2019 Appellate Advocacy Institute
Case Material

May 9, 2019
8:30 a.m. – 5:30 p.m.

May 10, 2019
8:30 a.m. – 2:30 p.m.

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INTRODUCTION

The case materials derive from *Whitney v. J.M. Scott Associates, Inc.*, A.C. 36912, which was litigated and resulted in a decision in the Appellate Court. If you have not already read the decision, we discourage you from doing so in preparing for argument.

The appeal is from a decision after a lengthy bench trial. Transcripts for the trial are not included in your materials. For purposes of the exercise, assume that the transcript excerpts in the appendices are the record. Similarly, while you should be familiar with the authority cited in the briefs, no additional research is required. Note that the plaintiff filed a cross appeal but that it was subsequently withdrawn.

Oral advocacy is one of the most important parts of the appellate process. Successful oral advocacy requires knowledge of the record, knowledge of the law, and practice. Practicing your argument prior to participating in the Institute will enhance the benefits of the exercise.

You will be assigned a role as appellant or appellee. You should prepare a presentation of not more than 15 minutes based on the briefs and appendices and the authority contained therein. Appellants may reserve time for rebuttal at the beginning of their argument.

Brief writing exercises are beyond the scope of the Institute, but there will be a lecture on brief writing presented by a Supreme Court Justice and Appellate Court judge.

We hope that the intensive work of the Institute will leave you with a thorough understanding of the various aspects of appellate practice and that you will have improved your skills in this area.

Kenneth J. Bartschi
Brendon P. Levesque
Co-Chairs, Appellate Advocacy Institute
May 2019

STATE OF CONNECTICUT

APPELLATE COURT

A.C. 36912

WALTER WHITNEY

VS.

J.M. SCOTT ASSOCIATES, INC., ET AL.

BRIEF OF THE DEFENDANTS WITH SEPARATE APPENDIX

TO BE ARGUED BY:

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STATEMENT OF ISSUES

I. Where the Plaintiff failed to prove the value of the business he sought to buy and failed to prove what his income as owner of the business would have been because the evidence was "too speculative," did the trial court improperly determine that a proper measure of damages was to award the Plaintiff ten years of the salary he was earning as an employee at the time of his termination? (Br. at 8-10.)

II. Did the trial court erroneously fail to enforce the provision in the stock option agreement requiring the Plaintiff to return his shares of stock if he was terminated? (Br. at 10-12.)

III. Did the trial court erroneously base its award of common-law punitive damages on a lodestar analysis rather than actual litigation costs? (Br. at 12-15.)

IV. Did the trial court improperly alter its decision in response to a motion for articulation by taking evidence and making findings as to the Plaintiff's litigation costs? (Br. at 15-19.)

V. Where most of the Plaintiff's claimed damages were not liquidated, did the trial court improperly order prejudgment interest pursuant to Conn. Gen. Stat. § 37-3a to run from the date of the purported breach of contract? (Br. at 19-21.)

TABLE OF AUTHORITIES

Cases:

Cases (cont.):

Statutes:

Other Authority:

STATEMENT OF FACTS AND PROCEEDINGS

The Plaintiff, Walter Whitney, brought this action against the Defendants, J.M. Scott Associates, Inc. (JMSA),[1] James M. Scott, Jr. (Scott), and Scott Swimming Pools, Inc. (SSP), alleging breach of contract, breach of the covenant of good faith and fair dealing, fraud, and violation of the Connecticut Unfair Trade Practices Act (CUTPA).[2] (MOD[3] at 1; App. at A43.) The Defendants counterclaimed, alleging breach of contract, abuse of process, and vexatious litigation and also raised various special defenses. (MOD at 1, 4; App. at A43, A46.) The trial court (Danaher, J.) found for the Plaintiff on counts alleging breach of contract, breach of the covenant of good faith and fair dealing, and fraud and also found for the Plaintiff on the Defendants' counterclaims. (MOD at 2; App. at A44.) The court found for the Defendants on the Plaintiff's CUTPA claim. (*Id.*) The court awarded compensatory and punitive damages and interest. (MOD at 62; App. at A104.) The Defendants moved to reargue, which the court denied. (App. at A107, A109.)

The Defendants appealed, and the Plaintiff cross appealed. The Defendants subsequently filed a motion for articulation, and the trial court held a hearing and took evidence over the Defendants' objection. (Tr. 12/11/14 at 12-17; App. at A210-A215.) The court issued a written articulation, and the Defendants filed an amended appeal and a motion for review. This Court granted the motion for review but denied the relief requested without prejudice to the panel that considers the merits to determine the propriety of the articulation. (Order, 5/6/15 (see court file).)

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[1] All claims against JMSA were withdrawn or resolved, and JMSA is not a party to this appeal. (MOD at 1 n.1; App. at A43.) "Defendants" in this brief refers to SSP and Scott.

[2] The operative complaint is the Second Amended Revised Complaint dated June 4, 2012, which was sealed pursuant to order dated June 19, 2012. (App. at 23.) Accordingly, the operative complaint is not included in the Defendants' appendix. See Practice Book § 67-2 (i). The discussion in this brief of the Plaintiff's complaint is taken from the memorandum of decision, which is not under seal.

[3] Unless otherwise indicated, MOD refers to the memorandum of decision of March 26, 2014.

The following facts are relevant to the resolution of this appeal. Scott is the majority stockholder of SSP and JMSA. (MOD at 2; App. at A44.) In 2001, the Plaintiff worked for New Milford Savings Bank in commercial lending. (MOD at 4; App. at A46; Tr. 5/21/13 at 26.) He contacted Scott regarding banking business in January 2001, and during the course of the meeting, Scott raised the possibility of the Plaintiff coming to work at SSP. (MOD at 5; App. at A47.) The Plaintiff indicated "he would need a 'good package' " if he left the bank because of his secure, senior position, among other things. (MOD at 5-6; App. at A47-A48.)

Scott and the Plaintiff began discussions about the prospective relationship, and the Plaintiff retained counsel to assist with the negotiations. (MOD at 6; App. at A48.) The negotiations resulted in three agreements: a stock option purchase agreement (SOPA) (Pl.'s Ex. 3; App. at A137), an employment agreement (EA) (Pl.'s Ex. 21; App. at A163), and a supplemental letter agreement (SLA) (Pl.'s Ex. 20; App. at A161.)[4] In broad strokes, the agreements provided that the Plaintiff would buy 20 shares of SSP stock, that he would work for the Defendants for five years, and would acquire the right to purchase SSP. (MOD at 7; App. at A49.)

The Plaintiff went to work for SSP in March 2002. (*Id.*) The court found that the Plaintiff attempted to fulfill his duties despite Scott's failure to engage in conduct consistent with succession planning. (MOD at 7-8; App. at A49-A50.) The court further found that during a meeting between the Plaintiff and Scott in August 2006, Scott told the Plaintiff he would not sell SSP to him. (MOD at 8; App. at A50.) Scott terminated the Plaintiff's employment in December 2006, and the Plaintiff notified Scott that he intended to exercise his rights under the agreements. (*Id.*) The court found that Scott did not honor the agreements, and the Plaintiff initiated arbitration proceedings, which Scott subsequently refused to continue after they had proceeded for some time, claiming insufficient funds to pay the costs of arbitration. (MOD at 8, 36; App. at A50, A78.) This action followed.

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[4] The Plaintiff testified that he and his attorney drafted all three agreements. (Tr. 5/22/13 at 153-54; App. at A178-A179.)

A. **The Agreements**

1. *The Stock Option Purchase Agreement*

The parties to the SOPA were the Plaintiff, Scott, and SSP. (Pl.'s Ex. 3 at 1; App. at A137.) The SOPA provided the Plaintiff "with the option for the purchase of Scott's Common Stock under certain circumstances . . . ." (*Id.* at 2; App. at A138.) Section 2.3 governed the return of the Plaintiff's stock in the event his employment terminated. That section provided, in pertinent part:

> (a) If Whitney's employment by the Company terminates or Whitney terminated his employment with the Company for any reason other than death, then Whitney shall be obligated to sell his Common Stock, and the Company and Scott shall be jointly and severally obligated to Whitney to purchase all his Common Stock, as provided below. The respective rights and obligations between Scott and the Company shall be determined by agreement between them before the time of purchase.
>
> . . . .
>
> (d) If Whitney terminates his employment with the Company on or after October 1, 2002, the purchase price for such shares shall be $26,000 plus the amount of any taxes due upon transfer of such shares. Upon delivery of such payment to Whitney, Whitney shall deliver his Common Stock as directed by Scott and the Company.
>
> (e) If Whitney's employment is terminated by the Company for Adequate Cause, the shares shall be returned to Scott without payment.
>
> (f) If Whitney's employment is found to have been terminated without Adequate Cause and he is paid the damages provided for in Section 8.4 of the Employment Agreement between Whitney and the Company of an even date herewith, the shares shall be returned to Scott. The purchase price for such shares shall be $26,000 plus the amount of any taxes due upon transfer of such shares. The purchase price shall be in addition to the amount of damages set out above. Upon delivery of such payment to Whitney, Whitney shall deliver his Common Stock as directed by Scott and the Company.

(*Id.* at 6-7; App. at A142-A143.)

Section 3.1(a) granted the Plaintiff the right to purchase Scott's stock for $1,270,873 on or after April 1, 2007, which option remained in effect until July 1, 2007. (*Id.* at 9; App. at A145.) If the Plaintiff exercised the option, § 3.1(b) provided that the Plaintiff would employ Scott as a consultant for up to five years. (*Id.*) If the Plaintiff did not exercise the option, § 3.1(c) provided for return of the Plaintiff's shares for a purchase price based on the bonus as set out in the EA. (*Id.* at 10; App. at A146.) The SOPA provided that the Plaintiff would give Scott a note for the purchase price with a 7% annual interest rate and a ten-year term if he exercised the option. (*Id.*) Section 8.5 provided for arbitration of disputes with the parties

sharing costs and paying their own counsel fees. (*Id.* at 15; App. at A151.)

2. *The Employment Agreement*

The parties to the EA were the Plaintiff and SSP.[5] (Pl.'s Ex. 21 at 1; App. at A163.) Section 4 of the EA set out the Plaintiff's compensation. Initially, the Plaintiff's salary was $122,153.00, but after the first six months, his salary was $142,153.00 plus a bonus equal to a percentage of Scott's annual bonus.[6] (*Id.* at 5-6; App. at A167-A168.) Section 8.3 provided that beginning July 1, 2002, the Plaintiff could only be terminated for adequate cause, which the agreement defined. (*Id.* at 10; App. at A172.) Section 8.3 further provided for arbitration of any disputes over whether the Plaintiff was terminated for adequate cause and that SSP would unconditionally pay the Plaintiff 26 weeks of his base salary. (*Id.*) Section 8.4 provided that if the Plaintiff was terminated without adequate cause, SSP would pay liquidated damages of $150,000 plus the purchase price of the stock, less any unconditional payments SSP made pursuant to § 8.3. (*Id.* at 10-11; App. at A172-A173.)

3. *The Supplemental Letter Agreement*

The parties supplemented the SOPA and EA with a letter setting forth additional terms. In pertinent part, the agreement provided that the Scott would purchase the buildings SSP occupied and lease them back to SSP. (Pl.'s Ex. 20; App. at A161.) If the Plaintiff exercised his option to purchase SSP, Scott would grant him the option to purchase the buildings and the land on which they are located for the fair market value at the time. (*Id.*; App. at A162.) The SLA also provided that by March 31, 2007, there would be no loans between SSP and Scott or members of his family. (*Id.*; App. at A161.)

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[5] Defendant Scott was not a party to the EA in his individual capacity.

[6] The Plaintiff testified that his previous compensation package at the bank was approximately $99,600. (Tr. 5/23/13 at 10.) He conceded he did not know what he would have earned if he had stayed at the bank. (Tr. 5/23/13 at 22.)

B. **Breach of Contract Claims**[7]

1. *Breach of the SOPA and the SLA by Both Defendants*

The Plaintiff alleged that the Defendants anticipatorily breached the SOPA and the SLA. (MOD at 34; App. at A76.) The court found that Scott told the Plaintiff in August 2006 that he would not sell SSP to the Plaintiff. (MOD at 35; App. at A77.) The court further found that the Plaintiff "fully established that he was ready, willing and able to perform his obligations under the EA, the SOPA and the SLA . . . ." (MOD at 38; App. at A80.) The court also concluded that the Defendants had the means to pay to continue the arbitration costs and therefore breached the arbitration provision. (MOD at 37-38; App. at A79-A80.)

As for damages, the Plaintiff asserted that he was due $4 million, which he claimed was the value of the balance of the SSP stock less the purchase price, plus "the income he reasonably expected to earn as owner of SSP." (MOD at 54; App. at A96.) Specifically, the Plaintiff explained that he planned to own the business for five years, after which he would sell it under the same terms as Scott and would therefore receive the same payout on a note that Scott would receive from him. (Tr. 5/22/13 at 134; App. at A176.) The Plaintiff further testified he that expected to receive ten years of salary at the rate of he was receiving when he was terminated, i.e., $175,000 annually. (Tr. 5/22/13 at 135; Tr. 7/10/13 at 44-45, 75-76; Tr. 7/11/13 a.m. at 69-71; App. at A177, A180-A183, A195-A197.) In support of this claim, he offered expert testimony by Sean Mathis. (See Tr. 7/18/13 at 34-64.)

The court evidently did not credit Mr. Mathis's testimony. The court concluded:

> [T]he evidence as to what the plaintiff "reasonably expected to earn" as owner of SSP is too speculative to form the basis for an award of damages. The vagaries of SSP's probable future growth and performance under the plaintiff's leadership preclude the court from determining damages based on the foregoing theory.

(MOD at 55; App. at A97.)

Even though the court found the evidence was speculative as to what the Plaintiff

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[7] The Defendants do not necessarily agree with the court's findings as to liability on the breach of contract and breach of good faith and fair dealing claims, but they recognize that challenging the findings as to liability would be futile under the clearly erroneous standard.

would earn as owner of SSP, the court accepted the Plaintiff's alternate calculation, which consisted of multiplying his salary and benefits by ten to represent the number of years he planned to own SSP and reducing for amounts paid by unemployment and substitute employment. (*Id.*) The Plaintiff's salary was $142,153 and he received benefits valued at $32,850 for a total annual compensation package of $175,003, or $1,750,030 over ten years. (*Id.*) The court reduced this figure by $408,970.60 (his substitute earnings and unemployment) for an award of $1,341,059.40. (*Id.*) The court also awarded $65,000 as damages for the failure to continue the arbitration proceedings. (*Id.* at 58; App. at A100.)

Lastly, in the second count of their counterclaim, the Defendants alleged that "the plaintiff was obligated to sell his shares back to SSP and Scott upon termination of his employment regardless of the reason," that the Plaintiff breached his agreement to sell the stock back, and that the Defendants were entitled to specific performance. (App. at A14.) The court declined to order specific performance, reasoning that "[i]n view of the court's findings that the termination was fraudulent, the defendants cannot prevail on the second count of their counterclaim." (MOD at 38 n.19 (citing *Phoenix Leasing, Inc. v. Koskinski*, 47 Conn. App. 650, 654 (1998)); App. at A80.)

2. *Breach of the Employment Agreement and SLA by SSP*

As for Count Five, and the court found that SSP breached the EA and the SLA in various ways. As it concerns damages, the court found that SSP terminated Scott without adequate cause and improperly terminated the arbitration proceedings. Pursuant to the liquidated damages provision, the court awarded the Plaintiff $150,000 plus $26,000 (the price of his shares in SSP) less $35,538.23 for the unconditional payments SSP made after the termination for an award of $138,461.77. (MOD at 57; App. at A99.) Only SSP was liable for this portion of the damages. (MOD at 62; App. at A104.)

C. **Fraud Claims**

Count One of the complaint alleged fraud against both Defendants. (MOD at 41; App. at A83.) The court found that the Plaintiff "established, by clear and convincing evidence, that the defendants fraudulently failed to disclose Scott's deferred compensation obligation when the plaintiff requested access to SSP's financial statements, tax returns and corporate records prior to entering into the EA, SOPA, and/or SLA."[8] (MOD at 42; App. at A84.) The court further found that "the plaintiff would not have entered into any of those agreements if he had known of the deferred compensation agreement." (*Id.*)

In assessing damages, the court recognized that the Plaintiff could not recover for the same loss in both contract and in tort. (MOD at 58; App. at A100.) The court explained that the Defendants not only deprived the Plaintiff of the benefit of the agreements, but "also tricked him into leaving a secure employment position by making promises they had no intention of keeping." (MOD at 59; App. at A101.) The court noted that the fraud had consequences to the Plaintiff, namely in that he gave up secure employment and had to return to the job market at age 56. (*Id.*) The court concluded that the Defendants "were recklessly indifferent to the rights of the plaintiff" and awarded $250,000 as punitive damages.[9] (MOD at 60; App. at A102.)

In the light of the foregoing, the court ordered a total damage award of $1,794,521.10 of which $138,461.77 was owed by SSP only. (MOD at 62; App. at A104.) The court also allowed interest to run at the rate of 10% annually against both Defendants. (*Id.*) The Defendants appealed, and the Plaintiff cross appealed. The Defendants amended their appeal.

Additional facts will be set out as necessary.

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[8] The court found that SSP owed Scott $1.6 million in deferred compensation and that this was never disclosed to the Plaintiff. (MOD at 33; App. at A75.)

[9] The Plaintiff offered as an exhibit his claim for counsel fees at trial for this action. (Ex. 150 (see court file).) The Defendant objected, and the court admitted the exhibit subject to further proceedings to determine the reasonableness of the fees. (Tr. 7/10/13 at 94-97; App. at A191-A194.) No such proceedings took place.

ARGUMENT

I. BREACH OF CONTRACT DAMAGES

The normal measure of damages for breach of a stock option purchase agreement is the difference between the purchase price and the value of the stock. The Plaintiff failed to prove his damages by this measure, and the trial court instead awarded him ten years of the salary he earned as an employee of SSP as damages. This is not a proper measure of damages, especially where the court found that the Plaintiff's income as an owner was too speculative. Reversal on the award of damages for breach of the SOPA is necessary because the Plaintiff failed to prove his damages.[10]

A. Standard of Review

Whether the trial court applied a proper measure of damages is a question of law subject to plenary review. *Day v. Gabriele*, 101 Conn. App. 335, 346, cert. denied, 284 Conn. 902 (2007).

B. The Court Applied an Improper Measure of Damages.

The principles applicable to the determination of damages for breach of contract are well established.

> It is axiomatic that the sum of damages awarded as compensation in a breach of contract action should place the injured party in the same position as he would have been in had the contract been performed. . . . It is also well established that the burden of proving damages is on the party claiming them. . . . When damages are claimed they are an essential element of the plaintiff's proof and must be proved with reasonable certainty.

FCM Group, Inc. v. Miller, 300 Conn. 774, 804 (2011) (citations and internal quotations omitted).

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[10] The Defendants do not challenge the award of liquidated damages owed by SSP for breach of the employment agreement in the amount of $138,461.77, nor do they challenge the award for arbitration costs in the amount of $65,000. The Defendants' challenge here pertains to the damages award of 1,341,059.40. (See MOD at 55; App. at A97.)

Where the claim concerns an option contract, damages are the difference between the contract price and the value of the property to be purchased. *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Cole*, 189 Conn. 518, 537 (1983) (breach of contract to purchase stock); *Robert Lawrence Associates, Inc. v. Del Vecchio*, 178 Conn. 1, 22 (1979) (breach of option contract to purchase real estate); *Peck v. McClurg*, 16 Conn. App. 651, 657 (1988) (proper measure of damages for breach of conditional sales contract was the difference between the contract price and the value of the stock at the time of the breach); see also *Worrell v. Multipress, Inc.*, 45 Ohio St. 3d 241, 245 (Ohio 1989) ("The stock of a closely held corporation that is not listed on an exchange and has no public market may be valued by what a willing buyer would pay to a willing seller who was not acting under compulsion.") (citation and internal quotations omitted).

By this measure, the Plaintiff's damages would be the value of SSP less the purchase price of $1.2 million subject to a note at 7% interest over a ten-year term. Although the Plaintiff offered expert testimony as to the value of SSP, the court did not credit it.[11] Further, the court found that the evidence as to what the plaintiff "reasonably expected to earn" as owner of SSP is too speculative to form the basis for an award of damages. (Br. at 5.)

Having rejected as "too speculative" the evidence that would have supported a proper measure of damages for the breach of the option to sell SSP, the court turned to an alternate measure of damages, namely ten more years of the salary the Plaintiff earned at the time he was terminated. (Br. at 5-6.) This method of measuring damages is improper for two reasons.

The damages in a contract action serve to place the injured party in the same position he would have been but for the breach. *FCM Group, Inc.*, 300 Conn. at 804. Put another way, damages should reflect the loss of the bargain to the Plaintiff. Here, the bargain was

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[11] As noted, the Plaintiff himself testified that he would sell SSP for what he purchased it for originally. (Br. at 5.) Thus, the Plaintiff evidently thought he was buying SSP for its fair market value.

the purchase of SSP; it was not to work for SSP for ten more years at the rate of $175,000. Thus, the court was awarding damages for a different bargain, not the one the Plaintiff made.

Second, had the parties performed the agreement, the Plaintiff would have been the owner of SSP. Consequently, his income of $175,000 would have been as owner, but the court expressly found that the evidence of his future income *as owner* was "too speculative."[12] Thus, the court relied on a measure of damages – his future salary – which the court found was too speculative to form the basis of damages. Even if the court was somehow compensating the Plaintiff for the bargain he actually made, the court made the calculation based on evidence the court specifically rejected.

For the foregoing reasons, the award of $1,341,059.40 and interest thereon must be reversed and judgment directed for the Defendants as to these damages.

II. SPECIFIC PERFORMANCE

Although the SOPA provided that the Plaintiff must surrender his stock to the Defendants upon his termination, and even though the court awarded the purchase price of the stock as liquidated damages, the trial court erroneously failed to order the Plaintiff to return the stock due to a misreading of the pertinent provisions of the SOPA.

A. **Standard of Review**

Interpretation of definitive written contract language is a question of law subject to plenary review. *Cruz v. Visual Perceptions, LLC*, 311 Conn. 93, 101 (2014).

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[12] The only evidence as to future salary the Plaintiff provided was for $175,000 annually. (Br. at 5.) The third time he made this claim, the Defendants objected that the evidence was speculative. The court permitted the evidence after Plaintiff's counsel promised to tie it to the testimony from his damages expert. (Tr. 7/10/13 at 76; App. at A183.) As the court found the evidence of future income as owner to be "too speculative," it is clear that the court did not find the Plaintiff's expert credible.

B. **The Court Misconstrued the Stock Option Purchase Agreement.**

Well established principles govern contract interpretation.

> The intent of the parties as expressed in a contract is determined from the language used interpreted in the light of the situation of the parties and the circumstances connected with the transaction. . . . [T]he intent of the parties is to be ascertained by a fair and reasonable construction of the written words and . . . the language used must be accorded its common, natural, and ordinary meaning and usage where it can be sensibly applied to the subject matter of the contract.

Association Resources, Inc. v. Wall, 298 Conn. 145, 183 (2010) (citations and internal quotations omitted). When construing contracts, courts "give effect to all the language included therein, as the law of contract interpretation . . . militates against interpreting a contract in a way that renders a provision superfluous." *Id.*

The plain language provides that if the Plaintiff's "employment is found to have been terminated without Adequate Cause and he is paid the damages provided for in Section 8.4 of the Employment Agreement . . . , the shares *shall be returned to Scott.*" (Pl.'s Ex. 3 at 6; App. at A142 (emphasis added).) Here, the court found that the Plaintiff had been terminated without adequate cause and ordered the damages provided in the EA. Under the plain language of the contract, the Plaintiff was required to return the stock upon payment of the liquidated damages. Accordingly, the court should have ordered the Plaintiff to sell back his stock as the SOPA requires instead of reading that provision out of the contract.

The court declined to order such relief in light of its findings that the Defendants engaged in fraud. (Br. at 6.) The court cited *Phoenix Leasing, Inc. v. Kosinski*, 47 Conn. App. 650, 654 (1998), for the proposition that a "court will not enforce a contractual provision when the party seeking enforcement of that provision engaged in fraud." (MOD at 38 n.19; App. at A80.) *Phoenix Leasing* did not concern the remedies for a breach of contract but enforcement of a choice of forum clause. Recognizing the due process concerns where personal jurisdiction was at issue, the court stated that "[a]bsent a showing of fraud or overreaching, such forum clauses will be enforced by the courts." *Phoenix Leasing, Inc.*, 47 Conn. App. at 654 (citation and internal quotations omitted). Thus, *Phoenix Leasing*

concerned a procedural question, namely where the dispute would be litigated, rather than a substantive response.

On the other hand, where fraud in the inducement is claimed in a contract action, the injured party must make an election of remedies.

> A defrauded party has the option of seeking rescission or enforcement of the contract and damages. Fraud in the inducement of a contract ordinarily renders the contract merely voidable at the option of the defrauded party, who also has the choice of affirming the contract and suing for damages. . . . *If he pursues the latter alternative, the contract remains in force*. . . .

Harold Cohn & Co. v. Harco International, LLC, 72 Conn. App. 43, 49-50 (quoting *A. Sangivanni & Sons v. F.M. Floryan & Co.*, 158 Conn. 467, 472 (1969)) (emphasis added; internal quotations omitted) , cert. denied, 262 Conn. 903 (2002). Here, the Plaintiff sought enforcement of the contract and damages for its breach, including damages for breach of the arbitration clause. The Plaintiff cannot seek to obtain the benefits of the contract on the one hand and seek to be relieved of its terms on the other. Having elected to enforce the contract as his remedy, the Plaintiff must live with his choice. The court erroneously failed to require the Plaintiff to comply with the provision in the SOPA regarding the return of the SSP stock.

The judgment on this issue should be reversed with direction to order the Plaintiff to return the stock upon the payment of the liquidated damages.

III. PUNITIVE DAMAGES

Because the trial court determined common-law punitive damages based on an erroneous lodestar analysis, the $250,000 award for punitive damages must be reversed.

A. **Standard of Review**

The decision to award punitive damages is reviewed for abuse of discretion. *Nelson v. Tradewind Aviation, LLC*, 155 Conn. App. 519, 542 (2015). Under this standard, the Court's review "is limited to the questions of whether the trial court correctly applied the law and reasonably could have reached the conclusion that it did." *Commission on Human Rights &*

Opportunities v. Brookstone Court, LLC, 107 Conn. App. 340, 347 (citations and internal quotations omitted), cert. denied, 288 Conn. 907 (2008).

B. **The Court Applied the Wrong Measure to Determine Punitive Damages.**

The following additional facts are pertinent to this issue. At trial, the Defendant objected to evidence pertaining to arbitration costs that the Plaintiff incurred. (Tr. 7/10/13 at 88; App. at A185.) This objection lead to a discussion about a pre-trial phone conference in which the Defendants' counsel understood that he would be able to challenge counsel fees in a post-trial hearing. (Tr. 7/10/13 at 90-91; App. at A187-A188.) The Plaintiff's counsel indicated that the Plaintiff would provide detailed bills later after addressing privilege and redaction issues.[13] (*Id.*) The court indicated that the Defendants would have the opportunity to challenge counsel fees. (Tr. 7/10/13 at 92; App. at 189.)

Despite this colloquy, the court did not afford the Defendants an opportunity to challenge the amount of counsel fees. Instead, in its decision, the court determined that $250,000 was the appropriate amount of punitive damages but did not explain the legal and factual basis for the amount. (MOD at 60; App. at A102.) The Defendants timely filed a motion for articulation, which posed, inter alia: "What was the factual and legal basis for the Court's $250,000 punitive damages award?" (Mot. Art., 10/9/14, at 2; App. at A121.) After a hearing,[14] the court acknowledged that "[c]ommon law punitive damages are limited to attorney's fees and ordinary litigation expenses." (Art., 12/12/14, at 3; App. at A132.) The court indicated that Plaintiff's exhibit 150 revealed billed counsel fees in excess of $138,000, further noting that the trial was not complete when that exhibit was submitted and that the exhibit therefore did not reflect the totality of counsel fees and expenses. (*Id.*) The court explained:

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[13] The Plaintiff never moved to open the evidence to address his counsel fees after the conclusion of trial and post-trial briefing by which time he would have known what his litigation costs were.

[14] The hearing is discussed further in Issue IV.

"In the absence of complete information regarding the plaintiff's attorney's fees, the court awarded $250,000 in punitive damages which, in the court's opinion, were reasonable fees for the entirety of the legal services provided to the plaintiff, through to the completion of trial and post-trial briefing." (*Id.*) Thus, the court did not award actual counsel fees and litigation costs, but made a finding based on a lodestar analysis.[15]

It is well established that common-law punitive damages "are properly limited to the plaintiff's litigation expenses less taxable costs." *R.I. Pools, Inc. v. Paramount Concrete, Inc.*, 149 Conn. App. 839, 875 (citations, internal quotations, and emphasis omitted), cert. denied, 312 Conn. 920 (2014). In *R.I. Pools, Inc.*, the trial court fashioned its punitive damages award using a lodestar approach, i.e., by multiplying the number of hours billed by an hourly rate that the court deemed appropriate. *Id.* at 876-77. The hourly rate, however, exceeded the hourly rate to which the plaintiff and the lawyer had agreed, and therefore the award was not limited to the plaintiff's actual expenses. *Id.* at 877. Consequently, the punitive damages award in that case could not stand.

Likewise here, the court did not base its punitive damages award on the Plaintiff's actual litigation costs. Indeed, it could not do so because it did not have evidence of all the Plaintiff's actual costs when it rendered its decision. Further, pursuant to *Smith v. Snyder*, 267 Conn. 456, 479 (2004), the Plaintiff was required to present "a statement of the fees requested and a description of the services rendered" so that the Defendants could challenge the amount requested. Even though the court indicated the Defendants would have such an opportunity, the court determined the amount without this information or opportunity for the Defendant to challenge.

Moreover, the Plaintiff never requested a post-trial proceeding to submit his claimed litigation costs nor did he avail himself of the post-judgment opportunities to do so by filing a

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[15] At the hearing on the motion for articulation, the court explained that it used the evidence it had at trial concerning fees and calculated what it believed to be "a reasonable approximation" of the additional fees for the remaining days of trial, allowing for post-trial briefing. (Tr. 12/11/14 at 5-6; App. at A203-A204.)

motion to reargue pursuant to Practice Book § 11-11 or a motion to open the judgment pursuant to Practice Book § 17-4. The Plaintiff did not carry his burden of production as to his litigation costs until the trial court invited him to do so (improperly, as discussed below) in response to the Defendants' motion for articulation. By contrast, the plaintiff in *R.I. Pools, Inc.*, presented redacted bills and sustained his burden of production. 149 Conn. App. at 876. Thus, while the plaintiff in *R.I. Pools, Inc.* took the necessary steps to prove his punitive damages – and therefore was entitled to a new hearing under the proper standard – the Plaintiff here did not carry his burden. He has effectively waived his claim, and therefore the Court should reverse the punitive damages award and direct judgment for the Defendants on this issue.

IV. IMPROPER ARTICULATION

In taking evidence and making a finding as to the Plaintiff's purported litigation costs, the trial court misused the articulation process. The court's improper finding should be stricken.

A. **Standard of Review**

The propriety of the court's construction of Practice Book § 66-5 presents a question of law subject to plenary review. *de Repentigny v. de Repentigny*, 121 Conn. App. 451, 456 (2010) ("The interpretation of rules of practice and statutes is a question of law subject to plenary review.")

B. **The Court Improperly Changed Its Factual Findings.**

The following additional facts are relevant to the resolution of this issue. After the Defendants filed their motion for articulation, the court issued a written order requiring the parties to appear at a hearing on the motion for articulation. (Order, 11/14/14; App. at A123.) The court stated: "At that hearing the plaintiff will produce, inter alia, evidence regarding all

attorney's fees and ordinary litigation expenses that the plaintiff has paid, or owes, in connection with this litigation." (*Id.* at 2; App. at A124.) The Defendants filed a written objection to the introduction of such evidence. (Obj., 12/11/14; App. at A125.) The court overruled the objection at the hearing. (Tr. 12/11/14 at 10; App. at A208.) The Defendants again objected to the introduction of evidence at the hearing on relevance grounds in light of their understanding of the purpose of the motion for articulation. (*Id.* at 12-14; App. at A210-A212.) The court overruled the objection. (*Id.* at 21; App. at A219.)

The court issued a written articulation finding that the Plaintiff's actual litigation expenses totaled $233,683.90. (Art., 12/12/14, at 3; App. at A132.) The Defendants filed a motion for review requesting that this finding be stricken. (Mot. Rev. at 4 (see court file).) This Court granted the motion but denied the relief requested "without prejudice to the panel who considers the merits of the defendant's appeal as amended, to decide whether the portion of the trial court's articulation wherein it makes that statement that the plaintiff's actual attorney's fees and ordinary litigation expenses totaling $233,683.90, is proper." (Order, 5/6/15 (See court file).) As previously noted, the Defendants amended their appeal to challenge this aspect of the court's articulation.

Motions for articulation are governed by Practice Book § 66-5, which provides, in pertinent part:

> A motion seeking corrections in the transcript or the trial court record or seeking an articulation or further articulation of the decision of the trial court shall be called a motion for rectification or motion for articulation, whichever is applicable. Any motion filed pursuant to this section shall state with particularity the relief sought.
>
> ....
>
> .... If any party requests it and it is deemed necessary by the trial court, the trial court shall hold a hearing at which arguments may be heard, evidence taken or a stipulation of counsel received and approved. The trial court may make such corrections or additions as are necessary for the proper presentation of the issues. . . .

Although the trial court justified its decision to hold a hearing and take evidence on the basis of the second quoted paragraph, the court misapprehended the purpose of an articulation.

It is axiomatic that the appellant bears the burden of providing an adequate record for review. Practice Book § 61-10; *DuBaldo Electric, LLC v. Montagno Construction, Inc.*, 119

Conn. App. 423, 433-34 (2010) (failure to seek articulation); *State v. Ciullo*, 140 Conn. App. 393, 412 (2013) (defendant failed to seek rectification of record to include written jury instructions as an exhibit where challenged), aff'd, 314 Conn. 28 (2014). The record may be inadequate because something is missing from the file such as an exhibit, a pleading, a financial affidavit, or child support guidelines worksheet. There may be issues with the transcript, such as an error in the transcript or a missing segment that requires reconstruction. In such cases a motion for rectification is in order and a hearing may be necessary to authenticate a document or to determine whether it was presented to the court or to reconstruct the contents of a transcript. The provision for a hearing applies to such situations.

The record also may be inadequate because of an ambiguity in the reasoning or factual findings of a decision in which case articulation of the trial court's reasoning or factual findings is in order. *DuBaldo Electric, LLC*, 119 Conn. App. at 434. Although this Court will no longer refuse review if the sole reason for an inadequate record is the absence of an articulation, § 61-10(b), the Court will read an ambiguous record to support rather than undermine the judgment. *Shamitz v. Taffler*, 145 Conn. App. 132, 142 (2013). Consequently, when it is unclear what the trial court meant, i.e., what the trial court considered in rendering its decision, an articulation is in order. In the normal course of things, an evidentiary hearing should not be necessary to determine what the trial judge was thinking.

Decisional law makes this point abundantly clear.

> It is well settled that [a]n articulation is appropriate where the trial court's decision contains some ambiguity or deficiency reasonably susceptible of clarification. . . . [P]roper utilization of the motion for articulation serves to dispel any . . . ambiguity by clarifying the factual and legal basis upon which the trial court rendered its decision, thereby sharpening the issues on appeal.

Alliance Partners, Inc. v. Oxford Health Plans, Inc., 263 Conn. 191, 204 (2003) (citations and internal quotations omitted).

An articulation, however, "is not an opportunity for the trial court to substitute a new decision nor to change the reasoning or basis of a prior decision." *Koper v. Koper*, 17 Conn. App. 480, 484 (1989). Accordingly, it is improper for the trial court to change its findings by

way of articulation. *Sosin v. Sosin*, 300 Conn. 205, 240 (2011); *Fantasia v. Milford Fastening Systems*, 86 Conn. App. 270, 284 (2004), cert. denied, 272 Conn. 919 (2005). Making new findings is also beyond the permissible scope of an articulation. *In re Christian P.*, 98 Conn. App. 264, 266 n.4 (2006). Nor may the court use the articulation process to correct legal errors by making factual findings that should have been made in the original decision. *Kiniry v. Kiniry*, 299 Conn. 308, 319-21 (2010) (articulation of amount of support due under child support guidelines failed to cure error in original decision where such findings were absent).

In this case, the trial court awarded the Plaintiff $250,000 in punitive damages. While the court explained in its decision *why* the Plaintiff was entitled to punitive damages (MOD at 59-60; App. at A101-A102), the court did not explain the legal and factual basis for the *amount* of the award. The Defendants therefore filed a motion for articulation. In its articulation, the court explained that it used what amounts to a lodestar analysis by looking at the fees billed and the number of days of trial. (Art., 12/12/14, at 3; App. at A132.) This was a proper use of the articulation process.

Where the court went astray was in directing the Plaintiff to present evidence at the hearing on the motion for articulation on his litigation costs and making findings based on this evidence. In *In re Christian P.*, 98 Conn. App. at 266 n.4, the court ordered that the trial court make findings as to three children who were the subject of a proceeding to terminate parental rights. The trial court complied but made "new and, arguably, somewhat inconsistent factual findings" regarding the parent at issue. *Id.* As the trial court "went beyond the permissible scope of an articulation," the court declined to rely on the new findings.

It is true that a trial court retains the authority to modify a judgment, even sua sponte, within four months of the judgment. *Rome v. Album*, 73 Conn. App. 103, 111-12 (2003); Conn. Gen. Stat. § 52-212a; Practice Book § 17-4. Here, however, the court entered its judgment on March 26, 2014, and its articulation issued on December 12, 2014, well outside the four month period for modifying judgments.

Because the court lacked authority to make new findings in response to the motion for

articulation, its findings as to the Plaintiff's actual litigation costs should be disregarded. *Sosin*, 300 Conn. at 240; *In re Christian P.*, 98 Conn. App. at 266 n.4.

V. IMPROPER PREJUDGMENT INTEREST

It is well established that statutory prejudgment interest is appropriate in a contract action where the damages are liquidated or the amount owed is not in dispute. Most of the damages awarded here, however, were not liquidated damages but were intended to make the Plaintiff whole for the breach of contract the court found. That amount was not known until the court established damages. Accordingly, pre-judgment interest was not appropriate.

A. Standard of Review

Whether this is the type of case for which prejudgment interest is authorized is a question of law. *Foley v. Huntington Co.*, 42 Conn. App. 712, 739 (1996) (deciding as a matter of law whether statutory basis for awarding prejudgment interest existed).

B. The Prejudgment Interest Award Is Improper.

The following additional facts are pertinent to resolution of this issue. In its initial decision, the trial court awarded interest pursuant to Conn. Gen. Stat. § 37-3a at the rate of ten percent annually. (MOD at 62; App. at A104.) The court did not specify when interest would run, and the Defendants moved for articulation asking whether interest began on the date of judgment, and if not, the date on which it was to start and the factual and legal basis for that date. (Mot. Art., 10/9/14, at 2; App. at A121.) The court explained in its articulation that the Defendants breached the contract at various points and noted that the Plaintiff sought interest "from the date of breach in March 2007." (Art., 12/12/14, at 4 (internal quotations omitted); App. at A133.) Accordingly, the court explained that it intended interest on damages to begin March 1, 2007, and interest on punitive damages to run from the date of judgment. (*Id.* at 5; App. at A134.)

The court's award of breach of contract damages sought to compensate the Plaintiff for the loss of his bargain as it concerned the SOPA.[16] (MOD at 53; App. at A95.) As the Plaintiff could not prove what he reasonably expected to earn as owner of SSP, the court adopted the Plaintiff's alternate calculation, concluding that the Plaintiff was entitled to $1,341,059.40 as "an appropriate measure of the benefit of the bargain" he lost. (*Id.* at 55 (internal quotations omitted); App. at A97.) For the breach of the arbitration agreement, the court awarded the Plaintiff's costs of $65,000. (MOD at 58; App. at A100.) Neither of these figures were the result of a liquidated damages clause or were undisputed.

Section 37-3a(a) provides, in pertinent part: "Except as provided in sections 37-3b, 37-3c and 52-192, interest at the rate of ten per cent a year, and no more, may be recovered and allowed in civil actions . . . as damages for the detention of money after it becomes payable." The statute provides for the payment of interest after it is wrongfully withheld. *Foley*, 42 Conn. App. at 740. "To award § 37-3a interest, two components must be present. First, the claim to which the prejudgment interest attaches must be a claim for a liquidated sum or money wrongfully withheld and, second, the trier of fact must find, in its discretion, that the equitable considerations warrant the payment of interest." *Ceci Brothers, Inc. v. Five Twenty-One Corp.*, 81 Conn. App. 419, 428 (2004). Thus, prejudgment interest pursuant to § 37-3a may be appropriate where there are liquidated damages for breach of contract, where a sum is determined by a contract that is detained by another party, where a partial breach of contract causes specific damages, or where debts have matured but have not been paid. *Foley*, 42 Conn. App. at 740 (citations omitted).

On the other hand, personal injury damages, which seek to make the injured party whole, do not normally constitute a claim for wrongful detention of money. *Id.* at 741. The reason is that such damages are necessarily undetermined until a fact-finder fixes the proper amount. *Travelers Property & Casualty Co. v. Christie*, 99 Conn. App. 747, 764 (2007) (citing

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[16] The court awarded liquidated damages for breach of the EA, reducing the amount for sums already paid. MOD at 57; App. at A99.)

Foley, 42 Conn. App. at 741-42). In *Foley*, the breach of contract damages were awarded to compensate the plaintiff "for the loss of the benefit of his bargain." 42 Conn. App. at 741. The *Foley* court concluded that the damages were akin to personal injury damages and since they did not involve liquidated damages, § 37-3a did not apply. *Id.* Similarly, such damages are necessarily uncertain until the fact-finder determines the proper amount.

Likewise here, the $1.3 million award for breach of the SOPA was to compensate the Plaintiff for the loss of the benefit of the bargain. Such damages were necessarily uncertain at the time of the breach of the contract. The Plaintiff's costs for the breach of the arbitration agreement were also uncertain. Until the court fixed the damages for both of these claims, the Defendants could not know what the amount it was owed. Accordingly, pursuant to *Foley* and its progeny, § 37-3a does not authorize an award of prejudgment interest on these awards.

The judgment concerning the award of prejudgment interest must be reversed.

Conclusion

The judgment of the trial court should be reversed with direction as to Issues I, II, and III and should be reversed and remanded for further proceedings as to Issue V. The improper portion of the articulation (Issue IV) should be stricken.

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CERTIFICATION

Pursuant to Practice Book § 67-2(h), I hereby certify that: (1) the electronically submitted brief and appendices were emailed on June 9, 2015, to counsel of record listed below; and (2) that the brief and appendices do not contain any names or personally identifiable information that is prohibited from disclosure or that any such information has been redacted.

Pursuant to Practice Book § 67-2(i), I hereby certify that: (1) in compliance with Practice Book § 62-7, a copy of the foregoing brief and appendices were mailed, postage prepaid, to the **Hon. John A. Danaher, III**, and the counsel of record listed below on June 9, 2015; (2) that the brief and appendices are true copies of the brief and appendices filed electronically pursuant to Practice Book § 67-2(g); (3) that the brief and appendices do not contain any names or personally identifiable information that is prohibited from disclosure or that any such information has been redacted; (4) and that the brief complies with all provisions of Practice Book § 67-2(i).

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STATE OF CONNECTICUT

APPELLATE COURT

A.C. 36912

WALTER WHITNEY

VS.

J.M. SCOTT ASSOCIATES, INC., ET AL.

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LLI-CV09-5007099-S WHITNEY,WALTER v. J. M. SCOTT ASSOCIAT
Prefix/Suffix: [none] **Case Type:** T90 **File Date:** 11/06/2009 **Return Date:** 05/10/2011

Case Detail Notices History Scheduled Court Dates E-Services Login Screen Section Help
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Information Updated as of: 05/15/2015

Case Information

Case Type: T90 - Torts - All other
Court Location: LITCHFIELD
List Type: COURT (CT)
Trial List Claim: 10/30/2012
Referral Judge or Magistrate:
Last Action Date: 01/29/2015 (The "last action date" is the date the information was entered in the system)

Disposition Information

Disposition Date: 03/26/2014
Disposition: JUDGMENT AFTER COMPLETED TRIAL TO THE COURT WITH NO JURY
Judge or Magistrate: HON JOHN DANAHER

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O-01	**JOSEPH SECOLA** Non-Appearing	

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Motions / Pleadings / Documents / Case Status

Entry No	File Date	Filed By	Description	Arguable
	11/12/2009	D	**APPEARANCE** Appearance	
	04/17/2012	P	**APPEARANCE** Appearance	
	06/21/2013	D	**APPEARANCE** Appearance	
100.30	11/06/2009	P	**NOTICE OF APPLICATION FOR PREJUDGMENT REMEDY / HEARING (JD-CV-53)**	Yes
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108.00	01/13/2010	D	**MOTION TO SEAL DOCUMENT**	Yes
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145.00	04/13/2012	D	**WITHDRAWAL IN PART** Third Count And Seventh Count Of The Counterclaim	No
146.00	04/13/2012	D	**REQUEST TO AMEND AND AMENDMENT** Setoffs and Counterclaims	No
147.00	04/20/2012	P	**MOTION FOR EXTENSION OF TIME** Mtn for Ext of Time to Resp to D Mtn for Sum Jgmt	No
147.01	04/30/2012	C	ORDER *RESULT:* Granted 4/30/2012 HON VINCENT ROCHE	No
148.00	05/09/2012	P	**MOTION TO STRIKE** DEFENDANTS' AMENDED COUNTERCLAIMS	Yes
148.10	09/07/2012	C	ORDER *RESULT:* Granted 9/7/2012 HON VINCENT ROCHE	No
148.20	09/07/2012	C	MEMORANDUM OF DECISION ON MOTION	No
149.00	06/04/2012	P	**WITHDRAWAL IN PART**	No
150.00	06/04/2012	P	**DOCUMENT SEALED**	No
151.00	06/05/2012	P	**MOTION TO SEAL DOCUMENT** *RESULT:* Granted 6/19/2012 HON JOHN PICKARD	Yes
151.01	06/19/2012	C	ORDER *RESULT:* Granted 6/19/2012 HON JOHN PICKARD	No
151.02	06/19/2012	C	ORDER SEALING FILE OR DOCUMENT	Yes
152.00	06/15/2012	P	**MOTION TO REDACT OR SEAL PERSONAL IDENTIFYING INFORMATION (PB 11-20B OR PB 25-59B)**	No
152.01	08/13/2012	C	ORDER	No
153.00	06/15/2012	P	**OBJECTION TO SUMMARY JUDGMENT** (REDACTED)	Yes
154.00	06/15/2012	P	**AFFIDAVIT IN OPPOSITION TO MOTION FOR SUMMARY JUDGMENT** (WHITNEY)	No
155.00	06/15/2012	P	**AFFIDAVIT IN OPPOSITION TO MOTION FOR SUMMARY JUDGMENT** (HEALEY)	No
156.00	06/20/2012	P	**MEMORANDUM IN SUPPORT OF MOTION** TO SEAL UNREDACTED OBJECTION TO MOTION	No
157.00	07/23/2012	P	**NOTICE OF SERVICE OF REQUEST FOR ADMISSION** DIRECTED TO SCOTT SWIMMING POOLS INC	No
158.00	08/08/2012	D	**OBJECTION TO MOTION TO STRIKE AND MEMORANDUM IN OPPOSITION TO MOTION**	Yes
159.00	08/10/2012	P	**REPLY** BRIEF IN SUPPORT OF MOT. TO STRIKE COUNTERCLAIM	No
160.00	08/20/2012	D	**ANSWER** to Plaintiff's Requests to Admit	No
161.00	08/23/2012	D	**REQUEST TO EXTEND TIME TO RESPOND TO INTERROGATORIES OR PRODUCTION REQ P.B. 13-7(a)(2)/13-10(a)(2)**	No
162.00	09/24/2012	D	**AMENDED ANSWER AND SPECIAL DEFENSE**	No
163.00	09/24/2012	D	**MOTION FOR EXTENSION OF TIME RE DISCOVERY MOTION OR REQUEST PB CH13**	No
163.01	10/09/2012	C		No

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			ORDER *RESULT:* Order 10/9/2012 HON WILSON TROMBLEY	
164.00	10/02/2012	P	**REPLY TO SPECIAL DEFENSE AND ANSWER TO COUNTERCLAIM**	No
165.00	10/03/2012	P	**OBJECTION TO EXTEND TIME TO RESPOND TO INTERROGATORIES OR PRODUCTION REQ P.B. 13-7(a)(2)/13-10(a)(2)**	No
165.01	10/09/2012	C	ORDER *RESULT:* Sustained 10/9/2012 HON WILSON TROMBLEY	No
166.00	10/19/2012	D	**REPLY TO SPECIAL DEFENSE** TO AMENDED COUNTERCLAIM	No
167.00	10/22/2012	D	**NOTICE** of Objections to Requests for Production	No
168.00	10/22/2012	D	**OBJECTION** to Requests for Production	No
169.00	10/22/2012	D	**NOTICE** of Objections to Requests for Production	No
170.00	10/22/2012	D	**OBJECTION** to Requests for Production	No
171.00	10/25/2012	D	**NOTICE** of Defendants' Discovery Compliance	No
172.00	10/30/2012	P	**CERTIFICATE OF CLOSED PLEADINGS AND CLAIM FOR TRIAL LIST**	No
173.00	12/06/2012	C	**SCHEDULING ORDER** *RESULT:* Granted 12/6/2012 HON JOHN PICKARD	No
174.00	01/16/2013	P	**AFFIDAVIT** OF S. HEALEY	No
175.00	01/16/2013	P	**MOTION TO COMPEL**	No
175.01	02/13/2013	C	ORDER *RESULT:* Order 2/13/2013 HON JOHN DANAHER	No
176.00	01/16/2013	P	**MOTION FOR PROTECTIVE ORDER**	No
176.01	02/13/2013	C	ORDER *RESULT:* Off 2/13/2013 HON JOHN DANAHER	No
177.00	02/05/2013	P	**CASEFLOW REQUEST** *RESULT:* Granted 2/6/2013 HON JOHN PICKARD	No
178.00	02/08/2013	D	**REQUEST FOR ARGUMENT (NON-ARG MATTER)**	No
179.00	02/08/2013	D	**OBJECTION TO MOTION** TO COMPEL	No
179.01	02/13/2013	C	ORDER *RESULT:* Overruled 2/13/2013 HON JOHN DANAHER	No
180.00	02/08/2013	D	**OBJECTION TO MOTION** FOR PROTECTIVE ORDER	No
180.01	02/13/2013	C	ORDER *RESULT:* Off 2/13/2013 HON JOHN DANAHER	No
181.00	03/11/2013	D	**DISCLOSURE OF EXPERT WITNESS**	No
182.00	03/12/2013	P	**MOTION FOR ORDER**	No
182.01	03/25/2013	C	ORDER *RESULT:* Order 3/25/2013 HON JOHN DANAHER	No
183.00	03/19/2013	D	**REQUEST TO BRING AUDIO / VISUAL EQUIPMENT INTO THE COURTHOUSE**	No
183.10	03/19/2013	C	ORDER *RESULT:* Granted 3/19/2013 HON JOHN PICKARD	No
184.00	03/20/2013	D	**OBJECTION** TO MOTION FOR SANCTIONS	No
184.01	04/02/2013	C	ORDER *RESULT:* Sustained 4/2/2013 HON JOHN PICKARD	No
185.00	03/28/2013	D	**MOTION TO REARGUE/RECONSIDER** *RESULT:* Order 4/1/2013 HON JOHN PICKARD	No
185.01	04/02/2013	C	ORDER *RESULT:* Off 4/2/2013 HON JOHN PICKARD	No

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186.00	04/01/2013	D	**NOTICE OF COMPLIANCE**	No
187.00	04/02/2013	D	**NOTICE OF COMPLIANCE**	No
188.00	04/03/2013	P	**MOTION FOR EXTENSION OF TIME** TO TAKE DEPOSITIONS	No
188.01	04/22/2013	C	ORDER *RESULT:* Granted 4/22/2013 HON JOHN PICKARD	No
189.00	04/15/2013	P	**MOTION FOR ORDER**	No
190.00	04/29/2013	P	**TRIAL MANAGEMENT REPORT** JOINT	No
191.00	04/30/2013	P	**OBJECTION** AND RESPONSES TO SCHEDULE A OF RE-NOTICE OF DEPOSITION	No
192.00	05/06/2013	D	**REQUEST FOR ADJUDICATION OF DISCOVERY OR DEPOSITION DISPUTE (JD-CV-119)**	No
192.10	05/06/2013	C	ORDER *RESULT:* Order 5/6/2013 HON JOHN DANAHER	No
193.00	05/14/2013	D	**MOTION IN LIMINE**	No
194.00	05/17/2013	P	**OBJECTION** AND RESPONSES TO SCHEDULE A ATTACHED TO RE-NOTICE OF DEPOSITION (SUPPLEMENTAL)	No
195.00	05/17/2013	D	**DISCLOSURE OF EXPERT WITNESS**	No
196.00	05/17/2013	D	**MOTION FOR CONTINUANCE** *RESULT:* Denied 5/20/2013 HON JOHN DANAHER	No
196.10	05/20/2013	C	ORDER *RESULT:* Denied 5/20/2013 HON JOHN DANAHER	No
197.00	05/20/2013	D	**REQUEST TO BRING AUDIO/VISUAL EQUIPMENT INTO THE COURTHOUSE (JD-CL-90)** *RESULT:* Granted 5/20/2013 HON JOHN DANAHER	No
197.10	05/20/2013	C	ORDER *RESULT:* Granted 5/20/2013 HON JOHN DANAHER	No
198.00	05/20/2013	P	**REQUEST TO BRING AUDIO/VISUAL EQUIPMENT INTO THE COURTHOUSE (JD-CL-90)** Laptop	No
198.10	05/20/2013	C	ORDER *RESULT:* Granted 5/20/2013 HON JOHN DANAHER	No
199.00	05/20/2013	P	**REQUEST TO BRING AUDIO/VISUAL EQUIPMENT INTO THE COURTHOUSE (JD-CL-90)** Laptop	No
199.10	05/20/2013	C	ORDER *RESULT:* Granted 5/20/2013 HON JOHN DANAHER	No
200.00	05/20/2013	P	**OBJECTION TO MOTION** IN LIMINE TO EXCLUDE EVIDENCE OF PRIOR FRAUDULENT ACTS	No
201.00	05/21/2013	P	**OBJECTION** TO AND MOTION TO PRECLUDE DEFENDANTS' UNTIMELY EXPERT DISCLOSURE	No
202.00	05/22/2013	D	**LIST OF EXHIBITS (JD-CL-28/JD-CL-28a)** Defendants' Responses To Plainitff's Exhibits	No
203.00	05/22/2013	D	**LIST OF EXHIBITS (JD-CL-28/JD-CL-28a)**	No
204.00	05/22/2013	P	**EXHIBITS** PLAINTIFF'S RESPONSES TO DEFENDANT'S PROPOSED	No
205.00	05/28/2013	D	**MOTION TO SEAL DOCUMENT**	Yes
206.00	06/07/2013	D	**DISCLOSURE OF EXPERT WITNESS**	No
207.00	06/12/2013	P	**MOTION TO PRECLUDE EXPERT TESTIMONY** *RESULT:* Order 7/12/2013 HON JOHN DANAHER	No
207.01	07/12/2013	C	ORDER *RESULT:* Order 7/12/2013 HON JOHN DANAHER	No
208.00	06/27/2013	D	**MOTION FOR CONTINUANCE** *RESULT:* Denied 6/28/2013 HON JOHN DANAHER	No
208.10	06/28/2013	C	ORDER *RESULT:* Denied 6/28/2013 HON JOHN DANAHER	No

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209.00	06/28/2013	D	**MOTION FOR CONTINUANCE** Revised Motion for Continuance	No
209.10	07/01/2013	C	ORDER *RESULT:* Denied 7/1/2013 HON JOHN PICKARD	No
210.00	07/09/2013	P	**MOTION FOR ORDER** RE: JUDICIAL NOTICE OF DEFENDANT'S ADMISSIONS	No
211.00	07/10/2013	D	**OBJECTION** TO MOTION TO PRECLUDE DATED JUNE 12, 2013 *RESULT:* Overruled 7/12/2013 HON JOHN DANAHER	No
212.00	07/16/2013	D	**MOTION TO PRECLUDE EXPERT TESTIMONY** OF H. SEAN MATHIS	No
213.00	07/16/2013	D	**MOTION TO PRECLUDE EXPERT TESTIMONY**	No
214.00	07/17/2013	D	**MOTION - SEE FILE** FOR PERMISSION TO AMEND RESPONSE TO REQUEST TO ADMIT #20	No
215.00	07/18/2013	P	**OBJECTION TO MOTION** TO PRECLUDE OPINION TESTIMONY OF JOHN MARSALISI	No
216.00	07/18/2013	P	**OBJECTION TO MOTION** TO PRECLUDE OPINION TESTIMONY OF H. SEAN MATHIS	No
217.00	07/24/2013	O	**MOTION TO QUASH**	No
218.00	07/24/2013	O	**MOTION FOR PROTECTIVE ORDER**	No
219.00	07/31/2013	C	**LIST OF EXHIBITS (JD-CL-28/JD-CL-28a)**	No
220.00	08/19/2013	D	**MOTION TO SEAL FILE PB 11-20A OR 25-59A** Exhibits Post Trial	Yes
220.10	09/26/2013	C	ORDER *RESULT:* Denied 9/26/2013 HON JOHN DANAHER	No
220.20	09/25/2013	C	MEMORANDUM OF DECISION ON MOTION	No
221.00	12/04/2013	P	**BRIEF** PLAINTIFF'S POST TRIAL	No
222.00	12/04/2013	D	**BRIEF**	No
223.00	12/18/2013	P	**REPLY MEMORANDUM** TO DEFENDANTS' POST-TRIAL BRIEF	No
224.00	12/18/2013	D	**REPLY MEMORANDUM**	No
225.00	03/26/2014	C	MEMORANDUM OF DECISION *RESULT:* Order 3/26/2014 HON JOHN DANAHER	No
226.00	03/26/2014	C	**JUDGMENT AFTER COMPLETED TRIAL TO THE COURT WITH NO JURY** *RESULT:* HON JOHN DANAHER	No
227.00	04/11/2014	D	**MOTION FOR EXTENSION OF TIME TO FILE APPEAL**	No
227.10	04/14/2014	C	ORDER *RESULT:* Order 4/14/2014 HON JOHN DANAHER	No
228.00	04/25/2014	P	**APPLICATION FOR PREJUDGMENT REMEDY**	Yes
229.00	04/25/2014	P	**APPLICATION FOR PREJUDGMENT REMEDY** *RESULT:* Order 5/16/2014 HON JOHN DANAHER	Yes
229.10	05/16/2014	C	ORDER	No
230.00	04/25/2014	P	**AFFIDAVIT**	No
231.00	04/25/2014	P	**MOTION FOR DISCLOSURE OF ASSETS**	Yes
231.01	05/19/2014	C	ORDER *RESULT:* Granted 5/19/2014 HON JOHN DANAHER	No
232.00	05/02/2014	D	**MOTION TO REARGUE/RECONSIDER**	No
232.01	05/19/2014	C	ORDER *RESULT:* Denied 5/19/2014 HON JOHN DANAHER	No
233.00	05/05/2014	D	**MOTION FOR CONTINUANCE** *RESULT:* Order 5/5/2014 HON JOHN DANAHER	No
234.00	05/12/2014	P	**OBJECTION TO MOTION** TO REARGUE	No

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234.10	05/19/2014	C	ORDER *RESULT:* Sustained 5/19/2014 HON JOHN DANAHER	No
235.00	05/14/2014	D	**OBJECTION TO MOTION**	No
236.00	05/14/2014	D	**MOTION TO QUASH**	No
236.10	05/15/2014	C	ORDER *RESULT:* Off 5/15/2014 HON JOHN DANAHER	No
237.00	05/14/2014	P	**MEMORANDUM IN SUPPORT OF MOTION** FOR PREJUDGMENT REMEDY AND DISCLOSURE OF ASSETS	No
238.00	06/03/2014	D	**APPEAL TO APPELLATE COURT**	No
238.10	07/22/2014	C	**APPELLATE COURT MATERIAL**	No
239.00	06/11/2014	P	**CROSS APPEAL**	No
239.10	07/22/2014	C	**APPELLATE COURT MATERIAL**	No
240.00	06/20/2014	D	**MOTION - SEE FILE** Motion to Substitute Other Sufficient Security *RESULT:* Denied 11/7/2014 HON JOHN DANAHER	No
240.10	11/07/2014	C	MEMORANDUM OF DECISION ON MOTION *RESULT:* Order 11/7/2014 HON JOHN DANAHER	No
241.00	06/23/2014	P	**MOTION FOR CONTEMPT** AND SANCTIONS, FOR AN ORDER REQUIRING THE DEFENDANTS TO POST A BOND, AND FOR ATTORNEY'S FEES	Yes
242.00	07/03/2014	P	**OBJECTION TO MOTION** TO SUBSTITUTE OTHER SUFFICIENT SECURITY	No
243.00	07/07/2014	P	**OBJECTION TO MOTION** Plaintiff's Objection to Defendant's Motion to Substitute Other Sufficient Security	No
244.00	07/11/2014	D	**REPLY** to Objection to Motion to Substitute Other Sufficient Security	No
245.00	07/11/2014	D	**OBJECTION** to Motion for Contempt	No
246.00	07/14/2014	D	**MOTION FOR CONTINUANCE**	No
246.01	07/14/2014	C	ORDER *RESULT:* Granted 7/14/2014 HON JOHN DANAHER	No
247.00	07/16/2014	C	**JUDGMENT FILE**	No
248.00	07/22/2014	P	**APPELLATE COURT MATERIAL**	No
249.00	08/06/2014	P	**CASEFLOW REQUEST (JD-CV-116)**	No
250.00	09/03/2014	D	**MOTION - SEE FILE** Motion for Continuance (with attachments)	No
250.10	09/05/2014	C	ORDER *RESULT:* Order 9/5/2014 HON JOHN DANAHER	No
251.00	09/18/2014	P	**MOTION - SEE FILE** FOR TEMPORARY RESTRAINING ORDER *RESULT:* Order 10/31/2014 HON JOHN DANAHER	No
252.00	09/18/2014	P	**AFFIDAVIT** OF ANN H. RUBIN IN SUPPORT OF MOTION FOR TEMPORARY RESTRAINING ORDER	No
253.00	09/18/2014	P	**PROPOSED ORDER** PROPOSED TEMPORARY INJUNCTION	No
254.00	10/01/2014	P	**REQUEST FOR ARGUMENT - NON-ARG MATTER (JD-CV-128)**	No
254.01	10/06/2014	C	ORDER *RESULT:* Off 10/6/2014 HON JOHN PICKARD	No
255.00	10/24/2014	D	**OBJECTION TO MOTION** Objection to #251 Motion for Temporary Restraining Order	No
256.00	10/28/2014	C	**MOTION FOR ARTICULATION** **Last Updated:** Legend Code - 11/17/2014	No
256.10	11/17/2014	C	MEMORANDUM OF DECISION ON MOTION *RESULT:* Order 11/17/2014 HON JOHN DANAHER	No
256.15	12/22/2014	C	MEMORANDUM OF DECISION ON MOTION	No

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257.00	10/30/2014	C	**EXHIBITS**	No
258.00	10/31/2014	C	**TEMPORARY INJUNCTION**	No
259.00	11/05/2014	P	**MOTION - SEE FILE** TO AMEND INJUNCTION ORDER	No
259.01	11/17/2014	C	ORDER *RESULT:* Granted 11/17/2014 HON JOHN DANAHER	No
260.00	11/25/2014	P	**CASEFLOW REQUEST (JD-CV-116)** RE: HEARING ON MOTION FOR ARTICULATION	No
261.00	11/25/2014	P	**CASEFLOW REQUEST (JD-CV-116)** (CORRECTED)	No
261.10	11/28/2014	C	ORDER *RESULT:* Order 11/28/2014 HON JOHN DANAHER	No
262.00	12/04/2014	D	**NOTICE** Notice of Disclosure of Assets	No
263.00	12/10/2014	D	**OBJECTION** Objection to the Introduction of Any Evidence at the Hearing on the Motion for Articulation	No
264.00	12/11/2014	P	**MOTION - SEE FILE** RE: MOTION FOR SUFFICIENT SECURITY	No
265.00	12/16/2014	P	**MOTION - SEE FILE** TO AMEND INJUNCTION ORDER	No
265.01	01/05/2015	C	ORDER *RESULT:* Granted 1/5/2015 HON JOHN DANAHER	No
266.00	12/24/2014	P	**MOTION FOR CONTEMPT** Motion for Contempt and Sanctions, Order for Bond, Attorney's Fees	Yes
267.00	12/30/2014	P	**REQUEST FOR ARGUMENT - NON-ARG MATTER (JD-CV-128)** MOTION FOR SUFFICIENT SECURITY	No
267.01	01/05/2015	C	ORDER *RESULT:* Order 1/5/2015 HON JOHN DANAHER	No
268.00	12/29/2014	D	**AMENDED APPEAL**	No
269.00	01/09/2015	D	**MOTION FOR CONTINUANCE** 1/20/15 hearing	No
269.10	01/12/2015	C	ORDER *RESULT:* Order 1/12/2015 HON JOHN DANAHER	No
269.20	01/13/2015	C	ORDER *RESULT:* Denied 1/13/2015 HON JOHN DANAHER	No
270.00	01/20/2015	D	**NOTICE OF BANKRUPTCY**	No
271.00	01/20/2015	C	ORDER	No
272.00	01/22/2015	D	**NOTICE OF BANKRUPTCY** Scott Swimming Pools, Inc.	No
273.00	01/29/2015	P	**RETURN OF SERVICE**	No
274.00	01/29/2015	P	**RETURN OF SERVICE**	No

Scheduled Court Dates as of 05/14/2015

LLI-CV09-5007099-S - **WHITNEY,WALTER v. J. M. SCOTT ASSOCIAT**

#	Date	Time	Event Description	Status
No Events Scheduled				

Judicial ADR events may be heard in a court that is different from the court where the case is filed. To check location information about an ADR event, select the **Notices** tab on the top of the case detail page.

Short Calendar and family support magistrate calendar matters are shown as scheduled court dates. If there are multiple motions on a single short calendar, the calendar will be listed once. You can see more information on matters appearing on short calendars and family support magistrate calendars by going to the Civil/Family Case Look-Up page and Short Calendars By Juris Number or By Court Location.

Periodic changes to terminology that do not affect the status of the case may be made.

This list does not constitute or replace official notice of scheduled court events.

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NOTICE RE: OPERATIVE COMPLAINT

The complaint and all amended versions have been sealed. See orders dated September 6, 2011 (#124.00) and June 19, 2012 (#150.02). The operative complaint is the Second Amended Revised Complaint, dated June 4, 2012 (#150.00), which was sealed on June 19, 2012. Pursuant to Practice Book § 67-2(i), the Second Amended Revised Complaint is excluded from this appendix but is available to the Court in the court file.

TIME, DATE, SCOPE AND DURATION OF SEALING OR CLOSURE ORDER
JD-CL-76 Rev. 12-07
P.B. §§ 11-20, 11-20A, 25-59, 25-59A

STATE OF CONNECTICUT
SUPERIOR COURT

NOTICE
No information entitled to remain confidential should be placed on this form.

FOR COURT USE ONLY
☐ SEALOR *(Document(s) or file sealed)*
☐ LIMITOR *(Disclosure limited)*
☐ CLOSEOR *(Courtroom closed)*
☐ PSEUDOR *(Use of pseudonym(s) granted)*

Pursuant to Practice Book Sections 11-20, 11-20A, 25-59 and 25-59A the time, date, scope and, except for court closure orders, duration of the order shall be reduced to writing, signed by the judicial authority, and entered by the clerk in the court file. This form should be used for that purpose.

In addition to signing this form, the judicial authority must also comply with the other requirements of the above rules, which include articulating the overriding interest being protected, specifying its findings underlying the order, and either ordering that a transcript of its decision be included in the court file or preparing a memorandum setting forth the reasons for its order. When sealing an entire court file, the judicial authority must also comply with Sections 11-20A(f) and 25-59A(f).

Instructions to Clerk for Civil and Family Cases: *Complete this form upon issuance of the court order and IMMEDIATELY enter it in the court file. Use Section I for an order sealing document(s) or a file. Use Section II for an order limiting disclosure. Use Section III for an order closing a courtroom. Use Section IV for an order granting permission to use pseudonyms. The judicial authority and clerk must sign Section V. Code this form using the appropriate docket legend(s) for the section(s) of the form completed.*

Additional Instructions to Clerk for Civil Cases only: *If Sections I, II or III are completed, IMMEDIATELY post a copy of this form on a bulletin board adjacent to the clerk's office and accessible to the public and fax the form IMMEDIATELY to Court Operations at (860) 263-2773 for posting on the judicial branch website.*

JUDICIAL DISTRICT OF	AT *(Town)*	DOCKET NO.
LITCHFIELD	LITCHFIELD	CV09-5007099

CASE NAME *(In the case of parties for whom a Motion for Permission to Use Pseudonym(s) was granted, use the pseudonym(s).)*
WALTER WHITNEY -V- J.M. SCOTT ASSOCIATES

SECTION I - ORDER SEALING DOCUMENT(S) OR FILE *(Use "SEALOR" Docket Legend)*

DATE OF SEALING ORDER	TIME OF SEALING ORDER	DURATION OF SEALING ORDER
09/06/2011	10:17 A.M.	NO EXPIRATION

SCOPE OF SEALING ORDER *("X" one)*
☐ Case caption and docket number to be disclosed, contents of file sealed.
☒ The following designated motion(s), pleading(s) or other document(s) is/are sealed.

ENTRY NUMBER(S) OF DOCUMENT(S) SEALED PURSUANT TO THE ORDER
100.32, 111.00 & 121.00

ADDITIONAL ORDERS REGARDING SCOPE

SECTION II - ORDER LIMITING DISCLOSURE *(Use "LIMITOR" Docket Legend)*
(Use only for order limiting disclosure OTHER THAN SEALING. If order is to seal document(s) or file use Section I above.)

DATE OF ORDER LIMITING DISCLOSURE	TIME OF ORDER LIMITING DISCLOSURE
DURATION OF ORDER LIMITING DISCLOSURE	ENTRY NUMBER(S) OF APPLICABLE DOCUMENT(S)

SCOPE OF ORDER LIMITING DISCLOSURE *(Explain limitation on disclosure, e.g., redaction, but do not include confidential information.)*

SECTION III - ORDER CLOSING COURTROOM *(Use "CLOSEOR" Docket Legend)*

DATE OF ORDER CLOSING COURTROOM	TIME OF ORDER CLOSING COURTROOM	ENTRY NUMBER OF DOCUMENT

SCOPE OF ORDER CLOSING COURTROOM

SECTION IV - ORDER PERMITTING USE OF PSEUDONYM(S) *(Use "PSEUDOR" Docket Legend)*

DATE OF ORDER PERMITTING USE OF PSEUDONYM(S)	TIME OF ORDER PERMITTING USE OF PSEUDONYM(S)

DURATION OF ORDER PERMITTING USE OF PSEUDONYM(S)

SCOPE OF ORDER PERMITTING USE OF PSEUDONYM(S)

SECTION V - SIGNATURES *(Complete in every case)*

SIGNATURE OF JUDICIAL AUTHORITY	DATE SIGNED
John W. Pickard	09/06/2011
SIGNATURE OF CLERK *(Chief Clerk or His/Her Designee)*	DATE SIGNED
CRAIG D. MALONE, ASST. CLERK	09/06/2011

124.00

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DOCKET NUMBER: LLI-CV09-5007099-S	: SUPERIOR COURT
WHITNEY, WALTER	: JUDICIAL DISTRICT OF LITCHFIELD
V.	: AT LITCHFIELD
J. M. SCOTT ASSOCIATES INC., ET AL	: APRIL 13, 2012

REQUEST FOR LEAVE TO AMEND DEFENDANTS' SETOFFS AND COUNTERCLAIMS

The defendants request leave to amend their setoffs and counterclaims dated December 15, 2011 in accordance with the proposed amended setoffs and counterclaims submitted herewith.

THE DEFENDANTS

By: /s/ 305547
Bruce L. Elstein
Elstein and Elstein, P.C.
1087 Broad Street, Suite 400
Bridgeport, Connecticut 06604
Juris No. 35172
belstein@elstein-law.com

CERTIFICATION

I hereby certify that a copy of the foregoing was sent on the above date to all counsel and pro se parties of record as follows:

Joseph P. Secola, Esq.
Secola Law Offices, LLC
78 North Mountain Road
P.O. Box 5122
Brookfield, CT 06804
attorneysecola@sbcglobal.net

/s/ 305547
Bruce L. Elstein

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DOCKET NUMBER: LLI-CV09-5007099-S	: SUPERIOR COURT
WHITNEY, WALTER	: JUDICIAL DISTRICT OF LITCHFIELD
V.	: AT LITCHFIELD
J. M. SCOTT ASSOCIATES INC., ET AL	: APRIL 13, 2012

PROPOSED AMENDED SETOFFS AND COUNTERCLAIMS

First Count – Breach Of Employment Agreement

1. On March 20, 2002, the defendant, SSP and the plaintiff entered into an employment agreement.
2. The employment agreement required the plaintiff to perform various tasks as specifically set forth in paragraph 3 thereof.
3. On and after the employment agreement was executed, the plaintiff failed and neglected to perform the tasks required.
4. Between March 20, 2002 and December 6, 2006, SSP notified the plaintiff on numerous occasions, both orally and in writing, that his satisfactory performance of the agreement was lacking.
5. At no time did the plaintiff perform as agreed.
6. The plaintiff is in breach of the employment agreement.
7. As a result of the breach, SSP is entitled to damages, including, but not limited to the loss of money paid to the plaintiff in wages and other benefits and incidental and consequential damage to SSP.

ELSTEIN AND ELSTEIN, P.C. • ATTORNEYS AT LAW
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Second Count - Breach of Stock Option Purchase Agreement

1. On March 20, 2002, the defendant, SSP and the plaintiff entered into a stock option purchase agreement ("SOPA").
2. Pursuant to the SOPA, the plaintiff obtained 10% of the shares in SSP.
3. Pursuant to §2.3 of the SOPA, the plaintiff was obligated to sell his shares back to SSP and Scott upon termination of his employment regardless of the reason.
4. On December 22, 2006, the plaintiff was terminated.
5. The plaintiff has breached his agreement to sell those shares.
6. As a result of that breach, SSP and Scott are entitled to specific performance of the SOPA.

Third Count – Fraudulent Inducement

Withdrawn April 13, 2012

Fourth Count – Abuse Of Process (Fraudulent Inducement Claim)

1. On or about September 26, 2007, the plaintiff initiated an arbitration proceeding against SSP and Scott.
2. During the course of the arbitration, the plaintiff made claims that he was fraudulently induced into signing the agreements with SSP and Scott as follows:

> "Mr. Scott and Scott Pools, Inc. have fraudulently induced Mr. Whitney to enter these said agreements with no intention of ever honoring the said agreements and selling the company to Mr. Whitney. Mr. Scott and Scott Pools, Inc. fraudulently used the time and services of Mr. Whitney these past five years to run Scott Pools, Inc., never having any intention of keeping the said

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> agreements or selling the company to Mr. Whitney pursuant to the said agreements. Such fraudulent conduct by Mr. Scott and Scott Pools, Inc. has deprived Mr. Whitney of other business pursuits. Unfortunately, this said fraudulent inducement fits a pattern of conduct by Mr. Scott and Scott Pools, Inc., which has been perpetrated against others."

3. The plaintiff made those claims while at the same time he sought to specifically enforce the agreements as follows:

> Mr. Whitney will also claim specific performance of the Employment Agreement and Stock Option Purchase Agreement, and thereby purchase and own Scott Pools, Inc.

4. Since the plaintiff claimed specific performance, he needed to prove that there was a difference in value between the property actually conveyed and the value of the property as it would have been if there had been no false representation.

5. It would have been impossible to succeed on the fraudulent inducement claim as alleged since there could be no damage if the agreements were specifically enforced.

6. On March 11, 2009, the Arbitrator (Acosta) entered summary judgment in favor of SSP and Scott on the grounds that the plaintiff "has not, and can not, prove a pecuniary injury which is a jurisdictional requirement to sustain a fraudulent inducement claim."

7. The Arbitrator's entry of summary judgment in favor of SSP and Scott terminated the litigation in favor of them.

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8. At the time the arbitration proceeding was initiated, and at all times between the date of filing and the date of the entry of the summary judgment, the plaintiff knew or should have known, that all of the claims made against the SSP and Scott lacked a jurisdictional basis.

9. As a direct and proximate result of the plaintiff's instituting, maintaining and prosecuting the arbitration proceeding against SSP and Scott, they have suffered damages, including but not limited to:

   a. Incurring attorney's fees necessary for the defense of the Underlying Action; and

   b. Expenditure of time, effort and resources by SSP and Scott, detracting from efforts which could have been devoted to business pursuits.

10. The plaintiff made the claims of fraudulent inducement primarily to vex, trouble and attempt to disrupt the orderly business affairs of SSP and Scott.

11. As a direct and proximate result of the plaintiff's instituting, maintaining and prosecuting the arbitration proceeding against SSP and Scott, they have suffered damages, including but not limited to economic damages by way of lost income, attorney's fees, arbitration fees and expenses and costs.

12. As a result of the claims of the plaintiff, SSP and Scott have suffered and will suffer consternation, mental anguish, and disruption of their lives to rebut the baseless claims.

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Fifth Count – Abuse Of Process (Breach Of Confidentiality)

1. On or about September 26, 2007, the plaintiff initiated an arbitration proceeding against SSP and Scott.
2. During the course of the arbitration, discovery of certain information was sought by the plaintiff.
3. On or about October 15, 2008, the plaintiff entered into a confidentiality agreement with SSP and Scott concerning certain sensitive and confidential financial information to be provided by SSP and Scott to the plaintiff.
4. Thereafter, in reliance upon the confidentiality agreement, SSP and Scott did provide certain sensitive and confidential financial information to the plaintiff.
5. Without notice to SSP or Scott, and in violation of the confidentiality agreement with them, the plaintiff publicly disclosed certain sensitive and confidential financial information in support of his application for prejudgment remedy, complaint and revised complaint.
6. The plaintiff made the public disclosures primarily to vex, trouble and attempt to disrupt the orderly business affairs of SSP and Scott.
7. As a result of the claims of the plaintiff, SSP and Scott incurred economic damages by way of lost income, attorney's fees, arbitration fees and expenses and costs.

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8. As a result of the claims of the plaintiff, SSP and Scott have suffered and will suffer loss of competitive advantage since customers, suppliers and customers had access to the confidential information, embarrassment, consternation, mental anguish, and disruption of their lives to seek protection of the confidential information.

Sixth Count – Abuse Of Process (TRO)

1. On or about September 26, 2007, the plaintiff initiated an arbitration proceeding against SSP and Scott.
2. By virtue of the agreements, the plaintiff knew that he had an option to purchase stock only if he were employed by SSP at the conclusion of five (5) years.
3. During the course of the arbitration, the plaintiff knew that SSP and Scott had maintained that exact position at all times.
4. At the commencement of the proceedings here to seek a prejudgment remedy, the plaintiff made an additional request that the defendants, including J. M. Scott Associates, Inc., a stranger to the agreements, be restrained from transferring any of its property pending a hearing.
5. In his presentation to the court on his application for an ex-parte temporary restraining order, the plaintiff failed to inform the Court of critical facts and made no attempt to notify the defendants or their known counsel of the ex-parte request.

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6. The information known to the plaintiff and hidden from the court included the fact that the stock option agreement terminated by its terms, terminated on account of certain other reasons set forth in the agreement, that the plaintiff was fully aware, or in the exercise of reasonable care, should have been aware, of all material facts he claims as a basis of fraud since he and his lawyer spent an extended period of time reviewing all of the books and records of SSP before the agreements were executed.

7. The plaintiff made the request for an ex-parte temporary restraining order primarily to vex, trouble and attempt to disrupt the orderly business affairs of the defendants.

8. As a result of the claims of the plaintiff, SSP and Scott incurred economic damages by way of lost income, attorney's fees and costs.

9. As a result of the claims of the plaintiff, SSP and Scott have suffered and will suffer damages by not being able to run business in an efficient and typical manner, loss of competitive advantage since customers, suppliers and customers had access to the baseless claims, embarrassment, consternation, mental anguish, and disruption of their lives.

Seventh Count (Fraud In The Inducement Concerning The Property)

Withdrawn April 13, 2012.

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Eighth Count (Vexatious Litigation - Common Law)

1 - 12. Paragraphs one through twelve of Fourth Count are hereby made paragraphs one through twelve of the Eighth Count as if fully set forth herein.

13. The plaintiff instituted the arbitration proceeding claiming fraudulent inducement against SSP and Scott without probable cause and with malice.

14. After the initiation of the arbitration proceeding claiming fraudulent inducement, the plaintiff continued to maintain and prosecute the arbitration proceeding against SSP and Scott without probable cause and with malice.

Ninth Count (Vexatious Litigation - Statutory Claim Pursuant To C.G.S. § 52-568(1))

1 - 14. Paragraphs one through fourteen of Eighth Count are hereby made paragraphs one through fourteen of the Ninth Count as if fully set forth herein.

15. Pursuant to Conn. Gen. Stat. § 52-568(1), SSP and Scott hereby claim double damages.

Tenth Count (Vexatious Litigation - Statutory Claim Pursuant To C.G.S. § 52-568(2))

1 - 14. Paragraphs one through fourteen of Eighth Count are hereby made paragraphs one through fourteen of the Tenth Count as if fully set forth herein.

15. Pursuant to Conn. Gen. Stat. § 52-568(2), SSP and Scott hereby claim treble damages.

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JURIS NO. 35172

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DOCKET NUMBER: LLI-CV09-5007099-S	: SUPERIOR COURT
WHITNEY, WALTER	: JUDICIAL DISTRICT OF LITCHFIELD
V.	: AT LITCHFIELD
J. M. SCOTT ASSOCIATES INC., ET AL	: APRIL 13, 2012

PRAYERS FOR RELIEF

Wherefore, the defendants claim:

As To The First Count

1. Rescission of the agreement;
2. Damages.

As To The Second Count

1. An order directing the plaintiff to transfer the stock to Scott;
2. Rescission of the agreement;
3. Damages.

As To The Third Count

Withdrawn April 13, 2012.

As To The Fourth Count

1. Damages;
2. Punitive Damages.

As To The Fifth Count

1. Damages;

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2. Punitive Damages.

As To The Sixth Count

1. Damages;

2. Punitive Damages.

As To The Seventh Count

Withdrawn April 13, 2012.

As To The Eighth Count

1. Damages;

As To The Ninth Count

1. Damages;

2. Double damages pursuant to Conn. Gen. Stat. § 52-568(1);

As To The Tenth Count

1. Damages;

2. Treble damages pursuant to Conn. Gen. Stat. § 52-568(2);

THE DEFENDANTS

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TIME, DATE, SCOPE AND DURATION OF SEALING OR CLOSURE ORDER
JD-CL-76 Rev. 12-07
P.B. §§ 11-20, 11-20A, 25-59, 25-59A

STATE OF CONNECTICUT
SUPERIOR COURT

NOTICE
No information entitled to remain confidential should be placed on this form.

FOR COURT USE ONLY
☐ SEALOR *(Document(s) or file sealed)*
☐ LIMITOR *(Disclosure limited)*
☐ CLOSEOR *(Courtroom closed)*
☐ PSEUDOR *(Use of pseudonym(s) granted)*

Pursuant to Practice Book Sections 11-20, 11-20A, 25-59 and 25-59A the time, date, scope and, except for court closure orders, duration of the order shall be reduced to writing, signed by the judicial authority, and entered by the clerk in the court file. This form should be used for that purpose.

In addition to signing this form, the judicial authority must also comply with the other requirements of the above rules, which include articulating the overriding interest being protected, specifying its findings underlying the order, and either ordering that a transcript of its decision be included in the court file or preparing a memorandum setting forth the reasons for its order. When sealing an entire court file, the judicial authority must also comply with Sections 11-20A(f) and 25-59A(f).

Instructions to Clerk for Civil and Family Cases: *Complete this form upon issuance of the court order and IMMEDIATELY enter it in the court file. Use Section I for an order sealing document(s) or a file. Use Section II for an order limiting disclosure. Use Section III for an order closing a courtroom. Use Section IV for an order granting permission to use pseudonyms. The judicial authority and clerk must sign Section V. Code this form using the appropriate docket legend(s) for the section(s) of the form completed.*

Additional instructions to Clerk for Civil Cases only: *If Sections I, II or III are completed, IMMEDIATELY post a copy of this form on a bulletin board adjacent to the clerk's office and accessible to the public and fax the form IMMEDIATELY to Court Operations at (860) 263-2773 for posting on the judicial branch website.*

JUDICIAL DISTRICT OF	AT *(Town)*	DOCKET NO.
LITCHFIELD	**LITCHFIELD**	**CV09-5007099-S**

CASE NAME *(In the case of parties for whom a Motion for Permission to Use Pseudonym(s) was granted, use the pseudonym(s).)*
WHITNEY, WALTER V. J.M. SCOTT ASSOCIATION INC., ET, AL

SECTION I - ORDER SEALING DOCUMENT(S) OR FILE *(Use "SEALOR" Docket Legend)*

DATE OF SEALING ORDER	TIME OF SEALING ORDER	DURATION OF SEALING ORDER
6/18/2012	9:35 A.M.	NO TERMINATION

SCOPE OF SEALING ORDER *("X" one)*

☐ Case caption and docket number to be disclosed, contents of file sealed.
☒ The following designated motion(s), pleading(s) or other document(s) is/are sealed.

ENTRY NUMBER(S) OF DOCUMENT(S) SEALED PURSUANT TO THE ORDER
150.00

ADDITIONAL ORDERS REGARDING SCOPE

SECTION II - ORDER LIMITING DISCLOSURE *(Use "LIMITOR" Docket Legend)*
(Use only for order limiting disclosure OTHER THAN SEALING. If order is to seal document(s) or file use Section I above.)

DATE OF ORDER LIMITING DISCLOSURE	TIME OF ORDER LIMITING DISCLOSURE
DURATION OF ORDER LIMITING DISCLOSURE	ENTRY NUMBER(S) OF APPLICABLE DOCUMENT(S)

SCOPE OF ORDER LIMITING DISCLOSURE *(Explain limitation on disclosure, e.g., redaction, but do not include confidential information)*

SECTION III - ORDER CLOSING COURTROOM *(Use "CLOSEOR" Docket Legend)*

DATE OF ORDER CLOSING COURTROOM	TIME OF ORDER CLOSING COURTROOM	ENTRY NUMBER OF DOCUMENT

SCOPE OF ORDER CLOSING COURTROOM

SECTION IV - ORDER PERMITTING USE OF PSEUDONYM(S) *(Use "PSEUDOR" Docket Legend)*

DATE OF ORDER PERMITTING USE OF PSEUDONYM(S)	TIME OF ORDER PERMITTING USE OF PSEUDONYM(S)

DURATION OF ORDER PERMITTING USE OF PSEUDONYM(S)

SCOPE OF ORDER PERMITTING USE OF PSEUDONYM(S)

SECTION V - SIGNATURES *(Complete in every case)*

SIGNATURE OF JUDICIAL AUTHORITY	DATE SIGNED
J. Pickard	6-19-12
SIGNATURE OF CLERK *(Chief Clerk or His/Her Designee)*	DATE SIGNED
	6-19-12

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151.02

DOCKET NUMBER: LLI-CV09-5007099-S	: SUPERIOR COURT
WHITNEY, WALTER	: JUDICIAL DISTRICT OF LITCHFIELD
V.	: AT LITCHFIELD
J. M. SCOTT ASSOCIATES INC., ET AL	: SEPTEMBER 24, 2012

DEFENDANTS' ANSWER AND SPECIAL DEFENSES

The defendants, Scott Swimming Pools, Inc. and James M. Scott, hereby answer the plaintiff's amended complaint dated June 4, 2012. The counterclaims of these defendants were previously filed December 15, 2011 as amended by pleading filed April 13, 2012.

ANSWER

First Count

1. Admitted.
2. Admitted.
3. Admitted.
4. Admitted.
5. It is admitted that Scott Swimming Pools, Inc. ("SSP") and the plaintiff entered into an employment agreement effective March 31, 2002. It is further admitted that James M. Scott ("Scott"), SSP and the plaintiff entered into a stock option purchase agreement on March 20, 2002. It is further admitted that Scott, SSP

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and the plaintiff signed a supplemental letter on March 20, 2002. The remainder of the allegations set forth in this paragraph, if any, is denied.

6. Denied.

7. Denied.

8. The defendants lack sufficient knowledge and information upon which to form a belief, and therefore, leave the plaintiff to his proof.

9. Denied.

10. Denied.

11. Denied.

12. Denied.

13. Denied.

14. Denied.

15. It is admitted that Scott was owed a significant amount in deferred compensation as of March 20, 2002. For the remainder of the allegations in this paragraph the defendants lack sufficient knowledge and information upon which to form a belief, and therefore, leave the plaintiff to his proof.

16. It is admitted that as of March 2007, the deferred compensation owed Scott has increased significantly. For the remainder of the allegations in this paragraph the defendants lack sufficient knowledge and information upon which to form a belief, and therefore, leave the plaintiff to his proof.

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17. The defendants lack sufficient knowledge and information upon which to form a belief, and therefore, leave the plaintiff to his proof.

18. Denied.

19. Denied.

20. Denied.

21. Deleted by agreement.

22. Denied.

23. It is admitted that a letter was delivered to the plaintiff on December 18, 2006. The remainder of the allegations set forth in this paragraph, if any, is denied.

24. The defendants lack sufficient knowledge and information upon which to form a belief, and therefore, leave the plaintiff to his proof.

25. Denied.

26. Deleted by court ruling.

27. It is admitted that the plaintiff was terminated on December 22, 2006. The remainder of the allegations set forth in this paragraph, if any, is denied.

28. Admitted.

29. It is admitted that an email was sent on August 14, 2009. It is further admitted that the parties had engaged in seven (7) days of arbitration hearings as of August 14, 2009, when the arbitration was originally scheduled for only three (3) days. It is also admitted that the arbitration was scheduled for eight (8) additional

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days as of August 14, 2009. The remainder of the allegations set forth in this paragraph, if any, is denied.

30. Denied.

31. Denied.

32. Denied.

33. The defendants lack sufficient knowledge and information upon which to form a belief, and therefore, leave the plaintiff to his proof.

34. Denied.

35. Denied.

36. Denied.

37. It is admitted that a transfer occurred on March 23, 2007. The remainder of the allegations set forth in this paragraph, if any, is denied.

38. It is admitted that the transfer partially satisfied a debt due. The remainder of the allegations set forth in this paragraph, if any, is denied.

38a. Denied.

38b. Denied.

38c. Denied.

39. Denied.

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40. The first sentence is denied. For the remainder of the allegations in this paragraph the defendants lack sufficient knowledge and information upon which to form a belief, and therefore, leave the plaintiff to his proof.

41. Denied.

42. The defendants lack sufficient knowledge and information upon which to form a belief, and therefore, leave the plaintiff to his proof.

43. The defendants lack sufficient knowledge and information upon which to form a belief, and therefore, leave the plaintiff to his proof.

44. The defendants lack sufficient knowledge and information upon which to form a belief, and therefore, leave the plaintiff to his proof.

45. Denied.

Second Count

Moved To Tenth Count.

Third Count

Summary Judgment Entered In Favor Of The Defendant To Whom This Was Directed. See Memorandum Of Decision - Docket Entry #135.

Fourth Count

1 – 44. The answers to paragraphs 1 – 44 of the First Count are hereby made the answers to paragraphs 1 – 44 of this count.

45. Denied.

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46. Denied.

47. Denied.

48. Denied.

49. Denied.

50. Denied.

Fifth Count

1 – 44. The answers to paragraphs 1 – 44 of the First Count are hereby made the answers to paragraphs 1 – 44 of this count.

45. Denied.

46. Denied.

47. Denied.

Sixth Count

1 – 46. The answers to paragraphs 1 – 46 of the Fifth Count are hereby made the answers to paragraphs 1 – 46 of this count.

47. Denied.

48. Denied.

Seventh Count

1 – 49. The answers to paragraphs 1 – 49 of the Fourth Count are hereby made the answers to paragraphs 1 – 49 of this count.

50. Denied.

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51. Denied.

Eighth Count

Previously Withdrawn.

Ninth Count

Previously Withdrawn.

Tenth Count

1 – 49. The answers to paragraphs 1 – 49 of the Fourth Count are hereby made the answers to paragraphs 1 – 49 of this count.

50. Denied.

51. Denied.

52. Denied.

53. Denied.

54. Denied.

55. The defendants lack sufficient knowledge and information upon which to form a belief, and therefore, leave the plaintiff to his proof.

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SPECIAL DEFENSES

First Special Defense – Applicable to the First, Sixth, Seventh and Tenth Counts

The right of action for the cause stated in the First, Sixth, Seventh and Tenth Counts of the complaint did not accrue within three (3) years next before the commencement of this action. This action is therefore barred under Connecticut General Statutes §52-577.

Second Special Defense – Applicable to the First Count

The rights and liabilities of the parties concerning the matters set forth in the plaintiff's complaint were expressly put in issue and determined and adjudicated by a judgment in a prior arbitration action in the entitled Whitney v. Scott Swimming Pools, Inc., AAA #12-166-00556-07 entered on March 11, 2009 to which action the plaintiff, SSP and Scott were parties.

Third Special Defense – Applicable to all counts

The causes of action implicating the "option" to purchase certain real estate is in violation of the Statute of Frauds and is, therefore, barred under Connecticut General Statutes §52-550.

Fourth Special Defense – Applicable to all counts

The right of action for the causes of action implicating the "option" to purchase certain real estate did not accrue within one year after the date provided in the agreement for the performance of it or within eighteen months after the date on which

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the agreement was executed next before the commencement of this action. This action is, therefore, barred under Connecticut General Statutes §49-33a.

Fifth Special Defense – Applicable to Fourth, Fifth, Sixth and Seventh Counts

SSP paid to the plaintiff the sum of $35,538.23 towards any sums due pursuant to the agreement(s).

Sixth Special Defense – Applicable to all counts

1. Before March 20, 2002, the plaintiff represented to the defendants, SSP and Scott, that he had the knowledge, business acumen and skill to manage the employees, customers and existing business affairs of SSP and to grow it in a highly profitable manner.
2. In fact, the plaintiff lacked any managerial skill necessary to accomplish what he represented.
3. Had SSP and Scott known that the representations were false, they would not have executed agreements with the plaintiff.
4. Therefore, SSP and Scott are not liable to the plaintiff on the agreements.

Seventh Special Defense – Applicable to all counts

Scott signed the employment agreement only on behalf of SSP and is not personally liable thereunder for any sums claimed due.

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JURIS NO. 35172

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Eighth Special Defense – Applicable to all counts

The claims made are barred by the express terms and conditions of the written agreements entered into between the plaintiff and SSP and Scott.

THE DEFENDANTS

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CERTIFICATION

I hereby certify that a copy of the foregoing was sent on the above date to all counsel and pro se parties of record as follows:

Ann H. Rubin, Esq.
Carmody & Torrance, LLP
P.O. Box 1110
Waterbury, CT 06721

/s/ 305547
Bruce L. Elstein

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DOCKET NO. LLI-CV09-5007099-S	:	SUPERIOR COURT
WALTER WHITNEY	:	J. D. OF LITCHFIELD
	:	AT LITCHFIELD
V.	:	
J.M. SCOTT ASSOCIATES, INC., SCOTT SWIMMING POOLS, INC. and JAMES M. SCOTT	:	OCTOBER 2, 2012

PLAINTIFF'S REPLY TO DEFENDANTS' SPECIAL DEFENSES AND ANSWER AND SPECIAL DEFENSES TO AMENDED COUNTERCLAIMS

The plaintiff, Walter Whitney ("plaintiff" or "Whitney"), replies to the defendants' special defenses dated September 24, 2012, as follows:

First Special Defense

The plaintiff denies the allegations of the first special defense.

Second Special Defense

The plaintiff denies the allegations of the second special defense.

Third Special Defense

The plaintiff denies the allegations of the third special defense.

Fourth Special Defense

The plaintiff denies the allegations of the fourth special defense.

Fifth Special Defense

The plaintiff lacks information sufficient to admit or deny the allegations of the fifth special defense and, therefore, leaves the defendants to their proof.

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Sixth Special Defense

1. The plaintiff denies the allegations of paragraph one of the sixth special defense as pled.

2. The plaintiff denies the allegations of paragraph two of the sixth special defense.

3. The plaintiff denies the allegations that the plaintiff made "false" representations. The plaintiff lacks information sufficient to admit or deny the remaining allegations of this paragraph three of the sixth special defense, and therefore leaves the defendants to their proof.

4. The plaintiff denies the allegations of paragraph four of the sixth special defense.

Seventh Special Defense

The plaintiff denies the allegations of the seventh special defense.

Eighth Special Defense

The plaintiff denies the allegations of the eighth special defense.

ANSWER TO THE AMENDED COUNTERCLAIMS

Whitney answers the amended counterclaims dated April 13, 2012 as follows:

First Count- Breach of Employment Agreement

1. Whitney admits the allegations of this paragraph.

2. The Employment Agreement speaks for itself. To the extent that the allegations of this paragraph are inconsistent with the Employment Agreement, the allegations are denied.

3. Whitney denies the allegations of this paragraph.

4. Whitney denies the allegations of this paragraph.

5. Whitney denies the allegations of this paragraph.

6. Whitney denies the allegations of this paragraph.

7. Whitney denies so much of this paragraph that states "[a]s a result of the breach . . ." Whitney lacks information sufficient to admit or deny the remaining allegations of this paragraph and, therefore, leaves the counterclaim plaintiffs to their proof.

Second Count-Breach of the Stock Option Purchase Agreement

1. Whitney admits that on March 20, 2002, Scott Swimming Pools, Inc., James Scott and Whitney entered into a Stock Option Purchase Agreement ("SOPA").

2. Whitney admits the allegations of this paragraph.

3. The SOPA speaks for itself. Whitney denies that he breached the SOPA.

4. Whitney admits that his employment with Scott Swimming Pools Inc. was terminated on December 22, 2006.

5. Whitney denies the allegations of this paragraph.

6. Whitney denies so much of this paragraph that states "[a]s a result of the breach . . ." Whitney lacks information sufficient to admit or deny the remaining allegations of this paragraph and, therefore, leaves the counterclaim plaintiffs to their proof.

Third Count –Fraudulent Inducement

Withdrawn on April 13, 2012

Fourth Count-Abuse of Process (Fraudulent Inducement Claim)

1. Whitney admits the allegations of this paragraph.

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2. Whitney admits that he alleged that he was fraudulently induced into signing agreements with Scott Swimming Pools, Inc. and James Scott during the underlying arbitration. Whitney lacks information sufficient to admit or deny the remaining allegations of this paragraph and, therefore, leaves the counterclaim plaintiffs to their proof.

3. Whitney lacks information sufficient to admit or deny the allegations of paragraph 3 and, therefore, leaves the counterclaim plaintiffs to their proof.

4. This paragraph does not allege facts or contentions; instead, it alleges a legal conclusion to which no answer is required.

5. This paragraph does not allege facts or contentions; instead, it alleges a legal conclusion to which no answer is required.

6. Whitney denies the allegations of this paragraph as pled. Whitney admits that, by a ruling captioned "Ruling on Motion to Dismiss or Summary Judgment" and dated March 11, 2008, the Arbitrator, Reuben Acosta, dismissed Whitney's claims of fraudulent inducement against Scott Swimming Pools, Inc.

7. This paragraph does not allege facts or contentions; instead, it alleges a legal conclusion to which Whitney leaves the counterclaim plaintiffs to their proof.

8. This paragraph does not allege facts or contentions; instead, it alleges a legal conclusion to which Whitney leaves the counterclaim plaintiffs to their proof. To the extent an answer is required, Whitney denies the allegation of this paragraph.

9. Whitney denies the portion of this paragraph which alleges that "[a]s a direct and proximate result of the plaintiff's instituting, maintaining and prosecuting the arbitration

proceeding against SSP and Scott. . . ." With respect to the remaining allegations of this paragraph, Whitney lacks information sufficient to admit or deny the allegations and, therefore, leaves the counterclaim plaintiffs to their proof.

10. Whitney denies the allegations of this paragraph.

11. Whitney denies the portion of this paragraph which alleges that "[a]s a direct and proximate result of the plaintiff's instituting, maintaining and prosecuting the arbitration proceeding against SSP and Scott . . . ." With respect to the remaining allegations of this paragraph, Whitney lacks information sufficient to admit or deny the allegations and, therefore, leaves the Counterclaim plaintiffs to their proof.

12. Whitney denies the portion of this paragraph which states that "[a]s a result of the claims of the plaintiff . . . ." With respect to the remaining allegations of this paragraph, Whitney lacks information sufficient to admit or deny the allegations and, therefore, leaves the counterclaim plaintiffs to their proof.

Fifth Count-Abuse of Process (Breach of Confidentiality)

1. Whitney admits the allegations of this paragraph.

2. Whitney admits the allegations of this paragraph.

3. The Confidentiality Agreement entered into between Whitney, James Scott and Scott Swimming Pools, Inc. on or about October 17, 2008 speaks for itself. To the extent that the allegations of this paragraph are inconsistent with the Confidentiality Agreement, the allegations are denied.

4. Whitney lacks information sufficient to admit or deny the allegations of this

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paragraph and, therefore, leaves the counterclaim plaintiffs to their proof.

5. Whitney denies the allegations of this paragraph.

6. Whitney denies the allegations of this paragraph.

7. Whitney denies so much of this paragraph that alleges "[a]s a result of the claims of the plaintiff . . . ." With respect to the remaining allegations of this paragraph, Whitney lacks information sufficient to admit or deny the allegations and, therefore, leaves the counterclaim plaintiffs to their proof.

8. Whitney denies so much of this paragraph that alleges "[a]s a result of the claims of the plaintiff . . . ." With respect to the remaining allegations of this paragraph, Whitney lacks information sufficient to admit or deny the allegations and, therefore, leaves the counterclaim plaintiffs to their proof.

Sixth Count- Abuse of Process (TRO)

1. Whitney admits the allegations of this paragraph.

2. Whitney denies the allegations of this paragraph.

3. Whitney denies the allegations of this paragraph.

4. Whitney admits that he sought and obtained a temporary restraining order against J. M. Scott Associates, Inc. at the outset of the instant lawsuit. With respect to the remaining allegations of this paragraph, Whitney lacks information sufficient to admit or deny the allegations and, therefore, leaves the counterclaim plaintiffs to their proof.

5. Whitney admits that he made no attempt to notify the defendants or their counsel of the ex-parte request, which the Court granted. The remaining allegations of this paragraph are

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denied.

6. Whitney denies the allegations of this paragraph.

7. Whitney denies the allegations of this paragraph.

8. Whitney denies so much of this paragraph that alleges "[a]s a result of the claims of the plaintiff . . . ." With respect to the remaining allegations of this paragraph, Whitney lacks information sufficient to admit or deny the allegations and, therefore, leaves the counterclaim plaintiffs to their proof.

9. Whitney denies so much of this paragraph alleging "[a]s a result of the claims of the plaintiff . . . ." With respect to the remaining allegations of this paragraph, Whitney lacks information sufficient to admit or deny the allegations and, therefore, leaves the counterclaim plaintiffs to their proof.

Seventh Count - (Fraud in the Inducement Concerning the Property)

Withdrawn on April 13, 2012.

Eighth Count (Vexatious Litigation – Common Law)

Stricken by Order of the Court dated September 7, 2012, Document Numbers 148.1 and 148.2.

Ninth Count (Vexatious Litigation –Statutory Claim Pursuant to C.G.S. §52-568(1))

Stricken by Order of the Court dated September 7, 2012, Document Numbers 148.1 and 148.2.

Tenth Count (Vexatious Litigation –Statutory Claim Pursuant to C.G.S. §52-568(2))

Stricken by Order of the Court dated September 7, 2012, Document Numbers 148.1 and 148.2.

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SPECIAL DEFENSES TO AMENDED COUNTERCLAIMS DATED APRIL 13, 2012

First Special Defense as to All Counts

The rights of action for the causes stated in all counts of the Counterclaim did not accrue within three (3) years before the filing of the Counterclaim. This action is therefore barred under Connecticut General Statutes §52-577.

Second Special Defense as to All Counts

None of the counts of the Counterclaim state a claim upon which relief can be granted.

Third Special Defense as to the Fourth, Fifth and Sixth Counts

Whitney prosecuted his claims and instituted the proceedings about which the counterclaims plaintiffs complain in good faith.

Fourth Special Defense as to All Counts

The counterclaim plaintiffs are not entitled to compensatory damages because they have failed to mitigate their damages, if they have any.

Fifth Special Defense as to All Counts

The counterclaim plaintiffs' claims are barred in whole or in part by the principles of waiver, estoppel and/or laches.

THE PLAINTIFF,
WALTER WHITNEY

By: _____
Sarah S. Healey
Ann H. Rubin
For: CARMODY & TORRANCE LLP
Its Attorneys

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DOCKET NUMBER: LLI-CV09-5007099-S	: SUPERIOR COURT
WHITNEY, WALTER	: JUDICIAL DISTRICT OF LITCHFIELD
V.	: AT LITCHFIELD
J. M. SCOTT ASSOCIATES INC., ET AL	: OCTOBER 19, 2012

RESPONSE TO SPECIAL DEFENSES TO COUNTERCLAIMS

The defendants, Scott Swimming Pools, Inc. and James M. Scott, hereby reply to the plaintiff's special defenses to the amended counterclaims dated October 2, 2012 as follows:

FIRST SPECIAL DEFENSE

Denied.

SECOND SPECIAL DEFENSE

Denied.

THIRD SPECIAL DEFENSE

Denied.

FOURTH SPECIAL DEFENSE

Denied.

FIFTH SPECIAL DEFENSE

Denied.

ELSTEIN AND ELSTEIN, P.C. • ATTORNEYS AT LAW
1087 BROAD STREET • BRIDGEPORT, CONNECTICUT 06604-4260 • (203) 367-4421 •
JURIS NO. 35172

A42

THE DEFENDANTS

By /s/ 305547
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CERTIFICATION

I hereby certify that a copy of the foregoing was sent on the above date to all counsel of record as follows:

Ann H. Rubin, Esq.
Carmody & Torrance, LLP
P.O. Box 1110
Waterbury, CT 06721

/s/ 305547
Bruce L. Elstein

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DOCKET NO.: LLI-CV-09-5007099-S	:	SUPERIOR COURT
WALTER WHITNEY	:	JUDICIAL DISTRICT OF LITCHFIELD
V.	:	AT LITCHFIELD
J.M. SCOTT ASSOCIATES, INC., ET AL.	:	MARCH 26, 2014

MEMORANDUM OF DECISION

INTRODUCTION

This case was tried to the court over a period of seventeen days, beginning on May 21, 2013, and concluding on July 30, 2013. The parties filed their post-trial briefs on December 4, 2013, which was thirty days after they each received a complete set of trial transcripts. The parties filed simultaneous reply briefs on December 18, 2013.

The plaintiff's claims include breach of contract, breach of the covenant of good faith and fair dealing, fraud, and violation of the Connecticut Unfair Trade Practices Act ("CUTPA"). The defendants, in addition to answering the complaint, filed a counterclaim, alleging breach of contract, abuse of process and vexatious litigation.

The plaintiff, Walter Whitney, alleges that his claims involve, primarily, three separate agreements, all executed in March 2002. Those agreements include an employment agreement ("EA"), a stock option purchase agreement ("SOPA"), and a supplemental letter agreement ("SLA"). The plaintiff brought his claims against the defendants, James M. Scott, Jr. ("Scott") and Scott Swimming Pools, Inc. ("SSP").[1]

[1] J.M. Scott Associates, Inc. ("JMSA") was also a named defendant but all claims against JMSA have been resolved or withdrawn.

Copies mailed 3/26/14 to:
Rep. of Jud Dec
Carmody Torrance Sandak + Hennessey
Goldman Snyder + Woods

The plaintiff claims that he was hired by SSP in 2002, but was terminated without adequate cause on December 22, 2006. He claims that he had, and has, rights under the SOPA that survive his termination. In contrast, the defendants claim that the plaintiff was properly terminated from his employment and that he breached the EA. The defendants claim that they owe no damages to the plaintiff and that, pursuant to their counterclaims, the plaintiff must compensate them for their losses.

The court finds for the plaintiff on counts one, four, five, six and seven. The court finds for the defendants on count ten. The court finds for the plaintiff, and against the defendants, as to all of the defendants' counterclaims.

I

FACTUAL BACKGROUND

This case arises out of a business relationship between Scott and the plaintiff.[2] Scott is the president and majority stockholder of the other two defendants, SSP and JMSA. On March 20, 2002, the plaintiff entered into three agreements with Scott and/or SSP. The EA, which Scott signed in his capacity as president of SSP, contemplated that the plaintiff would work for Scott for five years, after which time Scott would retire and the plaintiff would take ownership of SSP. The second contract was the SOPA, signed by Scott both individually and as president of SSP. Both agreements were supplemented with the SLA, and all agreements became effective in March 2002.

Before entering into the various agreements, the plaintiff reviewed and relied upon the accuracy of SSP's financial statements, tax returns and corporate records. Scott

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[2] The factual findings set forth throughout this opinion are the product of the court's review of all exhibits and the court's consideration of the testimony of all the witnesses that the court found to be credible, as more fully discussed, infra.

and SSP concealed information that should have been in the financial statements or in notes to those financial statements, including deferred compensation liabilities owed to Scott that, by March 2007, exceeded $2.5 million.

The plaintiff worked for Scott and SSP for well over four years when, for the first time, Scott informed the plaintiff that he would not to sell SSP to the plaintiff. On December 16, 2006, Scott gave the plaintiff a five-day notice of intent to terminate the plaintiff's employment. The plaintiff's employment was terminated on December 22, 2006, approximately three months before the plaintiff would have been allowed to purchase SSP, pursuant to the SOPA.

In January 2007, the plaintiff claimed a right to arbitrate the dispute with Scott and SSP. Arbitration began on September 28, 2007, and continued until August 14, 2009, when Scott claimed that he lacked funds to continue the arbitration. The plaintiff then elected to proceed with this action, filing a proposed writ, summons and complaint on November 6, 2009. After substantial motion practice, the plaintiff filed the operative complaint on June 4, 2012. The defendants filed an answer, special defenses and counterclaims on September 24, 2012. The plaintiff replied to the defendants' special defenses and answered their counterclaims on October 2, 2012.

Count one of the second amended revised complaint ("complaint") alleges fraud as to SSP and Scott; count four alleges breach of contract as to SSP and Scott relative to the SOPA and the SLA; count five alleges breach of contract as to SSP relative to the EA and the SLA; count six alleges breach of the covenant of good faith and fair dealing as to SSP and Scott relative to the EA and the SLA; count seven alleges breach of the covenant

of good faith and fair dealing as to SSP and Scott relative to the SOPA and the SLA; and count ten alleges a CUTPA violation as to SSP and Scott.[3]

The defendants' answer to the complaint includes eight special defenses, and the "proposed amended setoffs and counterclaims" include multiple counts. The first count of the counterclaim alleges breach of the EA; the second count alleges breach of the SOPA; the third count was withdrawn; the fourth, fifth and sixth counts allege abuse of process; the seventh count was withdrawn; and counts eight through ten, alleging vexatious litigation, were previously stricken. In their post-trial memorandum, the defendants seek relief under the second, fourth, fifth and sixth counts of the counterclaim.

Trial commenced on May 21, 2013. In 2001, the plaintiff was fifty-one years of age. The plaintiff holds a Bachelor of Science degree from Boston University and a Master's Degree in Business Administration in banking and finance, a degree that he received in 1980. He has taken additional courses since obtaining his MBA. His employment background includes ownership of a construction company, JBL Construction. He also worked for a bank in New York City, where he developed property for the bank, and he worked for a real estate company that was also involved in retail and manufacturing. He then worked for New Milford Savings Bank for ten years.

The plaintiff's responsibility at New Milford Savings included the resolution of non-performing loans and he handled a book of some $40 million in loans. Thereafter, he transitioned to commercial lending, which was where he first came into contact with the defendants. Something of a polymath, the plaintiff also holds a swimming pool

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[3] The original second count now appears as the tenth count; the third count was dismissed pursuant to the court's January 4, 2012 ruling in favor of JMSA's motion for summary judgment; the eighth and ninth counts were previously withdrawn.

plumber's license, is certified in fork lift operations, and held a license to engage in home improvement sales. During the course of his employment with SSP, the plaintiff took seminars and classes in the maintenance and service of equipment, such as heaters and decorative cement. Indeed, the plaintiff has lengthy experience in the field of swimming pools, starting with pool maintenance when he was fourteen and engaging in swimming pool construction work in college. In the late 1990s, the plaintiff actually purchased a pool from SSP and participated in the construction of the pool himself, using his own heavy earth moving equipment to dig the hole for the pool.

In 2001, Scott was sixty-three years of age. He holds a general equivalency diploma. His parents developed the swimming pool business in the 1930s, and he took ownership of the company in the 1960s, paying for the company at the rate of $10,000 per year. He made those payments out of his salary and SSP's profits. Scott also has real estate interests, a business also started by his father. Scott claims that his real estate interests made him wealthy and his SSP income made him "well to do."

In January 2001, the plaintiff contacted Scott to discuss banking business that involved Scott and New Milford Savings. In the course of that meeting, Scott told the plaintiff that Scott's son and nephew were to be his successors at the company, but that they were no longer with the company. Scott raised the possibility of the plaintiff "helping" Scott with the business, because Scott no longer wished to run it himself, preferring to spend more of his time in Tortola. Scott told the plaintiff that the business was very lucrative, that he would teach the plaintiff the business and the plaintiff would be well compensated. The plaintiff explained that he would need a "good package" if he

were to leave New Milford Savings in view of his secure, senior position, his pension, his age and his family obligations.

The parties then began an ongoing discussion about the nature of the prospective relationship. Eventually, the plaintiff retained counsel to assist him in the negotiations. Scott, too, had the assistance of counsel and he also involved an accountant in the negotiations. Prior to executing any agreements with the defendants, the plaintiff and his attorney asked to review certain corporate records, including SSP's general ledger, but they were told that SSP did not have a general ledger.

The plaintiff's review of the records that were provided to him revealed that SSP had annual gross receipts consistently in the $5-7 million range, and that Scott averaged $200,000 per year in compensation. Scott's position yielded him many other benefits. Specifically, Scott enjoyed racing Porsche automobiles, and SSP owned three Porsche racing cars, employed a full time Porsche mechanic, and expended at least $100,000 annually to support the car racing expenses. SSP also provided personal landscaping services to Scott, made payments to Scott's real estate company, and SSP employees worked off-season on other Scott business interests. The records also showed that, in 2000, SSP had made some $242,000 in loans to Scott. Pl.'s Ex. ("PX") 12, n.6. Moreover, Scott took regular trips to Tortola and traveled to Florida to race his Porsche. The corporate books showed travel and entertainment expenses of $68,000.

The records suggested a cash flow of about ten percent of gross sales, yet the cash flow did not appear on the corporate books and records. Based on Scott's representations, the plaintiff concluded that the cash flow was going to the other services that Scott was taking from SSP. The plaintiff planned for those services to end once he

took over the company, and he also saw other opportunities to reduce expenses. Thus, the plaintiff concluded that he would be able to address his obligations, and more, from the restored cash flow.

The various agreements that emerged from the discussions between the parties combined to create a scenario in which the plaintiff would become the owner of twenty shares of SSP stock; he would work for Scott and SSP for a period of five years; and, in five years, he would acquire the right to purchase the balance of SSP stock for $1.27 million at seven percent interest over a period of ten years, in order to delay recognition of income to Scott. The plaintiff also agreed to a consulting agreement with Scott that would yield up to $1 million in additional payments to Scott over a five year period. Scott, for his part, agreed not to restructure SSP's debt during the five year period of the plaintiff's employment and not to sell SSP assets or increase its liabilities. Further, Scott agreed that all loans to or from Scott and his family members were to be fully paid before the plaintiff took ownership of SSP.

After the agreements were executed in March 2002, the plaintiff began his employment for SSP and Scott. The transition was not an easy one. Scott soon embarked upon a course of shifting the direction of the company, shrinking the service and supply departments because he wanted to supply to construction companies and not the public. Scott did not consult with the plaintiff before making that decision, and, indeed, there is little evidence that Scott engaged in any meaningful course of conduct that one would expect to find in an owner engaged in succession planning. Instead, Scott kept a rigid hold on the helm of SSP, a hold he never really relinquished during the plaintiff's tenure at SSP. In fact, a number of employees, who should have reported to

the plaintiff, went around the plaintiff and continued their former practice of reporting to Scott, a practice that Scott did not discourage. The plaintiff found Scott to be routinely critical of many of his SSP employees, and employee turnover was high and frequent.

The plaintiff persevered, attempting to fulfill his duties under the EA. He tried to revise procedures and implement a coordinated computer software program; he developed new forms; and he held weekly meetings in an effort to coordinate operations among the various departments. The plaintiff even created a business plan and submitted it to Scott; PX 30; but Scott never commented on the plan. In 2006, Scott closed the supply and service departments without consulting the plaintiff.

Although the plaintiff received bonuses throughout his tenure, he was never given a performance review or an evaluation. In August 2006, Scott told the plaintiff that he would not sell the company to the plaintiff, despite their agreement. Scott did not, at any time, attribute his decision to the plaintiff's job performance. Thereafter, in October 2006, on a single day, Scott sent seven memoranda to the plaintiff, all criticizing the plaintiff's work. In December 2006, Scott terminated the plaintiff's employment.

On December 21, 2006, the plaintiff notified Scott that he intended to exercise his rights under their three agreements, including his right to purchase the company. PX 33. Scott refused to honor the agreements, and the plaintiff did, in fact, exercise his right to arbitration. After two years in arbitration, Scott's counsel sent an email to the plaintiff, indicating that his "client" had advised him that "it" lacked the funds to carry on with the arbitration. At trial, the defendants argued that this email referred, only, to SSP. After the defendants refused to honor their obligation to pay for their share of the arbitration, the plaintiff filed his lawsuit.

II

PARTIES' ARGUMENTS

A

Plaintiff's Position

The plaintiff opened his post-trial argument by addressing two preliminary issues of law. The first issue involves SSP's motion to amend its response to the plaintiff's request for admission ("RFA") number twenty, a response in which SSP admitted that certain documents were provided to the plaintiff on December 18, 2006, and that certain documents attached to the RFA were the only documents SSP allegedly referenced in its termination letter to the plaintiff or in its synopsis memoranda regarding the plaintiff's alleged shortcomings. The plaintiff's second preliminary issue is his claim that an arbitration ruling on a "motion to dismiss or summary judgment" should not be given preclusive effect.

Next, the plaintiff argues that the evidence at trial established that SSP breached the employment agreement by terminating the plaintiff without the requisite "adequate cause," and by failing to effect the plaintiff's termination pursuant to the terms of the EA. The plaintiff argues that both defendants breached the SOPA by refusing to allow the plaintiff to exercise his right to purchase SSP. The plaintiff contends that the defendants openly refused to permit him to exercise his rights under the SOPA and then terminated his employment, not only without adequate cause but also in bad faith.

The plaintiff's third claim is that the defendants breached the covenant of good faith and fair dealing throughout his employment with SSP, beginning with the defendants' nondisclosure of key financial information continuing through to the

plaintiff's unwarranted termination and beyond. Fourth, the plaintiff argues that the defendants engaged in fraud, particularly by failing to disclose Scott's deferred compensation claim owed to him by SSP. The plaintiff also argues that the defendants fraudulently claimed that they had no funds to continue the arbitration. Fifth, the plaintiff argues that the defendants violated CUTPA as evidenced by numerous instances of the defendants' bad faith conduct. The plaintiff also contends that the evidence shows that he suffered substantial injury, not outweighed by any other consideration, and that the injury could not have been avoided.

The plaintiff claims damages of four million dollars under the SOPA; up to $80,000, plus interest, for the alleged breach of the arbitration clauses; $141,000 for breach of the EA, plus interest; and four million dollars under CUTPA, plus interest, attorney's fees and costs.

B

Defendants' Position

The defendants deny that any of their alleged conduct constitutes fraud, and argue that, to the extent the plaintiff was unaware of Scott's deferred compensation agreement, it was up to the plaintiff to ask for more information. The defendants also deny having breached the EA, contending that the plaintiff was fired for adequate cause. The defendants challenge the plaintiff's credibility and ask the court to credit the testimony of their witnesses. The defendants claim that, even if a breach of any agreement is established, the plaintiff's recovery is limited by the terms of a liquidated damages clause. Finally, they deny any violation of CUTPA.

Turning to their defenses, the defendants argue that all of the plaintiff's claims are barred by the applicable statute of limitations; the fraud claims are barred by res judicata, in view of an arbitration decision and the "economic loss doctrine;" and the SOPA claims are barred by the statute of frauds.

The defendants filed multiple counterclaims. First, they argue that the plaintiff breached the SOPA by refusing to sell his stock to SSP "and/or" Scott. Second, they argue that, during the arbitration, the plaintiff made meritless claims of fraudulent inducement and they are entitled to a hearing in order to develop their claim for attorney's fees. Third, the defendants seek attorney's fees based on their argument that the plaintiff revealed confidential information in violation of a promise not to do so. The defendants' fourth and final contention is that they are entitled to a hearing on damages suffered as a result of the plaintiff's application for a temporary restraining order without having provided the court with certain material facts.

C

Plaintiff's Reply

In his reply brief, the plaintiff, in addition to asserting that he complied with his obligations under the EA and that he was terminated without adequate cause, also restates and expands upon his original claim that the defendants breached the SOPA, committed fraud, and violated CUTPA.

The plaintiff also responded to the defendants' defenses and counterclaim. The plaintiff claims that the statute of limitations relied upon by the defendants does not bar the plaintiff's claims because the one-year statute of limitations applies to actions for specific performance of a real estate contract and, thus, does not apply to the claims

involving the SOPA. Second, he claims that the three-year statute of limitations applicable to the fraud and CUTPA claims was tolled due to the defendants' continuing course of conduct. The plaintiff disagrees with the defendants' argument regarding the economic loss doctrine, contending that the defendants made fraudulent representations prior to executing the EA, SOPA and/or SLA. Consequently, he argues, those fraudulent representations are actionable, independent of claims arising from the defendants' breach of subsequently-executed contracts. Next, the plaintiff claims that this court should not give res judicata effect to the arbitrator's interlocutory ruling because the plaintiff had no avenue by which to appeal that ruling.

The plaintiff summarizes his damage claims by asserting that, although the EA provides for liquidated damages, there is no such provision in the SOPA or the SLA. He also argues that he made efforts to mitigate his damages.

Finally, the plaintiff claims that the defendants' counterclaims fail for multiple reasons, including his contention that he did not breach the SOPA. He also argues that he did not engage in abuse of process, both as a matter of law and fact.

D

Defendants' Reply

In their reply memorandum, the defendants argue that the evidence was insufficient to establish that the plaintiff was wrongfully terminated; that the defendants engaged in fraudulent conduct; or that Scott had previously breached similar promises to sell SSP to three other men, including Scott's son.

The defendants also argue that the plaintiff will suffer no prejudice if the defendants are allowed to amend their responses to the plaintiff's requests for admission.

The defendants claim, further, that the arbitrator's interlocutory ruling should be given preclusive effect, even though the arbitration was terminated.

Next, the defendants contend that they did not anticipatorily breach the contract because the plaintiff, himself, breached the contract and was terminated for cause. Similarly, they argue that they did not breach the covenant of good faith and fair dealing. The defendants contend that they did not engage in fraud, but rather that the plaintiff did not exercise due diligence. They argue that the plaintiff's evidence does not reach, as it must, the "clear and convincing" level. The defendants assert that the claim that they lacked funds to continue with the arbitration was not fraudulent because, as soon as it was made, the plaintiff believed the claim was fraudulent and, therefore, cannot have relied on the defendants' claim.

Finally, the defendants reject the plaintiff's CUTPA claim because the allegedly fraudulent conduct was incidental to the defendants' primary business. They also reject the claims regarding emotional distress because those claims were not specially pleaded, and reiterate their claim that the statute of limitations bars all of the plaintiff's claims.

III

DISCUSSION

This case was tried to the court. "It is well established that [i]n a case tried before a court, the trial judge is the sole arbiter of the credibility of the witnesses and the weight to be given specific testimony." (Internal quotation marks omitted.) *Blasco* v. *Commercial Linens, LLC*, 133 Conn. App. 706, 709, 36 A.3d 737 (2012). The role of the trier of fact is to assess "the credibility of the witnesses . . . on the basis of its firsthand observation of [the witnesses'] conduct, demeanor and attitude." (Internal quotation

marks omitted.) *Cohen* v. *Roll-A-Cover, LLC*, 131 Conn. App. 443, 450, 27 A.3d 1, cert. denied, 303 Conn. 915, 33 A.3d 739 (2011).

In the present case, as in many cases, the testimony by the plaintiff and his witnesses, and the testimony by Scott and his witnesses, was frequently diametrically opposed and irreconcilable. The court had ample opportunity to observe the conduct, demeanor and attitude of each witness, to evaluate the testimony and to relate the testimony of each witness to the exhibits in the case. In considering the evidence, in addition to evaluating the testimony and exhibits, the court also drew reasonable inferences from the facts established in this case. The court also took into consideration direct and circumstantial evidence that was admitted in the course of the trial.

The court evaluated all witnesses who came before it, taking into account not only their spoken testimony, but also their ability to perceive the things about which they testified; their ability to recall relevant facts and events; any interest that they may have had in the outcome; the reasonableness of their testimony; and any contradictions that arose between their testimony and other evidence introduced at trial. The court's findings of fact, including its decision to credit some witnesses and not others, are based upon all of the foregoing factors.

A

Motion to Amend the Requests for Admission

"A party's response to a request for admission is binding as a judicial admission unless the judicial authority permits withdrawal or amendment therefore." *Westbrook* v. *ITT Hartford Group, Inc.*, 60 Conn. App. 767, 772-73 n.11, 761 A.2d 242 (2000). An amendment should not be permitted if it will "mislead the opposing party, take unfair

advantage of the opposing party or confuse the issues, or if there has been negligence or laches attaching to the offering party." *Kelley* v. *Tomas*, 66 Conn. App. 146, 178, 783 A.2d 1226 (2001).

On or about December 18, 2006, the plaintiff was presented with a letter indicating that he had previously been notified of his "failure to comply with [his] performances [sic] numerous times verbally and numerous times in writing as further outlined in the attached SYNOPSIS OF MEMOS issued by me [Scott] and for me [Scott] by Lisa Burns, Bob Tata, and Fay." PX 32. There were three attachments to that letter (hereinafter, the "synopsis memos"). The first attachment was a December 4, 2006, one-page memorandum from Scott to the plaintiff, entitled "Synopsis of Memos issued by James M. Scott and for James M. Scott by Lisa Burns and by Bob Tata (250+ memos)." The second attachment was another one-page memorandum, also dated December 4, 2006, from Scott to the plaintiff, entitled "Synopsis of Memos issued by James M. Scott and for James M. Scott by Fay (24 memos)." The third attachment was yet another December 4, 2006 memorandum from Scott to the plaintiff, entitled "Synopsis of Memos issued by James M. Scott and for James M. Scott." The latter memorandum was two pages in length. None of the "250+ memos" or "24 memos" was appended to the synopsis memos.

The plaintiff filed requests for admission ("RFA"), to which SSP responded on August 20, 2012. RFA number 19 asked SSP to admit that "the documents attached hereto as Exhibit Q are a true and accurate copy of the documents you allege are

referenced in the memoranda attached hereto as Exhibit D."[4] SSP's response to RFA 19 was "admitted." RFA 20 asked SSP to admit that it possessed no documents, other than those attached as Exhibit Q, that were referenced in Exhibit D. SSP's response to RFA 20 was, again, "admitted."

On July 17, 2013, almost two months after trial began, SSP moved to amend their August 20, 2012 response to RFA 20. Specifically, SSP claimed that it had additional documents, beyond those included in "Exhibit Q," that were purportedly referenced in the synopsis memos. SSP referred to "approximately 25 exhibits . . . offered by the defendants (not all admitted at present but the Exhibit List is not available to counsel until Court [sic]). Many were admitted after the plaintiff represented that he had no prejudice since he had obtained such documents in the arbitration and claimed no surprised [sic] by them."

The plaintiff asserts that the defendants are attempting to add thirty-six, not twenty-five, additional exhibits,[5] and objects to the request to amend on the basis that he relied on SSP's admissions to evaluate the documents that supposedly supported the termination letter. See PX 32. The plaintiff claims that it is unfair and prejudicial to permit SSP to "amend" its response to the RFA because the plaintiff relied on SSP's admission to prepare his trial strategy. In contrast, SSP argues that the plaintiff is not

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[4] At trial, "Exhibit Q" was introduced as an attachment to PX 1. It consists of a series of notes, memoranda, letters, and other assorted documents, most of which relate to a wide variety of issues regarding the swimming pools designed, installed and maintained by SSP. Some of the documents are typed memoranda and letters, but the majority are handwritten notes. Some were directed to the plaintiff, some were copied to the plaintiff, and others do not refer to the plaintiff at all. Also introduced at trial, as an attachment to PX 1, was the "Exhibit D" referenced in the request for admission. Exhibit D is the same December 4, 2006 letter and synopsis memos comprising PX 32.

[5] Pl.'s Post Trial Mem. at App. 2, December 4, 2013.

prejudiced by the request to amend because he had actual notice of the documents at issue, prior to trial. Further, SSP argues that these documents should now be admitted in order to permit a "full and accurate presentation of the merits" of the case.

The court agrees with the plaintiff. A central issue in this case is whether Scott had just cause for terminating the plaintiff. The defendants rely heavily on PX 32 as justification for terminating the plaintiff. However, none of the documentation referred to within in the synopsis memos was appended thereto, and the plaintiff's attempt to determine exactly what led to his termination has been, through much of the litigation, a frustrating effort to identify, let alone hit, what may be fairly characterized as a "moving target."

As will be discussed in more detail, the court is convinced that Scott decided to end the plaintiff's employment, not due to any shortcomings on the plaintiff's part, but rather because Scott did not want to live up to his end of the bargain. The court concludes that the synopsis memos were false and misleading, and they reflect Scott's attempt to retroactively justify his decision to terminate the plaintiff by papering the file with a false written record. The court's conclusion that the claims in PX 32 were not based in fact are supported not only by the plaintiff's difficulty in identifying the documents referred to in the synopsis memos, but also by the defendants' own difficulty in producing those documents in a timely manner.

The plaintiff's requests for admission were dated July 23, 2012, some five and one-half years after Scott terminated the plaintiff. It is inconceivable that, in that span of time, the defendants were unable to accumulate and identify the documents referred to in the synopsis memos. Indeed, if the representations in PX 32 were truthful, the entire

collection of supporting documentation would necessarily have been gathered before the synopsis memos were generated and should, therefore, have been identified and segregated from all other business records prior to December 4, 2006, the date each of the synopsis memos was allegedly written.

The plaintiff was entitled to know which documents formed the basis of the synopsis memos, he sought this information through requests for admission, and the defendants were the only ones in a position to know exactly which documents were the subjects of the synopsis memos.[6] This case is exceptionally document intensive, and it would be unfair and prejudicial to the plaintiff to allow the defendants to amend their response to RFA 20[7] well after the commencement of the trial. The defendants offer no legitimate explanation for not having answered RFA 20 differently when the request was first presented. The defendants' motion to amend its response to the plaintiff's RFA is denied.

B

Arbitration Ruling

Initially, the plaintiff sought relief through arbitration and so notified the defendants in January 2007. After pre-arbitration negotiations proved unsuccessful, the plaintiff sought to exercise his option to purchase SSP. The defendants declined to

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[6] The defendants argue that they should also be able to revisit their response to the request for admission because some or all of the documents at issue were admitted at trial. The defendants are mixing two concepts. The fact that the documents were admitted at trial does not require the conclusion that the defendants should be allowed to claim, years after the plaintiff was terminated and almost one year after they answered the plaintiff's request for admission, that the documents at issue were among those referenced in the synopsis memos.

[7] In fact, although the defendants claim they are seeking to "amend" their response to RFA 20, they are, in fact, seeking to change their answer entirely, from "admitted" to "denied."

permit that purchase and arbitration began in September 2007. The arbitration proceeded for nearly two years until, on August 14, 2009, counsel for the defendants sent an email to the American Arbitration Association, stating: "My client informs me that it has no funds to pay for the continuation of the arbitration at this time. . . ."[8] Prior to August 14, 2009, the arbitrator had concluded that the plaintiff's fraudulent inducement claim should be dismissed. Defs.' Ex. ("DX") A. The defendants assert that this ruling should be given preclusive effect. Thus, the issue presented is whether a ruling issued in the course of an aborted arbitration proceeding should – or must – be given preclusive effect.

Neither party has identified authority resolving this precise question. However, our Supreme Court has concluded that, with regard to a decision of an administrative agency, it is not ordinarily appropriate to give such a decision preclusive effect unless there is an opportunity for judicial review. *Convalescent Center of Bloomfield, Inc.* v. *Dept. of Income Maintenance*, 208 Conn. 187, 195-201, 544 A.2d 604 (1988). The authority cited by the defendants either fails to apply to the situation before this court or, when carefully considered, supports the plaintiff.

The defendants claim that an arbitrator's decision is binding, as res judicata, in subsequent judicial proceedings, even when the arbitration decision is not confirmed by the Superior Court. The defendants rely, first, on *Murphy* v. *Metropolitan Property & Casualty Ins. Co.*, Superior Court, judicial district of Middlesex, Docket No. CV-07-5003333-S (June 30, 2009, *Burgdorff, J.*) (48 Conn. L. Rptr. 179). However, in that case, the arbitration was completed and the unsuccessful party had the opportunity to appeal

[8] The defendants argue that the email reference to "it" is necessarily a reference to SSP, not Scott. The court will address this claim, but nonetheless concludes, without hesitation, that SSP had more than adequate funds to pay for the arbitration. Each party's share of the deposit and cost for the arbitration was approximately $33,000. PX 55.

the arbitrator's final decision. The defendants also rely on *Tierney* v. *Renaud Morin Siding, Inc.*, Superior Court, judicial district of Fairfield, Docket No. CV-08-5014179-S (October 29, 2008, *Gilardi, J.*) (46 Conn. L. Rptr. 599). In that case, as in *Murphy*, the arbitrator not only reached a final decision, but the arbitration award was, in fact, appealed to the Superior Court and the court declined to modify or vacate the award. *Tierney* v. *Murray*, Superior Court, judicial district of Fairfield, Docket No. CV-06-5002655-S (August 22, 2007, *Gilardi, J.*). Most significantly, the defendants' reliance on *Jacobs* v. *Yale University*, Superior Court, judicial district of New Haven, Docket No. CV-277513-S (September 21, 2000, *Blue, J.*), is misplaced in that *Jacobs* indirectly supports the plaintiff.

Unlike the situation before this court, the arbitrator in *Jacobs* reached, what Judge Blue concluded was, a final decision. Id. Judge Blue noted, first, our Supreme Court's conclusion that "[n]o satisfactory reason can be assigned why an award, which the parties have expressly stipulated should be final as to the subject submitted, should not be as conclusive as a court-rendered judgment." (Internal quotation marks omitted.) Id., quoting *Corey* v. *Avco-Lycoming Division*, 163 Conn. 309, 318, 307 A.2d 155 (1972), cert. denied, 409 U.S. 1116, 93 S. Ct. 903, 34 L. Ed. 2d 699 (1973). Judge Blue cited, as well, to our Supreme Court's statement that "ordinarily a factual determination made in *final* and binding arbitration is entitled to preclusive effect." (Emphasis added; internal quotation marks omitted.) *Jacobs* v. *Yale University*, supra, Superior Court, Docket No. CV-277513-S, quoting *Genovese* v. *Gallo Wine Merchants, Inc.*, 226 Conn. 475, 483, 628 A.2d 946 (1993); see *Haynes* v. *Yale-New Haven Hospital*, 243 Conn. 17, 21 n.5, 699 A.2d 964 (1997) (containing language to the same effect).

It is apparent that the critical factor in these cases is missing from the present case, to wit, a completed arbitration. In the present case, there was no final arbitration award and, no opportunity for the plaintiff to appeal the arbitrator's decision.[9] This court concludes that the principles expressed in *Convalescent Center of Bloomfield, Inc.* v. *Dept. of Income Maintenance*, supra, 208 Conn. 187, govern the situation before this court. In the absence of a final arbitration award, the plaintiff had no opportunity to seek review of the arbitrator's interlocutory ruling. In the absence of a final award, and, therefore, in the absence of an opportunity to obtain judicial review, the arbitrator's interlocutory decision should not, and indeed cannot, be given preclusive effect.[10] The court finds against the defendants on their second special defense and on the fourth count of their counterclaim.

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[9] General Statutes § 52-417 permits an appeal to confirm an award "within one year after an award has been rendered . . . ." An appellant may also seek to vacate an award; General Statutes § 52-418; or may seek to modify or correct an award. General Statutes § 52-419; see General Statutes § 52-423 (permitting appeal of an award). The defendants do not identify any authority supporting the proposition that the plaintiff had an avenue to appeal an arbitration decision when the arbitration was aborted and, as a result, there was no award. It is true that a party to an arbitration may appeal to the Superior Court pendente lite to "protect the rights of the parties pending the rendering of the award and to secure the satisfaction thereof . . . ." General Statutes § 52-422. However, such a pendente lite appeal would not have been available in this case. See *New England Pipe Corp.* v. *Northeast Corridor Foundation*, 271 Conn. 329, 857 A.2d 348 (2004) (interlocutory orders issued in an arbitration are not normally subject to review).

[10] The court agrees with the plaintiff that it would be particularly inappropriate to allow the defendants to benefit from an interlocutory order that could not be appealed when it was the defendants who prevented the arbitration from running its full course. However, the court's conclusion is not based on which party caused the termination of the arbitration, nor does it turn on the factual basis for the termination. Rather, it is based on the fact that preclusive effect should not be given to an arbitrator's interlocutory decision in the absence of an opportunity for any party to obtain judicial review of that decision.

C

Employment Agreement and the Supplemental Letter Agreement

Count five of the complaint alleges that SSP breached the EA and the SLA. "The elements of a breach of contract action are the formation of an agreement, performance by one party, breach of the agreement by the other party and damages." (Internal quotation marks omitted.) *300 State, LLC* v. *Hanafin*, 140 Conn. App. 327, 330, 59 A.3d 287 (2013). There is no dispute that the EA is an express employment contract, properly executed by the plaintiff and Scott, as president of SSP, on March 31, 2002. PX 21. Similarly, there is no dispute that the SLA is a contract, properly executed by the plaintiff and Scott, individually and as president of SSP, on March 20, 2002. PX 20.

The EA detailed the plaintiff's employment obligations, which included individual responsibilities as well as responsibilities that the plaintiff could not meet without Scott's cooperation. Specifically, the EA called upon the plaintiff and Scott to coordinate strategies to improve SSP's profitability; to improve relationships with subcontractors and suppliers, and develop new products; and to establish quarterly goals and objectives for the plaintiff's employment. The plaintiff's individual responsibilities were, principally, to prepare a department-by-department budget for March 2003, a business plan for the years 2003 to 2005, and to assess personnel, information systems and needs. PX 21 § 3.

The court's factual findings, regarding the events that took place at SSP, are based on all of the factors previously discussed in this opinion concerning fact-finding by the court, and also upon the differing motives of the parties. The plaintiff, in accepting the offer of employment with the defendants, carefully considered the fact that, in order to

work with the defendants, he would be leaving secure employment that had potential for future growth. He was fifty-one years old at the time he signed the EA, knowing that, if the plan did not succeed, he might have to seek new employment at age fifty-six. He retained the services of an attorney to assist him in examining SSP's books and records. The plaintiff was highly motivated to expend every effort to make his association with the defendants a successful one.

Scott, on the other hand, had no intention of ever selling SSP to the plaintiff. His motivation was to recruit a talented, dedicated upper management employee, take advantage of that employee's skills and work ethic, and then terminate that employee before having to honor the agreement he had entered into. The court finds that Scott was also interested in having the plaintiff allied with SSP because the plaintiff had close ties with a financial institution that Scott had used, in the past, to obtain financing.

Prior to entering into the employment agreement with the plaintiff, Scott had made representations to his son, Jonathan Scott, and to his nephew, William Drakeley, in the 1990s, that Scott was tiring of the business and wanted to sell it to them in approximately five years. However, even though Scott used the expression "five year plan," it was never clear when the five-year period was to begin. Nonetheless, Jonathan Scott and Drakeley trusted Scott and relied on his promise. In the end, Drakeley worked for SSP for eleven years; Jonathan Scott worked for SSP for twelve years.

Scott never provided his son or Drakeley with the SSP financial information that they requested, nor did Drakeley and Jonathan Scott ever work out the terms of a purchase agreement with Scott. Jonathan Scott did have discussions with his father about purchasing SSP and paying for the purchase over time with SSP revenues. However,

Scott never honored his agreement to sell SSP to his son and to Drakeley. Instead, in 2000, Scott rehired Arnold Gunderson, a former SSP employee. After his return, Gunderson advised Drakeley that *he* would be buying SSP. Now certain that Scott would never sell them the business, Drakeley and Jonathan Scott left the company in 2000.

Scott had reached out to Gunderson around December 1999 and January 2000. Gunderson was rehired with the job title of "Acting President," and Scott told Gunderson that he was tiring of the business, that his son could not run the business, and that he wanted Gunderson to become president of SSP. Gunderson then drafted a "letter of intent," without the aid of counsel, and gave it to Scott, but Scott never returned a signed copy of that letter. In January 2000, Gunderson had a discussion with Scott concerning Scott's plan to eventually sell SSP to Gunderson; something that Gunderson understood would happen over a three-to-five-year time frame. Gunderson knew that he would not be in a position to buy SSP without an understanding of SSP's finances, and so he requested access to the books, a request which Scott ignored. Within one year, Scott told Gunderson that he was being demoted to the position of a commission-only salesman and, in December 2000, Gunderson left the company. PX 57.

After Gunderson left the company, the plaintiff happened to visit SSP in January 2001 to discuss banking issues. During that visit, Scott told the plaintiff that he had recently lost a senior manager, that he needed to replace that person, and that he was tired and wanted to spend more time in Tortola.

If Scott had sold SSP to any of the people to whom he made such promises, his control over the company would have disappeared and, ultimately, his income would have diminished. However, Scott learned that he could find a steady stream of motivated

employees to work hard for SSP, by implying - or even promising - that he would sell them the company.

The court finds that the plaintiff fully performed his obligations under the EA. The court credits the plaintiff's testimony regarding his efforts to meet his contractual obligations while at SSP. The plaintiff learned the various aspects of the SSP operations, oversaw the work of many employees, worked up to eighty hours per week and, in addition, he was SSP's most productive salesperson during several of the years he was with SSP. Moreover, the plaintiff made efforts to improve SSP's operations, but received little support from Scott. When the plaintiff offered Scott a marketing plan, Scott took no action, not even reviewing the plan with the plaintiff. The plaintiff also prepared and submitted a business plan to Scott, but Scott claimed that it did not conform to what he wanted. Scott did not, however, offer the plaintiff any guidance as to an acceptable form of business plan.

The court finds that the plaintiff fully performed his obligations under the EA and finds against the defendants on their sixth and eighth special defenses, as well as on the first count of their counterclaim.

In fact, the court finds that it was Scott, not the plaintiff, who breached the EA. From the outset, Scott did not supply the plaintiff with the information he requested prior to signing the EA. Scott never advised the plaintiff of deferred compensation obligations that Scott had arranged for himself; compensation that, Scott later claimed, exceeded $2.5 million.[11] Nor did Scott eliminate officer "loans" from SSP, which, in 2002, were over

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[11] The court does not credit Scott's testimony that he recalled telling the plaintiff, in 2001, about SSP's deferred compensation obligation to Scott.

$660,000. In fact, in the SLA, Scott had promised to eliminate those loans, but, instead of doing so, they rose to over $1.1 million by 2007.

Scott never included the plaintiff, who was an SSP shareholder, in the SSP shareholder meetings that typically included Scott, his wife and a fifty-year SSP employee, Fay Platt. A typical example of such a meeting is reflected in PX 102, which includes the minutes of an October 2, 2006 shareholder meeting, entitled "Special Shareholders/Board of Directors" meeting. The attendees included James Scott as SSP president, treasurer and director; Susan Scott as vice-president and director; and Fay Platt as secretary. At the outset, the minutes note that no notice of the meeting was sent to the shareholders. The only shareholder not included in the meeting was the plaintiff. Perhaps not surprisingly, the "officers and directors" present, i.e., Scott and his wife, voted to waive the obligation to give notice of the meeting.[12]

At the October 2, 2006 meeting, Scott presented a September 29, 2006 demand letter from JMSA, which sought payment of over $1 million in outstanding loans, plus interest. That letter, attached to the minutes, is addressed to SSP and is signed by Scott, as president of JMSA. According to the minutes, Scott moved that SSP respond to JMSA by stating that SSP's cash position made it impossible to respond to the demand. Scott and his wife voted in favor of the latter motion and, accordingly, the minutes reflect a second attachment, a letter dated October 2, 2006, addressed to JMSA and signed by Scott, as president of SSP, stating that SSP had a negative cash balance and was unable to respond to the demand.

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[12] The court notes that this meeting took place only two days before Scott, for the first time, sent memoranda to the plaintiff that, at least to some extent, directly criticized the plaintiff's work performance. As discussed, Scott drafted and sent to the plaintiff seven separate memoranda, all dated October 4, 2006.

Such meetings provided Scott with opportunities, of which Scott fully availed himself, to create corporate obligations to himself or JMSA, all at the expense of the plaintiff's interests – and to do so in a manner unknown to the plaintiff. Indeed, on March 13, 2007, after Scott terminated the plaintiff's employment, but while the plaintiff was still an SSP shareholder, SSP held another shareholders' meeting at which Scott and his wife voted to respond to the JMSA "demand" letter, previously the subject of the October 2, 2006 meeting. SSP voted to respond to that demand letter by selling buildings owned by SSP in partial satisfaction of the $1 million dollar loan to SSP. The sale price was $325,000, even though a 1999 town appraisal showed the buildings' market value at more than $1.4 million. In the SLA, Scott had promised that SSP would sell those same buildings to Scott on or before March 31, 2003. Scott was to finance the latter purchase with a ten year note to SSP. The March 2007 sale of the buildings from SSP to JMSA served to deprive SSP of its primary asset, and, by selling that asset for less than one-quarter of the market value, the sale only reduced SSP's $1.1 million "obligation" to JMSA by $325,000. The minutes also show that due to the sale, SSP acquired an additional obligation in that it would, in the future, lease its space from JMSA. DX LLL.

The purpose of transferring the SSP asset to JMSA in such a manner was to diminish the value of SSP, permitting Scott to claim that SSP was insolvent in 2007. Under the terms of the SOPA, the insolvency of SSP would serve to terminate the agreement, thereby terminating the plaintiff's right to purchase SSP. PX 3, § 8.2 (b). The court credits the deposition testimony of John Marsalisi, an expert witness, who testified that SSP was not, in fact, insolvent in March 2007. See PX 119 at 67, 241.

In the summer of 2006, as the time approached for Scott to sell SSP to the plaintiff, Scott found himself in difficulties that had not arisen when he breached his promises to his son, to Drakeley and to Gunderson. As opposed to Scott's "arrangements" with his son, Drakeley or Gunderson, Scott was bound to the plaintiff by the EA, SOPA and SLA. The obligations created by those contracts could only be avoided, even in part, if Scott could find a way to legitimately terminate the plaintiff's employment. However, the EA itself provided that the plaintiff could only be terminated for adequate cause, which was defined as a "conviction of or a plea of guilty . . . or a continued breach of [the plaintiff's] duties and obligations arising under [the EA] or of any written policy, rule, or regulation of [SSP] . . . ." PX 21, § 8.3. The court finds that the plaintiff established that his conduct at SSP did not give rise, in any way, to "adequate cause" for termination.

The court notes that the EA contemplated more than an isolated breach of some company policy before such a breach could constitute "adequate cause" for termination. Instead, it defined a "continued breach" as a breach that continued for five days after Scott provided the plaintiff with written notice specifying the breach.

On August 27, 2006, Scott told the plaintiff that he would not sell him SSP.[13] Scott did not, however, criticize the plaintiff's work at that meeting. The plaintiff reminded Scott of the contracts, to which Scott replied that he would just tear them up. The court concludes that Scott realized that the plaintiff would not simply walk away, as

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[13] On cross-examination, Scott was asked if, in the summer of 2006, he told his construction crew that, no matter what his age, he would not leave SSP. After initially denying making that statement, Scott testified, "I might have said it." Trial Tr. vol. 17A, 15, July 30, 2013.

had Scott's son, Drakeley and Gunderson, and Scott determined that the only way to avoid his contractual obligations was to terminate the plaintiff's employment.

Scott faced a significant obstacle in terminating the plaintiff's employment because, until October 4, 2006, Scott had not sent the plaintiff any written notice that the plaintiff was in breach of any SSP policy, rule or regulation. Suddenly, on that day, some six months before Scott would be compelled to sell SSP to the plaintiff, Scott prepared no less than seven separate memoranda which supposedly supported his effort to terminate the plaintiff. A review of those memoranda make clear that, for the most part, they are a pastiche of routine issues, more focused on mistakes by other employees or unverified customer complaints, as opposed to breaches of policy, rules or regulations by the plaintiff. DX M, W, X, Z, AA, BB and CC. The plaintiff testified that he made every effort to immediately address the issues raised in those memoranda, and Scott never claimed that the plaintiff failed to do so. Thus, the October 4, 2006 memoranda did not provide adequate cause, under the EA, to terminate the plaintiff.

Scott's disingenuous and inept effort to "paper the file" in October 2006, deteriorated into blatant fraud when Scott attempted to fabricate "adequate cause" to terminate the plaintiff's employment in December 2006, just three months before Scott was obligated to sell SSP to the plaintiff. On December 4, 2006, the plaintiff traveled to California to be with his dying father. After his father passed away, the plaintiff returned to Connecticut. When he reported to work on Monday, December 18, 2006, Scott presented the plaintiff with a letter, dated December 18, 2006, and three attachments to that letter, to wit, the synopsis memos. PX 32. The letter is a single page and the

attachments total four pages. Both the letter and the synopsis memos merit an extended analysis.

The December 18, 2006 letter gave the plaintiff five days "to provide proof that all the issues which we consider to be continuing breaches of your Employment Agreement are corrected to the level of the published Corporation History, Procedures, and Practices, and as outlined in the SYNOPSIS OF MEMOS." It stated that the plaintiff had been notified "for failure to comply with your performances [sic] numerous times verbally and numerous times in writing as further outlined in the attached SYNOPSIS OF MEMOS issued by me and for me by Lisa Burns, Bob Tata, and Fay. These issues have not been corrected by you to-date." The letter is signed by Scott, as president for SSP.

The first of the three attached synopsis memos is a December 4, 2006 memorandum from Scott to the plaintiff, which refers to "250+ memos" issued by Scott and for Scott "by Lisa Burns and by Bob Tata." None of the "250+ memos" was appended to the memorandum. The second attachment is a December 4, 2006 memorandum from Scott to the plaintiff, which refers to "24 memos" "issued by . . . Scott and for . . . Scott by Fay." Again, the "24 memos" were not appended. The third attachment is a two-page memorandum from Scott to the plaintiff, entitled "synopsis of memos issued by . . . Scott and for . . . Scott." Similarly, although it identifies various other memoranda, none was appended to the two-page memorandum. The December 18, 2006 letter and synopsis memos purport to show "adequate cause" for the plaintiff's termination.

As a result of Scott's failure to provide the plaintiff with the documents referenced in the synopsis memos, the plaintiff was faced with the impossible task of

tracking down all of these underlying documents and "correcting" the issues presented therein, many of which were coming to the plaintiff's attention for the first time. Moreover, he was supposedly expected to "correct" those issues within five days.

It seems logical that, if the underlying "250+ memos" and "24 memos" existed, then, prior to drafting the December 18, 2006 letter and synopsis memos, those documents would have been collected and could easily have been provided to the plaintiff. The evidence, however, makes clear that the December 18, 2006 letter and the synopsis memos constituted a bad faith effort to create "adequate cause" for termination when no such cause existed.

First, Scott never located – or at least never introduced into evidence – the totality of the underlying memoranda referenced in the synopsis memos. The memoranda that Scott did introduce into evidence were, for the most part, routine internal business correspondence discussing pool installations, customer inquiries and requests for information among SSP staff. Scott's own witness, Bob Tata, testified that, in December 2006, Scott asked him to produce his "Walter Whitney file," which Tata did. Tata testified that his "Walter Whitney file" was not a "job performance" file, but rather contained memoranda and notes about pool projects for which Tata needed answers. Tata maintained such files for various SSP employees to whom he sent memoranda in the normal course of business. In fact, many of the memoranda, which Scott claims were illustrations of the plaintiff's deficient work performance, were actually routine business memoranda addressed to multiple people including, on some occasions, Scott himself. Tata testified that any of the addressees on the memoranda could have provided the

requested information. On direct examination, Tata testified that the plaintiff "probably did" give him the answers he sought.

In fact, Tata was one of the few defendants' witnesses who did not attempt to advocate for the defendants. His testimony about the memoranda amply illustrates that, in December 2006, Scott was searching for an excuse to satisfy the "adequate cause" requirement of the EA, permitting him to terminate the plaintiff's employment. Scott wanted documentation that he could use to show the plaintiff's "deficient" work performance, and, in the course of that effort, he grasped at a wide variety of routine business correspondence that did not make such a showing. At trial, Scott testified that it was his perception, under the various agreements with the plaintiff, that he could terminate the plaintiff's employment at any time, for any reason.[14] The court concludes, therefore, that Scott viewed the need to "paper the file" as some sort of insignificant formality.

The court finds that multiple conclusions are appropriate, after reviewing the December 18, 2006 letter and the synopsis memos, and considering them in conjunction with the testimony of the witnesses and the memoranda introduced into evidence. First, the documents underlying the synopsis memos do not demonstrate inadequate performance by the plaintiff. Second, it was impossible for the plaintiff to "correct" the "shortcomings" set forth in those documents within five days as a result of the defendants' failure to provide those documents. Third, the foregoing conclusions mandate a finding that SSP materially breached the EA because the plaintiff was not terminated in accordance with its terms.

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[14] On cross-examination, Scott was asked if it was his view that he "could fire Mr. Whitney at any time, for any reason." Scott answered, "I think my agreement says that." Trial Tr. vol. 17A, 44, July 30, 2013.

The fifth count of the complaint also alleges that SSP breached the EA when it failed to comply with Section 9, by declining to pay its share of the arbitration costs. See PX 21 (disputes arising from the EA were to be addressed through arbitration). The court agrees and finds that SSP breached the EA when it failed to pay its share of the costs of completing the arbitration, which brought the arbitration to a premature end. The facts surrounding SSP's breach of Section 9 of the EA will be discussed in more detail in sections III E and F of this decision.

The SLA, which is also the subject of count five of the complaint, is a March 20, 2002 letter intended to supplement both the EA and the SOPA.[15] Paragraph two of the SLA provides that "[t]here will be no outstanding loans to or from [SSP] from . . . Scott, any family member of Scott, or any entity owned by Scott or owned by any family member of Scott on or after March 31, 2007." PX 20, ¶ 2.

In March 2002, Scott was allegedly owed $1.6 million in deferred compensation; an obligation that he did not disclose to the plaintiff when the EA, SOPA and SLA were executed, or at any time during the plaintiff's employment at SSP. Moreover, not only did Scott make no effort to eliminate that obligation but those obligations increased and, as of March 2008, Scott claimed that SSP owed him $2.5 million in deferred compensation.

Further, in 2002, Scott had outstanding officer loans from SSP that totaled more than $660,000. Similar to the deferred compensation obligation, not only did Scott make no effort to eliminate those loans during the period of the plaintiff's employment with SSP, those loans actually increased to over $1.1 million by 2007. The court finds that

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[15] Claims regarding the SOPA and the SLA's effect upon the SOPA are addressed infra.

Scott did not reveal those increased loans to the plaintiff during the plaintiff's employment with SSP, nor did the plaintiff ever approve those loans. The court finds that SSP breached the SLA both with regard to Scott's deferred compensation and with regard to Scott's officer loans.

For foregoing reasons, the court finds in favor of the plaintiff on count five of the complaint. The court also finds that SSP failed to meet its burden relative to the special defenses applicable to the fifth count,[16] and that SSP failed to meet its burden of proof relative to the first and fourth counts of the counterclaim, insofar as those counts implicate the EA and the SLA.[17]

D

Stock Option Purchase Agreement and Supplemental Letter Agreement

Count four alleges that the defendants engaged in anticipatory breach of the SOPA and the SLA. There is no dispute that the SOPA and, as previously discussed, the SLA are express contracts, properly executed by the plaintiff and Scott, both individually and as president of SSP, on March 20, 2002. PX 3; PX 20.

"An anticipatory breach of contract occurs when the breaching party repudiates his duty before the time for performance has arrived. . . . Its effect is to allow the nonbreaching party to discharge his remaining duties of performance, and to initiate an action without having to await the time for performance. . . . The manifestation of intent not to render the agreed upon performance may be either verbal or nonverbal . . . and is largely a factual determination in each instance." (Internal quotation marks omitted.) *Cottman Transmission Systems, Inc.* v. *Hocap Corp.*, 71 Conn. App. 632, 639, 803 A.2d

[16] The third special defense will be addressed in section III *I* of this opinion.

[17] Counterclaim counts eight, nine and ten were ordered stricken, *Roche, J.*, on September 7, 2012.

402 (2002). "Repudiation can occur either by a statement that the promisor will not perform or by a voluntary, affirmative act that indicates inability, or apparent inability, substantially to perform." *Gilman* v. *Pedersen,* 182 Conn. 582, 584, 438 A.2d 780 (1981). Once repudiation is proven, the plaintiff "need show only that he would have been ready, willing and able to perform had there been no repudiation." *McKenna* v. *Woods*, 21 Conn. App. 528, 534, 574 A.2d 836 (1990).

Section 3.1 of the SOPA provides that the plaintiff had the right to purchase Scott's stock in SSP at any time between April 1, 2007, and July 1, 2007, for a purchase price of $1,270,873. By letter dated December 21, 2006, the plaintiff advised Scott that he intended to exercise his stock purchase option "in the spring." PX 33. The plaintiff repeated that position in a January 26, 2007 letter from his counsel to Scott. PX 35.

The court credits the plaintiff's testimony that, on August 27, 2006, Scott told the plaintiff that he would not sell the company to the plaintiff. In response to the plaintiff's reminder of their contractual agreements, Scott stated that he didn't care, that he would tear up the contracts, and that he would bankrupt the company before he would sell it to the plaintiff. Scott stated that, if necessary, he would start the company under another name and move all of the employees to that new company. At no time during that discussion did Scott state that his decision was due to the plaintiff's job performance or, indeed, that his decision bore any relationship to the plaintiff's job performance. Trial Tr. vol. 1, 170-71, May 21, 2013. On direct examination, Scott did not deny that the August 27, 2006 meeting took place, that he told the plaintiff that he would not honor his agreement to sell SSP, or that he would rip up the agreements. He simply testified that he did not "recall" those events. Trial Tr. vol. 16B, 44, July 25, 2013.

In October 2006, an SSP employee, Lisa Burns, informed Scott of her intention to resign from SSP because she did not want to work with the plaintiff. Scott told Burns that he wanted her to continue with SSP and, in fact, she did not leave SSP, despite having submitted her letter of resignation. Instead, on or prior to December 4, 2006, Scott directed Burns to gather every memoranda she had written to the plaintiff while he was employed at SSP. That was the first time he had made such a request of her. Scott asked Burns to prepare a summary of those memos. The summary that she prepared; DX DD; became one of the synopsis memos given to the plaintiff on December 18, 2006. PX 32. Once the plaintiff's employment was terminated, Burns was given an increase in her salary and became the acting general manager of SSP, a position she held until she left SSP in 2009. Approximately two months before the trial in this case, Burns was rehired by Scott to work as an independent contractor for SSP.

In August 2009, after the arbitration had been underway for approximately two years, SSP claimed that it had "no funds" to pay for its share of the arbitration, approximately $33,000. As a result, the arbitration did not proceed to resolution. SSP did not offer any evidence that it attempted to seek a waiver or reduction in the American Arbitration Association ("AAA") fees, even though that possibility may have been available. PX 55.

The evidence is conclusive, and the court finds, that SSP had the funds necessary to complete the arbitration. Further, even if SSP needed additional funds to complete the arbitration, this court concludes that, based on the ease with which Scott transferred liquid and real assets among himself, his wife, SSP and JMSA, Scott could have readily acquired those funds. Although Scott was a party to the arbitration and there is no

evidence that he lacked the funds, he nonetheless did not pay the arbitration fees for which he was personally obligated under the SOPA.

The plaintiff has established the following facts by clear and convincing evidence: SSP's representation that it lacked the funds to continue the arbitration was false; Scott, acting as president of SSP, knew that the representation was false; the false representation was made to disrupt the arbitration proceeding, possibly in the hope that the plaintiff would abandon his claims rather than begin again with a civil suit; and the plaintiff did initiate a civil suit which has greatly protracted this case to the plaintiff's detriment. The claim that SSP lacked the funds to continue the arbitration was fraudulent. See *Miller* v. *Appleby*, 183 Conn. 51, 54-55, 438 A.2d 811 (1981) (elements of fraud).

Scott, the president of SSP, had ample personal funds in August 2009, and SSP had significant funds on deposit in the summer of 2009. In 2009, Scott owned JMSA, a business that possessed real property with a fair market value in the millions of dollars. Moreover, Scott and his wife owned a home worth over a million dollars, and Scott testified that he had a practice of "borrowing" funds from his wife when he needed funds for SSP operations. Scott testified that, over the years, he had "given" his wife approximately $500,000 and that, from time to time, he would "borrow" operating funds from his wife and then later repay those "loans" with interest.[18]

The court finds that the claim that SSP lacked the relatively minimal funds needed to continue the arbitration was false, and also finds that SSP's failure to complete the arbitration was part of the defendants' ongoing effort to deprive the plaintiff of his

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[18] The court also finds that SSP owned three Porsche automobiles and a full time Porsche mechanic to service those automobiles. Scott acknowledged that he raced the cars, claiming that it was for the purpose of advertising SSP, in that the cars carried the SSP logo.

contractual rights. SSP's unwarranted failure to complete the arbitration was yet another example of SSP's failure to abide by the terms of the SOPA and the EA, both of which called for the resolution of disputes through arbitration.

Based on the foregoing findings of fact, the court concludes that the defendants repudiated their duties to the plaintiff before the time for performance arrived. This conclusion is based, inter alia, on Scott's clear statement to the plaintiff that he would not honor his written promises; the SSP corporate actions that conflicted with the requirements of the EA and the SOPA; and on Scott's efforts, both individually and as president of SSP, in October 2006 and December 2006 to concoct excuses to terminate the plaintiff's employment. The plaintiff fully established that he was ready, willing and able to perform his obligations under the EA, the SOPA and the SLA, had there been no repudiation of the SOPA and the SLA by the defendants.

The court finds in favor of the plaintiff on count four of the complaint. The court finds against the defendants on their eighth special defense and on the second count of their counterclaim.[19]

E

Covenant of Good Faith and Fair Dealing

Count six of the complaint alleges that the defendants breached the covenant of good faith and fair dealing relative to the EA and SLA. Count seven alleges that the

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[19] The second count of the counterclaim relies upon the fact that the plaintiff was terminated from his employment. In view of the court's findings that the termination was fraudulent, the defendants cannot prevail on the second count of their counterclaim. See *Phoenix Leasing, Inc.* v. *Kosinski*, 47 Conn. App. 650, 654, 707 A.2d 314 (1998) (court will not enforce a contractual provision when the party seeking enforcement of that provision engaged in fraud). For the same reasons, the court finds against the defendants on the sixth count of their counterclaim.

defendants breached the covenant of good faith and fair dealing relative to the SOPA and the SLA.

"Every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement." (Internal quotation marks omitted.) *Warner* v. *Konover*, 210 Conn. 150, 154, 553 A.2d 1138 (1989). "[A] claim for breach of the implied covenant of good faith and fair dealing is not legally sufficient unless a dishonest purpose or sinister motive is alleged." (Internal quotation marks omitted.) *Wolverine Fire Protection Co.* v. *Tougher Industries*, Superior Court, judicial district of Hartford, Docket No. CV-01-0805554-S (June 20, 2001, *Hale, J.*) (29 Conn. L. Rptr. 731, 733). "Bad faith in general implies both actual or constructive fraud, or a design to mislead or deceive another, or a neglect or refusal to fulfill some duty or some contractual obligation, not prompted by an honest mistake as to one's rights or duties, but by some interested or sinister motive. . . . Bad faith means more than mere negligence; it involves a dishonest purpose." (Citation omitted; internal quotation marks omitted.) *Habetz* v. *Condon*, 224 Conn. 231, 237, 618 A.2d 501 (1992). "A mere conclusory allegation of bad faith unsupported by any factual allegations, is insufficient to sustain a claim of bad faith." (Internal quotation marks omitted.) *Wolverine Fire Protection Co.* v. *Tougher Industries*, supra.

The facts found and fully articulated by this court, in sections III C and III D of this decision, also support a finding, supported by clear and convincing evidence, that the defendants breached the covenant of good faith and fair dealing with regard to the EA, the SOPA, and the SLA. Without repeating in detail all of the court's factual findings regarding the business relationship between the plaintiff and the defendants, the evidence

requires the conclusion, and the court finds, that Scott never intended to abide by his bargain to sell SSP to the plaintiff. Even in their preliminary discussions, before any formal agreement was effected, Scott failed to disclose to the plaintiff, when in fairness he should have done so, the massive deferred compensation obligation that Scott had arranged for himself. That obligation, alone, was a burden on SSP's financial and operational future that should have been revealed to the plaintiff.

The defendants claim that the plaintiff is at fault for, in effect, failing to ask enough questions or failing to press for further disclosure from Scott and SSP. The court disagrees. The plaintiff made scrupulous efforts to obtain and review SSP's books and records but the defendants deliberately withheld the documents that would have revealed the deferred compensation agreement. Further, during the plaintiff's employment, Scott and SSP excluded the plaintiff – a shareholder – from shareholder meetings where the plaintiff would have had an opportunity to explore, not only deferred compensation obligations, but also transfer of SSP assets and the status of loans from SSP to Scott. Scott excluded the plaintiff from much of the day-to-day decision making and cooperation that was contemplated by the EA. Instead of transferring increasing authority and responsibility to the plaintiff, Scott progressively distanced the plaintiff from the inner workings of SSP, he diminished the plaintiff's authority within the organization, and he undercut the plaintiff's authority with employees over whom the plaintiff should have had more, not less, responsibility over the course of the five-year agreement.

Scott never planned to live up to his bargain. From the outset, he planned to dishonor his promise in the same manner he had dishonored his promises to his son, his

nephew and to Gunderson. He obtained the services of a talented, dedicated and highly motivated employee, the plaintiff, and then, after obtaining the benefit of those services for fifty-seven months of a sixty-month term, he fabricated an excuse to terminate the plaintiff's employment.

The court finds that Scott, both individually and as president of SSP, was dishonest with the plaintiff, and he intended to, and did, deceive the plaintiff before entering into the EA, SOPA and SLA, as well as after the parties executed those agreements. Scott, either individually, as president of SSP, or both, refused to meet his contractual obligations under all three agreements.

For the foregoing reasons, the court finds in favor of the plaintiff on counts six and seven of the complaint. The court finds against the defendants on their first, sixth, and eighth special defenses and finds against the defendants on the second count of their counterclaim.

F

Fraud

In the first count of his complaint, the plaintiff alleges common law fraud as to both defendants. "Under the common law . . . it is well settled that the essential elements of fraud are: (1) a false representation was made as a statement of fact; (2) it was untrue and known to be untrue by the party making it; (3) it was made to induce the other party to act upon it; and (4) the other party did so act upon that false representation to his injury." (Internal quotation marks omitted.) *Leonard* v. *Commissioner of Revenue Services*, 264 Conn. 286, 296, 823 A.2d 1184 (2003). "All of these ingredients must be found to exist . . . . Additionally, [t]he party asserting such a cause of action must prove

the existence of the first three of [the] elements by a standard higher than the usual fair preponderance of the evidence, which . . . we have described as clear and satisfactory or clear, precise and unequivocal." (Internal quotation marks omitted.) *Harold Cohn & Co.* v. *Harco International, LLC*, 72 Conn. App. 43, 51, 804 A.2d 218, cert. denied, 262 Conn. 903, 810 A.2d 269 (2002). The burden is on the plaintiff to prove each of these elements by clear and convincing evidence. *Duplissie* v. *Devino*, 96 Conn. App. 673, 680-81, 902 A.2d 30, cert. denied, 280 Conn. 916, 908 A.2d 536 (2006).[20]

The plaintiff has established, by clear and convincing evidence, that the defendants fraudulently failed to disclose Scott's deferred compensation obligation when the plaintiff requested access to SSP's financial statements, tax returns and corporate records prior to entering into the EA, SOPA, and/or SLA. The court finds credible the testimony of expert witness Edward Ronan that Scott's deferred compensation obligation should have been included in the SSP financial statements. To conclude that the plaintiff was at fault for not discovering the foregoing obligation, which exceeded $1.6 million, is untenable, particularly in view of the evidence that the information should have been included in the financial statements provided to the plaintiff.

This is a case in which the defendants wanted the plaintiff to enter into the EA, SOPA and SLA so that the plaintiff would fill the company's need for a skilled and talented manager. The court finds that the plaintiff would not have entered into any of those agreements if he had known of the deferred compensation agreement. The

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[20] The plaintiff is permitted to bring claims in both breach of contract and fraud because the fraudulent scheme found by the court began prior to the execution of the contracts at issue. Indeed, the defendants' fraudulent withholding of substantial and critical information from the plaintiff was intended to induce the plaintiff to enter into the three agreements at issue. Thus, the economic loss doctrine does not preclude the plaintiff from bring both breach of contract and fraud claims. *Ulbrich* v. *Groth*, 310 Conn. 375, 406, 78 A.3d 76 (2013).

defendants withheld the deferred compensation information in order to induce the plaintiff to execute the agreements at issue. Such deliberate nondisclosure was fraudulent. See *Egan* v. *Hudson Nut Products, Inc.*, 142 Conn. 344, 347-48, 114 A.2d 213 (1955) (fraud by nondisclosure). The defendants revealed significant financial information to the plaintiff, thus giving rise to a duty to make full and fair disclosure about SSP's finances, yet they deliberately withheld information, of which they were fully aware, regarding one of SSP's largest financial obligations. The latter conduct, in the context of this case, was fraudulent. See *Duksa* v. *Middletown*, 173 Conn. 124, 127, 376 A.2d 1099 (1977) ("[a] party who assumes to speak 'must make a full and fair disclosure as to the matters about which he assumes to speak'").[21]

The defendants engaged in a fraudulent scheme that began in 2001 and early 2002 with the nondisclosure of Scott's deferred compensation obligations and continued through August 14, 2009, when the defendants falsely claimed that they lacked the funds to continue the arbitration. See section III D, supra. The court finds in favor of the plaintiff on count one of the complaint, and against the defendants as to their first, sixth and eighth special defenses.

G

CUTPA

In the tenth count of the complaint, the plaintiff alleges that the defendants violated CUTPA, General Statutes § 42-110b (a), which provides in relevant part that "[n]o person shall engage in unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce." "In determining whether certain

[21] Also see section III D of this decision for a discussion regarding SSP's fraudulent conduct relative to the arbitration proceeding.

acts constitute a violation of [CUTPA], we have adopted the criteria set out in the cigarette rule by the federal trade commission . . . (1) [W]hether the practice, without necessarily having been previously considered unlawful, offends public policy as it has been established by statutes, the common law, or otherwise -- whether, in other words, it is within at least the penumbra of some common law, statutory, or other established concept of unfairness; (2) whether it is immoral, unethical, oppressive, or unscrupulous; (3) whether it causes substantial injury to consumers [competitors or other business persons]." (Internal quotation marks omitted.) *Williams Ford, Inc.* v. *Hartford Courant Co.*, 232 Conn. 559, 591, 657 A.2d 212 (1995). "All three criteria do not need to be satisfied to support a finding of unfairness. A practice may be unfair because of the degree to which it meets one of the criteria or because to a lesser extent it meets all three. . . . Thus a violation of CUTPA may be established by showing either an actual deceptive practice . . . or a practice amounting to a violation of public policy." (Citations omitted; internal quotation marks omitted.) *Cheshire Mortgage Service, Inc.* v. *Montes*, 223 Conn. 80, 106, 612 A.2d 1130 (1992).

In sixteen separate subparagraphs, the plaintiff alleges conduct by the defendants that constitutes unfair or deceptive acts under CUTPA. The bulk of those claims involve the defendants' failure to include Scott's deferred compensation agreement on the financial statements produced to the plaintiff. They also include Scott's threat to destroy the written agreements; the "looting" of SSP by doubling officer loans to Scott in violation of those agreements; the manner in which SSP buildings were transferred; and the false claim that SSP was insolvent in 2007.

There must be aggravating factors present, such as bad faith conduct or violation of some concept of fairness, in order sufficiently to plead a CUTPA claim based upon a breach of contract. See *Landmark Investment Group, LLC* v. *Chung Family Realty Partnership, LLC*, 125 Conn. App. 678, 708, 10 A.3d 61 (2010), cert. denied, 300 Conn. 914, 13 A.3d 1100 (2011) (upholding finding of aggravating factors sufficient to prove a violation of CUTPA where, in addition to a breach of an employment contract, the defendant engaged in multiple false misrepresentations and other acts exhibiting "a pattern of bad faith conduct, seeking to escape its contractual obligations unfairly while negotiating a more favorable offer with . . . a third party").

This court has found that events described in the tenth count of the complaint, at paragraphs 51a through 51q, did, indeed, take place. The court has already concluded that the defendants' conduct was fraudulent. The court also finds that the conduct described in the foregoing paragraphs of count ten constituted a scheme. That scheme was composed of a related, orchestrated series of actions designed to deprive the plaintiff of his contractual rights by means that were unfair and deceptive. The defendants' course of conduct was both unethical and unscrupulous, and it caused grievous financial injury to the plaintiff.

The defendants' principal argument is that it did not violate CUTPA because a CUTPA claim may not lie "for activities that are incidental to an entity's primary trade or commerce." (Internal quotation marks omitted.) *Sovereign Bank* v. *Licata*, 116 Conn. App. 483, 494, 977 A.2d 228 (2009), appeal dismissed, 303 Conn. 721, 36 A.3d 662 (2012). The defendants argue that neither Scott nor SSP is in the business of selling businesses or stock options, but rather, the defendants are in the business of selling

swimming pools. In response, the plaintiff contends that our Supreme Court has not directly addressed this issue, and that the defendants rely on Appellate Court authority that does not conform to the legislative intent that CUTPA be liberally construed.

Our Appellate Court has held that "a plaintiff must have at least *some* business relationship with the defendant in order to state a cause of action under CUTPA." (Emphasis in original.) *Pinette* v. *McLaughlin*, 96 Conn. App. 769, 778, 901 A.2d 1269, cert. denied, 280 Conn. 929, 909 A.2d 958 (2006); see *Ventres* v. *Goodspeed Airport, LLC*, 275 Conn. 105, 157, 881 A.2d 937 (2005), cert. denied, 547 U.S. 1111, 126 S. Ct. 1913, 164 L. Ed. 2d 664 (2006) (alleged business relationship between land trust and airport held insufficient to support a CUTPA claim, rejecting argument that land trust and airport were competing for airspace).[22] In the present case, although there is obviously a business relationship between the plaintiff and the defendants, the defendants are not in the business of selling businesses. Even though the plaintiff is correct that Scott agreed to sell SSP on three separate occasions, Scott never actually consummated any of those sales. Although the question is a close one, the court finds that the defendants are in the business of selling swimming pools, not businesses. The defendants' conduct in their dealings with the plaintiff, even though unscrupulous, was incidental to their primary trade or commerce. Consequently, the CUTPA claim cannot prevail. *Phillips Industrial*

[22] In *Ventres*, it was alleged that the airport cut down trees on land trust property in order to maintain the airport's runway approach slope. Id., 154. The land trust attempted to support its CUTPA claim by arguing that it was in the business of protecting natural resources and the airport was competing with the land trust for the airspace occupied by the trees that were improperly removed. Id., 157. The Supreme Court rejected that argument, holding that such a conclusion "would convert every trespass claim involving business property into a CUTPA claim." Id. The Supreme Court also rejected the land trust's theory that it was "'competing' with the airport defendants for the rights to airspace over their properties." Id. The court found that their relationship "cannot be characterized as competitive in any ordinary business sense. Rather, before the clear-cutting, the relationship was merely one of neighboring landowners. After the clear-cutting, the relationship was one of landowner and trespasser." Id. Consequently, the court rejected the claim that there was a business relationship between the two defendants and held that the trial court had properly stricken the CUTPA cross-claim. Id., 157-58.

Service Corp. v. *Connecticut Light & Power Co.*, Superior Court, judicial district of Waterbury, Complex Litigation Docket, Docket No. X02-CV-98-04099665-S (June 18, 1999, *Sheldon, J.*) (24 Conn. L. Rptr. 641, 643) ("'mere' unscrupulousness in the conduct of business activities is not actionable under CUTPA *unless* it occurs in that portion of such activities which constitutes the conduct of any trade or commerce . . ." (emphasis in original)).

For all of the foregoing reasons, the court finds for the defendants on count ten of the complaint.

H

Statute of Limitations

In their first special defense, the defendants allege that the causes of action set forth in the plaintiff's first, sixth, seventh and tenth counts are barred by the applicable statute of limitations, General Statutes § 52-577.[23] The plaintiff claims that the statute of limitations does not bar his claim because of the continuing course of conduct doctrine.[24]

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[23] The court has found against the plaintiff on the tenth count of the complaint and, therefore, will not discuss the applicability of the statute of limitations special defense relative to that count. In addition, the court notes that the defendants' fourth special defense, purportedly applicable to all counts, alleges that the plaintiff's claims are barred by "General Statutes § 49-33a." No such statute exists. The defendants may be referring to General Statutes § 47-33a, but that section applies to a claim for specific performance of a contract for the sale of real estate. The plaintiff has not asserted a claim for specific performance of a sale of real estate *to him*. He seeks specific performance of the SOPA and the SLA. The SOPA does not call for the transfer of real estate to the plaintiff; and the plaintiff has made clear that he does not seek specific performance of paragraph five of the SLA, a paragraph that gives the plaintiff an option to purchase real estate. Compare Compl. Prayer for Relief ¶ 1 with Pl.'s Response Mem. 28, December 18, 2013. The SOPA dealt with the plaintiff's right to purchase stock; the SLA provided, at paragraph three, that *Scott* was to purchase SSP buildings in 2003. In summary, General Statutes § 47-33a has no application to this case and the court will not further address the defendants' fourth special defense.

[24] In his reply, the plaintiff simply denied the defendants' first special defense. The "continuing course of conduct doctrine . . . must be pleaded in avoidance of a statute of limitations special defense." *Beckenstein Enterprises-Prestige Park, LLC* v. *Keller*, 115 Conn. App. 680, 688, 974 A.2d 764, cert.

The "continuing course of conduct" doctrine will toll the statute of limitations "[w]hen the wrong sued upon consists of a continuing course of conduct . . . ." (Internal quotation marks omitted.) *Giulietti* v. *Giulietti*, 65 Conn. App. 813, 833, 784 A.2d 905, cert. denied, 258 Conn. 946, 788 A.2d 95 (2001). In *Watts* v. *Chittenden*, 301 Conn. 575, 587-88, 22 A.3d 1214 (2011), our Supreme Court explained that, "[i]n examining the use of the continuing course of conduct doctrine, we are mindful of the nature of the doctrine as Chief Judge Richard Posner of the Seventh Circuit Court of Appeals has explained: A violation is called 'continuing,' signifying that a plaintiff can reach back to its beginning even if that beginning lies outside the statutory limitations period, when it would be unreasonable to require or even permit him to sue separately over every incident of the defendant's unlawful conduct. The injuries about which the plaintiff is complaining in [these] case[s] are the consequence of a numerous and continuous series of events . . . . When a single event gives rise to continuing injuries . . . the plaintiff can bring a single suit based on an estimation of his total injuries, and that mode of proceeding is much to be preferred to piecemeal litigation despite the possible loss in accuracy. But in [cases in which the continuing course of conduct doctrine is applicable, each incident increases the plaintiff's injury]. Not only would it be unreasonable to require him, as a condition of preserving his right to have [the full limitations period] to sue . . . to bring separate suits [during the limitations period] after each [incident giving rise to the claim]; but it would

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denied, 293 Conn. 916, 979 A.2d 488 (2009). Although the defendants appear to dispute the applicability of the continuing course of conduct doctrine to the facts of this case, the defendants did not argue that this doctrine is foreclosed to the plaintiff due to his failure to plead it pursuant to Practice Book § 10-57. See *Mollica* v. *Toohey*, 134 Conn. App. 607, 611 n.3, 39 A.3d 1202 (2012).

impose an unreasonable burden on the courts to entertain an indefinite number of suits and apportion damages among them." (Internal quotation marks omitted.)

In order to trigger the continuing course of conduct doctrine, a plaintiff must demonstrate that the defendant committed an initial wrong and breached a duty that remained in existence after commission of the original wrong. *Giulietti* v. *Giulietti*, supra, 65 Conn. App. 834. "Where [our Supreme court has] upheld a finding that a duty continued to exist after the cessation of the 'act or omission' relied upon, there has been evidence of either a special relationship between the parties giving rise to such a continuing duty *or* some later wrongful conduct of a defendant related to the prior act." (Emphasis added.) *Fichera* v. *Mine Hill Corp.*, 207 Conn. 204, 210, 541 A.2d 472 (1988). "[T]hat continuing wrongful conduct may include acts of omission as well as affirmative acts of misconduct . . . ." (Internal quotation marks omitted.) *Haas* v. *Haas*, 137 Conn. App. 424, 433, 48 A.3d 713 (2012). "The continuing course of conduct doctrine is conspicuously fact-bound." (Internal quotation marks omitted.) Id.

In the present case, the first count of the complaint alleges fraud, and the sixth and seventh counts allege breach of the covenant of good faith and fair dealing. General Statutes § 52-577 provides that "[n]o action founded upon a tort shall be brought but within three years from the date of the act or omission complained of." Fraudulent misrepresentation, as alleged in count one of the complaint, is a tort; *Kramer* v. *Petisi*, 285 Conn. 674, 684 n.9, 940 A.2d 800 (2008); and so is subject to the provisions of General Statutes § 52-577.

Counts six and seven allege violations of the covenant of good faith and fair dealing, and are not governed by General Statutes § 52-577. "[A] claim brought pursuant

to a contract, alleging a breach of the implied covenant of good faith and fair dealing, sounds in contract because [e]very contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement. . . . To constitute a breach of [that duty], the acts by which a defendant allegedly impedes the plaintiff's right to receive benefits that he or she reasonably expected to receive under the contract must have been taken in bad faith. . . . Such a claim is therefore subject to the six year contract statute of limitations as provided in § 52–576." (Citation omitted; internal quotation marks omitted.) *Bellemare* v. *Wachovia Mortgage Corp.*, 94 Conn. App. 593, 610, 894 A.2d 335 (2006), aff'd on other grounds, 284 Conn. 193, 931 A.2d 916 (2007).[25] As will be discussed, the defendants' fraudulent conduct continued through August 14, 2009. Thus, counts six and seven are not barred by the six year statute of limitations.

As this court previously found, the defendants defrauded the plaintiff beginning prior to the 2001 execution of the EA, SOPA and SLA, and they continued that course of fraudulent conduct during and after the plaintiff's tenure with SSP. The transfer of the SSP buildings on March 31, 2007, was a part of the defendants' fraudulent scheme, as was the August 14, 2009 false claim that the defendants lacked the funds to continue the arbitration.[26]

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[25] The Supreme Court did not grant certiorari with respect to the question of whether the six-year statute of limitations applies to claims of breach of the covenant of good faith and fair dealing, and explicitly stated that it would not address that claim. *Bellemare* v. *Wachovia Mortgage Corp.*, 284 Conn. 193, 195 n.2, 931 A.2d 916 (2007); see *Bellemare* v. *Wachovia Mortgage Corp.*, 280 Conn. 901, 907 A.2d 88 (2006) (denying certification with respect to this issue).

[26] The court notes, as well, that there existed a special relationship among Scott, SSP and the plaintiff in that the plaintiff was a minority shareholder in SSP and Scott was the majority shareholder. Scott, by wrongfully terminating the plaintiff and barring the plaintiff from exercising his rights under the SOPA, breached his fiduciary duty to the plaintiff. *Pacelli Bros. Transportation, Inc.* v. *Pacelli*, 189 Conn. 401, 407-08, 456 A.2d 325 (1983).

The defendants now claim that their August 14, 2009, email, asserting that "my client informs me that it has no funds to pay for the continuation of the arbitration at this time," indicated only that SSP lacked funding for the arbitration, not that Scott, himself, lacked funds. The court finds this claim to be disingenuous and disagrees with the defendants' view of the matter. The arbitration involved both SSP and Scott, individually. The SOPA, which Scott signed in his individual capacity, imposed an obligation on "the parties," which includes Scott, to share the costs of the arbitration. Furthermore, the arbitration named Scott, individually and as president of SSP. PX 37. Thus, even though he was a party to the arbitration, Scott, as an individual, never attempted to pay the costs of continuing the arbitration. The fraudulent conduct that began in 2001 and continued to August 14, 2009, was conduct by Scott, acting both individually and as president of SSP.

This action was served on April 14, 2011, well within three and six years of August 14, 2009. Therefore, the statute of limitations will not serve to bar the claims in counts one, six or seven. The court finds against the defendants on their first and fourth special defenses.

I

Statute of Frauds

In their third special defense, the defendants contend that all counts implicating the option to purchase real estate are in violation of the statute of frauds and so are barred by General Statutes § 52-550. General Statutes § 52-550 (a) provides in relevant part: "No civil action may be maintained in the following cases unless the agreement, or a memorandum of the agreement, is made in writing and signed by the party, or the agent

of the party, to be charged . . . (6) upon any agreement for a loan in an amount which exceeds fifty thousand dollars."

Our Supreme Court has "previously . . . applied the doctrine of equitable estoppel to bar a party from asserting the statute of frauds as a defense so as to prevent the use of the statute itself from accomplishing a fraud. . . . When estoppel is applied to bar a party from asserting the statute of frauds, however, we also require that the party seeking to avoid the statute must demonstrate acts that constitute 'part performance' of the contract. . . . Specifically, [t]he acts of part performance . . . must be such as are done by the party seeking to enforce the contract, in pursuance of the contract, and with the design of carrying the same into execution, and must also be done with the assent, express or implied, or knowledge of the other party, and be such acts as alter the relations of the parties. . . . The acts also must be of such a character that they can be naturally and reasonably accounted for in no other way than by the existence of some contract in relation to the subject matter in dispute. . . . In the context of the statute of frauds, therefore, we sometimes have referred to the application of estoppel as the 'doctrine of part performance . . . .'" (Citations omitted; internal quotation marks omitted.) *Glazer* v. *Dress Barn, Inc.*, 274 Conn. 33, 60-62, 873 A.2d 929 (2005).

The only option to purchase real estate that is even arguably at issue appears in paragraph five of the SLA. That paragraph provides that, if the plaintiff exercises the option set forth in the SOPA, "Scott will grant you the option to purchase the buildings and the property on which they are located at the then current market value." The plaintiff opposes the defendants' argument that the real estate purchase option set forth in the SLA is barred by the statute of frauds. However, the plaintiff also takes the position

that he does not seek specific enforcement of paragraph five of the SLA. Pl.'s Response Mem. 28. Therefore, the issue of whether the statute of frauds applies in this case is moot and the court will not address this issue further.

J

Damages

The plaintiff seeks damages for breach of the SOPA and SLA; for breaches of the arbitration clauses; for breaches of the EA; and for fraud and violation of CUTPA. In their fifth special defense, the defendants claim that the plaintiff has received $35,538.23 toward any sums due under the EA, SOPA and SLA. In their seventh special defense, they argue that Scott is not individually liable under the EA. In their memorandum, they contend that the plaintiff's breach of contract damages, if any, are limited to a liquidated damages provision. The defendants failed to address the damages issue relative to the plaintiff's claim of fraud.

(a)

Damages for Breach of Contract

The court has found that SSP breached the EA, and that both SSP and Scott breached the SOPA and the SLA, all of which are contracts. "It is axiomatic that the sum of damages awarded as compensation in a breach of contract action should place the injured party in the same position as he would have been in had the contract been performed. . . . The injured party . . . is entitled to retain nothing in excess of that sum which compensates him for the loss of his bargain. . . . Guarding against excessive compensation, the law of contract damages limits the injured party to damages based on his actual loss caused by the breach. . . . The concept of actual loss accounts for the

possibility that the breach itself may result in a saving of some cost that the injured party would have incurred if he had had to perform. . . . In such circumstances, the amount of the cost saved will be credited in favor of the wrongdoer . . . that is, subtracted from the loss . . . caused by the breach in calculating [the injured party's] damages." (Internal quotation marks omitted.) *Hees* v. *Burke Construction, Inc.*, 290 Conn. 1, 7-8, 961 A.2d 373 (2009). It is also well established "that the burden of proving damages is on the party claiming them. . . . When damages are claimed they are an essential element of the plaintiff's proof and must be proved with reasonable certainty." (Internal quotation marks omitted.) *FCM Group, Inc.* v. *Miller*, 300 Conn. 774, 804, 17 A.3d 40 (2011); see *Carrano* v. *Yale-New Haven Hospital*, 279 Conn. 622, 646, 904 A.2d 149 (2006) ("[d]amages are recoverable only to the extent that the evidence affords a sufficient basis for estimating their amount in money with reasonable certainty" (internal quotation marks omitted)).

(1)

Stock Option Purchase Agreement and Supplemental Letter Agreement

The plaintiff asserts that the "benefit of the bargain" under the SOPA is $4 million, based on the value of the balance of the SSP stock he would have acquired, i.e., the value of ninety percent of the SSP stock, less the purchase price stated in the SOPA, together with the income he reasonably expected to earn as owner of SSP. Pl.'s Post Trial Mem. 33. He argues that this reflects his expectation interest and will put him in as good a position as he would have been had the defendants performed under the agreements. See *Little Mountains Enterprises, Inc.* v. *Groom*, 141 Conn. App. 804, 809,

64 A.3d 781 (2013). He also seeks interest, at the rate of ten percent, from March 2007, the date of the breach, to the present. General Statutes § 37-3a.

This court concludes that the evidence as to what the plaintiff "reasonably expected to earn" as owner of SSP is too speculative to form the basis for an award of damages. The vagaries of SSP's probable future growth and performance under the plaintiff's leadership preclude the court from determining damages based on the foregoing theory. See *American Diamond Exchange, Inc.* v. *Alpert*, 302 Conn. 494, 510-11, 28 A.3d 976 (2011).

A more reliable damage calculation lies with the plaintiff's alternate "benefit of the bargain" contention. The latter calculation is based on the salary the plaintiff was paid during his employment with SSP, plus benefits, for the ten-year period he planned to own SSP after he purchased it in 2007, reduced by the earnings he acquired from substitute employment and unemployment compensation.

As of October 1, 2002, the plaintiff was being paid $142,153, plus benefits valued at $32,850. See PX 21, ¶ 4. Thus, the plaintiff's total annual compensation package was $175,003. That figure, over ten years, equals $1,750,030. The plaintiff's substitute employment and unemployment compensation after his employment was terminated totaled $408,970.60. That figure, subtracted from $1,750,030, equals $1,341,059.40. The court finds that the latter figure is an appropriate measure of the "benefit of the bargain" owed to the plaintiff as damages resulting from the defendants' breach of the SOPA.

The defendants argue that the SOPA limits the plaintiff's damage claim. The SOPA provides that the plaintiff had until March 31, 2007, to exercise the right to

purchase Scott's stock for $906,115. The defendants argue that Section 2.3 (a) of the SOPA provides that the plaintiff would have to sell his stock back to Scott "upon termination for any reason." Defs.' Post Trial Mem.16, December 4, 2013.

The defendants' argument does not accurately reflect the language of Section 2.3 (a) of the SOPA. That section provides in relevant part that "[i]f Whitney's employment by the Company terminates or Whitney terminated his employment with the Company for any reason other than death," then Whitney was obligated to sell his stock back to the defendants. The use of the disjunctive "or" makes clear that the termination "for any reason other than death" language only applies if *Whitney* terminated his employment. See *State* v. *Vakilzaden*, 272 Conn. 762, 771 n.15, 865 A.2d 1155 (2005) (use of the disjunctive "or" makes clauses separated by that word independent and equal in weight). The reference to a situation in which the plaintiff's employment "terminates" is not similarly unrestricted. Therefore, a fair reading of the SOPA, read as a whole, requires the conclusion that actions by Scott or SSP leading to the plaintiff's termination are governed by the SOPA provisions involving termination for "adequate cause." Compare PX 3 ¶¶ 2.3 (e), (f) with PX 21 ¶ 8.3. "When interpreting a contract, we construe the contract as a whole and all relevant provisions are considered when determining the intent of the parties." (Citations omitted; internal quotation marks omitted.) *Hilb Rogal & Hobbs Co.* v. *Randall*, 115 Conn. App. 89, 96, 971 A.2d 796, cert. granted on other grounds, 293 Conn. 913, 978 A.2d 1110, 293 Conn. 934, 981 A.2d 1078 (2009).

The SOPA addresses a situation where, as here, the plaintiff is terminated without adequate cause, and provides that, if the plaintiff is paid the damages allowed by the EA, he will also be paid $26,000 for his shares of SSP stock plus taxes due for the transfer.

PX 3 ¶ 2.3 (f). The SOPA also gave the plaintiff the right, exercisable after April 1, 2007, but before July 1, 2007, to purchase Scott's SSP stock for $1,270,873. That purchase, if it had taken place, would have triggered additional, subsequent obligations between the parties.

Paragraph 8.4 is the relevant provision of the EA that was referenced in the SOPA regarding damages upon termination. That paragraph provides that, if the plaintiff was terminated without adequate cause, his damages are limited to "the lesser of his actual damages or the sum of $150,000 plus [$26,000 for the price of his SSP shares and the taxes due on the transfer of those shares] . . . ." PX 21 ¶ 8.4. Although the SOPA refers to the damages allowed under the EA, the SOPA does not provide that, in the event the defendants breach the SOPA, the plaintiff's sole remedy for his termination for inadequate cause is the price to be paid for his SSP shares. In short, the SOPA does not include a liquidated damages clause.

(2)

Employment Agreement

As previously discussed, the EA provides for liquidated damages, owed by SSP to the plaintiff, in the amount of $150,000, plus the price of the plaintiff's SSP shares ($26,000) and the taxes due on the transfer of those shares, minus payments made in the amount of $35,538.23 (which the plaintiff does not dispute). DX WW. The court awards the plaintiff $138,461.77 for SSP's breach of the EA.[27]

[27] The court finds that the plaintiff made every appropriate effort to mitigate his damages following his wrongful termination of employment.

(3)

Arbitration

Both Scott and SSP breached the arbitration agreement by not completing the arbitration proceeding as they had promised in the SOPA. The plaintiff calculates the cost of the arbitration, to him, at "approximately $65,000 to $80,000" but, in his testimony, he indicated that at least a portion of the latter figure includes his attorney's fees, which the court does not award for breach of the agreement to arbitrate. The court awards the plaintiff $65,000 for his costs of arbitration. PX 54; PX 55.

(b)

Damages for Fraud

The plaintiff argues that he is entitled to "benefit of the bargain" damages for the defendants' fraud and violation of CUTPA. See *Leisure Resort Technology, Inc.* v. *Trading Cove Associates*, 277 Conn. 21, 33, 889 A.2d 785 (2006). The court has found for the defendants on the CUTPA claim and so will not consider any damages claim under CUTPA.

However, the court has found for the plaintiff on the claim of fraud, and so it is appropriate to assess the appropriate damages for the defendants' fraudulent conduct. "[T]he general rule is that plaintiffs may not recover for the same loss in both contract and in tort. If the damages for two causes of action are the same, then the damages award merges." 22 Am. Jur. 2d 71, Damages § 40 (2013). Therefore, in order to determine whether the plaintiff is entitled to recover damages beyond those awarded for breach of contract, it is necessary to determine what damages, appropriate as a result of the defendants' fraudulent conduct, have not already been awarded for their breach of the

EA, SOPA and SLA. See *Ulbrich* v. *Groth*, 310 Conn. 375, 406, 78 A.3d 76 (2013).

"In an action for fraud, the plaintiffs are entitled to punitive damages, in addition to general and special damages. . . . The [purpose] of awarding punitive damages is not to punish the defendant for his offense, but to compensate the plaintiff for his injuries. . . . The rule in this state as to torts is that punitive damages are awarded when the evidence shows a reckless indifference to the rights of others or an intentional and wanton violation of those rights." (Citations omitted.) *DeSantis* v. *Piccadilly Land Corp.*, 3 Conn. App. 310, 315, 487 A.2d 1110 (1985).

In the present case, the defendants not only cost the plaintiff the benefit of the bargain, but they also tricked him into leaving a secure employment position by making promises that they had no intention of keeping. There were significant consequential damages to the plaintiff that arose from the defendants' fraudulent actions. The defendants' false promises had the effect of usurping fifty-seven months of the plaintiff's working life. It is true that the plaintiff was well-compensated during those fifty-seven months, but, at the end of that time, the defendants wrongfully and falsely terminated the plaintiff's employment. The plaintiff was then faced with the prospect of acquiring new employment, but that prospect was burdened by the fact that he had been out of his primary occupation for nearly five years; he was a job-seeker who had been terminated from his previous employment; and he was fifty-six years of age when he was forced back into the job market. Further, the secure financial future that had awaited him, had the defendants lived up to their promises, was completely eliminated by the defendants' wrongful actions.

The defendants made their initial misrepresentations to the plaintiff for the purpose of inducing him to accept employment with SSP, knowing that, in the end, he would be sorely injured by their conduct. The best that can be said of the defendants is that they were recklessly indifferent to the rights of the plaintiff. The plaintiff is entitled, not only to the benefit of the bargain, but also to punitive damages for the damage done to his employment prospects and for depriving him of a financial future that he lost due to the defendants' fraudulent conduct.

Based on all of the court's findings, the court concludes that it is appropriate to award the plaintiff $250,000 in punitive damages.[28]

K

Breach of Confidentiality Agreement

In the fifth count of the defendants' counterclaim, they allege that the plaintiff improperly disclosed confidential financial information in violation of a confidentiality agreement, dated October 15, 2008, involving the plaintiff, SSP and Scott. The defendants contend that the disclosure caused them to "suffer loss of competitive advantage . . . ." The defendants argue that the plaintiff's breach of the agreement is established by the court's orders that appear in the court file at numbers 102.01, 113.01, 124, 151.01 and 151.02.[29]

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[28] In his brief, the plaintiff seeks damages for emotional distress. However, he did not specially plead emotional distress, nor did he include a claim for emotional distress in his prayer for relief. *Kilduff* v. *Adams, Inc.*, 219 Conn. 314, 326, 593 A.2d 478 (1991) (such damages must be specially pleaded). The court will not award damages for emotional distress.

[29] However, even though the defendants refer to orders 151.01 and 151.02 in their memorandum, they state, in a footnote to that discussion, that they are not seeking attorney's fees relative to those two orders.

This court has concluded that the documents at issue cannot, pursuant to the rules of this court, remain sealed. See Ruling No. 220.20, September 25, 2013. Second, the defendants did not establish, and the court does not find, that any documents filed with this court "caused them to suffer loss of competitive advantage . . . ." Even if the defendants had made such a showing, the relief they seek in their memorandum is limited to "a hearing . . . to prove the attorney's fees incurred by SSP." Defs.' Post Trial Mem. 34. The confidentiality agreements upon which the defendants rely do not provide for an award of attorney's fees in the event that either party breaches any of those agreements. See DX GGG.

"[W]e have often explained that Connecticut adheres to the 'American rule' regarding attorney's fees. Under the 'American rule,' in the absence of statutory or contractual authority to the contrary, a successful party is not entitled to recover attorney's fees or other ordinary expenses and burdens of litigation . . . . There are few exceptions. For example, a specific contractual term may provide for the recovery of attorney's fees and costs . . . or a statute may confer such rights." (Citations omitted; internal quotation marks omitted.) *Total Recycling Services of Connecticut, Inc.* v. *Connecticut Oil Recycling Services, LLC*, 308 Conn. 312, 326-27, 63 A.3d 896 (2013). The defendants did not establish, nor even claim, that any such exception to the "American rule" applies in this case. The court finds for the plaintiff on the fifth count of the counterclaim.

IV

CONCLUSION

For all of the foregoing reasons, the court finds for the plaintiff on counts one, four, five, six and seven. The court finds for the defendants on count ten. The court awards damages to the plaintiff for counts one, four, five, six and seven in the amount of $1,544,521.10. In addition, the court awards damages to the plaintiff for count seven in the amount of $250,000 for a total damage award of $1,794,521.10. Of the foregoing damage total, $138,461.77 is owed by defendant SSP, only. Scott and SSP are jointly and severally liable for the balance of the damage award. The court allows interest to the plaintiff, and against both defendants, at the rate of ten percent per year. General Statutes § 37-3a (a); *DiLieto* v. *County Obstetrics & Gynecology Group, P.C.*, 310 Conn. 38, 48-49, 74 A.3d 1212 (2013). The court finds against the defendants on their counterclaims.

So ordered.

BY THE COURT,

John A. Danaher III

STATE OF CONNECTICUT

LLI-CV-09-5007099-S	:	SUPERIOR COURT
WALTER WHITNEY 9 Church Hill Road Washington, CT	:	JUDICIAL DISTRICT OF LITCHFIELD
vs.	:	AT LITCHFIELD
J.M. SCOTT ASSOCIATES, INC. 75 Washington Road Woodbury, CT	:	
JAMES M. SCOTT 45 Tanner Hill Road Warren, CT	:	
SCOTT SWIMMING POOLS, INC. 75 Washington Road Woodbury, CT	:	March 26, 2014

JUDGMENT

Present: Hon. John A. Danaher, III, Judge

This action was commenced by the plaintiff, Walter Whitney, in Litchfield Superior Court by writ and complaint served on the defendants James M. Scott, J.M. Scott Associates, Inc., and Scott Swimming Pools, Inc. on April 4, 2011, with a return date of May 10, 2011. The plaintiff claimed breaches of multiple contracts, breach of the covenant of good faith and fair dealing, fraud and violation of Connecticut's Unfair Trade

Practices Act. Thence, to a later date the defendants counterclaimed on grounds of breach of contract, abuse of process and vexatious litigation.

All claims against J.M. Scott Associates, Inc. having been resolved or withdrawn, the matter proceeded to trial before the Court. The Court took evidence and heard testimony on May 21, 22, 23, 24, June 19, 20, 21, July 10, 11, 12, 17, 18, 19, 23, 24, 25 and 30, 2013. The Court, having heard the parties and considered all testimony and evidence, finds in favor of the plaintiff on all counts of the complaint with the exception of plaintiff's claim pursuant to the Connecticut Unfair Trade Practices Act. The Court also finds in favor of the plaintiff on all of defendants' counterclaims. It is therefore adjudged that the plaintiff shall be entitled to recover the amount of $138,461.77 against the defendant Scott Swimming Pools, Inc. only, and that the plaintiff shall be entitled to recover the amount of $1,656,059.33 against the defendants James M. Scott and Scott Swimming Pools, Inc., jointly and severally. The plaintiff is also awarded [redacted] interest at the rate of ten percent annually, against both defendants jointly and severally.

WHEREFORE, judgment may enter in accordance with the Memorandum of Decision issued as of this date.

BY THE COURT, (DANAHER, J.)

CRAIG D. MALONE, ASST. CLERK

DOCKET NUMBER: LLI-CV-09-5007099-S	: SUPERIOR COURT
WHITNEY, WALTER	: JUDICIAL DISTRICT OF LITCHFIELD
V.	: AT LITCHFIELD
J. M. SCOTT ASSOCIATES INC., ET AL	: MAY 2, 2014

MOTION TO REARGUE

Pursuant to Practice Book §11-11, the defendants respectfully move to reargue the decision of the court rendered in this matter, reserving all rights on appeal, including the right to raise any and all claims of error even if not set forth below, see Santopietro v. New Haven, 239 Conn. 207, 211-21 (1996), for the following reasons:

1. By decision dated March 26, 2014, the Court (Danaher, J.) entered judgment for the plaintiff;
2. On page 55 of the decision, the Court calculated damages for a ten (10) year period commencing, presumably, in 2007;
3. The Court credited past earnings in the amount of $408,970.60. No allowance was made for the earning capacity of the plaintiff for any period of time.
4. The evidence established that the plaintiff earned $99,598.64 in the last full year of employment in banking before his tenure with the defendant, Scott Swimming Pools, Inc. See Plaintiff's Exhibit 53, p. 1.

P.B. §11-11 MOTION
ORAL ARGUMENT NOT REQUESTED
TESTIMONY NOT REQUIRED

GOLDMAN, GRUDER & WOODS, LLC • ATTORNEYS AT LAW
105 TECHNOLOGY DRIVE • TRUMBULL, CONNECTICUT 06611 • (203) 880-5333 •
JURIS NO. 411134

A107

5. The evidence established that the plaintiff earned the following in banking employment after his tenure with the defendant, Scott Swimming Pools, Inc.:

a.	Year – 2009	$96,781.15;
b.	Year – 2010	$95,956.80;
c.	Year – 2011	$96,185.26

See Plaintiff's Exhibit 53.

6. Projecting future earning capacity based upon past earnings is reasonable and appropriate. See Duncan v. Mill Management Co. of Greenwich, Inc., 308 Conn. 1, 36 - 37 (2013); Marchetti v. Ramirez, 240 Conn. 49, 54–55 (1997).

7. The failure to including the plaintiff's earning capacity in the future results in a windfall for the plaintiff.

Wherefore, the defendants move to reargue that aspect of the decision.

THE DEFENDANTS

By /s/ 305547
Bruce L. Elstein
Goldman, Gruder & Woods, LLC
105 Technology Drive
Trumbull, CT 06611
Email: belstein@goldmangruderwoods.com

ORDER 431195

DOCKET NO: LLICV095007099S

SUPERIOR COURT

WHITNEY,WALTER
V.
J. M. SCOTT ASSOCIAT

JUDICIAL DISTRICT OF LITCHFIELD
AT LITCHFIELD

5/19/2014

ORDER

ORDER REGARDING:
05/02/2014 232.00 MOTION TO REARGUE/RECONSIDER

The foregoing, having been considered by the Court, is hereby:

ORDER: DENIED

431195

Judge: JOHN A DANAHER

State of Connecticut
Post Date: 06/03/2014
Payfile: 1415340-2

(Page 1 of 2)

Docket: CV14xxxxxxxS
Receipt Nbr: 0402350
Amount: $250.00

List Total: 001 $250.00

APPEAL - CIVIL

JD-SC-28 Rev. 12-09
P.B. §§ 3-8, 62-8, 63-3, 63-4, 63-10
C.G.S. §§ 31-301b, 51-197f, 52-470

☐ To Supreme Court ☒ To Appellate Court

See Instructions on Back/page 2

Name of case *(State full name of case as it appears in the judgment file)*
Walter Whitney v. J.M. Scott Associates, Inc., et al.

Classification
☒ Appeal ☐ Cross appeal ☐ Joint appeal ☐ Amended appeal ☐ Stipulation for reservation ☐ Corrected/amended appeal form ☐ Other *(Specify)*

Trial Court History

Tried to: ☒ Court ☐ Jury
Trial court location: **15 West Street, Litchfield**
Trial court judges being appealed: **Danaher**
All other trial court judge(s) who were involved with the case: **Pickard, Roche, Trombley**
List all trial court docket numbers, including all location prefixes: **LLI-CV-09-5007099-S**
Judgment for *(Where there are multiple parties, specify any individual party or parties for whom judgment may have been entered.)*
☒ Plaintiff ☐ Defendant ☐ Other:
Judgment date of decision being appealed: **3/26/2014**
Date of issuance of notice on any order on any motion which would render judgment ineffective: **5/15/14**
Date for filing appeal extended to: **5/4/14**
Case type
☐ Juvenile — Termination of Parental Rights ☐ Juvenile — Order of Temporary Custody ☐ Juvenile — Other
☒ Civil/Family: Major/Minor code **T90** ☐ Habeas Corpus ☐ Workers compensation ☐ Other
For habeas corpus or zoning appeals indicate the date certification was granted:

Appeal

Appeal filed by *(Where there are multiple parties, specify the name of the individual party or parties filing this appeal.)*
☐ Plaintiff(s) ☒ Defendant(s) **See attached** ☐ Other
From *(the action which constitutes the appealable judgment or decision)*: **Judgment for plaintiff after completed trial to the court with no jury.**
If to the Supreme Court, the statutory basis for the appeal *(Connecticut General Statutes section 51-199)*

By *(Signature of attorney or self-represented party)* ► Kenneth J. Bartschi
Telephone number: **860-522-8338**
Fax number: **860-728-0401**
Juris number *(If applicable)*: **38478**

Appearance

Type name and address of person signing above *(This is your appearance; see Practice Book section 62-8)*: **Kenneth J. Bartschi, Horton Shields & Knox, PC, 90 Gillett St, Hartford 06105**
E-mail address: **kbartschi@hortonshieldsknox.com**
"X" one if applicable
☒ Counsel or self-represented party who files this appeal will be deemed to have appeared **in addition to** counsel of record who appeared in the trial court under Practice Book section 62-8.
☐ Under Practice Book section 3-8, counsel or self-represented party who files this appeal is appearing **in place of:**
Name of counsel or self-represented party:
Juris number *(If applicable)*:

Certification (Practice Book section 63-3)

I certify that a copy of this appeal was mailed or delivered to all counsel and self-represented parties of record as required by Practice Book section 62-7 on:* **6/3/14**
Signed *(Individual counsel/self-represented party)* ► Kenneth J. Bartschi
** Attach a list with the name, telephone number and fax number of each counsel and self-represented party and the address where the copy was mailed or delivered.*

To Be Completed By Trial Court Clerk

☑ Entry Fee Paid ☐ No Fees Required ☐ Fees, Costs, and Security waived by Judge *(enter judge's name below)*

Judge:
Date waived:
Signed *(Clerk of trial court)*: Mary Barrella
Date: 6/3/14

The clerk of the original trial court, if different from this court, was notified on _____ that this appeal was filed.
In habeas matters, a copy of this endorsed appeal was provided to the Office of the Chief State's Attorney, Appellate Bureau, on _____.

Court Use Only
Date and time filed
FILED
JUN - 3 2014

Documents to be given to the Appellate Clerk with the endorsed Appeal form

The following documents must be filed with the Appellate Clerk when filing the endorsed appeal form; Practice Book sections 63-3 and 63-4.
1. Preliminary Statement of the Issues
2. Preliminary Designation of Pleadings
3. Court Reporter's Acknowledgment/Certification re transcript
4. Docketing Statement
5. Statement for Preargument Conference (form JD-SC-28A)
6. Draft Judgment File
7. Constitutionality Notice (if applicable)
8. Sealing Order form, if any
9. List of counsel of record in trial court (DS1 received from clerk)
10. Proof of receipt of the copy of the endorsed appeal form by the original trial court clerk or the clerk of the court or courts where the case was transferred, if the case was in more than one trial court

Certification

I certify that a copy of the endorsed appeal and all documents to be given to the Appellate Clerk with the endorsed Appeal form were mailed or delivered to all counsel and self-represented parties of record* as required by Practice Book section 63-3 on: 6/3/14
Signed *(Individual counsel or self-represented party)* ► Kenneth J. Bartschi
** Attach a list with the name, telephone number and fax number of each counsel and self-represented party and the address at which the copy was mailed or delivered.*

A110

Walter Whitney v. J.M. Scott Associates, Inc., LLI-CV-09-5007099-S – continuation page

Appeal filed by

Defendants James M. Scott and Scott Swimming Pools, Inc.

Transmission Report

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FAX TRANSMISSION

DATE: June 3, 2014

TO: Chief Clerk, Litchfield

FROM: Kenneth J. Bartschi

RE: LLI-CV-09-5007099-S–*Whitney v. J.M. Scott Associates, et al*

FAX: (860) 567-4779

Total Number of Pages including Cover Sheet: 11

MESSAGE: Attached is a copy of the appeal in the above-captioned matter, which was filed today with the clerk's office at the Hartford Superior Court.

Total Pages Scanned : 11 Total Pages Confirmed : 11

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Abbreviations:

HS: Host send	PL: Polled local	MP: Mailbox print	CP: Completed	TS: Terminated by system
HR: Host receive	PR: Polled remote	RP: Report	FA: Fail	G3: Group 3
WS: Waiting send	MS: Mailbox save	FF: Fax Forward	TU: Terminated by user	EC: Error Correct

A112

APPEAL - CIVIL

JD-SC-28 Rev. 12-09
P.B. §§ 3-8, 62-8, 63-3, 63-4, 63-10
C.G.S. §§ 31-301b, 51-197f, 52-470

See Instructions on Back/page 2

☐ To Supreme Court ☒ To Appellate Court

Name of case *(State full name of case as it appears in the judgment file)*
Walter Whitney v. J.M. Scott Associates, Inc., et al.

Classification
☐ Appeal ☒ Cross appeal ☐ Joint appeal ☐ Amended appeal ☐ Stipulation for reservation ☐ Corrected/amended appeal form ☐ Other *(Specify)*

Trial Court History

Tried to: ☒ Court ☐ Jury
Trial court location: **J.D. of Litchfield at Litchfield**
Trial court judges being appealed: **Danaher, J.**
List all trial court docket numbers, including all location prefixes: **LLI-CV-09-5007099-S**
All other trial court judge(s) who were involved with the case: **Pickard, J., Roche, J., Trombley, J.**
Judgment for *(Where there are multiple parties, specify any individual party or parties for whom judgment may have been entered.)*
☐ Plaintiff ☐ Defendant ☒ Other: **Please see attached.**
Judgment date of decision being appealed: **3/26/2014**
Date of issuance of notice on any order on any motion which would render judgment ineffective: **5/19/2014**
Date for filing appeal extended to: **6/3/2014**
Case type
☐ Juvenile — Termination of Parental Rights ☐ Juvenile — Order of Temporary Custody ☐ Juvenile — Other
☒ Civil/Family: Major/Minor code **T/90** ☐ Habeas Corpus ☐ Workers compensation ☐ Other
For habeas corpus or zoning appeals indicate the date certification was granted:

Appeal

Appeal filed by *(Where there are multiple parties, specify the name of the individual party or parties filing this appeal.)*
☒ Plaintiff(s) ☐ Defendant(s) ☐ Other
From *(the action which constitutes the appealable judgment or decision)*: **Judgment for defendants on count ten of plaintiff's second amended revised complaint pursuant to Connecticut's Unfair Trade Practices Act, C.G.S. Sec. 42-110b(a)**
If to the Supreme Court, the statutory basis for the appeal *(Connecticut General Statutes section 51-199)*

By *(Signature of attorney or self-represented party)* ▶ Ann H. Rubin
Telephone number: **(203) 575-1200**
Fax number: **(203) 575-2600**
Juris number *(If applicable)*: **008512**

Appearance

Type name and address of person signing above *(This is your appearance; see Practice Book section 62-8)*: **Ann H. Rubin**
E-mail address: **arubin@carmodylaw.com**
"X" one if applicable
☐ Counsel or self-represented party who files this appeal will be deemed to have appeared **in addition to** counsel of record who appeared in the trial court under Practice Book section 62-8.
☐ Under Practice Book section 3-8, counsel or self-represented party who files this appeal is appearing **in place of:**
Name of counsel or self-represented party
Juris number *(If applicable)*

Certification (Practice Book section 63-3)

I certify that a copy of this appeal was mailed or delivered to all counsel and self-represented parties of record as required by Practice Book section 62-7 on:* **06/11/2014**
Signed *(Individual counsel/self-represented party)* ▶ Ann H. Rubin
** Attach a list with the name, telephone number and fax number of each counsel and self-represented party and the address where the copy was mailed or delivered.*

To Be Completed By Trial Court Clerk

☐ Entry Fee Paid ☐ No Fees Required ☐ Fees, Costs, and Security waived by Judge *(enter judge's name below)*

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Date and time filed

Judge
Date waived
Signed *(Clerk of trial court)*
Date

The clerk of the original trial court, if different from this court, was notified on _____ that this appeal was filed.
In habeas matters, a copy of this endorsed appeal was provided to the Office of the Chief State's Attorney, Appellate Bureau, on _____.

Documents to be given to the Appellate Clerk with the endorsed Appeal form

The following documents must be filed with the Appellate Clerk when filing the endorsed appeal form; Practice Book sections 63-3 and 63-4.
1. Preliminary Statement of the Issues
2. Preliminary Designation of Pleadings
3. Court Reporter's Acknowledgment/Certification re transcript
4. Docketing Statement
5. Statement for Preargument Conference (form JD-SC-28A)
6. Draft Judgment File
7. Constitutionality Notice (if applicable)
8. Sealing Order form, if any
9. List of counsel of record in trial court (DS1 received from clerk)
10. Proof of receipt of the copy of the endorsed appeal form by the original trial court clerk or the clerk of the court or courts where the case was transferred, if the case was in more than one trial court

Certification

I certify that a copy of the endorsed appeal and all documents to be given to the Appellate Clerk with the endorsed Appeal form were mailed or delivered to all counsel and self-represented parties of record* as required by Practice Book section 63-3 on.
Signed *(Individual counsel or self-represented party)* ▶ Ann H. Rubin
** Attach a list with the name, telephone number and fax number of each counsel and self-represented party and the address at which the copy was mailed or delivered.*

The plaintiff appeals from the decision of the trial court in favor of the defendants on Count Ten of the plaintiff's second amended revised complaint, brought pursuant to Connecticut's Unfair Trade Practices Act, C.G.S. § 42-110b(a). The trial court found in favor of the plaintiff on the remaining counts of the complaint.

(LLI-CV-09-5007099-S) A.C. _____	:	APPELLATE COURT
WALTER WHITNEY	:	
vs.	:	
J.M. SCOTT ASSOCIATES, INC., et al.	:	JUNE 3, 2014

DOCKETING STATEMENT

Pursuant to Practice Book § 63-4(a)(3), the Defendants, James M. Scott and Scott Swimming Pools, Inc., provides the following information:

A. **Parties:**

Plaintiff:

Walter Whitney
9 Church Hill Road
Washington Depot CT 06794

Plaintiff's Counsel:
Attorney Ann H. Rubin
Attorney Sarah S. Healy
CARMODY & TORRANCE, LLP
50 Leavenworth Street
PO Box 1110
Waterbury CT 06721

Defendants:

James M. Scott
45 Tanner Hill Road
Warren Ct 06754

Scott Swimming Pools, Inc.
75 Washington Road
Woodbury CT 06798

Defendants' Trial Counsel:
Attorney Bruce L. Elstein
GOLDMAN GRUDER & WOODS, LLC
105 Technology Drive
Trumbull CT 06611

HORTON, SHIELDS & KNOX, P.C. · ATTORNEYS AT LAW
90 GILLETT STREET · HARTFORD, CT · (860) 522-8338 · JURIS NO. 38478

Defendants' Appellate Counsel:
Attorney Kenneth J. Bartschi
Attorney Karen L. Dowd
HORTON, SHIELDS & KNOX, PC
90 Gillett Street
Hartford CT 06105

B. None

C. There were exhibits.

D. N/A

DEFENDANTS, JAMES M. SCOTT &
SCOTT SWIMMING POOLS, INC.,

By Kenneth J. Bartschi
Kenneth J. Bartschi
Karen L. Dowd
Horton, Shields & Knox, P.C.
90 Gillett Street
Hartford CT 06105
Juris No. 38478
Phone: 860-522-8338
Fax: 860-728-0401

A.C._____	:	APPELLATE COURT
(LLI-CV-09-5007099-S)	:	STATE OF CONNECTICUT
WALTER WHITNEY	:	
VS.	:	
J.M. SCOTT ASSOCIATES, INC, et al.	:	June 19, 2014

DOCKETING STATEMENT

Pursuant to Practice Book § 63-4(a)(3) the plaintiff, Walter Whitney, hereby submits the following Docketing Statement:

A. NAMES AND ADDRESSES OF ALL PARTIES, COUNSEL AND PERSONS HAVING A LEGAL INTEREST IN THE CAUSE SUFFICIENT TO RAISE A SUBSTANTIAL QUESTION WHETHER A JUDGE SHOULD BE DISQUALIFIED.

Plaintiff:

Walter Whitney
9 Church Hill Road
Washington, CT 06794

Plaintiff's Trial and Appellate Counsel:

Ann H. Rubin
Sarah S. Healey
Carmody Torrance Sandak & Hennessey LLP
50 Leavenworth Street
Waterbury, CT 06702
Phone: 203-573-1200
Facsimile: 203-575-2600
arubin@carmodylaw.com
shealey@carmodylaw.com
Firm Juris No.: 008512

Defendants:

James M. Scott
45 Tanner Hill Road
Warren, CT 06754

Scott Swimming Pools, Inc.
75 Washington Road
Woodbury, CT 06798

Defendants' Trial Counsel:

Bruce L. Elstein, Esq.
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Phone: (203) 880-5333
Fax: (203) 880-5332
belstein@goldmangruderwoods.com

Defendants' Appellate Counsel:

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Hartford, CT 06105
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Phone: (860) 522-8338
Fax: (860) 728-0401
kbartschi@hortonshieldsknox.com

The plaintiff is not aware of any additional persons having an interest in the subject matter of this appeal.

B. CASE NAMES AND DOCKET NUMBERS OF ALL PENDING APPEALS WHICH ARISE FROM SUBSTANTIALLY THE SAME CONTROVERSY AS THIS OR INVOLVE CLOSELY RELATED ISSUES.

Defendants James Scott and Scott Swimming Pools, Inc. have also appealed the Trial Court judgment. That appeal was filed on June 3, 2013. No docket number has been assigned yet.

C. EXHIBITS IN TRIAL COURT

There were exhibits in the trial court.

D. N/A

THE PLAINTIFF/CROSS APPELLANT,
WALTER WHITNEY

By: _____

Ann H. Rubin
Sarah S. Healey
FOR: Carmody Torrance Sandak & Hennessey LLP
50 Leavenworth Street
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shealey@carmodylaw.com
Firm Juris No.: 008512
His Attorneys

(LLI-CV-09-5007099-S) :
A.C. 36912 : APPELLATE COURT

WALTER WHITNEY :

vs. :

J.M. SCOTT ASSOCIATES, INC., et al. : OCTOBER 9, 2014

MOTION FOR ARTICULATION

Pursuant to Practice Book § 66-5, the Defendants, James M. Scott and Scott Swimming Pools, Inc., move the Court (Danaher, J.) to articulate its March 26, 2014 decision as set forth below. The Defendants seek articulation as to the basis for the award of punitive damages and the date from which interest runs.

I. Brief History

The Plaintiff, Walter Whitney, brought this action for breach of contract and other claims, and the Defendants counterclaim. The matter was tried to the Court (Danaher, J.), which in large part ruled in the Plaintiff's favor. The Defendant's appealed and the Plaintiff cross appealed.

II. Specific Facts

In very broad strokes, the Plaintiff went to work for the Defendants and planned to buy the business from Defendant Scott pursuant to a stock option purchase agreement. The Defendants fired him before he could so, and the Plaintiff sued. His claims included fraud, and the Court found in his favor on this count. The Court awarded $250,000 as "punitive damages for the damage done to his employment prospects and for depriving him of a financial future that he lost due to the defendants' fraudulent conduct." (MOD, 3/26/14, at 60.) The Court did not otherwise explain how it arrived at the $250,000 punitive damage award.

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Among the issues the Defendants raised in their preliminary statement of issues pursuant to Practice Book § 63-4(a)(1) was the following: "Was the punitive damages award erroneous because (a) it was not based on litigation costs or (b) if it was based on litigation costs, the Defendants were not afforded the opportunity to challenge the reasonableness of counsel fees?"

Because the Court did not explain how it arrived at the $250,000 figure, further articulation is necessary to facilitate appellate review. Accordingly, the Defendants request the Court respond to the following question:

1. "What was the factual and legal basis for the Court's $250,000 punitive damages award?"

The Court also awarded interest pursuant to Conn. Gen. Stat. § 37-3a, citing *DiLieto v. County Obstetrics & Gynecology Group, P.C.*, 310 Conn. 38, 48-49 (2013). (MOD, 3/26/14, at 62.) Earlier in the decision, the Court noted that the Plaintiff sought interest from March 2007. (*Id.* at 55.) The Court did not indicate from what date interest begins to run, which may raise an issue as to the propriety of the interest award. Accordingly, the Defendants request the Court to respond to the following questions:

2. Did the Court intend its interest order to run from the date of the judgment?

3. If the Court intended its interest order to run from a date prior to judgment, (a) what is the date interest begins to run and (b) what is the legal and factual basis for that starting date?

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III. Legal Basis

Practice Book § 66-5 provides authority for the Court to articulate aspects of its decision in response to a party's motion. Articulation facilitates appellate review by explaining ambiguities or gaps in the record so that the reviewing court has a better understanding of the basis of the trial court's decision for review. *Kiniry v. Kiniry*, 299 Conn. 308, 327 (2010). An articulation, however, should not be used to substitute a new decision or change the reasoning or basis of a previous decision. *Id.* Although an appellant no longer forfeits review by failing to seek articulation, see Practice Book § 61-10(b), articulation still serves the purpose of sharpening the issues for review. Articulation of the basis of the Court's punitive damages award and interest award will facilitate appellate review of these issues.

Conclusion

For the foregoing reasons, the Court should grant the motion for articulation.

DEFENDANTS, JAMES M. SCOTT &
SCOTT SWIMMING POOLS, INC.,

By Kenneth J Bartschi

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DOCKET NO: LLI-CV-09-5007099-S	:	SUPERIOR COURT
WALTER WHITNEY	:	JUDICIAL DISTRICT OF LITCHFIELD
V.	:	AT LITCHFIELD
J.M. SCOTT ASSOCIATES, INC., ET AL.	:	NOVEMBER 14, 2014

ORDER RE: MOTION FOR ARTICULATION

On October 9, 2014, defendants, James M. Scott and Scott Swimming Pools, Inc., moved this court to articulate three aspects of the court's memorandum of decision filed on March 26, 2014 ("decision"). By letter of transmittal dated October 24, 2014, the Appellate Court submitted the motion for articulation to this court for a ruling. The plaintiff did not file a response to the motion for articulation.

Practice Book § 66-5 permits an appellant or an appellee to move for further articulation of a decision of the trial court. That section provides in relevant part that "[i]f any party requests it and it is deemed necessary by the trial court, the trial court shall hold a hearing at which arguments may be heard, evidence taken or a stipulation of counsel received and approved."

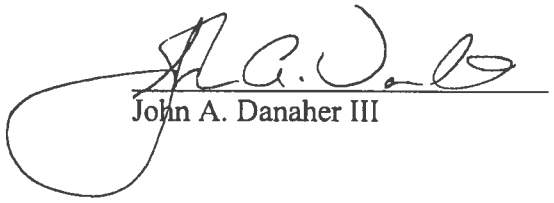
The plaintiff responded to certain questions raised by the court, regarding the motion for articulation, at an unrelated hearing on October 30, 2014. However, the court deems it necessary to hold a hearing at which arguments may be heard relative to the issues raised in the motion for articulation.

The court directs the parties to communicate with the caseflow coordinator to determine a hearing date that is mutually convenient for the court and the parties. At that time the court will hear arguments relative to the issues raised in the motion for

Copies to counsel of Rpt. of Judicial Decision 11/17/2014 EKD, CC

articulation and will also give the parties the opportunity to introduce evidence relative to the motion. At that hearing the plaintiff will produce, inter alia, evidence regarding all attorney's fees and ordinary litigation expenses that the plaintiff has paid, or owes, in connection with this litigation.

BY THE COURT,



John A. Danaher III

DOCKET NUMBER: LLI-CV09-5007099-S	:	SUPERIOR COURT
WHITNEY, WALTER	:	J.D. OF LITCHFIELD
V.	:	AT LITCHFIELD
J. M. SCOTT ASSOCIATES INC., ET AL	:	DECEMBER 11, 2014

OBJECTION TO THE INTRODUCTION OF ANY EVIDENCE AT THE HEARING ON THE MOTION FOR ARTICULATION

The defendants, James M. Scott and Scott Swimming Pools, Inc. (the "Defendants"), hereby object to the introduction of any evidence at the hearing on the Motion for Articulation [Dkt. # 256.00] and, in support hereof, state the following:

I. PROCEDURAL HISTORY

The plaintiff, Walter Whitney (the "Plaintiff") brought this action for, *inter alia*, breach of contract. The Defendants filed defenses to the action, as well as related counterclaims. In May, June and July 2013, the parties tried the case to the Court (Danaher, J.). The Court issued its Memorandum of Decision herein on March 26, 2014, granting judgment to the Plaintiff in the amount of $1,794,521.10 (the "Judgment"). As part of the Judgment, the Court awarded the Plaintiff $250,000 in punitive damages. The Defendants filed an appeal of the Judgment and the Plaintiff cross-appealed. Thereafter, the Defendants filed their Motion for Articulation, seeking clarification of the legal and factual basis of the $250,000 punitive damage award [Dkt. # 256.00] (the "Motion for Articulation"). In response to the Motion for Articulation, the Court issued an Order wherein it "deem[ed] it necessary to hold a hearing at which

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arguments may be heard relative to the issues raised" and ordered the Plaintiff to produce "inter alia, evidence regarding all attorney's fees and ordinary litigation expenses that the plaintiff has paid, or owes, in connection with this litigation." [Dkt. #256.10] The Defendants now object to the introduction of evidence at the hearing on the Motion for Articulation for the reasons set forth below.

II. LAW AND ARGUMENT

> It is well settled that "[a]n articulation is appropriate where the trial court's decision contains some ambiguity or deficiency reasonably susceptible of clarification.... [P]roper utilization of the motion for articulation serves to dispel any ... ambiguity by clarifying the factual and legal basis upon which the trial court rendered its decision, thereby sharpening the issues on appeal."

Alliance Partners, Inc. v. Oxford Health Plans, Inc., 263 Conn. 191, 204 (Conn. 2003) (Citations quotations omitted). While articulation is meant to clarify and sharpen, "it is not an opportunity for the trial court to substitute a new decision [for a prior one,] change the reasoning or basis of a prior decision . . . [or] retry[] the facts." Koper v. Koper, 17 Conn. App. 480, 484 (Conn. App. Ct. 1989). Not only is it impermissible for a trial court to alter its initial findings by way of articulation, Fantasia v. Milford Fastening Sys., 86 Conn. App. 270, 284 (Conn. App. Ct. 2004) (citing Eichman v. J & J Bldg. Co., Inc., 216 Conn. 443, 458 (Conn. 1990)), an articulation cannot be used to create findings that should have been made in the original decision. Kiniry v. Kiniry, 299 Conn. 308, 319-21 (Conn. 2010).

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In this case, the question posed to the Court for articulation is: "What was the factual and legal basis for the Court's $250,000 punitive damages award?" In other words: What specific evidence presented at the trial of this matter did the Court use to determine the Plaintiff's entitlement to punitive damages and how did the Court then calculate the punitive damage figure of $250,000? Any response to the question posed would have to be derived solely from the evidence presented at trial. To permit the Plaintiff to introduce "evidence regarding all attorney's fees and ordinary litigation expenses that the plaintiff has paid, or owes, in connection with this litigation" at the hearing on the Motion for Articulation would, in effect, be the substitution of new evidence for old; or worse, the substitution of new evidence for a complete lack of prior evidence. Such a substitution of new evidence is the equivalent of a complete change in the reasoning of, and basis for, the Judgment herein. This attempted alteration of reasoning and substitution of new judgment for the prior one – however unsupportable the prior one may have been – is impermissible. Kiniry v. Kiniry, 299 Conn. 308 (Conn. 2010); Fantasia v. Milford Fastening Sys., 86 Conn. App. 270 (Conn. App. Ct. 2004); Koper v. Koper, 17 Conn. App. 480 (Conn. App. Ct. 1989).

Furthermore, if this Court entertains new evidence related to attorneys' fees and other litigation costs, this Court would effectively be opening the Judgment, *sua sponte*, for the sole purpose of supporting its punitive damages award. As set forth in Conn. Prac. Bk. § 66-5 itself, a motion for articulation "is not intended to affect the existing

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practice with respect to opening and correcting judgments and the records on which they are based." Therefore, if this Court wanted to open the Judgment to correct same, it would have had to do so within four months of the entry of Judgment. Conn. Gen. Stat. § 52-212; Conn. Prac. Bk. § 17-4. Since judgment entered on March 26, 2014 – more than seven months ago – the Court cannot now attempt to correct same by bootstrapping on the articulation provisions of the Practice Book. Conn. Prac. Bk. § 66-5; Blake v. Blake, 211 Conn. 485, 495 (Conn. 1989) (after four months court can open to correct clerical errors only, unless parties otherwise consent); East Haven Bldrs. Supply, Inc. v. Fanton, 80 Conn. App. 734, 743 (Conn. App. Ct. 2004) (reversing opening of judgment after four months where parties had not consented to same); Richards v. Richards, 78 Conn. App. 734, 739 (Conn. App. Ct. 2003), *cert. denied* 266 Conn. 922 (2003) (after four months, court can open and modify only to correct clerical errors).

Finally, although it is true that Conn. Prac. Bk. § 66-5 provides for "a hearing at which . . . evidence [may be] taken," that is because the stated provision applies to motions for rectification as well as motions for articulation. As stated therein, a motion for rectification seeks "corrections in the transcript or the trial court record." If such a motion is filed, the court may hold an evidentiary hearing to determine the authenticity of documents before admitting them for the sole purpose of augmenting the trial court record, or to amend the trial transcript to include conversations had off-the-record that

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should have been in the transcript on appeal. Nair v. Thaw, 156 Conn. 445, 455 (Conn. 1968); Bauer v. Bauer, No. FA030733285S, 2009 WL 1532343, *2 (Conn. Super. Ct. May 7, 2009), *aff'd*, 308 Conn. 124 (Conn. 2013); Lane v. Lane, No. FA950405610, 1999 WL 701816, *1-2 (Conn. Super. Ct. July 20, 1999); see also Cioffoletti v. Planning & Zoning Comm'n, 34 Conn. App. 685 (Conn. App. Ct. 1994). In this case, the Defendants have asked this Court for an articulation of its decision, not for a rectification of the transcript or record. As a result, the admission of new evidence at the hearing on the Motion for Articulation is both impermissible and unnecessary.

III. CONCLUSION

Based on the foregoing, the defendants, James M. Scott and Scott Swimming Pools, Inc., respectfully request that this Court deny the admission of any and all new evidence at the hearing on the Motion for Articulation.

THE DEFENDANTS

By: /s/ 305547
Bruce L. Elstein
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Email: belstein@goldgru.com

A.C. 36912	:	SUPERIOR COURT
DOCKET NO: LLI CV 09 5007099-S	:	JUDICIAL DISTRICT OF LITCHFIELD
WALTER WHITNEY		AT LITCHFIELD
V.	:	
J.M. SCOTT ASSOCIATES, INC., ET AL	:	DECEMBER 12, 2014

RULING ON MOTION FOR ARTICULATION

This matter is currently on appeal. *Whitney v. J.M. Scott Associates, Inc., et al.*, Docket No. A.C. 36912. On October 9, 2014, the defendants, James M. Scott ("Scott") and Scott Swimming Pools, Inc., ("SSP"), moved this court to articulate three aspects of its memorandum of decision filed on March 26, 2014 ("decision"). By letter of transmittal dated October 24, 2014, the Appellate Court submitted the motion for articulation to this court for a ruling. The plaintiff did not file a response to the motion for articulation. On December 11, 2014, the parties appeared, and were heard, on the motion.

DISCUSSION

"[A]n articulation is appropriate where the trial court's decision contains some ambiguity or deficiency reasonably susceptible of clarification. . . . [P]roper utilization of the motion for articulation serves to dispel any . . . ambiguity by clarifying the factual and legal basis upon which the trial court rendered its decision, thereby sharpening the issues on appeal." (Internal quotation marks omitted.) *Kaczynski v. Kaczynski*, 294 Conn. 121, 131 n.11, 981 A.2d 1068 (2009). Practice Book § 66-5 permits an appellant or an appellee to move for further articulation of a decision of the trial court. That section provides in relevant part that "[i]f any

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party requests it and it is deemed necessary by the trial court, the trial court shall hold a hearing at which arguments may be heard, evidence taken or a stipulation of counsel received and approved."

The parties came before the court on October 30, 2014 relative to a matter unrelated to the motion for articulation. However, the court gave the parties the opportunity, at that time, to address the issues raised in the motion for articulation. The parties were not fully prepared to address the motion for articulation at that time, so the court ordered that a hearing on the motion be scheduled, and that hearing proceeded on December 11, 2014.

In an effort to assist in "sharpening the issues on appeal," the court grants the motion for articulation. The plaintiff seeks articulation with regard to three specific issues. The court will address the issues seriatim.

1. The defendants ask the court to respond to the question: "[w]hat was the factual and legal basis for the court's $250,000 punitive damages award." In its decision the court found for the plaintiff on the claim of fraud, and concluded that "punitive damages are appropriate when the evidence shows a reckless indifference to the right or others or an intentional and wanton violation of those rights." Decision at 58-59. The court then summarized the nature of the defendants' fraudulent conduct and its impact upon the plaintiff, the details of which were discussed elsewhere in the opinion. Id. 59-60. The court specifically found that "the best that can be said of the defendants is that they were recklessly indifferent to the rights of the plaintiff." Id. 60.

"Punitive damages are awarded when the evidence shows a reckless indifference to the rights of others or an intentional and wanton violation of those rights." *Bhatia v. Debek*, 287

Conn. 397, 420, 948 A.2d 1009 (2008). Common law punitive damages are limited to attorney's fees and ordinary litigation expenses. *Hylton v. Gunter*, 313 Conn. 472, 484-87 (2014). The plaintiff introduced, at trial, plaintiff's exhibit 150, which showed attorney's fees billings of $138,616.19 up to June 19, 2013. However, the trial of this case was not complete as of that date, and so the foregoing exhibit did not reflect the totality of attorney's fees and ordinary litigation expenses in this case, to include, inter alia, the completion of the trial, post-trial briefing, and post-trial motion practice. In the absence of complete information regarding the plaintiff's attorney's fees, the court awarded $250,000 in punitive damages which, in the court's opinion, were reasonable fees for the entirety of the legal services provided to the plaintiff, through to the completion of trial and post-trial briefing.

On May 6, 2014, the Appellate Court ruled that when punitive damages are awarded, not only must those punitive damages be limited to plaintiff's litigation expenses, the calculation of those expenses must be based on actual expenses and not a lodestar analysis. *R.I. Pools, Inc.* v. *Paramount Concrete, Inc.*, 149 Conn. App. 839, 874-77, 89 A.3d 993 (2014).

At the December 11, 2014, the plaintiff submitted additional exhibits, establishing that the plaintiff's attorney's fees and ordinary litigation expenses, owed to counsel who are now representing the plaintiff, total $233,683.90.[1]

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[1] See Plaintiff's Hearing Exhibits 1-4. Plaintiff's counsel represented at the December 11, 2014 hearing that plaintiff's prior counsel also performed services on the plaintiff's behalf, but the records reflecting those services were insufficiently clear to permit a submission to the court regarding anyfees associated with the services performed by prior counsel. Thus, there is nothing before the court reflecting attorney's fees, if any, owed by the plaintiff to that prior counsel. The court notes that the parties had reached an agreement, prior to trial, that the issue of attorney's fees would be addressed post trial, with the defendants having an opportunity to opposeany such attorney's fee claims at that time. July 10, 2013 Transcript at 90-91. At the hearing on the motion for articulation, the defendants opposed the admission of the plaintiff's attorney's fees exhibits on the theory that Prac. Bk § 66-5 does not authorize the admission of such evidence. The defendants did not contest the authenticity of the plaintiff's

2. and 3. The defendants acknowledge that the court, in its decision, allowed "interest to the plaintiff, and against both defendants, at the rate of ten percent per year." Decision at 62. The defendants now ask if the court intended that interest order to run from the date of judgment and, if not, what date the interest began to run and what is the legal and factual basis for that starting date.

In this case, the court awarded damages in the amount of $1,341,059.40 for breach of the stock option purchase agreement. Decision at 55. The court awarded the plaintiff $138,461.77 for breach of the employment agreement. Decision at 57. The court awarded $65,000 for the costs of arbitration, as well as $250,000 in punitive damages, for a total award of $1,794,521.10.

The court found that Scott breached the employment agreement on multiple occasions, including the date the employment agreement was signed on March 20, 2002. He also breached the supplemental letter agreement as early as March 20, 2002. Decision at 25-34. The defendants breached the stock option purchase agreement no later than July 1, 2007. Decision at 35. The plaintiff sought statutory interest, with regard to the breaches of the supplemental letter agreement and stock option purchase agreement, from March 2007. Plaintiff's Post-Trial Memorandum at 33. The plaintiff sought interest for the breach of the employment agreement from the date of termination, which was five days after Scott provided the plaintiff a notice of incipient termination on December 18, 2006. That termination notice that gave the plaintiff five days to "correct" alleged shortcomings, thus causing the court to conclude that the defendants terminated the plaintiff's employment on December 23, 2006. The plaintiff sought statutory interest for the defendants' fraud, beginning "from the date of breach in March 2007." Plaintiff's post-trial memorandum at 34.

Even though the record reflects factual and legal bases for an award of interest on the judgment to run at a date prior to March 2007, it was the court's intention to award interest for damages awarded for counts one, four, five, six, and seven beginning on March 1, 2007 and continuing until the judgment is paid. It was the court's intention to award interest on the punitive damage award beginning on the date of the judgment and continuing until the judgment is paid.

The court's award was based on the authority provided by General Statutes § 37-3a(a), which permits the court to award "interest at the rate of ten per cent a year . . . in civil actions . . . as damages for the detention of money after it becomes payable." That statute permits an award of prejudgment interest when a defendant withholds money that it owes pursuant to a contract. *DiLieto v. County Obstetrics & Gynecology Group, Inc.*, 310 Conn. 38, 49 n.11, 74 A.3d 1212 (2013). That same statute also allows for an award of postjudgment interest. Id. 50 n. 11.

BY THE COURT,

John A. Danaher III

Notice sent 12/19/14
Horton, Shields & Knox, P.C.
Goldman, Gruder & Woods, LLC
Carmody Torrance Sandak & Hennessey, LLP
Clerk, Litchfield JD (CV09-5007099)
PAC

cb

Conn. Gen. Stat. § 37-3a. Rate recoverable as damages. Rate on debt arising out of hospital services

(a) Except as provided in sections 37-3b, 37-3c and 52-192a, interest at the rate of ten per cent a year, and no more, may be recovered and allowed in civil actions or arbitration proceedings under chapter 909,[1] including actions to recover money loaned at a greater rate, as damages for the detention of money after it becomes payable. Judgment may be given for the recovery of taxes assessed and paid upon the loan, and the insurance upon the estate mortgaged to secure the loan, whenever the borrower has agreed in writing to pay such taxes or insurance or both. Whenever the maker of any contract is a resident of another state or the mortgage security is located in another state, any obligee or holder of such contract, residing in this state, may lawfully recover any agreed rate of interest or damages on such contract until it is fully performed, not exceeding the legal rate of interest in the state where such contract purports to have been made or such mortgage security is located.

(b) In the case of a debt arising out of services provided at a hospital, prejudgment and postjudgment interest shall be no more than five per cent per year. The awarding of interest in such cases is discretionary.

Practice Book § 66-5. Motion for Rectification; Motion for Articulation

A motion seeking corrections in the transcript or the trial court record or seeking an articulation or further articulation of the decision of the trial court shall be called a motion for rectification or a motion for articulation, whichever is applicable. Any motion filed pursuant to this section shall state with particularity the relief sought.

Except in cases where the trial court was a three judge court, an original and two copies of such motion shall be filed with the appellate clerk. Where the trial court was a three judge court, an original and four copies of such motion shall be filed. Any other party may oppose the motion by filing an original and two or four copies of an opposition with the appellate clerk within ten days of the filing of the motion for rectification or articulation.

The appellate clerk shall forward the motion for rectification or articulation and the opposition, if any, to the trial judge who decided, or presided over, the subject matter of the motion for rectification or articulation for a decision on the motion. If any party requests it and it is deemed necessary by the trial court, the trial court shall hold a hearing at which arguments may be heard, evidence taken or a stipulation of counsel received and approved. The trial court may make such corrections or additions as are necessary for the proper presentation of the issues. The trial judge shall file the decision on the motion with the appellate clerk.

Nothing herein is intended to affect the existing practice with respect to opening and correcting judgments and the records on which they are based. The trial judge shall file any such order changing the judgment or the record with the appellate clerk.

Corrections or articulations made before the appellant's brief and appendix are prepared shall be included in the appellant's appendix. Corrections or articulations made after the appellant's brief and appendix have been filed, but before the appellee's brief and appendix have been filed, shall be included in the appellee's appendix. When corrections or articulations are made after both parties' briefs and appendices have been filed, the appellant shall file the corrections or articulations as an addendum to its appendix. Any

addendum shall be filed within ten days after issuance of notice of the trial court's order correcting the record or articulating the decision.

The sole remedy of any party desiring the court having appellate jurisdiction to review the trial court's decision on the motion filed pursuant to this section or any other correction or addition ordered by the trial court during the pendency of the appeal shall be by motion for review under Section 66-7.

Upon the filing of a timely motion pursuant to Section 66-1, the appellate clerk may extend the time for filing briefs until after the trial court has ruled on a motion made pursuant to this section or until a motion for review under Section 66-7 is decided.

Any motion for rectification or articulation shall be filed within thirty-five days after the delivery of the last portion of the transcripts or, if none, after the filing of the appeal, or, if no memorandum of decisi[X]was filed before the filing of the appeal, after the filing of the memorandum of decision. If the court, sua sponte, sets a different deadline from that provided in Section 67-3 for filing the appellant's brief, a motion for rectification or articulation shall be filed ten days prior to the deadline for filing the appellant's brief, unless otherwise ordered by the court. The filing deadline may be extended for good cause. No motion for rectification or articulation shall be filed after the filing of the appellant's brief except for good cause shown.

A motion for further articulation may be filed by any party within twenty days after issuance of notice of the filing of an articulation by the trial judge. A motion for extension of time to file a motion for articulation shall be filed in accordance with Section 66-1.

STOCK OPTION PURCHASE AGREEMENT

by and among

JAMES M. SCOTT, WALTER A. WHITNEY

and

SCOTT SWIMMING POOLS, INC.

~~February~~ March 20, 2002

This Agreement is made on ~~February~~ March 20, 2002, by and among JAMES M. SCOTT ("Scott"), WALTER A. WHITNEY ("Whitney") and SCOTT SWIMMING POOLS, INC., a Connecticut corporation with its principal place of business in Woodbury, Connecticut (the "Company"). The parties, in consideration of the mutual agreements herein, agree as follows:

I. General

Section 1.1 Purpose of Agreement. Each of James M. Scott and Walter A. Whitney is an employee of the Company and the owner of shares of the Company's common stock without par value. James M. Scott owns 180 shares of the Company's common stock. Walter A. Whitney owns 20 shares of the Company's common stock. Shares of such common stock are herein called the "Common Stock". Ownership of such shares is more fully identified in Schedule A which is attached and made a part of this Agreement. Walter A. Whitney received his 20 shares of the Company's Common Stock at the same time this Agreement is being signed, and an

employment agreement between Walter A. Whitney and the Company is effected. Before such time, James M. Scott has been the sole shareholder of the Company. The purpose of this Agreement is, among other things, to provide Whitney with the option for the purchase of Scott's Common Stock under certain circumstances (the "Option"). Reference to "Common Stock" herein shall mean Common Stock issued and outstanding both before and after the execution of the employment agreement referred to above.

Section 1.2 Life insurance policies. Each Shareholder shall have the right to purchase insurance on the life of the other Shareholder to carry out his obligations under this Agreement. The parties, however, expressly agree that neither Shareholder is required to purchase such life insurance and if a Shareholder chooses to purchase insurance on the life of the other Shareholder, he shall not be reimbursed by the Company or the other Shareholder for any premium due on such life insurance policy.

Section 1.3 Meaning of word "transfer". Whenever used in this Agreement, a reference to "transfer" of Common Stock shall mean any disposition or contract of disposition whatsoever including, without limitation, disposition by sale, gift, bequest, intestate succession, hypothecation or pledge. A shareholder's agreement not to transfer Common Stock shall be interpreted to include an agreement not to permit involuntary transfer or transfer by operation of law.

II. Transfers of Common Stock.

Section 2.1 Restriction on Transfer During Scott's Lifetime. During the lifetime of Scott, neither party shall transfer any Common Stock without the prior written approval of the other party.

Section 2.2 Purchase of Scott's Common Stock Upon Death or Permanent Disability. (a) Scott hereby grants Whitney the right and option (Option) until March 31, 2007 to purchase his stock, if Scott dies or is permanently disabled (as defined in Section 2.5 below). Upon Scott's death or permanent disability, if he wishes to exercise the Option, Whitney shall give notice to the personal representative or Scott of his intent to exercise the Option within 45 days of the death of Scott or the determination of Scott's permanent disability if permanently disabled. If Whitney fails to give such notice, the Option under this Section shall terminate. If Whitney exercises the Option, the Estate of Scott or his personal representative shall cause the sale of Scott's stock to Whitney for the price of $906,115.00 and Whitney shall simultaneously therewith, execute and deliver to the Estate of Scott or Scott's personal representative ("Secured Party") a promissory note (Note I) in the amount of $906,115.00 payable annually together with interest at the rate of seven (7%) per cent annum over a fifteen (15) year term commencing one year from the date of Note I. Note I shall provide for a 15 day grace period, acceleration and attorneys' fees in the event of default, and the right to prepay without penalty. Note I shall be secured by the delivery by Whitney to the Secured party of the stock and a stock

power duly executed by Whitney. The Secured Party shall continue to hold the stock as security for the payment of Note I according to its terms until payment in full shall have been made. Until default, Whitney shall retain all of the voting rights and privileges as stockholder. Upon default under Note I, the Secured Party shall have all of the rights accorded by the Connecticut Uniform Commercial Code. Upon Whitney's satisfaction of Note I, the Secured Party shall immediately deliver to Whitney the stock and stock power used to secure Note I.

The Company shall not refinance or in any way restructure any of its debt without the consent of the holder of Note I, such consent shall not be unreasonably withheld.

Except as set forth below, if the aggregate payments from the Company to Whitney and his family members (the "Aggregate Payments") exceed $250,000.00 in any calendar year ("Excess Payment"), Whitney shall pay Scott in reduction of the principal then due under Note I, a sum equal to ½ the Excess Payment ("Reduction Payment"). Payments made by the Company to members of Whitney's family for actual work performed on behalf of the Company shall not be used to calculate the Aggregate Payments or Excess Payment. For example, if the Excess Payment is $30,000.00, Whitney shall pay Scott $15,000.00. Such Reduction Payment shall be payable upon Whitney's receipt of such Excess Payment.

(b) If Scott becomes Permanently Disabled, as defined in Section

2.5 below, during the term of this Agreement, the Company shall continue to pay Scott an annual salary of $250,000.00 per year, payable bi-weekly, until March 31, 2007, and during such period, the Company shall be credited with any sums received by Scott under any disability insurance policy that may provide him with any benefits for such disability. In the event of the death of Scott, his widow shall continue to receive such salary until March 31, 2007. If Whitney shall have elected to exercise the Option upon the determination of Scott's permanent disability as set forth in Section 2.2(a) and such salary shall be paid to Scott or his widow, the annual payment of interest and principal under the Note shall be postponed and shall commence on April 1, 2007 and shall be payable annually thereafter.

Section 2.3 Purchase of Walter A. Whitney's Common Stock Upon Termination of Employment. (a) If Whitney's employment by the Company terminates or Whitney terminated his employment with the Company for any reason other than death, then Whitney shall be obligated to sell his Common Stock, and the Company and Scott shall be jointly and severally obligated to Whitney to purchase all his Common Stock, as provided below. The respective rights and obligations between Scott and the Company shall be determined by agreement between them before the time of purchase.

(b) If Whitney's employment terminates or Whitney terminates his

employment before ~~February 1, 2003~~ March 31, 2003, then such sale and purchase shall occur as of ~~February 10, 2003~~ March 31, 2003. If Whitney's employment terminates or Whitney terminates his employment with the Company on or after ~~February~~ March 31, 2003, then such sale and purchase shall occur no later than 45 days after such termination of employment.

(c) If Whitney's employment terminates on or before ~~June~~ September 30, 2002, the purchase price for such shares shall be $26,000.00 plus the amount of any taxes due upon his transfer of such shares. Upon delivery of such payment to Whitney, Whitney shall deliver his Common Stock as directed by Scott and the Company.

(d) If Whitney terminates his employment with the Company on or after ~~July 1, 2002~~ October 1, 2002, the purchase price for such shares shall be $26,000 plus the amount of any taxes due upon transfer of such shares. Upon delivery of such payment to Whitney, Whitney shall deliver his Common Stock as directed by Scott and the Company.

(e) If Whitney's employment is terminated by the Company for Adequate Cause, the shares shall be returned to Scott without payment.

(f) If Whitney's employment is found to have been terminated without Adequate Cause and he is paid the damages provided for in Section 8.4 of the Employment Agreement between Whitney and the Company of even date herewith, the shares shall be returned to Scott. The purchase price for such shares shall be $26,000 plus the amount of any taxes due upon transfer of such shares. The purchase price shall be in addition to the

amount of damages set out above. Upon delivery of such payment to Whitney, Whitney shall deliver his Common Stock as directed by Scott and the Company.

Section 2.4 Purchase of Whitney's Common Stock Upon Death or Permanent Disability. If Whitney dies or becomes permanently disabled ("Permanently Disabled") as defined below, then his personal representative shall immediately offer to Scott Whitney's shares of the Common Stock. The purchase price shall be $26,000 plus ~~½ the amount if any, of the aggregate increase in Scott's base compensation ($250,000) from April 1, 2002 to the date of termination~~ minus the amount Whitney has received in bonus compensation through that date. Scott shall pay the purchase price in twelve (12) equal monthly payments. The first payment shall be made on the 15th day of the first month following Whitney's death or permanent disability.

Section 2.5 Meaning of "Permanently Disabled".

A Shareholder is "Permanently Disabled" if the Shareholder:

(a) Is under a legal decree of incompetency (the date of such decree being deemed to be the date on which such disability occurred);

(b) Submits any claim for disability insurance benefits or for early distribution of any amounts from a qualified pension or profit-sharing plan maintained by the Company on account of more than fifty

* the amount defined as the bonus earned in paragraph 4.3 of The Employment Agreement. March 20 - 2002

percent (50%) disability (the date of the earliest of such claims shall be the date on which such disability shall be deemed to have occurred); or

(c) Is subject to a medical determination that the Shareholder, because of a medically determinable disease, injury, or other mental or physical disability, is unable to perform substantially all of his or her regular duties, and that such disability is determined or reasonably expected to last at least twelve (12) months, based on then-available medical information.

A. A medical determination of disability shall exist upon the receipt by the Company of the written opinion of a physician who has examined the Shareholder whose disability is in question.

B. If the Company disagrees with the opinion of such physician (the "First Physician"), it may engage at its own expense another physician (the "Second Physician") to examine the Shareholder whose disability is in question. The Second Physician shall confer with the First Physician and, if they together agree in writing that the Shareholder is or is not disabled, their written opinion shall be conclusive as to such disability. If the First and Second Physicians do not agree, they shall choose a third consulting physician (the expense of which shall be borne by the Company), and the written opinion of a majority of these three (3) physicians shall be conclusive as to

such disability. The date of any written opinion that is conclusive as to such disability is the date on which such disability, if that is the conclusion, will be deemed to have occurred.

C. Each Shareholder hereby consents to such examination, to furnish any medical information requested by any examining physician, and to waive any applicable physician-patient privilege that may arise because of such examination. All physicians except the First Physician selected hereunder must be board-certified in the specialty most closely related to the nature of the disability alleged to exist.

III. Post Initial Employment Option

Section 3.1 Grant (a) Scott hereby grants Whitney the right and option (the "Post Initial Employment Option") exercisable on or after April 1, 2007 to purchase his stock for the price of $1,270,873. The Post Initial Employment Option shall remain in effect until July 1, 2007 when it shall expire.

(b) Consulting Agreement. If Whitney exercises the Post Initial Employment Option, the Company agrees to employ Scott as a consultant for a term of five (5) years at a salary of $200.00 per hour for up to 1,000 hours per year. Scott shall choose, at his sole discretion, the number of hours that he shall work for the Company during each year of said 5 year term. Scott and the Company, as a condition of such

employment, shall enter into a mutually acceptable covenant not to compete. If Scott dies or becomes Permanently Disabled during said five (5) year term, the Company agrees to employ Susan Marie Scott upon the same terms and conditions as those applicable to Scott.

c. Failure to Exercise Post Initial Employment Option. If Whitney does not exercise the Post Initial Employment Option, then Whitney shall be obligated to sell his Common Stock, and the Company shall be obligated to Whitney to purchase the Common Stock. The purchase price for such shares shall be the * ~~aggregate increase in Scott's base compensation ($250,000.00) from April 1, 2002 to March 31, 2007~~ minus the amount Whitney shall have received in bonus compensation through that date. The sale and purchase shall occur no later than forty-five (45) days after Whitney provides Scott with notice of his intention not to exercise the Option.

IV. Note

If Whitney exercises the Post Initial Employment Option, the parties agree that Scott shall sell and Whitney shall purchase the stock within forty-five (45) days of Whitney's exercise of the Post Initial Employment Option. Simultaneously with the sale of the stock, Whitney shall execute and deliver to Scott a non-negotiable promissory note (Note II) in the amount of $1,270,873 or such lesser sum as may be owed by Whitney on such sale payable annually together with interest at the rate of 7% per annum over a ten year term commencing one (1) year from that

* the amount defined as the bonus earned in paragraph 4.3 of the Employment Agreement Mar 28-2002

date of Note II. Note II shall provide for a fifteen (15) day grace period, acceleration and attorneys' fees in the event of default, and the right to prepay without penalty.

The Company shall not refinance or in any way restructure any of its debt without the consent of the holder of Note II such consent shall not be unreasonably withheld. Except as set forth below, if the aggregate payments from the Company to Whitney and his family members (the "Aggregate Payments") exceed $250,000.00 in any calendar year ("Excess Payment"), Whitney shall pay Scott in reduction of the principal then due under Note I, a sum equal to 1/2 of the Excess Payment ("Reduction Payment"). Payments made by the Company to members of Whitney's family for actual work performed on behalf of the Company shall not be used to calculate the Aggregate Payments or Excess Payment. For example, if the Excess Payment is $30,000.00, Whitney shall pay Scott $15,000.00. Such Reduction Payment shall be payable upon Whitney's receipt of such Excess Payment.

(a) Security. Note II shall be secured by the delivery by Whitney to Scott of the stock and a stock power duly executed by Whitney. ~~Scott shall continue to hold the stock as security for the payment of the~~ Note according to its terms until payment in full shall have been made. Until default, Whitney shall retain all of the voting rights and privileges as a stockholder. Upon default under the Note, Scott shall have all of the rights accorded by the Connecticut Uniform Commercial Code.

V. Representations.

Scott and the Company represent the following:

(a) The Company is authorized to issue 5,000 shares of the Common Stock and 200 shares are currently issued;

(b) Scott is the sole owner and has the right to sell 180 shares of the Common Stock;

(c) Such shares of the Common Stock are now and until Whitney's exercise of this Option shall be free of all encumbrances;

(d) Upon his exercise of this Option, Whitney shall receive good and marketable title to such Common Stock;

(e) Scott Swimming Pools, Inc. is a Connecticut corporation in good standing under the laws of the State of Connecticut and shall still be such on the exercise of this Option;

VI. Anti-Dilution Provision.

The Company shall not issue any additional shares of common stock, amend its certificate of incorporation to authorize the issuance of any new classes of stock, and shall not authorize a stock dividend, a merger, a consolidation, a combination or an exchange of shares, a separation, a reorganization, a liquidation or lend corporate assets to any party prior to the April 1, 2007 unless such action is approved by Scott and Whitney.

VII. Attorney's Representations.

The parties all acknowledge that Whitney's counsel, HILLEL GOLDMAN, prepared this Agreement on behalf of and in the course of this attorney's representation of Whitney, and that:

(1) THE PARTIES HAVE BEEN ADVISED BY MR. GOLDMAN THAT A CONFLICT EXISTS AMONG THEIR INDIVIDUAL INTERESTS; AND

(2) THE PARTIES HAVE BEEN ADVISED BY MR. GOLDMAN TO SEEK THE ADVICE OF INDEPENDENT COUNSEL; AND

(3) THE PARTIES HAVE HAD THE OPPORTUNITY TO SEEK THE ADVICE OF INDEPENDENT COUNSEL; AND

(4) THE PARTIES HAVE RECEIVED NO REPRESENTATIONS FROM MR. GOLDMAN ABOUT THE TAX CONSEQUENCES OF THIS AGREEMENT; AND

(5) THE PARTIES HAVE BEEN ADVISED BY MR. GOLDMAN THAT THIS AGREEMENT MAY HAVE TAX CONSEQUENCES; AND

(6) THE PARTIES HAVE BEEN ADVISED BY MR. GOLDMAN TO SEEK THE ADVICE OF INDEPENDENT TAX COUNSEL; AND

(7) THE PARTIES HAVE HAD THE OPPORTUNITY TO SEEK THE ADVICE OF INDEPENDENT TAX COUNSEL.

VIII. Miscellaneous.

Section 8.1 Compliance with Agreement. During the term of this Agreement, the parties shall not sell, encumber or otherwise dispose of the Common Stock, except in accordance with the provisions of this Agreement.

Section 8.2 Termination. This Agreement shall terminate upon the occurrence of any of the following events:

(a) The written agreement of the Shareholders and the Company;

(b) The cessation of business, dissolution, bankruptcy or insolvency of the Company; or

(c) The registration of the Common Stock under the Securities Act of 1933 with the result that the Common Stock becomes publicly traded.

Section 8.3 Amendment. The parties reserve the right to amend, alter or revoke this Agreement by an instrument in writing signed by the Shareholders and the Company.

Section 8.4 Notices. All notices, offers, acceptances, requests and other communications hereunder shall be in writing and shall be deemed to have been duly given if personally delivered or mailed by certified or registered mail. Written notice to the Company shall be addressed to its

principal place of business, and written notice to a Shareholder shall be to the address of record for that Shareholder on the Company's stock records. Any party may designate a new address by giving written notice to the other parties.

Section 8.5 Enforcement and arbitration. This Agreement shall be binding upon the parties and their successors, heirs, executors, administrators and assigns and such persons shall execute and deliver any documents or legal instruments necessary or desirable to carry out the provisions and intent of this Agreement. This Agreement shall be interpreted according to the laws of the State of Connecticut. Any dispute hereunder which the parties shall be unable to resolve shall be submitted to arbitration in Danbury or Waterbury, Connecticut, in accordance with the rules and practices then prevailing of the American Arbitration Association. Judgment upon the award rendered may be entered in any Court having jurisdiction thereof, and any such award may be supported by a decree of specific performance or appropriate injunctive relief. The cost of any such arbitration proceeding shall be shared equally by the parties to the dispute. Each of the parties shall pay for his own attorney's fees in any dispute submitted to arbitration under this Section.

Section 8.6 Endorsement of stock certificates. Upon the execution of this Agreement, the certificates of stock subject hereto shall be surrendered to the Company for endorsement as follows:

"This certificate is transferable only upon compliance with the provisions of a Stock Option Purchase Agreement dated ~~February~~ March 20, 2002, among James M. Scott, Walter A. Whitney, and Scott Swimming Pools, Inc., a copy of which is on file in the office of the Secretary of Scott Swimming Pools, Inc."

After endorsement the certificates shall be returned to the Shareholders. All stock hereafter issued to any Shareholder shall bear the same endorsement.

Section 8.7 Effective date. This Agreement shall become effective when it has been signed by all the parties.

IN WITNESS WHEREOF, the Shareholders have set their hands and seals and the Company has caused this Agreement to be duly executed on its behalf on the dates shown below, but as of ~~February~~ March 20, 2002.

March 20, 2002

James M. Scott

March 20, 2002

Walter A. Whitney

Scott Swimming Pools, Inc.
(the "Company")

March 20, 2002

by:
James M. Scott,
President

SCHEDULE A

Owner	Number of Share	Certificate Number
James M. Scott 45 Tanner Hill Road Warren, CT 06754	180	23
Walter A. Whitney 9 Church Hill Road Washington Depot, CT 06794	20	24

Attach copies of stock certificates

STOCK POWER

In consideration of Twenty Thousand Dollars represented by the nonrecourse promissory note attached hereto and made a part hereof, I, James M. Scott hereby assign and transfer to WALTER A. WHITNEY, TWENTY (20) Shares of the common capital stock of SCOTT SWIMMING POOLS, INC. standing in my name on the books of said Corporation represented by Certificate No. 24 herewith, and do hereby irrevocably constitute and appoint the secretary of the Corporation as Attorney to transfer such shares on the books of said Corporation with full power of substitution in the premises.

Dated as this 20th day of March, 2002.

James M. Scott

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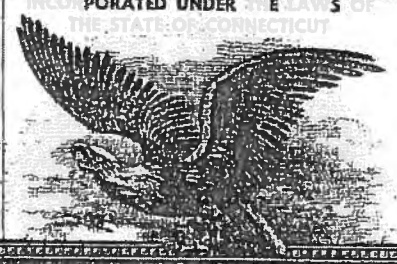

INCORPORATED UNDER THE LAWS OF THE STATE OF CONNECTICUT

NUMBER 31

SHARES

SCOTT SWIMMING POOLS, INC.

Authorized Capital Stock $5,000,000 — Par Value $1.000

FULLY PAID — NON-ASSESSABLE

This Certifies that WALTER A. WHITNEY is the registered holder of 20 Shares

SCOTT SWIMMING POOLS, INC.

transferable only on the books of the Corporation by the holder hereof in person or by Attorney upon surrender of this Certificate properly endorsed.

COMMON

In Witness Whereof, the said Corporation has caused this Certificate to be signed by its duly authorized officers and its Corporate Seal to be hereunto affixed this 20th day of MARCH A. D. 19 2002

PRESIDENT

Jay B. Scott

SECRETARY

A1553

Promissory Note

$20,000.00 Woodbury, Connecticut March 20, 2002

For value received, the undersigned promises to pay to the order of James M. Scott at 45 Tanner Hill Road, Warren, Connecticut, or at such other place as the holder designates, the principal sum of $20,000.00 without interest (except as provided below) upon demand.

If payment is not received within 15 days after it is due, then the holder may declare the undersigned in default and the entire unpaid principal will become due immediately. If the undersigned continues to be employed by Scott Swimming Pools, Inc. after September 30, 2002, this promissory note shall terminate and the undersigned's obligations under this promissory note shall be extinguished.

The undersigned waives presentment, protest, demand or notice in connection with the enforcement and collection of this promissory note, and agrees that if the holder declares the undersigned in default, the undersigned will pay the cost and expense of enforcement and collection of this promissory note including, without limitation, attorneys' fees, court costs and related disbursements.

The undersigned reserves the right to prepay this promissory note in whole or in part at any time prior to its maturity without penalty.

NOTWITHSTANDING ANYTHING TO THE CONTRARY CONTAINED IN THIS PROMISSORY NOTE, ANY AND ALL AMOUNTS OWING UNDER THIS PROMISSORY NOTE WILL BE COLLECTED ONLY FROM THE 20 SHARES OF STOCK IN SCOTT SWIMMING POOLS, INC. OWNED BY THE UNDERSIGNED, AND THE UNDERSIGNED SHALL NOT HAVE ANY PERSONAL LIABILITY UNDER THIS PROMISSORY NOTE, AND THE OTHER ASSETS OF THE UNDERSIGNED SHALL NOT BE SUBJECT TO THE OBLIGATIONS UNDER THIS PROMISSORY NOTE.

This promissory note shall be governed by, and construed and enforced in accordance with, the laws of the State of Connecticut without regard to its conflict of laws rules, and the undersigned consents to the jurisdiction of the courts of the State of Connecticut.

_____

Walter A. Whitney

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PLEDGE AND SECURITY AGREEMENT

This Pledge and Security Agreement (the "Pledge Agreement") is made by WALTER A. WHITNEY of Washington Depot, Connecticut (the "Pledgor"), in favor of JAMES M. SCOTT of Warren, Connecticut (the "Lender" or "Pledgee").

BACKGROUND

(a) Pledgor is the owner of share certificate number 24 for 20 shares of stock in SCOTT SWIMMING POOLS, INC. ("Pools"), a Connecticut corporation with its principal place of business in Woodbury, Connecticut.

(b) The Lender has made a loan to Pledgor in the amount of TWENTY THOUSAND ($20,000.00) DOLLARS (the "Loan"), pursuant to a Promissory Note of even date ("Note").

(c) As collateral to secure the obligations of Pledge (the "Obligations") under the Note, the Pledgor agreed to pledge his shares of common capital stock in Pools as evidenced by share certificate number 24 to secure the Note.

(d) By its signature at the end of this Agreement, Pools agrees to acknowledge the existence of the Pledge of the Shares, and to act in accordance with this Pledge Agreement with respect to the rights of the Pledge.

NOW, THEREFORE,

In consideration of the promises and the mutual agreements and undertakings hereinafter set forth, and in order to induce the Lender to extend credit to Pledgor, Pledgor hereby agrees with the Lender to secure the Note as follows:

Section 1. Grant of Security Interest. The Pledgor hereby pledges, grants, assigns and transfers to the Lender as Pledgee, on the terms and conditions hereinafter set forth, a continuing security interest in the issued and outstanding shares of stock of Pools Pledgor owns in Pools, namely 20 shares, represented by share certificate number 24 together with all dividends, distributions, interest and other rights with respect thereto, and all proceeds thereof (the "Shares").

Section 2. Security for Obligations. This Pledge Agreement secures the payment and performance of all obligations of the Pledgor pursuant to the Note. This Pledge Agreement shall create a continuing security interest in the Shares and shall remain in full force and effect until payment in full or termination of the Loan.

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Section 3. Transfer of Shares to Pledgee and Defeasance.

(a) The Pledgor has herewith delivered a certificate evidencing the Shares along with a stock power endorsed in blank to the Pledgee.

(b) The Pledgee shall be entitled to retain possession of the certificate evidencing the Shares so long as the Loan remains outstanding, and upon payment or termination of the Loan, shall return the certificates and stock power to the Pledgor.

(c) Upon default of the Loan, the Pledgee may exercise all of the rights and privileges in connection with the Interests to which a transferee may be entitled as record holder thereof, together with all rights and privileges granted hereunder, except as otherwise set forth herein.

Section 4. Additional Covenant. The Pledgor agrees that, except as otherwise consented to or approved by the Pledgee, the Pledgor will not sell, assign, transfer, pledge, or encumber in any other manner the Shares, except in favor of the Pledgee pursuant to this Pledge Agreement.

Section 5. Voting Rights. Unless and until there is an event of default, as set forth in Section 7 hereof, the Lender shall have no right to vote the Interests on any corporate matters while this Pledge Agreement remains in effect.

Section 6. Pledgor's Representations.

(a) Pledgor has granted no interest in the shares to any other person and owns them beneficially and of record.

(b) The recitals set forth in the Background Section of this Pledge Agreement are deemed to be representations of the Pledgor and are true and accurate in all material respects.

(c) Pledgor knows of no consent of any person which is needed as a condition precedent to his granting of the herein Pledge, nor will the granting of this Pledge violate or contravene any other agreement or constitute a default under any other agreement.

Section 7. Default Remedies. Upon a breach or default by Pledgor or his failure immediately to cure the breach or default, the Pledgee shall have the following rights and remedies:

(a) Transfer all or any part of the Shares and the certificates representing the same into the name of the Pledgee;

(b) Take control of any proceeds of the Shares;

(c) Execute endorsements, assignments, stock powers and other instruments of conveyance or transfer with respect to the Shares; and

(d) Exercise, to the exclusion of the Pledgor, the voting power and all other incidental rights of ownership with respect to the Shares, and the Pledgor hereby grants the Pledgee an irrevocable proxy, exercisable under such circumstances, to vote the Shares.

Section 8. Assignment. This Pledge Agreement is for the benefit of the Pledgee and his heirs and assigns; and in the event that the Pledgee shall assign, endorse, sell, transfer, or hypothecate to any person or corporation all or any portion of his rights hereunder, such assignment or transfer to that extent automatically shall constitute an assignment and transfer of this Pledge Agreement and of the rights given to the Pledgee hereunder, and the assignee, endorsee, transferee or successor of the Pledge shall have all of the rights and privileges given to the Pledgee by the terms hereof.

Section 9. Term of Agreement. This Pledge Agreement shall constitute a continuing agreement between the Pledgor and the Pledgee, and all powers, rights, privileges, obligations, and duties herein set forth shall apply to, inure to the benefit of, and be binding on the heirs, executors, administrators, successors and assigns of the Pledgor and the Lender.

Section 10. Notices. Any notice or other communication to be given hereunder shall be in writing and mailed or telecopied to such party at the address or number set forth below:

If to the Pledgor:	WALTER A. WHITNEY 9 Church Hill Road Washington Depot, CT 06754
If to the Lender/Pledgee	JAMES M. SCOTT 45 Tanner Hill Road Warren, CT 06754
With a copy to:	Henry Elstein, Esq. 1087 Broad Street Bridgeport, CT 06604

Or to such other person, address or number as the party entitled to such notice or communication shall have specified by notice to the other party given in accordance with the provisions of this Section. Any such notice or other communication shall be deemed given: (i) if mailed, when deposited in the mail, properly addressed and with postage prepaid; or (ii) if sent by telecopy, when transmitted.

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Section 12. Governing Law. This Pledge Agreement shall be governed by and construed in accordance with the laws of the State of Connecticut, without giving effect to its principals of the law of conflicts of laws.

Section 13. Remedies Cumulative. The rights and remedies herein are cumulative, and not exclusive of other rights and remedies which may be granted or provided by law.

Section 14. Counterparts. This Pledge Agreement may be executed in two or more counterparts, each of which shall be deemed an original but all of which together shall constitute one and the same instrument.

Section 15. Entire Agreement; Amendment. This Pledge Agreeemnt embodies the entire agreement and understanding between the parties relating to the subject matter hereof and there are no covenants, promises, agreements, conditions or understandings, oral or written, except as herein set forth. This Pledge Agreement may not be amended, waived or discharged except by an instrument in writing executed by the party against whom such amendment, waiver or discharge is to be enforced.

IN WITNESS WHEREOF, the parties hereto have executed or caused to be executed this Pledge Agreement as of the 20th day of March, 2002.

IN PRESENCE OF:

Diane Swan

Fay B. Platt

Pledgor: WALTER A. WHITNEY

Walter A. Whitney

Pledgee: JAMES M. SCOTT

ACKNOWLEDGEMENT

Pools, issuer of the shares of stock the subject of the foregoing Pledge Agreement, acknowledges the existence of the foregoing pledge and agrees to act in accordance with this Pledge Agreement with respect to the rights of the Pledgee therein.

March 20, 2002

SCOTT SWIMMING POOLS, INC.

By: James M. Scott, its President

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March 20,
~~February~~ , 2002

Mr. Walter A. Whitney
9 Church Hill Road
Washington Depot, CT 06754

Re: Employment with Scott Swimming Pools, Inc. and Stock Purchase Option

Dear Walter:

Per our discussion, this letter supplements the Employment Agreement dated ~~February~~ March 20, 2002 and the Stock Option Purchase Agreement dated ~~February~~ March 20, 2002 related to your employment with Scott Swimming Pools, Inc. (the "Company") and your option to purchase my stock.

1. All equipment currently leased to the Company by Morton Leasing shall be transferred to the Company at the completion of each lease at the price of $1.00.

2. There will be no outstanding loans to or from the Company from James M. Scott ("Scott"), any family member of Scott, or any entity owned by Scott or owned by any family member of Scott on or after March 31, 2007.

3. The Company's buildings located at 71 Washington Road, Woodbury, Connecticut (the "Buildings") shall be sold by the Company to Scott on or before March 31, 2002. It is anticipated that the purchase price for the Buildings will be between $300,000 and $400,000 which is the estimated current fair market value. Scott shall finance his purchase of the Buildings with a 10 year note to the Company in the amount of the purchase price (the "Note"). The interest rate of the Note shall be 7% per annum and the Note shall be amortized over 10 years.

4. ~~On~~ By April 1, 2003 the Company shall enter into a 10 year lease (the "Lease") with Scott for the Buildings and the property on which they are located. The base monthly rent payment shall be equal to the amount of the monthly principal and interest payment of the Note plus $100. The Lease shall be a triple net lease.

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5. If you choose to exercise the option set forth in the Stock Option Purchase Agreement, Scott will grant you the option to purchase the Buildings and the property on which they are located at the then current fair market value.

If this correctly sets forth the additional terms agreed to in our discussions, please so indicate by signing the enclosed copy of the letter.

Very truly yours,

SCOTT SWIMMING POOLS, INC.

By: _____
James M. Scott, President

_____
James M. Scott, Individually

Agreed and accepted
Date: 3/20/02

_____
Walter A. Whitney

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EMPLOYMENT AGREEMENT

THIS EMPLOYMENT AGREEMENT (this "Agreement") is effective as of the 31 day of ~~February~~ March, 2002 (the "Effective Date"), by and between SCOTT SWIMMING POOLS, INC., having an address at 75 Washington Road, Woodbury, Connecticut 06798 (the "Corporation"), a Connecticut corporation, and WALTER A. WHITNEY (the "Employee").

Explanatory Statement

A. The Corporation is a swimming pool contractor engaged in the business of designing, building, selling, servicing, performing landscaping for and renovating swimming pools.

B. The Employee has specialized management expertise and construction expertise.

C. The Corporation desires to employ the Employee as an assistant to the President to render certain management services for and on behalf of the Corporation and such other and further services as shall be assigned reasonably, form time-to-time, to the Employee by the President of the Corporation, and the Employee is willing to accept such employment, upon the terms and conditions hereinafter provided.

NOW, THEREFORE, in consideration of the Explanatory Statement, which shall be deemed to be a substantive part of this Agreement, and the mutual covenants, promises, agreements, representations and warranties hereinafter set forth, the parties hereto do hereby covenant, promise, agree, represent and warrant as follows:

1. Employment.

1.1 The Corporation hereby employs the Employee as an assistant to the President to render for and on behalf of the Corporation the services set forth in Section 3 below, and the Employee shall render such other and further services for and on behalf of the Corporation as may be assigned reasonably, from time-to-time, to the Employee by the President of the Corporation (the "services"). The Employee hereby accepts such employment with the Corporation and agrees to render the Services for and on behalf of the Corporation on the terms and conditions set forth in this Agreement. The power to direct, control and supervise the Services to be performed, the means and manner of performing the Services and the time for performing the Services shall be exercised by the President of the Corporation; provided, however, that the President shall not impose employment duties or constraints of any kind which would require the Employee to violate any law, statute, ordinance, rule or regulation now or hereinafter in effect.

2. Term. This Agreement shall commence on the date hereof and, subject to the further provisions of this Agreement, shall

end on March 31, 2007.

3. **Performance of Services.** The Employee shall devote all of his time exclusively to the Corporation's business and shall render the Services to the best of his ability for and on behalf of the Corporation. The Employee shall comply with all laws, statutes, ordinances, rules and regulations relating to the Services. During the term of this Agreement the Employee shall perform the following work:

(a) Year 1:

I. Learn the history, procedure and practices of the Corporation's business including:

1. Review of operating manuals;
2. Establish personal contact with all employees, key vendors, subcontractors and professionals (Employee shall be introduced by the Corporation's President (the "President") as the person to contact in the President's absence;
3. Engineering and site evaluation;
   Contract implementation
   A. Drawings
   B. Specifications
   C. Work Orders;
4. Field Implementation
   A. Develop capability, with tools and Equipment (exception Class 1

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vehicles)

B. Field Management

C. Dispatching:

5. Special item Purchasing;

6. Service;

7. Renovation;

8. Sales (retail and commercial);

9. Estimating and Specifications;

10. Financial Reports and controls;

11. Store Sales and Operations;

12. Subcontract Administration;

13. Personnel Administration;

14. Licensing and Permits; and

15. Corporate Filings and Corporate Maintenance.

(b) Years 2-5

The Employee shall coordinate with the President strategies to build the Corporation's business and increase the Corporation's net income. The Employee shall also work in conjunction with the President to improve subcontractor and supplier relationship, to develop new products, and to implement new strategic business alliances for the Corporation. The Employee shall have the authority to bind the Corporation to contracts and obligations, following the Corporation's standard procedures and guidelines. The Employee shall seek the President's approval, prior to exercising this authority.

Employee shall provide a company-wide budget by Department

for the year March 2003 to President by June 30, 2002. Additionally, Employee shall prepare a business plan for the year 2003-2005 by December 31, 2002 as well as a departmental assessment by department assessing personnel, information systems, and needs by December 31, 2002.

Employee and President shall set forth Quarterly goals and objectives for Employee beginning with the first month of employment.

(c) The Employee represents that his employment hereunder and compliance by him with the terms and conditions of this Agreement will not conflict with or result in the breach of any agreement to which he is a party or by which he is bound.

4. Compensation.

4.1 A. In compensation for all Services rendered or agreed to be rendered by the Employee hereunder, the Corporation shall pay to the Employee in the first year of this Agreement an annual base salary at the rate of $122,153 (the "Salary") until October 1, 2002, payable in equal, consecutive installments. Payment of the Salary shall be subject to the customary withholding tax and other employment taxes as required with respect to compensation paid by a corporation to an employee.

4.1 B. Salary shall increase on October 1, 2002 by $20,000.00 for a total new salary base of $142,153.00.

Years 2-5: $142,153.00 October 1, 2002 - March 31, 2007

4.3 Beginning in Year 2 (April 1, 2003-March 31, 2004),

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Corporation shall pay Employee as additional compensation a bonus within 60 days after the last day of each fiscal year an amount equal ~~to the President's bonus for such fiscal year.~~ The President's bonus shall mean all payments made to the President in any fiscal year above his base W-2 compensation of $250,000.

4.4 The Corporation shall reimburse the Employee for automobile, cell phone, travel, lodging and meal expenses incurred by him in connection with his performance of the Services hereunder upon submission by the Employee of evidence satisfactory to the Corporation, of the incurrence and purpose of each such expense.

4.5 The Employee's salary shall be suspended during any period where the Employee is disabled in excess of six weeks.

5. Vacations and Benefits.

5.1 Employee will receive company benefits of two weeks paid vacation and the four holidays and other company benefits similar to those enjoyed by other full- time employees of SCOTT SWIMMING POOLS, INC.

6. Confidential Information.

6.1 The Employee acknowledges that in the Employee's employment hereunder, the Employee will be making use of, acquiring and adding to the Corporation's trade secrets and its confidential and proprietary information of a special and unique nature and value relating to such matters as, but not limited to, the Corporation's business operations, internal structure,

To 40% of the President's bonus, for the second year, 60% of the President's bonus for the third year, 80% of the President's bonus for the fourth year, and 100% of the President's bonus for the fifth year.

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financial affairs, programs, software, systems, procedures, manuals, confidential reports, lists of clients and prospective clients and sales and marketing methods, as well as the amount, nature and type of services, equipment and methods used and preferred by the Corporation's clients and the fees paid by such clients, all of which shall be deemed to be confidential information. The Employee acknowledges that such confidential information has been and will continue to be of central importance to the business of the Corporation and that disclosure of it to or its use by others could cause substantial loss to the Corporation. In consideration of employment by the Corporation, the Employee agrees that during the Term of this Agreement and upon and after leaving the employ of the Corporation for any reason whatsoever, the Employee shall not, for any purpose whatsoever, directly or indirectly, divulge or disclose to any person or entity any of such confidential information which was obtained by the Employee as a result of the Employee's employment with the Corporation or any trade secrets of the Corporation, but shall hold all of the same confidential and inviolate.

6.2. All contracts, agreements, financial books, records, instruments and documents; client lists; memoranda; data; reports; programs; software; tapes; Rolodexes; telephone and address books; letters; research; card decks; listings; programming; and any other instruments, records or documents relating or pertaining to clients serviced by the Corporation or the Employee, the Services rendered by the Employee, or the

business of the Corporation (collectively, the "Records") shall at all times be and remain the property of the Corporation. Upon termination of this Agreement and the Employee's employment under this Agreement, the Employee shall return to the Corporation all Records.

6.3. All inventions and other creations, whether or not patentable or copyrightable, and all ideas, reports and other creative works, including, without limitation, computer programs, manuals and related materials, made or conceived in whole or in part by the Employee while employed by the Corporation which relate in any manner whatsoever to the business of the Corporation or any other business or research or development effort in which the Corporation or any of its subsidiaries or affiliates engages during Employee's employment by the Corporation will be disclosed promptly by the Employee to the Corporation and shall be the sole and exclusive property of the Corporation. All copyrightable works created by the Employee and covered by this Section 6.3 shall be deemed to be works for hire. The Employee shall cooperate with the Corporation in patenting or copyrighting all such inventions, ideas, reports and other creative works, shall execute, acknowledge, seal and deliver all documents tendered by the Corporation to evidence its ownership thereof throughout the world, and shall cooperate with the Corporation in obtaining, defending, and enforcing its rights therein.

7. **Restrictive Covenants.** The Corporation and the Employee acknowledge and agree that the Employee's Services are of a special and unusual character which have a unique value to the Corporation, the loss of which cannot be adequately compensated by damages in an action at law and if used in competition with the Corporation could cause serious harm to the Corporation. Further, the Employee and the Corporation also recognize that an important part of the Employee's duties will be to develop goodwill for the Corporation through his personal contact with customers, vendors and others having business relationships with the Corporation, and that there is a danger that this goodwill, a proprietary asset of the corporation, may follow the Employee if and when his relationship with the Corporation is terminated. Accordingly, the Employee covenants that for a period of two years after the Employee ceases to be employed by the Corporation, the Employee shall not, without the prior written consent of the Corporation, directly or indirectly, have any financial interest in or work for as an employee, consultant or otherwise in a competing swimming pool contracting company in the State of Connecticut, New York, Massachusetts, or Rhode Island, limited to those geographical areas that SCOTT SWIMMING POOLS, INC. has or is currently doing business or will have done business during the employment of the Employee.

8. **Termination of Employment.**

8.1 The Employee may terminate his employment hereunder by giving the Corporation 90 days written notice.

8.2 The Corporation may terminate the Employee's employment hereunder at any time prior to June 30, 2002.

8.3 Commencing on July 1, 2002, Employee may be terminated by the Corporation only for "Adequate Cause". "Adequate Cause" for termination of Employee is limited to conviction of or a plea of guilty to a felony or misdemeanor, dishonesty, any other criminal conduct against the Corporation, or a continued breach of the Employee's duties and obligations arising under this Agreement or of any written policy, rule, or regulation of the Corporation, for a period of 5 days following his receipt of written notice from the President specifying such breach. If the Corporation terminates the Employee for "Adequate Cause" and the Employee disputes the termination, such dispute shall be settled by arbitration as set out in Section 9 of this Agreement and the Corporation will unconditionally pay to the Employee his annual base salary in effect at the time of the termination, in equal, consecutive installments for a period of 26 consecutive weeks commencing on the date of termination (the "Unconditional Payment").

8.4 If the Employee is found to have been terminated without Adequate Cause, the amount of his damages shall be limited to the lesser of his actual damages or the sum of $150,000 plus the amount of the purchase price provided for in the in Section 2.3(f) of the Stock Option Purchase Agreement among the President, the Employee and the Corporation of even date

herewith. The damages paid to the Employee set out under this Section 8.4 shall be reduced by the amount of the Unconditional Payment made by the Corporation to the Employee as set forth in Section 8.3 above.

9. **Arbitration.** Any dispute or controversy arising under or in connection with this Agreement shall be settled exclusively by arbitration in either Danbury or Waterbury, Connecticut, in accordance with the rules of the American Arbitration Association then in effect.

10. **Notices.** All notices and other communications required or permitted to be given by this Agreement shall be in writing and shall be given and shall be deemed received if and when either hand-delivered and a signed receipt is given therefor or mailed by registered or certified U.S. Mail, return receipt requested, postage prepaid, and if to the Corporation to:

James M. Scott, President
Scott Swimming Pools, Inc.
75 Washington Road
Woodbury, CT 06798

and if to the Employee to:

Walter A. Whitney
9 Church Hill Road
Washington Depot, CT 06794

or at such other address as either party hereto shall notify the

other of in writing.

11. Miscellaneous.

11.1 This Agreement shall be binding upon and inure to the benefit of the Corporation, its successors and Assigns. This Agreement shall be binding upon the Employee and his heirs, personal and legal representatives, and guardians, and shall inure to the benefit of the Employee. Neither this Agreement nor any part hereof or interest herein shall be assigned by the Employee.

11.2 The terms and provisions of this Agreement may not be modified except by written instrument duly executed by each party hereto.

11.3 The use of any gender herein shall be deemed to be or include the other genders and the neuter and the use of the singular herein shall be deemed to be and include the plural (and vice versa), wherever appropriate.

11.4 This Agreement shall be governed by and enforced and construed in accordance with the laws of the State of Connecticut.

11.5 This Agreement sets forth the entire, integrated understanding and agreement of the parties hereto with respect to the subject matter hereof.

11.6 The headings in this Agreement are included for the convenience of reference and shall be given no effect in the

construction of this Agreement.

IN WITNESS WHEREOF, the parties have executed, acknowledge, sealed and delivered this Agreement the day and year first herein above set forth.

ATTEST:

SCOTT SWIMMING POOLS, INC.

By: James M. Scott, President

WITNESS:

Walter A. Whitney

[Tr. 5/22/13, Walter Whitney, Plaintiff's Case, Direct Examination]

* * * *

sold the company in about 15 years. At least that's what I heard.

ATTY. RUBIN: Thank you, your Honor.

BY ATTY. RUBIN:

Q Mr. Whitney, can you explain for the Court your calculation of the salary component of your damages.

A Yes. There was a salary that I was receiving at the time that I was terminated, including some of the benefits, a total of $175,000 per year. So that was my base salary of 142,000, plus my portion of, for instance, medical benefits, telephone, car, so forth, amounting to 175,000 per year for a period of 15 years.

Q And --

A Excuse me, a period of ten years. My plan was to work in the company for five years, five years subsequent I would, as owner, work and benefit from ownership of the company, and then in the final five years I would replicate it, to the best of my ability, what Jim Scott had done, namely, find an individual that could succeed me, train them over a period of five years, convey the company to that individual under, for purposes of this calculation, the same terms as were conveyed to me, just for the sake of clarity and simplicity, and then at age 66, 65 and 66, I would retire and be in the same condition of receiving a payout on a note for the same amount that Jim Scott had sold the company to me for.

ATTY. ELSTEIN: Your Honor, I would renew my motion. Move to strike.

THE COURT: Denied.

BY ATTY. RUBIN:

Q So, Mr. Whitney, in calculating your damages, you considered your salary for a period of ten years?

A Yes.

Q And you also -- what age were you in March of 2007?

A I was 50 years old -- I'm sorry. 2007, I was thinking when I bought the company -- or when he negotiated.

In 2007, I was 57.

Q And then you also in explaining your own assessment --

A I'm sorry, 56.

Q Okay.

A I turned 57 in that year.

Q And in explaining your damages to the Court, did you assume that you would be able to secure a -- withdrawn.

In assessing your own damages, did you assume that you would sell the company after owning it for ten years at the same price of it -- the same amount of the note that you and Mr. Scott had agreed to?

ATTY. ELSTEIN: Objection.

THE WITNESS: Yes.

ATTY. ELSTEIN: Lack of foundation.

THE COURT: Overruled.

THE WITNESS: Yes.

BY ATTY. RUBIN:

Q Now, the note that was called for under the stock option purchase agreement, the note from you to Mr. Scott,

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* * * *

A Yes.

Q And you relied upon his legal expertise, true?

A Yes.

Q And he was the only lawyer involved in the action who was the one who actually drafted the documents as opposed to suggesting modifications, true?

A Uh, as opposed to drafting modifications, in other words, there were modifications that were drafted by others.

Q Right, but Mr. Goldman is the one who prepared the first draft of the agreements?

A I prepared the first draft of the agreements in connection with my conversations with Mr. Scott.

THE COURT: Could we be clear. My understanding is there are three agreements entered into that day, well, maybe not all on that date, but three operative agreements, I think we can agree on that. Could we be clear which ones were drafted by whom.

ATTY. ELSTEIN: Yes, thank you.

BY ATTY. ELSTEIN:

Q With respect to the stock option purchase agreement, the first draft of that document was prepared by Attorney Goldman, true?

A Again, it was prepared by me.

Q Okay. You prepared the business terms of the agreement, but Mr. Goldman created the legal document to surround the business framework, am I correct?

A That's correct.

Q And the same is true of the employment agreement, you may have prepared some of the business terms, but Mr. Goldman drafted the legal document that eventually became the employment agreement?

A Yes.

Q And that's -- the same is true as the supplemental letter, true?

A Yes.

Q And so you would agree that Mr. Goldman was the scrivener, the writer of the documents?

A Yes.

Q You agree Ken Ostrowski was not the scrivener of the documents?

A No, he only provided, as you said, modifications to the documents.

Q And Jim Scott wasn't the scrivener of the documents?

A Correct.

Q And Henry Elstein was not the scrivener of the documents?

A Correct.

Q Okay. And you were satisfied with the advice and representation that Mr. Goldman provided to you throughout the -- leading up and through the signing of the agreements?

A I was.

Q Before Scott Pools, you described that you were a banker at what was last known as NewMil Bank before you left, correct?

[Tr. 7/10/13, Walter Whitney, Redirect Examination, Plaintiff's Case]

he had obtained his wealth from Scott Swimming Pools. He gave me many details, he told me that he hadn't inherited the money that it came from Scott Swimming Pools and that, well, there was much more than that, but, I don't know how far you want to go.

Q Well, if -- please explain anything else that Mr. Scott said to you on that subject during that timeframe.

A Well, we were of course, talking about the purchase price for the pool company. And we were talking about my compensation, Jim Scott's compensation, and the benefits of ownership of the company. And in each of those areas Jim Scott told me that there were amounts of money that the company was producing that would pay my salary, his salary, pay for his racing hobby, pay for amounts of money that were paid to his family members, pay for personal services that were -- that were given to him by the company.

That there would be sufficient funds to buy the debt that I was going to incur in order to buy the company. And that there would be no problem with the company producing the income to service all of those areas.

Q And when you mentioned, Mr. Whitney, the debt that you would incur to buy the company, can you explain more specifically what you meant by that?

A Sure.

The agreement was that I would buy the company for $1,200,000 plus another uneven amount. And that I would pay for it in the form of a note, over 10 years, at 7 percent

interest, and that those payments would be approximately $180,000 a year. And that there would be no problem for the company to produce a $180,000 a year in payment of that note, in addition to paying Mr. Scott $200,000 a year for his consulting, paying myself $175,000 a year, which was my agreed upon compensation, paying for the other items and expenses that -- that I had just mentioned.

Q Did you believe Mr. Scott when he told you that?

A Yes.

Q You -- you mentioned that Mr. Scott told you something about racing cars.

A Yes.

Q Can you explain that to the Court, please?

A Yes, he told me that he had a racing hobby that he had qualified as an advertising expense so that the company could pay for his racing and that the cost of having a full time in house mechanical and a number of racing cars, and the travel that was involved with it, was close to $200,000 a year.

Q And did Mr. Scott tell you who paid for the expenses of the car racing?

A He told me that Scott Swimming Pools paid for it.

Q Did Mr. Scott tell you anything else about the benefits of ownership of Scott Swimming Pools?

A He told me about the benefits that he had as the owner, and he told me that they would be mine once I became the owner

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[Tr. 7/10/13, Walter Whitney, Redirect Examination, Plaintiff's Case]

Can you explain for the Court -- question withdrawn.

You testified, previously, about your own calculation of some of the components of your damages, and I would like you you to explain for the Court, in detail, that calculation that you prepared?

A Sure, it really consists of three items, and that is the income that I would receive once I became the owner of the company until I sold the company and the sales price that I would receive when I sold the company. And my plan was to work for the company in -- in accordance with the terms of my employment agreement for 5 years, and then to sell the company after a total of 15 years, 10 years after I became the owner of the company. So, I would receive 10 years of compensation from the time that I owned the company until the time that I sold it. And that amount would be $175,000, in my mind I felt that was conservative because in was what I was earning at -- during the first 5 year period, and it was much less than what Jim Scott was earning, so, I felt that it was safe to estimate that I would continue to earn $175,000 a year, during that 10 year period.

ATTY. ELSTEIN: Objection, Your Honor. Move to strike as pure speculation. He started the statement by saying, I felt I could earn a $175,000 a year; it's not based on any reasonable prospect. It's pure speculation.

THE COURT: Well, are you going provide any additional -- are you going to connect it to

additional evidence or?

ATTY. RUBIN: We have -- we have a damage expert who's going to testify, Your Honor, but, I -- Mr. Whitney has testified that that was his salary under the employment agreement and also that that was less than the salary that James Scott was drawing --

THE COURT: Okay.

ATTY. RUBIN: -- so, I believe, on that basis alone it is far beyond the speculation.

THE COURT: All right. Overrule the objection. Go ahead.

ATTY. RUBIN: So, just so I'm --

THE COURT: I'm sorry it was a motion to strike. Denied.

BY ATTORNEY RUBIN:

Q So, you calculated, Mr. Whitney, that you would be compensated at the rate of $175,000 per year, for a period of 10 years. Correct?

A Yes, during the period that I was owning the company, that's right.

Q And did you do any further calculations of your damages relating to the fact that you have not been permitted to buy this business?

A Yes, there were two other components, one was the sales price of the company when I sold it to my successor and that amount I --

ATTY. RUBIN: Objection, Your Honor. Calls for

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[Tr. 7/10/13, Walter Whitney, Redirect Examination, Plaintiff's Case]

* * * *

an effort to determine whether anything else here, intend to offer in the future, have has information like this, so it can be redacted before it's offered.

ATTY. RUBIN: Very well, Your Honor. I will make sure that I do that.

THE COURT: Thank you.

ATTY. RUBIN: Thank you.

May I ask -- I'm going to take the original 78, as well.

THE COURT: Okay.

BY ATTORNEY RUBIN:

Q Mr --

ATTY. RUBIN: May I resume, Your Honor?

THE COURT: Yes, please.

BY ATTORNEY RUBIN:

Q Mr. Whitney, can you -- you mentioned that the company, Scott Swimming Pools, had a consistency of earnings. Do you recall that this morning?

A Yes.

Q Can you explain for the Court what you mean by that?

A Well, the -- particularly, the top line or the gross revenues would be in the 5 to 6 million dollar range, with some fluctuation, but, I -- at least in -- in general it showed, if you were to graph the gross income, that it was a gently upward sloping line.

Q Mr. Whitney, in addition to the component of your damages claim for -- for not having been permitted to buy

the company, do you also have other components of your claim -- claim for damages against James Scott and Scott Swimming Pools in this lawsuit?

A Yes.

Q Can you identify or explain those for the Court, please?

A There are various costs and -- and personal suffering that are involved.

Q All right.

THE COURT: I'm sorry, what was that?

THE WITNESS: Costs and personal suffering.

THE COURT: All right. Go ahead.

BY ATTORNEY RUBIN:

Q Can you explain the costs that you seek as damages for the Court? Explain the categories or types of costs.

A Yes. There were arbitration fees and attorney's fees, the cost of the arbitration and of course, the cost of ligation.

Q And --

ATTY. RUBIN: Excuse me one moment, Your Honor.

BY ATTORNEY RUBIN:

Q Do you recall the amount of the arbitration costs that you incurred in this -- in the arbitration matter, Mr. Whitney?

ATTY. ELSTEIN: Objection, Your Honor. Relevance.

THE COURT: Well, he just testified it's one of

his elements of damages.

ATTY. ELSTEIN: I understand that, but, it's not an element that's permissible under the law.

THE COURT: Well, there's a -- I'll let counsel respond.

ATTY. RUBIN: I don't understand.

THE COURT: Contents that it's not allowable under the law. I -- I -- there is a CUTPA claim, but, perhaps you care to respond.

ATTY. RUBIN: There is -- there is a CUTPA claim and there's also a claim that anticipatory brief of the stock option purchase agreement which and -- and wrongful failure to participate in the arbitration.

And one of our claims for damages is the fees and cost that Mr. Whitney incurred in connection with those activities.

THE COURT: All right.

ATTY. RUBIN: There's also a fraud claim, which I would add, at Your Honor, would permit -- would permit the Court to award fees and costs, if it chose to do so under the circumstances.

ATTY. ELSTEIN: And that would be on a post-trial proceeding.

The claims that they make, if I may be permitted to argue, go to -- we spent attorney's fees in arbitration, where they admit that the agreement provided each side paid their own. They're now

trying to get in attorney's fees here, which would not be permissible there and I don't believe they're admissible here, under any theory of the law. It's the American Rule. The only exception might be CUTPA. If and when there's a finding under CUTPA, if that applies, may be an award of fees.

THE COURT: Well, I think they need to put in the elements of the alleged damages, whether we ever get to that point is a totally different question.

So, I'm going to overrule the objection. You can introduce the evidence.

ATTY. ELSTEIN: May I also just make an argument because we had a pre-trail discussion of this, with Your Honor, on the evidence coming, perhaps, after trial so that we could --

THE COURT: Well, whether we would bifurcate the issues, no, I'm not going to bifurcate this case.

ATTY. ELSTEIN: No, but -- but, the point was, not coming in to object to the amount of the quality of the fees in providing in a post-trial right, is what we agreed to.

THE COURT: I'm sorry, say that again, Counsel.

ATTY. ELSTEIN: At pre-trial we had a phone conversation, status conference with Your Honor, and my point then was -- you know -- certain exhibits are going to be offered on fees, I don't want to be precluded from a -- might being a -- permitted to

question the amount and the validity and the reasonableness of any of these fees. But, allowed to do that post-trial went and if there's a finding that they would be recoverable.

And I understood then, and I still think now, that I should be permitted that post-trial and award, if any, on attorney's fees to then attack those fees. Otherwise, what we anticipated doing was having experts on the issue and coming in and having those kinds of --

THE COURT: Having experts on what issue?

ATTY. ELSTEIN: Attorney's fees.

THE COURT: I wasn't aware of that. I don't recall that in any status conference discussion.

ATTY. ELSTEIN: It was with Attorney Healey, myself, and Your Honor, on the phone.

ATTY. RUBIN: If I might, Your Honor? It was my understanding based on the discussion, that we would put in now the evidence of the amount of arbitration fees claimed and the amount of the attorney's fees claimed. We would not put in any of the attorney's fees bills at this time, which we would raise all these issues about privilege and redaction and that consistent with Mr. Elstein's report that if the Court awarded attorney's fees, we would then provide the detailed bills and there would be an opportunity to face those.

THE COURT: That's my recollection. What counsel doing now is just making a record. I -- it doesn't -- there's no finding by me that these bills are -- are valid, they're accurate --

ATTY. ELSTEIN: Right.

THE COURT: -- they are to be awarded.

ATTY. ELSTEIN: Correct.

THE COURT: They're simply making a record of what was expended.

ATTY. ELSTEIN: And I understand Your Honor's ruling and that's fine. But, I do not want to be precluded from being able to attack the -- what they claim are the attorney's fees in the arbitration, as well, by not raising it now and dealing with it post-trial just like theirs.

THE COURT: All right. In summary you just made your record. Your objection has been made and you want that opportunity and I think there's no disagreement about the fact that you'll have that.

ATTY. ELSTEIN: Okay. Thank you.

THE COURT: All right? So, overrule the objection.

ATTY. RUBIN: Thank you, Your Honor.

BY ATTORNEY RUBIN:

Q Mr. Whitney, showing you Exhibit 55, which has been previously marked. Do you recognize that to be 1 of the fee bills from American Arbitration Association directed to you?

A I do.

Q And in addition, you indicated that you sought payment for attorney's fees?

A Yes.

Q And do you seek -- well, can you identify to the Court, the category -- what categories of attorney's fees that you seek as part of your damages in this action?

A The attorney's fees in connection with the arbitration.

ATTY. RUBIN: If I could have one moment, Your Honor.

BY ATTORNEY RUBIN:

Q Showing you what's been previously marked as Exhibit 54 for identification only, Mr. Whitney, can you identify that for the Court?

A These are copies of my payments to my attorney in connection with the arbitration.

Q And what was the name of your attorney in the arbitration?

A Joseph Secola.

Q And do you know the total amount that you paid to Attorney Secola for his representation of you in the arbitration?

A I recall the total the amount for the arbitration -- the arbitration costs being upwards of $80,000, but, I forget how much was for Mr. Secola.

ATTY. RUBIN: Offer as a full exhibit.

ATTY. ELSTEIN: Your Honor, I -- what I'm being shown are payments. The testimony is it's a payment of a bill, we don't have the bills to match.

THE COURT: I'm sorry, say that again, please.

ATTY. ELSTEIN: We don't have the bills to match it up.

THE COURT: No, but, he's testified that that's the amount that he paid. That's -- I mean --

ATTY. ELSTEIN: Yes.

THE COURT: I think that's sufficient --

ATTY. ELSTEIN: As long as they're not precluded from scratching that surface. Thank you.

THE COURT: Understood, understood. Overrule the objection. May be marked as a full exhibit, Plaintiff's 54.

ATTY. RUBIN: Thank you.

BY ATTORNEY RUBIN:

Q Mr. Whitney, do you claim any other attorney's fees as part of your damages in this case?

A The attorney's fees for this action here.

Q Okay.

Showing you a copy of Plaintiff's Exhibit 150 for identification, can you identify that for the Court, please?

A These are charges for attorney's fees in this case.

Q Does the document cover any particular time period?

A It covers April 3, 2012 to June 19, 2013.

ATTY. RUBIN: Offer as a full exhibit, Your

Honor.

ATTY. ELSTEIN: Your Honor, I object to this.

THE COURT: Basis?

ATTY. ELSTEIN: Hearsay. It's also not the best evidence.

THE COURT: Well, if -- do you want counsel to testify as to what her bills are?

ATTY. RUBIN: Not particularly, Your Honor, no. But, I would -- I think that in order to prove this, I need see the underlie, I will not stand on a hearsay objection.

THE COURT: All right.

ATTY. RUBIN: Your Honor, it was my understanding that based -- that we would as part of our case at this time, for the evidence of the amount claimed and that if the Court awarded attorney's fees, whether for this matter or for the arbitration --

THE COURT: At that time.

ATTY. RUBIN: -- we would provide counsel with the bills and if necessary testimony about -- further testimony about those claims. So, it's for that reason that Exhibit 150 is offered at this time.

THE COURT: So, you're making a record as to the figure, you're not expecting any kind of an award, if at all, until liability is found, if liability is found, and after there be a subsequent hearing that

would detail the source of these bills, however, we agree to do that with Mr. Elstein having the opportunity to oppose the ultimate figure. As I understand that. I think that's what you all just agreed on a few minutes ago.

ATTY. RUBIN: To clarify one -- one point, which might be hairsplitting, Your Honor. I would expect that when the Court issues its decision, the Court would indicate whether or not it awarded, Mr. Whitney, any attorney's fees, and if so, the Court would conduct further proceedings to determine the amount.

THE COURT: I think that's what we all just said.

ATTY. ELSTEIN: Yes, sorry, I don't know why we need the evidence any more.

THE COURT: We're all in -- no, no, it's important to get --

ATTY. ELSTEIN: Yes.

THE COURT: -- make sure we're all in the same place.

ATTY. RUBIN: Yes.

THE COURT: I think we're all in agreement, are we not?

ATTY. ELSTEIN: Yes.

THE COURT: So, I'm going to overrule the objection on that basis.

ATTY. RUBIN: Okay. So, the -- there will be no finding of the fee, just an entitlement to the fines.

THE COURT: Or not.

ATTY. ELSTEIN: That's fine. Thank you.

THE COURT: We may never get to this issue.

ATTY. ELSTEIN: Yes.

THE COURT: That's the understanding as to how we're going to proceed. Go ahead.

ATTY. RUBIN: Thank you.

THE COURT: So, it may be marked as a full exhibit. That is Plaintiff's 150.

ATTY. RUBIN: Your Honor, could I have one moment, I seem to have shuffled my papers too much.

THE COURT: In view of the fact that your un-shuffling your papers and the time. Do you think this is an appropriate time to break or are you nearing conclusion.

ATTY. RUBIN: That -- that would be fine if -- if I could have -- it we could break now then I can finish directly without holding anyone up tomorrow morning.

THE COURT: Excellent.

ATTY. RUBIN: I need a few minutes, I've over shuffled things.

THE COURT: All right.

ATTY. RUBIN: I apologize.

THE COURT: I -- I raise that now because, as

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[Tr. 7/11/13am, Walter Whitney, Re-cross Examination, Plaintiff's Case]

Pools you were never given accountant-prepared financial statements for the company.

A Yes, that's true.

Q Okay. And yet you did your analysis on what you thought you could earn at the company after you left, true?

A Yes. That's true.

Q And you came up with the idea that you could earn $175,000 in salary for ten years, right?

A Yes.

Q And that you then get a consultant agreement and work another five years similar to the deal with Jim Scott.

A Identical to that deal.

Q And --

THE COURT: I'm sorry, can I interrupt. And I think I actually wasn't sure I got this right yesterday. You expected the salary for the next five years to be $175,000, is that the figure?

THE WITNESS: Yes.

THE COURT: All right. That's what I thought. Thank you.

BY ATTY. ELSTEIN:

Q And that you then get the consulting agreement for five years similar to the -- same as the deal here?

A Identical to the deal.

Q And then you get the same note from the buyer of the company, true?

A I didn't consider that.

Q You get the same amount for the sale of the company.
A The purchase price for the company was identical.
Q Right. Okay. Isn't it true that when you did that analysis you did it based upon a review of the tax returns and the financial statements for the company, right?
A No. I previously said that I had those financial statements, but that I didn't need them in order to make my analysis.
Q So you only did it based on the tax returns.
A I did it based on the gross revenues of the company. The gross revenues are really determinant of everything else.
Q And so you took the gross revenue and you determined, based on the gross revenue, what you thought you could earn as a net profit from the company. Is that what you're saying?
A That in combination with what Mr. Scott had told me he was receiving and the cash flow that was available at that level of gross revenues.
Q Okay. I'm talking about now after 2006, you're now out of the company, you get ready to bring this lawsuit, and you did your analysis in saying I would earn $175,000 a year for ten years.
A Yes.
Q You were basing that upon a review of the tax returns and tax returns only for the company, true?
A No. I was basing it on the fact that I had received

$175,000 for five years and that Jim Scott was receiving $250,000, he said, and that I would be taking his place, but instead of receiving the $250,000 a year that Jim Scott told me he was receiving as the owner I was proposing that I would receive just a continuation of what I had in the five years that I worked there.

Q Okay. Isn't it true that you were making $175,000 at the beginning?

A I had a period of probation, if you will, and within a few months I went to a base pay of $142,000 and the difference between the 142 and the 175 is benefits.

Q Medical, whatever benefits you otherwise receive -- car, phone, that kind of thing.

A Correct.

Q Okay. So you're not talking about the net profit, you're talking about the 175 being inclusive of those benefits, right?

A Yes.

Q And now you're testifying you're basing that 175 on two things; one, the tax returns and information that Jim Scott had given you before you signed the agreements, right?

A During the -- he had given me information before I signed the agreements. After I signed the agreements and it was based on what he told me and what I knew about the gross revenues of the company and my historical experience of -- of what I was earning that I based it on.

Q Okay. Now, to do the analysis that the company would

DOCKET NO: LLI-CV-09-5007099S	:	SUPERIOR COURT
WALTER WHITNEY	:	JUDICIAL DISTRICT OF LITCHFIELD
v.	:	AT LITCHFIELD, CONNECTICUT
J.M. SCOTT ASSOCIATES, INC., SCOTT SWIMMING POOL, INC., AND JAMES M. SCOTT	:	DECEMBER 11, 2014

BEFORE THE HONORABLE JOHN A. DANAHER, III, JUDGE

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THE MARSHAL: Good afternoon, your Honor.

THE COURT: Good afternoon, Marshal.

Good afternoon, everybody.

ATTY. RUBIN: Good afternoon, your Honor.

ATTY. ELSTEIN: Good afternoon, your Honor.

THE COURT: Please be seated.

This is the case of Whitney versus Scott. This is Civil Number 095007099. Parties identify themselves for the record, please.

ATTY. RUBIN: Ann Rubin, your Honor, and Sarah Healey representing the plaintiff, Walter Whitney.

ATTY. ELSTEIN: Bruce Elstein, Goldman, Gruder and Woods for the defendant, and with me is Ken Bartschi from Horton, Shields and Knox.

THE COURT: All right.

All right, there is a motion for articulation filed on October 9, 2014 asking this Court to articulate three aspects of its memorandum of decision dated March 26, 2014. That motion was transmitted to this Court, and I did issue an order on November 14th asking the parties to appear here for a hearing, which I believe is authorized by Practice Book Section 66-5. That provision permits a hearing at which arguments may be heard, evidence may be taken or stipulation of counsel received and approved.

The parties did come before this Court on

October 30th regarding an unrelated matter; that is, unrelated to the motion for articulation. But I did at that time attempt to give the parties an opportunity to address the issues raised in the motion for articulation. I don't think that really happened. I had some views expressed by counsel for the plaintiff. And if I recall -- forgive me if I'm not recalling accurately, Mr. Elstein, but I think the defendant's position was essentially the decision is what it is and it wasn't something, at least at that point, particularly, you wanted to comment on. That's the best of my recollection. And whether that's exactly right or wrong is probably beside the point, because I did order this hearing directed specifically to the motion for articulation pursuant to that rule.

There were, as I said, three questions presented in the motion for articulation, and the first asks for the factual and legal basis for the $250,000 punitive damages award.

I might as well go through all three questions to be sure we're all on the same page.

Questions two and three I think were related. There was an award of interest to the plaintiff against both defendants at the rate of ten percent per year, and the question asked was whether the Court intended the interest order to run from the

date of the judgment and if not, what date, and if from some other date, what the legal and factual basis was for the starting date.

Is that -- so far, is there a disagreement with anything that I've said, turning first to the plaintiff?

ATTY. RUBIN: No, your Honor.

THE COURT: Defendant?

ATTY. ELSTEIN: No, your Honor.

THE COURT: All right.

Well, my recollection of the issues and of the positions taken by the parties are that, if I'm not mistaken, the plaintiffs asked for punitive damages I think in the amount of four million dollars. Is that correct? That was --

ATTY. RUBIN: I don't remember the amount, your Honor, but I know we did ask for punitive damages both in our prayer for relief, in our complaint, and in our -- at trial and in our post trial brief.

THE COURT: Well, you're -- this is a long case and a lot to remember, but my recollection is that when you sought punitive damages, at that time undecided was the CUTPA claim.

ATTY. RUBIN: That's right. The CUTPA -- well, at the time that we asked for punitive damages, all of the claims were undecided, right.

THE COURT: Well, I missed -- I didn't --

ATTY. RUBIN: But that's right. We had a pending CUTPA claim, which at that point was as viable as the other claims.

We also had, of course, a claim of fraud and a claim of breach of covenant -- breach of the covenant of good faith and fair dealing, all of which would support an award of punitive damages --

THE COURT: Right.

ATTY. RUBIN: -- under certain circumstances.

THE COURT: I didn't phrase that appropriately. Of course nothing was decided --

ATTY. RUBIN: Right.

THE COURT: -- at the time you were filing your post-trial briefs, but among the claims was a CUTPA claim. And there was a question that I think was open until late 2013 when the Supreme Court decided Ulbrich versus Groth and stated at that time that -- it was squarely deciding the question of whether punitive damages under CUTPA should be limited to common law punitive damages.

But that decision and other decisions, I believe, made clear that punitive damages are limited to attorney's fees. Is there an agreement on that?

ATTY. RUBIN: We haven't been able -- I haven't been able to find a case, your Honor, which holds otherwise --

THE COURT: All right.

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ATTY. RUBIN: -- which expressly awarded -- which expressly awarded or supported the award of punitive damages on some basis other than attorney's fees outside of the CUTPA context or other statutory claims which authorized double and treble damages.

THE COURT: All right. And that was my sense as well. I was attempting to -- I thought my recollection was that you were looking for -- maybe you were looking for total damages in the amount of four million dollars, but I --

ATTY. RUBIN: Yes. That's right.

Excuse me. That is right, your Honor.

THE COURT: I was attempting to award allowable punitive damages equal to attorney's fees but without really -- I didn't do the analysis that would reflect what I was trying to accomplish. I did see I think a recent Appellate Court case in which Judge Blawie did a lodestar analysis. I don't know if you saw that. I don't happen to have it in front of me.

My recollection is the Appellate Court said, No, it has to be based on the actual attorney's fees, and -- so that's -- that was my -- my goal was to award punitive damages equal to attorney's fees. The evidence I had on that issue was incomplete, as I recall, because the case was ongoing, there was more to be done. My recollection is I think, and I may be wrong about this, Exhibit 150, which reflected

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approximately, I'm going from memory, $138,000 in attorney's fees, something like that.

ATTY. RUBIN: That's right, your Honor. Trial Exhibit 150, which of course was a full exhibit, was a listing of the attorney's fees incurred by Mr. Whitney with the Law Firm of Carmody and Torrance through a bill date of June 7, 2013, which would have meant --

THE COURT: Correct.

ATTY. RUBIN: -- effort expended through May of 2013. And at that point, we had had one or two days of trial, and of course we then went on to have -- let's see, I did the calculation. There were thirteen additional days of trial after the day that Exhibit 150 was put into evidence. And so from Exhibit 150 it was a relatively straightforward matter for the Court to do the math because to -- to make a reasonable approximation of what the additional attorney's fees, or at least the minimum amount, what the additional attorney's fees would be through trial let alone the post-trial briefing, and of course that is -- that issue; that is, the ability to make a reasonable approximation of attorney's fees, is something that's rather uniquely within the skillset of an experienced trial judge who always in an ongoing basis hears trials of various sorts and hears attorney's fee evidence in all sorts of

matters, and so I think there was sufficient evidence in the record from which the Court could make a reasonable conclusion as to fees, whether approximate or exact.

THE COURT: Well, I will tell you it would have been better if I had done the more detailed lodestar analysis done by Judge Blawie, although I now am of the view, based on that decision placed by the Appellate Court, that they're looking for -- the Court should be seeking and receiving specific evidence as to what the fees are, and I propose to invite you, if you're in a position to do so, to submit a statement as to what the fees are to date so the record will have them. Now, whether -- I'll hear from the defendants as to their view on that, whether they believe that should be a full exhibit. Practice Book 66-5 does permit the Court to hear evidence, and that would be the basis for suggesting that. I think it would complete the record. But I'd like to hear from the defendant on that issue.

ATTY. ELSTEIN: Thank you, your Honor.

First, I want to make sure that you have -- you're aware of an objection we filed to this hearing. We filed it yesterday.

THE COURT: I am not.

ATTY. ELSTEIN: Okay. We set forth our grounds for objecting,

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THE COURT: Do you have a copy with you?

ATTY. ELSTEIN: I do.

THE COURT: I'm sorry. I should have looked.

Thank you. Give me a moment to review it.

I will say that I -- the last pleading I looked at, I asked the parties to select dates, and you did choose this date. I think I assumed -- well, I assumed that --

ATTY. ELSTEIN: It's dated today but it was filed yesterday, your Honor.

THE COURT: Right. But I assume that by agreeing to the date, I guess I wrongfully assumed, you were agreeing to the hearing. But in any case --

ATTY. ELSTEIN: That was an incorrect assumption.

THE COURT: Clearly.

Let me look through the objection.

Okay, I have reviewed it. What's your -- you've reviewed it as well, Attorney Rubin, the objection?

ATTY. RUBIN: First of all, your Honor, there's no case that I could find, and there's no case cited by the defendants that says that the Court isn't permitted to take evidence in -- at a hearing on a motion for articulation.

Having said that, and subject to the decision that the Court just mentioned indicating that perhaps the lodestar calculation is something -- is evidence

that the Court should have, I think there is enough evidence in the record to support the Court's award based on a reasonable approximation of the attorney's fees. And I also wanted to call the Court's attention to a bit of testimony in the trial transcript that goes to the same issue, but.

So I guess our position is there's no case law that supports the defendant's position, or at least no case law that holds that evidence isn't admissible at a hearing such as this, and I'm not certain that -- or at least coming here today, I believe that the Court really didn't need any additional evidence to have a full and complete record to support the punitive damages award because it's already in the record.

But, you know, having said that and the court order having directed us to be prepared to present that evidence, of course we are prepared to do so.

THE COURT: All right. I don't see -- give me one second.

I don't see Rule 66-5 in the Practice Book drawing a line between articulation or rectification with regard to the provision that evidence may be taken in the rule. I think the question's open.

If it's determined by the Appellate Court that evidence under that rule is only admissible for issues relating to rectification, then the Appellate

Court will disregard anything I take, but I don't see any advantage to precluding the evidence of they take a different view. On the contrary, I think the record will be complete if they choose the evidence can be considered.

I did intend to approximate to the best of my judgment what the attorney's fees would be. I knew that the evidence I had did not reflect the complete attorney's fees because the trial continued after that date because there was briefing to be done, transcripts to be reviewed -- I know how much time it took me to read those transcripts -- and briefs to be written. And so I have seen the two thousand -- I believe it was a 2014 Appellate Court decision that I had not seen prior to my opinion that drew a -- not drew a line but rejected a lodestar analysis for the purposes of calculating punitive damages, if I recall the decision correctly, and indicated that the actual fees expended could form the basis. And so for that reason I will overrule the objection to that extent and will allow the plaintiffs to offer whatever evidence they have of attorney's fees expended in connection with this litigation to the present.

Now, I don't know if you have evidence of attorney's fees expended with regard to Mr. Secola. The evidence that was offered -- again, I'm going from recollection -- is that I think there was an

estimate that between sixty-five thousand and eighty-five thousand was expended by Mr. Whitney in connection with the arbitration. I think that was the figure, or something like that. And I believe that in the opinion I awarded the lower end of that figure. However, Mr. Secola did other work after the arbitration, so I don't know if you have evidence of that. I know I did not at trial, or I don't believe I did at trial.

ATTY. RUBIN: Right.

Your Honor, I guess we're -- I'll just say that some of the records that we obtained from Mr. Secola were less than organized, and so because Mr. Whitney's fees with our firm exceed I think by some margin at least the award entered by the Court, we're not going to try to -- we decline to try to unwind the records given to us by Mr. Secola for that purpose.

THE COURT: Is it agreed by both parties that, other than the $250,000 figure, there -- I don't recall any award in the opinion to the plaintiff for fees expended by the plaintiff to Mr. Secola other than the fees associated with the arbitration. That's correct, isn't it?

ATTY. RUBIN: Actually, I believe, your Honor, my memory of the opinion is that the Court -- Mr. Whitney testified that he had costs and expenses in

the arbitration of between sixty and eighty or sixty-five and eighty-five thousand dollars. Those were costs, not exclusively attorney's fees. The Court awarded Mr. Whitney, as your Honor indicated, the lower number, whether it was sixty or sixty-five thousand dollars, and declined to award him any additional amount with respect to the arbitration.

THE COURT: Correct. But there was work unrelated to the arbitration done by Mr. Secola --

ATTY. RUBIN: Right.

THE COURT: -- for Mr. Whitney after --

ATTY. RUBIN: There was.

THE COURT: -- the arbitration was done.

ATTY. RUBIN: Right.

THE COURT: And there's no award for that --

ATTY. RUBIN: Right.

THE COURT: -- other than the general attorney's fee -- punitive damages award that was made.

ATTY. RUBIN: Correct.

THE COURT: All right.

All right. So what do you have with regard to current fees expended?

ATTY. ELSTEIN: May I be heard, your Honor?

THE COURT: Certainly.

ATTY. ELSTEIN: We object to the relevance of any additional information being offered today. I think your Honor's incorrect on your understanding of

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the rule. I think it would turn all the cases that have been written on articulation and the reasons for articulation into an opportunity for courts every day to go back and change the basis for what they did.

The basis for the rule is twofold: one is articulation and one is rectification. It's clear from the cases that the articulation prong of the rule applies to what we have asked for here and doesn't permit a post-judgment hearing. That would violate the four-month rule. It would also violate the cases that say a court is not to change the basis; it's not to allow additional evidence to support the bases; it's to articulate why the decision says what it said based on the evidence that existed at the time. It's not a chance to supplement now. All the cases that have been written on articulation stand for that basis.

Now, I agree the rule does provide for a hearing, and that's simply because under the rectification prong there may be a requirement to have evidence on a missing exhibit from the record or a, or a missing transcript or something else that would be indicative of a mistake, and there might be evidence to correct that or rectify that portion of the record.

I would also point out that I am in very much disagreement with the argument that Attorney Rubin

makes on the existing evidence in the case at the time it was tried, because I'm sure your Honor and Attorney Rubin will recall that the defendant specifically reserved, by agreement, the right to challenge any and all fees post-judgment if and when the Court decided it would be appropriate to make an award based on them.

THE COURT: I don't recall that.

ATTY. ELSTEIN: Well, it's July 10th.

THE COURT: I don't disagree with you. I just don't recall it.

ATTY. ELSTEIN: I'll point you to the record, your Honor. It's the transcript --

THE COURT: As I said, I don't disagree with you. I'm just telling you I don't recall it.

Attorney Rubin --

ATTY. RUBIN: I do recall it.

THE COURT: So that you believe that the parties reserved an opportunity to be heard on attorney's fees?

ATTY. RUBIN: The defendants made a reservation, but it's clear that the defendant's didn't raise any objections to the $250,000 portion of the award until it -- until -- until they filed the motion for articulation, and even then it's not clear that that issue is being challenged. But the July 10th transcript does address the issue, your Honor, and

there is -- there is discussion on the record between counsel and the Court about that issue, absolutely.

THE COURT: And I don't have that transcript with me. So what did you --

ATTY. ELSTEIN: I have the portion if you'd like to read it.

ATTY. RUBIN: I do too.

THE COURT: Thank you. I would.

ATTY. ELSTEIN: And just for the record, I don't think that was the only time that the issue was discussed, but it's the one that's, I think, most clear.

THE COURT: Well, help me out. Haven't you just indicated here that the parties reserved the right to introduce evidence of attorney's fees post-trial?

ATTY. ELSTEIN: If and when it was found to be appropriate, it would have been addressed in a post-trial hearing. Your Honor went ahead and made a finding without allowing us that opportunity.

THE COURT: Because the finding was not a separate award of attorney's fees. It was an award of punitive damages, and in Connecticut the figure that make up punitive damages are attorney's fees.

ATTY. ELSTEIN: That's correct.

THE COURT: It's the manner in which they were calculated that by -- perhaps I should have anticipated, but by at least a subsequent Appellate

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Court ruling that I saw indicated that there needed to be specific evidence of fees expended as opposed to an estimate by the Court, which is what I did.

I'm going to overrule the objection. I will allow you to make the offer. I, quite frankly, think that the July 10th transcript is not -- it may be a little bit ships passing in the night, but it may be supportive of where we're going here. The Practice Book rule does permit evidence to be taken. I did award punitive damages. I was aware and am aware that they are intended to be reflective of attorney's fees.

If the Appellate Court agrees with you that such evidence can't be taken in this setting, then the Appellate Court will disregard it. But if I don't take it and the Appellate Court decides that such evidence could be admitted, it's not going to be in the record, so it doesn't make sense to me to not accept it. So I'm going to allow the plaintiff -- I overrule the objection. You may make your offer.

ATTY. RUBIN: Thank you, your Honor.

Two options: I can ask Attorney Healey to get on the witness stand and authenticate the business records of our law firm, or I can show the records to the -- to defendant's counsel.

What's your pleasure?

ATTY. ELSTEIN: I take no position, your Honor.

It's their burden of proof.

THE COURT: All right. You've been given the opportunity to cross-examine a live witness, but if there is no objection to -- other than the one you already made, to the authenticity of the document, then you can simply make the offer. That's what I'm hearing.

ATTY. RUBIN: Is there an objection to the authenticity of the records?

ATTY. ELSTEIN: No, your Honor.

THE COURT: All right.

ATTY. RUBIN: Would the Court inquire as to whether defendant's counsel wishes to cross-examine Attorney Healey on these records, in which case I'll ask her to take the stand, otherwise I'll just offer the documents.

THE COURT: I think I just did, and I think he said he took no position.

ATTY. RUBIN: Oh.

THE COURT: So, I gave him the opportunity.

ATTY. RUBIN: Thank you, your Honor.

Then we offer the following -- excuse me -- the following records. I'll go through them and identify them one at a time, if that works best.

THE COURT: Are they marked in some way?

ATTY. RUBIN: No.

ATTY. ELSTEIN: They are not, your Honor.

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THE COURT: You should mark them for identification and then --

ATTY. RUBIN: Okay.

May I ask the Clerk to mark as Exhibit 1 for identification a letter dated March of 2012? It's the first item.

Here, I'll take those back.

Are we using 1 for ID, your Honor?

THE COURT: Yes.

ATTY. RUBIN: Thank you.

So the first item is a letter dated March of 2012 marked Exhibit 1 for identification, which is an engagement letter between Mr. Whitney and our law firm, Carmody and Torrance.

The second document marked Exhibit 2 for identification is an engagement letter dated September 25, 2013 between Mr. Whitney and Carmody and Torrance.

Exhibit 3 for identification is a matter ledger card, your Honor, which shows bills and payments with respect to Carmody and Torrance's representation of Mr. Whitney in this matter. It has two or three handwritten revisions at the end, which I'll review or explain, if I might, in a moment.

And Exhibit 4 for identification, your Honor, is a set of bills rendered to Mr. Whitney by Carmody and Torrance -- Carmody, Torrance, Sandak and Hennessey,

your Honor. Our firm changed its name. And these show -- sorry. These bills are copies of the bills rendered to Mr. Whitney, and they show the date of the invoice, the invoice number, the name of the -- or the initials for the timekeeper rendering the services, the date the services were rendered, the amount of time spent on each itemized entry, the billing rate of the timekeeper and the total amount billed for each time entry. And so this -- these are itemized entries of all of the work done on this matter with respect to our firm's representation of Mr. Whitney.

And if I might offer two explanations, your Honor. The first is -- well, a couple of explanations, the first with respect to Exhibit 4 for identification, which is the set of itemized bills. There are some entries deleted, and they are blacked out, and the amount of the entry is shown in parentheses. Those are deleted because when we reviewed these bills very carefully, we saw that those entries were with respect to work performed for Mr. Whitney by our firm with respect to other matters not this matter, and so we subtracted all of those out.

The other thing I wanted to point out to the Court is that -- these pages aren't numbered, but with respect to the invoice dated April 3, 2012, the

last page, there are two part -- two entries that are partially redacted. Those are the entries of March 28, 2012 and -- both March 28, 2012. Those entries are redacted because they -- the redacted portion would disclose attorney/client privileged information. So the basic entry is shown. The amount billed, the timekeeper, the time devoted, et cetera, all of that is disclosed. Just the privileged portion of the entry is removed, or I should say redacted.

Taking a look at Exhibit 3 for identification, the matter ledger card, on the last page there are hand -- one, two, three handwritten cross-outs. Those are the totals that are crossed out and the new totals written in by hand. And you'll see that the handwritten totals are lower than the computer printed totals, and that's to reflect the deletions that I just explained with respect to Exhibit 4 for identification. The computer system would not make any changes so we had to make them by hand.

And then with respect to Exhibits 1 and 2 for identification, I just wanted to indicate to the Court that our fee arrangement with Mr. Whitney changed, and that is why there is a second fee agreement.

If I can have just one second?

And I should clarify, as Attorney Healey

reminded me, that, with respect to Exhibit 2 for identification, the second engagement letter, September 25, 2013, that engagement letter provides for a partial contingent fee for our firm with respect to this matter, and it provides for a fee of ten percent of any award or settlement collected above $150,000. So in addition to -- and that was entered into after the trial was over but before the decision had been issued. And so that amount should be factored into the hourly rate fees shown in Exhibit 4 for identification to determine the total attorney's fees due to our firm. Of course, no amount has been paid with respect to this judgment, and so I have to note that for the Court as well.

THE COURT: All right.

You're offering these as full exhibits?

ATTY. RUBIN: I am, your Honor.

THE COURT: All right.

ATTY. ELSTEIN: Same objection, your Honor.

THE COURT: All right. The objection, as I understand it, is pursuant to Rule 66-5.

ATTY. ELSTEIN: And relevancy.

THE COURT: And relevancy, all right.

I will overrule the objection. I understand, I believe, the purpose of the motion for articulation and the limitations on that. The ruling at issue in the motion and before the Court is the $250,000

punitive damage award. And, in summary, the ruling did award punitive damages, number one. That's not being changed. It awarded punitive damages in the amount of $250,000, and that's not been changed. The basis for that figure was the Court's approximation of the attorney's fees that were generated and for which the plaintiff was responsible. To that -- to the extent that's an articulation, I'm making that now. I didn't state that in the opinion, but that was my thought process. And because I don't believe Rule 66-5 precludes a reflection of what those attorney's fees -- evidence of what those attorney's fees were, I will admit Plaintiff's Exhibits 1, 2, 3 and 4 as full exhibits.

Turning to the -- and I have put them together, and I think you didn't disagree with that. Second and third question because I thought they were related, which is a request as to what the Court intended with regard to the date from which interest runs. In summary fashion, I awarded damages in the amount of $1,341,059.40 for the breach of the stock option purchase agreement; $138,461.77 for the breach of the employment agreement; $65,000 for the cost of arbitration as well as $250,000 in punitive damages for a total award of $1,794,521.10. I found, in the course of that opinion, that Mr. Scott breached the employment agreement on multiple occasions including

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conduct at the time the employment agreement was signed on March 20, 2002. I found that he breached the supplemental letter agreement as early as March 20, 2002, and I refer you to the discussion at Pages 25-34 of the opinion. I found that he breached the stock option purchase agreement no later than July 1, 2007, and that was, I believe, discussed at Page 35 of the opinion.

The plaintiff sought statutory interest with regard to the breaches of the supplemental letter agreement and the stock option purchase agreement from March 2007. The plaintiff sought interest for the breach of the employment agreement from the date of the termination, which was five days after Scott provided the plaintiff with a notice of termination on December 18, 2006. That notice gave the plaintiff five days to correct alleged shortcomings, thus leading to the conclusion that the employment was terminated on December 23, 2006.

The plaintiff sought statutory interest for the defendant's fraud beginning from the date of the breach in March 2007. And so even though the record reflects factual and legal issues supporting an award of interest on the judgment to run at a date or dates prior to March 2007, it was my intention to award interest for damages awarded for counts one, four, five, six and seven beginning on March 2007

continuing until the judgment is paid. It was my intention to award interest on the punitive damages beginning on the date of judgment and continuing until the judgment is paid.

To the extent the motion for articulation sought the legal basis -- I'll follow this up with a written opinion. I made some notes that I'm working off right now.

To the extent the defendant is seeking a legal basis for that finding, I based my finding on the authority of General Statutes Section 37-3a, subsection (a), which permits a defendant to withhold -- permits interest when a defendant withholds money that it owes pursuant to a contract, and that statute also allows for an award of post-judgment interest.

I have a recollection, and I don't have it front of me, but I believe I -- there was one point I found that the defendant's fraudulent scheme began in 2001. So I do have a variety of dates available to me to choose the date from which interest could run, but I did accept and find that it was appropriate for interest to run from the date sought by the plaintiff, which was March of 2007. That was the basis for that finding.

ATTY. BARTSCHI: Just a housekeeping question. Did I hear your Honor correctly that you're going to

be issuing a written decision?

THE COURT: Yes.

ATTY. BARTSCHI: The reason I ask is that there are a couple of deadlines that depend on notice of the decision which normally comes from the Appellate Court, so I just wanted to be sure the Court wasn't formally ruling today so I don't have to scramble.

THE COURT: I am not formally ruling today because I will issue something in writing.

ATTY. BARTSCHI: Thank you.

THE COURT: And I'll do it as soon as I can. I don't think it will take me very long, but I want to go over all of these matters again and review, obviously, the exhibits that have been presented today, but I will turn to this as quickly as I can.

Is there anything else today?

ATTY. RUBIN: Your Honor, I have a couple of matters on this case unrelated to the hearing on the motion for articulation if the Court has a few moments to speak with counsel in chambers.

THE COURT: Certainly. I do have a few moments. We're having the family bar here at three-thirty, but that gives us forty-five minutes.

ATTY. RUBIN: Ten minutes should be more than sufficient, your Honor.

THE COURT: And if it's not, I'll give you the time another day.

ATTY. RUBIN: Thank you, your Honor.

THE COURT: Thank you.

We're in recess.

(Matter concluded)

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APPELLATE COURT OF THE STATE OF CONNECTICUT

NO. A.C. 36912

WALTER WHITNEY

Plaintiff – Appellee

VS.

J.M. SCOTT ASSOCIATES, INC., ET AL.

Defendants – Appellants

On Appeal From The Superior Court
For the Judicial District Of Litchfield
(Hon. John A. Danaher, III, J.)

BRIEF AND PART TWO APPENDIX OF PLAINTIFF – APPELLEE

JULY 8, 2015

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3. Did the trial court properly deny the defendants the remedy of specific performance where the trial court found that the defendants committed fraud in terminating the plaintiff's employment, and where defendants breached the SOPA? (Br. at 21-23.)
4. Did the trial court abuse its discretion in awarding the plaintiff punitive damages where the trial court's Memorandum was issued prior to the ruling in R.I. Pools Inc., v. Paramount Concrete, Inc., 149 Conn. App. 839 (2014), and the trial court ultimately based its award on plaintiff's actual attorneys' fees and costs? (Br. at 23-26.)
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6. Did the trial court abuse its discretion in awarding plaintiff prejudgment interest on all claims pursuant to C.G.S. § 37-3a where the defendants breached their contracts with the plaintiff, and wrongfully withheld money from the plaintiff? (Br. at 31-35.)

TABLE OF AUTHORITIES

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I. COUNTERSTATEMENT OF FACTS

This action arises out of a series of agreements entered into by and between the plaintiff, Walter Whitney, and the defendants James M. Scott ("Scott"), and Scott Swimming Pools, Inc. ("SSP") in March 2002. Scott is the president, director, and majority stockholder of SSP. (March 26, 2014 Memorandum of Decision, "MOD" or "Memorandum" at 2; Defs.' App. at A44.) The parties entered into a total of three agreements. The agreements provided that the plaintiff would be employed by SSP for a period of five years, following which he would have the option to purchase SSP from Scott.

In 2001, the plaintiff was 51 years of age, and had been employed at New Milford Savings Bank for approximately ten years. (MOD at 4; Defs.' App. at A46.) Plaintiff performed a variety of senior management roles at New Milford Savings Bank, including the resolution of non-performing loans, and was responsible for managing $40 million in assets. (Id.) At that time, Scott was 63 years of age. (MOD at 5; Defs.' App. at A47.) In addition to SSP, a business that was started by Scott's parents and later acquired by Scott, Scott owns or has an interest in other lucrative enterprises, including J.M. Scott Associates, Inc. ("JMSA"), a real estate business. (MOD at 5; Defs.' App. at A47; Tr. 7/25/13 at 55-58; Pl. App. at A-135-38.) Scott testified that JMSA made him a wealthy man, and that SSP has "made him well-to-do." (Id.)

In 2001, while employed at New Milford Savings Bank, the plaintiff visited SSP's offices to discuss banking business.[1] (MOD at 5; Defs.' A47; Tr. 5/21/13 at 30; Pl. App at A-109.) During that meeting, Scott told the plaintiff that his senior management—his son and nephew—had unexpectedly left the company, and that Scott needed someone to help

[1] Plaintiff had provided banking services to the defendants previously during his tenure at New Milford Savings Bank. (MOD at 4-5; Defs.' App. at A46-47.)

him manage and rebuild SSP. (Id.; Tr. 5/21/13 at 30-32; Pl. App. at A-109-11.) Scott also told the plaintiff that he was "tired" of running SSP, and that he wanted to sell the business so that he could spend more time in Tortola. (MOD at 5; Defs.' App. at A47; Tr. 5/21/13 at 31-33; Pl. App. at A-110-12.) Scott asked the plaintiff whether he would consider joining SSP and buying the Company. (Tr. 5/21/13 at 32-33; Pl. App. at A-111-12.) Plaintiff was enthusiastic about the idea, but expressed concerns to Scott – namely plaintiff's age, family obligations, and his secure senior position at the Bank. (MOD at 5-6; Defs.' App. at A47-48.) Scott assured the plaintiff that SSP was "very lucrative." (MOD at 5; Defs.' App at A47.) The parties began negotiating the agreements that form the basis of this dispute.

During the course of the negotiations, both plaintiff and Scott were represented by counsel. (MOD at 6; Defs.' App. at A48.) Plaintiff and his counsel asked to review SSP's corporate records, some of which were provided by defendants. Plaintiff specifically asked to see SSP's general ledger, but was told that SSP did not maintain one. (Id.) The records that were provided showed that SSP had "annual gross receipts consistently in the $5-7 million range, and that Scott averaged $200,000 per year in compensation." (Id.) In spite of this, plaintiff's review of the financial records provided by Scott showed that SSP did not, on paper, appear to be profitable. (Tr. 5/21/13 at 64; Pl. App. at A-114.) Scott informed plaintiff that SSP provided other services to Scott, such as landscaping at his residence, and loans and other payments to Scott and his other businesses. (MOD at 6; Defs.' App. at A48.) In addition, plaintiff learned that SSP owned three Porsche racing cars, and employed a full time Porsche mechanic. (Id.) Scott also traveled frequently to Tortola, where he owned a home, and Florida, where Scott raced his Porsches. (Id.) SSP spent "at least $100,000 annually" on the Porsche racing operation alone. (Id.) Based on these disclosures, and

plaintiff's plan to eliminate these additional expenses, plaintiff concluded that he could generate sufficient cash flow at SSP. (MOD at 6-7; Defs.' App. at A48-49; Tr. 5/21/13 at 80-82; Pl. App. at A-115-17.) Scott did not disclose a critical fact to the plaintiff during any of these negotiations: a deferred compensation arrangement set up by Scott, pursuant to which SSP owed Scott deferred compensation that, by March 2007, exceeded $2.5 million. (MOD at 2-3, 25; Defs.' App. at A44-45, A67.)

On or around March 20, 2002, the parties entered into three separate agreements, the Employment Agreement ("EA"), the Stock Option Purchase Agreement ("SOPA"), and the Supplemental Letter Agreement ("SLA"). The agreements documented an arrangement under which plaintiff would be employed by SSP for five years, at the conclusion of which plaintiff would have the right to purchase the remainder of Scott's shares in SSP for $1,270,873.00.[2] (MOD at 35; Defs.' App. at A77; Pl.'s Ex. 3 at 9; Defs.' App. at A145.) Plaintiff's option ran from April 1 through July 1, 2007. (Id.) The SOPA provided that the purchase price would be paid over a ten year period at seven percent interest. (MOD at 7; Defs.' App. at A49; Pl.'s Ex. 3 at 10-11, Defs.' App. at A146-47.) Scott selected the applicable rate of interest, and the payments were spread out over ten years to benefit Scott by allowing him to defer recognition of the income for tax purposes. (MOD at 7, Defs.' App. at A49; Tr. 5/21/13 at 48, Pl. App. at A-113.)

The SOPA also provided that if plaintiff exercised his option to purchase SSP, he would be obligated to retain Scott as a consultant for five years, on terms dictated in Scott's "sole discretion," that could amount to an additional $1 million in compensation to Scott. (Id.) The SOPA prohibited SSP from restructuring its debts during the plaintiff's five year

[2] The plaintiff received 20 shares (10%) of SSP stock upon execution of the SOPA. (Pl.'s Ex. 3; Defs.' App. at A137.)

employment, and from selling SSP assets or increasing its liabilities. (MOD at 7; Defs.' App. at A49; Pl.'s Ex. 3 at 11; Defs.' App. at A147.) The SLA required that "[[t]here will be no outstanding loans to or from the Company [SSP] from James M. Scott ("Scott"), any family member of Scott, or any entity owned by Scott or owned by any family member of Scott on or after March 31, 2007." (Pl.'s Ex. 20 at 1; Defs.' App. at A161.)

The EA, among other things, set forth a schedule of duties and tasks the plaintiff was obligated to perform during each successive year of his employment, and set forth the plaintiff's compensation structure. (Pl.'s Ex. 21 at 3-6; Defs.' App. at A165-68.) As of October 1, 2002, plaintiff earned a salary of $142,153, plus benefits valued at $32,850, for total annual compensation of $175,003. (MOD at 55; Defs.' App. at A97; Pl.'s Ex. 21, Par. 4; Defs.' App. at A167-68.) As found by the trial court, the "plaintiff's individual responsibilities were, principally, to prepare a department-by-department budget for March 2003, a business plan for the years 2003 to 2005, and to assess personnel, information systems and needs." (MOD at 22; Defs.' App. at A64; Pl.'s Ex. 21 at 3-5; Defs.' App. at A165-67.) The trial court also found that in addition to plaintiff's individual responsibilities, the EA set forth tasks that the plaintiff could only achieve with Scott's cooperation. (Id.)

The EA also provided that SSP could terminate plaintiff's employment only for "Adequate Cause." (Pl.'s Ex. 21, Par. 8.3; Defs.' App. at A172.) Adequate Cause was limited to "conviction of or a plea of guilty to a felony, misdemeanor, dishonesty, any other criminal conduct against [SSP] . . . or continued breach of [plaintiff's] duties and obligations arising under [the EA] or of any written policy, rule or regulation of [SSP] . . ." (Id.) Finally, the EA provided that: "[a]ny dispute or controversy arising under or in connection with [the EA] shall be settled exclusively by arbitration . . .." (Id., Par. 9; Defs.' App. at A173.)

After the agreements were signed, plaintiff began his employment with SSP and Scott. (MOD at 7; Defs.' App. at A49.) Plaintiff fully performed his duties under the EA, including learning the various aspects of SSP's business, overseeing SSP's employees, and undertaking efforts to improve SSP's operations. (MOD at 25; Defs.' App. at A67.) Plaintiff worked up to eighty hours a week, and was the most productive pool salesman for several years during his employment with SSP. (Id.) During his employment, plaintiff also "made efforts to improve SSP's operations, but received little support from Scott." (MOD at 25; Defs.' App. at A67.) Plaintiff prepared a marketing plan, which he presented to Scott, but which Scott refused to even discuss with the plaintiff. (Id.) Plaintiff also prepared a business plan, which Scott claimed "did not conform to what he wanted." (Id.) Scott never informed the plaintiff of what he considered an acceptable business plan to be. (Id.)

Scott, on the other hand, "kept a rigid hold on the helm of SSP." (MOD at 7; Defs.' App. at A49.) During the term of plaintiff's employment, "Scott excluded the plaintiff from much of the day-to-day decision making and cooperation that was contemplated by the EA. Instead of transferring increasing authority and responsibility to the plaintiff, Scott progressively distanced the plaintiff from the inner workings of SSP, he diminished the plaintiff's authority within the organization, and he undercut the plaintiff's authority with employees..."(MOD at 40; Defs.' App. at A82.) In addition, Scott increased the amount of SSP's loans from $660,000 in 2002 to over $1.1 million by 2007, although the SLA required him to eliminate these loans entirely. (MOD at 25-26; Defs.' App. at A67-68.)

Scott also failed to include the plaintiff in any of the SSP shareholder meetings, despite plaintiff's clear status as a shareholder. (MOD at 26; Defs.' App. at A68.) These meetings were usually attended by Scott, his wife, and another 50-year employee of SSP.

(Id.) Plaintiff never received notice of a single shareholder meeting during his entire tenure at SSP. (Tr. 7/24/13 at 3, 59-60; Pl. App. at A-130-31.) Moreover, at these meetings, Scott took secret actions that negatively impacted SSP's financial condition to the detriment of the plaintiff. For example, in response to a "demand" for repayment of a $1.1 million loan to SSP by Scott's other company, JMSA, Scott sold buildings owned by SSP to JMSA for $325,000, although the buildings had a fair market value in 1999 of over $1.4 million. (MOD at 27; Defs.' App. at A69.)

In 2006, Scott closed the supply and service departments of SSP without consulting the plaintiff. (MOD at 7; Defs.' App. at A49.) In a meeting in August 2006, Scott told the plaintiff he would not sell SSP to him. Scott stated that he would "tear up" the contracts and bankrupt the company before he would ever sell it to the plaintiff.[3] (MOD at 28, 35; Defs.' App. at A70, A77; Tr. 5/21/13 at 170; Pl. App. at A-126.) He also threatened to simply re-start the company under another name, and take all the employees with him. (MOD at 35; Defs.' App. at A77.) Scott did not inform the plaintiff at this meeting that his decision had anything to do with plaintiff's job performance. (MOD at 28; Defs.' App. at A70.) Up until this point, the plaintiff had never received a performance evaluation, was never issued any warnings, and was never told by Scott that his job performance was in any way deficient or unsatisfactory. (MOD at 29; Defs.' App. at A74; Tr. 5/21/13 at 162-67; Pl. App. at A-120-25.)

On October 4, 2006, four and a half years into plaintiff's five year employment

[3] This was not, evidently, an idle threat. In January, 2015, Scott filed for bankruptcy individually and on behalf of SSP. (See, Suggestion of Bankruptcy; Dckt. Nos.270.00 and 272.00; Pl. App. at A-25-28, A-29-32). Apparently, this has not impacted Scott's other companies or business interests. Nor, presumably, has this impacted Scott's wife, to whom Scott has "given" approximately $500,000 "over the years." (MOD at 37; Defs.' App. at A79.)

contract, and only six months before Scott would be required to sell SSP to the plaintiff, Scott sent the plaintiff seven separate memos in a single day, purporting to be critical of plaintiff's job performance; however, these memos consisted only of a "pastiche of routine issues, more focused on mistakes by other employees or unverified customer complaints, as opposed to breaches of policy, rules or regulations by the plaintiff." (MOD at 29; Defs.' App. at A71.)

In early December, 2006, plaintiff traveled to California to be with his dying father. (Id.) After his father passed away, plaintiff returned to work on December 18, 2006, at which time he was presented with a letter containing three attachments. (Id.) This letter, signed by Scott as president of SSP, stated that plaintiff had five days "to provide proof that all the issues which we consider to be continuing breaches of your Employment Agreement are corrected to the level of the published Corporation History, Procedures, and Practices, and as outlined in the SYNOPSIS OF MEMOS." (MOD at 30; Defs.' App. at A72; Pl.'s Ex. 32; Pl. App. at A-33-37.) The letter further stated that plaintiff was notified "for failure to comply with your performances [sic] numerous times verbally and numerous times in writing as further outlined in the attached "SYNOPSIS OF MEMOS ... [and that] these issues have not been corrected by you to-date." (Id.) Collectively, the attachments to the letter referenced over 250 "other memos" – none of which were attached to the synopsis. (Id.)[4] On December 21, 2006, the plaintiff notified Scott in writing that he disputed Scott's December 18 letter, and that he intended to exercise his right to purchase SSP. (MOD at 8; Defs.' App. at A50; Pl.'s Ex. 33; Pl. App. at A-38.) On December 22, 2006, after the plaintiff had completed four years and nine months of his five-year employment contract, and only

[4] The defendants never introduced the underlying memos into evidence during trial. (MOD at 31; Defs.' App. at A73.)

three months before Scott would be compelled to sell SSP to the plaintiff, the defendants terminated the plaintiff's employment.

In the 1990's, before the plaintiff and the defendants entered into the agreements in 2002, Scott had made representations to Scott's son and nephew that Scott was "tired" of running SSP, and wanted to sell them the business in five years. (MOD at 23; Defs.' App. at A65.) Based on Scott's statements that he would sell SSP to them, Scott's nephew and son worked for SSP for eleven and twelve years, respectively. (Id.) Scott never provided them with financial information they requested, and no terms for any purchase agreement were ever reached. (Id.)

In 2000, Scott rehired Arnold Gunderson, a former SSP employee, as SSP's "Acting President." (MOD at 24; Defs.' App. at A66.) Scott gave Gunderson the same story he had given his son and nephew and, ultimately, to the plaintiff: that he was tired of running SSP, and that he wanted Gunderson to become SSP's president. (Id.) Upon his re-hire, Gunderson informed Scott's nephew that Gunderson would be buying SSP from Scott. (Id.) Based on their conclusion that Scott never intended to keep his promise to them, Scott's son and nephew left the company in 2000. (Id.) Scott and Gunderson had a discussion in January 2000 about Scott's plan to sell SSP to Gunderson in what Gunderson believed would be three to five years. (Id.) When Gunderson requested access to SSP's books, Scott ignored him, and within one year Scott demoted Gunderson to the position of commission-only salesman. (MOD at 24; Defs.' App. at A66.) Gunderson too left the company in December 2000. (Id.) Plaintiff's first visit to SSP in January 2001, when Scott told plaintiff he was "tired" of running SSP and wanted to spend more time in Tortola, occurred one month after Gunderson's departure from SSP. (Id.)

In January 2007, after Scott refused to honor his obligation under the SOPA, the plaintiff demanded arbitration in accordance with the terms of the SOPA and EA. Arbitration continued for two years, until August 2009, when SSP claimed that it lacked sufficient funds, approximately $33,000, to continue with the arbitration. (MOD at 36; Defs.' App. at A78.) After the defendants failed to fund their share of the arbitration costs, plaintiff filed this action.

This case was tried to the court (Danaher, J.) over a period of seventeen days in May, June and July, 2013. On March 26, 2014, the trial court issued its 62-page Memorandum. The trial court rendered judgment in plaintiff's favor on plaintiff's claims for breach of contract, breach of the covenant of good faith and fair dealing, and fraud. The trial court entered judgment in favor of the defendants on plaintiff's CUTPA claim, and in favor of plaintiff on defendants' counterclaims. The court awarded the plaintiff $1,341,059.40 for breach of the SOPA (MOD at 55; Defs.' App. at A97); $138,461.77 for breach of the EA (Id. at 57; Defs.' App. at A99); $65,000 for plaintiff's arbitration costs (Id. at 58; Defs.' App. at A100) and $250,000 in punitive damages on plaintiff's fraud claim. (Id. at 60; Defs.' App. at A102.) This appeal followed. Additional facts will be set forth below as necessary.

II. ARGUMENT

A. Defendants Never Raised Any Issue with the Trial Court's Measure of Damages and Have Not Preserved the Issue for Appeal.

Although the trial court's award of contract damages easily meets the required legal standard, the defendants have waived any claim to dispute the measure of damages adopted by the trial court. The defendants first raised this issue in their appellate brief and the Court should decline to review this unpreserved argument. The following additional

facts are relevant to consideration of this issue.

At trial, the plaintiff presented evidence of contract damages according to the well settled "benefit of the bargain" standard. (MOD at 53-57; Defs.' App. at A95-99.) Plaintiff's first claim regarding the proper *amount* of damages to be awarded under the SOPA was based on testimony by Sean Mathis as to the value of plaintiff's lost business opportunity caused by defendants' breach of the SOPA. (Id.) Plaintiff also presented an alternative calculation of the *amount* of damages for defendants' breach of contract that was based on the actual salary plaintiff was paid while he was employed at SSP, for the ten year period he planned to own the company, less the amount plaintiff actually earned after his termination from SSP. (MOD at 55; Defs.' App. at A97.)

In his post-trial brief, the plaintiff again set forth both of these alternative calculations of his "benefit of the bargain" damages. (Pl.'s Post-Trial Br. at 32-34; Pl. App. at A-8-10). In their post-trial brief, defendants argued that all of the contracts contained liquidated damages clauses that limited the amount of damages, and also argued that the testimony presented by Mr. Mathis "lacked reliability and credibility." (Defs.' Post-Trial Br. at 15-21; Pl. App. at A-14-20.) Defendants' brief was silent on plaintiff's alternative calculation of damages. Likewise, in their Reply to Plaintiff's Post-Trial Brief, the defendants devoted precisely one paragraph to a discussion of damages, reincorporating the arguments from their initial brief, and adding that plaintiff was not entitled to damages for emotional distress. (Defs.' Reply at 17; Pl. App. at A-23.)[5] Again, defendants were silent on whether plaintiff's alternative damages calculation was legally correct.

After the trial court issued the Memorandum, the defendants filed a Motion to

[5] The trial court agreed with the defendants on this issue. (MOD at 60, n.28; Defs.' App. at A102.)

Reargue, directly solely to the trial court's award of contract damages. (Defs.' App. at A107-08.) In the Motion to Reargue, however, the defendants made no claim that the Court's award of contract damages was based on an improper measure of damages. To the contrary, the defendants argued only that the court's failure to consider plaintiff's projected future earning capacity when calculating these damages "results in a windfall for the plaintiff." (Id.) Thus, defendants implicitly conceded that the trial court's damages measure and calculation was legally correct.

Defendants' failure to raise this claim to the trial court at any time constitutes a waiver of that claim, and this Court need not consider it on appeal. Practice Book § 60-5. Indeed, this Court found virtually identical arguments waived under similar circumstances in Cedar Mountain, LLC v. D & M Screw Machine Products, LLC, 135 Conn. App. 276 (2012). In Cedar Mountain, the plaintiff leased property to the defendant for a nominal sum, and the defendant agreed to pay taxes, insurance, and utilities while the plaintiff sought a buyer for the property. Id. at 279. At some point, there was a fire in the property that affected the electrical service, resulting in a disruption to the defendant's business. Id. at 279-81. The defendant re-located and terminated its lease with the plaintiff. Id. at 281. The plaintiff brought suit for breach of the lease, and the defendant counterclaimed for disruptions to its business during the period when the electric service was not operating. Id. at 281-82.

At the conclusion of the trial to the court, the parties filed comprehensive post-trial briefs. Id. at 278, 282. The court issued its memorandum of decision, finding for both parties, and applying the defendant's award as a credit against the plaintiff's. Id. at 283. Both parties appealed. Id. On appeal, the plaintiff claimed, among other things, that the trial court improperly calculated defendant's damages by using defendant's loss of gross

revenue as the measure of damages, instead of lost profits. Id. at 290. In its post-trial brief, the defendant argued that the plaintiff had not challenged the calculation, only liability. See id. at 291. This Court noted that "the first time the plaintiff has claimed that the court used loss of gross revenue to calculate the actual damages is in its appellate brief." Id. at 293. This Court then held:

> Accordingly, we decline to review the plaintiff's claim that the court improperly calculated the defendant's counterclaim damages by treating loss of gross revenue as the measure of actual damages. The plaintiff did not present that theory to the trial court. A party cannot present a case to the trial court on one theory and then seek appellate relief on a different one. . . . For this court to consider a claim on the basis of a specific legal ground not raised during trial would amount to trial by ambuscade, unfair to the court and to the opposing party.

Id. (internal footnote, quotations, and citations omitted).

Here, the argument in support of waiver is even more compelling. The defendants did not raise the argument regarding the measure of damages (1) in a motion to dismiss under Practice Book § 15-8; (2) in their post-trial brief; (3) in their Reply to the plaintiff's post-trial brief; and (4) conceded that the trial court used a correct measure of damages in their motion to reargue. Thus, this issue appears for the first time on appeal, after the defendants implicitly conceded the correctness of the trial court's measure of damages.[6]

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[6] The unfairness of presenting such an unpreserved argument is not theoretical. By not making this argument in the trial court, the defendants have precluded the plaintiff from arguing to support the damages award on alternative grounds. For example, defendants' pedantic argument relies on the trial court's characterization of the award as "benefit of the bargain" damages. Importantly, contract damages include two components: (1) direct damages; and (2) other loss, including incidental and consequential damages. See City of Milford v. Coppola Const. Co., Inc., 93 Conn. App. 704, 715 (2006). Defendants' argument focuses only on whether the trial court's damages are a proper measure of the first component. Because defendants did not raise this issue to the trial court, neither the trial court nor the plaintiff were afforded a fair opportunity to address whether the damages award could, in the alternative, be a proper measure of the second component. Thus, the appellate court should decline to review this unfairly presented and unpreserved argument.

This Court should decline to review this argument and affirm the judgment.

B. The Damages Award Easily Meets the Legal Standard for Damages in a Breach of Contract Action.

1. Standard of Review[7]

In an action for breach of contract, "[t]he trial court has broad discretion in determining damages.... The determination of damages involves a question of fact that will not be overturned unless it is clearly erroneous." Duplissie v. Devino, 96 Conn. App. 673, 699 (2006), quoting Russell v. Russell, 91 Conn. App. 619, 643, cert. denied, 276 Conn. 924, 925 (2005); Ed Lally & Assocs, Inc. v. DSBNC, LLC, 145 Conn. App. 718, 733 (2013).

2. The Trial Court's Award of Damages to the Plaintiff Was Not Clearly Erroneous, and Should be Affirmed

The trial court devoted a substantial portion of its Memorandum setting forth the facts that formed the basis for its conclusion that the defendants breached every one of their contracts with the plaintiff. (See generally, MOD at 22-38; Defs.' App. at A64-80.) The following additional facts are relevant to the Court's consideration of this issue. With regard to the EA and the SLA, the trial court found that "the plaintiff, in accepting the offer of employment with the defendants, carefully considered the fact that, in order to work with the defendants, he would be leaving secure employment that had potential for future growth," and that if the plan failed, plaintiff would be forced back into the job market at age fifty-six. (MOD at 22-23; Defs.' App. at A64-65.) The trial court concluded that "the plaintiff was highly motivated to expend every effort to make his association with the defendants a successful one." (Id.)

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[7] The defendants have gone to great lengths to frame the issues before this Court in a manner that they claim requires this Court to engage in a plenary review of virtually all claims. It is respectfully submitted that in most instances, the defendants are mistaken, and the majority of the trial court's rulings are properly reviewed under a lower standard.

The trial court found that "Scott, on the other hand, had no intention of ever selling SSP to the plaintiff. His motivation was to recruit a talented, dedicated upper management employee, take advantage of that employee's skills and work ethic, and then terminate that employee before having to honor the agreement he had entered into." (MOD at 23; Defs.' App. at A65) (emphasis added). The trial court detailed Scott's history of making similar promises to others, and concluded that "[i]f Scott had sold SSP to any of the people to whom he made such promises, his control over the company would have disappeared and, ultimately, his income would have diminished. However, Scott learned that he could find a steady stream of motivated employees to work hard for SSP, by implying – or even promising – that he would sell them the company." (MOD at 24-25; Defs.' App. at A66-67.)

The trial court found in the summer of 2006, Scott was facing difficulties that had not arisen when he broke his promises to his son, nephew and Gunderson, because unlike those individuals, Scott and SSP were obligated to the plaintiff by the SOPA, EA and SLA, and Scott could try to avoid the obligations of the agreements only if he could "find a way to legitimately terminate the plaintiff's employment." (MOD at 28; Defs.' App. at A70.) However, "Scott faced a significant obstacle in terminating the plaintiff's employment because, until October 4, 2006, Scott had not sent the plaintiff any written notices that the plaintiff was in breach of any SSP policy, rule or regulation." (MOD at 29; Defs.' App. at A71.) As set forth above at pp. 7-8, the October 2006 memos were simply routine business matters "more focused on mistakes by other employees" and such. Plaintiff made every effort to "immediately address the issues raised" in the memos, and Scott "never claimed that the plaintiff failed to do so." (Id.) The trial court concluded that these memos "did not provide adequate cause, under the EA, to terminate the plaintiff." (Id.) The trial court also

found that "Scott's disingenuous and inept effort to 'paper the file' in October 2006, deteriorated into blatant fraud when Scott attempted to fabricate 'adequate cause' to terminate the plaintiff's employment in December 2006 ..." (Id.) (Emphasis added).

The trial court also found that Scott breached the SLA when Scott not only failed to eliminate outstanding loans among and between SSP, Scott, Scott's family members and Scott's other businesses by March of 2007, but that these liabilities actually increased during the plaintiff's employment with SSP. (MOD at 33-34; Defs.' App. at A75-76.) Scott's secret deferred compensation arrangement increased from $1.6 million in 2002 to $2.5 million in 2007. (MOD at 33; Defs.' App. at A75.) Likewise, Scott's outstanding officer loans from SSP totaled approximately $660,000 in 2002; by 2007 they had increased to over $1.1 million. (Id.) Scott failed to disclose any of this information to the plaintiff. (Id. at 34; Defs.' App. at A76.)

The trial court found that the defendants also breached the SOPA by claiming to have insufficient funds to continue with the arbitration required by the agreement. The trial court found the evidence to be "conclusive" that SSP did in fact have funds to continue the arbitration, which was approximately $33,000. (MOD at 36; Defs.' App. at A78.) "Further, even if SSP needed additional funds to complete the arbitration...based on the ease with which Scott transferred liquid and real assets among himself, his wife, SSP and JMSA, Scott could have readily acquired those funds." (Id.) The trial court concluded that plaintiff established the following by clear and convincing evidence:

> SSP's representation that it lacked funds to continue the arbitration was false; Scott, acting as President of SSP, knew that the representation was false; the false representation was made to disrupt the arbitration proceeding, possibly in the hope that the plaintiff would abandon his claims rather than begin again with a civil suit; and the plaintiff did initiate a civil suit which has greatly protracted this case to the plaintiff's detriment. The claim that SSP lacked the funds to continue the arbitration

was fraudulent.

(MOD at 37; Defs.' App. at A79.)(Emphasis added). Defendants do not dispute any of the facts found by the trial court, or the trial court's conclusions that they breached the contracts, in certain instances by committing "blatant fraud."[8] Rather, defendants attempt to create a legal issue by claiming that the trial court applied an "improper measure of damages" on plaintiff's breach of contract claim to invoke a higher standard of review by this Court. (Defs.' Br. at pp. 8-10.) This claim is entirely meritless, and should be rejected.

Even a cursory review of the Memorandum establishes that the trial court applied the proper measure of damages to plaintiff's breach of contract claims. To be clear, the plaintiff presented only one legal theory of contract damages, which was adopted by the trial court, and which defendants themselves concede is the proper standard. It is equally clear that the defendants' real dispute is not with the measure of damages awarded by the trial court, but rather with the trial court's calculation of the amount of damages. It is respectfully submitted that this is not an issue of law, but rather one that will not be overturned in the absence of a finding of clear error, which does not exist here.

In assessing the measure of damages, the trial court cited the following widely accepted standard: "it is axiomatic that the sum of damages awarded as compensation in a breach of contract case should place the injured party in the same position as he would have been in had the contract been performed." (MOD at 53-54; Defs.' App. at A95-96), citing, Hees v. Burke Construction, Inc., 290 Conn. 1, 708 (2009). This is precisely the language cited by the defendants in their brief to this Court. (See, Defs.' Br. at 8.) After

[8] Defendants make passing reference to the fact that they "do not necessarily agree with the court's findings as to liability on the breach of contract and breach of good faith and fair dealing claims". (Defs.' Br. at 5, n. 7.) They make no such statement with regard to the court's finding that the defendants committed fraud.

acknowledging that this is the correct standard, the defendants quibble with the fact that, in defendants' opinion, although the trial court properly awarded so-called "benefit of the bargain" damages, the court erred in awarding damages based on a bargain that was "different" than the bargain the parties made. (Defs.' Br. at 9-10.) Specifically, the defendants' claim that, "...the bargain was for the purchase of SSP; it was not to work for SSP for ten more years at the rate of $175,000. Thus, the court was awarding damages for a different bargain, not the one the Plaintiff made." (Id.) The proper measure of damages in a breach of contract case, though, is not nearly so narrow and inflexible as the defendants urge.[9]

To the contrary, it is well-settled that:

> the trial court has broad discretion in determining damages . . . . The determination of damages involves a question of fact that will not be overturned unless it is clearly erroneous . . . Damages are recoverable only to the extent that the evidence affords a sufficient basis for estimating their amount in money with reasonable certainty . . . . Thus, [t]he court must have evidence by which it can calculate the damages, which is not merely subjective or speculative, but which allows for some objective ascertainment of the amount.

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[9] None of the cases cited by the defendants are on point. Merrill Lynch, Pierce, Fenner and Smith, Inc. v. Cole, 189 Conn. 518 (1983) involved a dispute between a stock broker and the broker's client about an agreement to sell 5,000 shares of stock privately rather than on the open market; the Court found that the situation was "analogous" to damages under the Uniform Commercial Code where a buyer is forced to "cover" the contract by procuring substitute goods because of the seller's breach. Id. at 537. Likewise, Robert Lawrence Associates v. Del Vecchio, 178 Conn. 1, 22 (1979) dealt with a contract for the sale of real property. Although Peck v. McClurg, 16 Conn. App. 651, 657 (1988) involved the sale of a business, that case is factually distinguishable because it was the inverse of the situation here. In Peck, the parties entered into a series of agreements to purchase a restaurant. Several months after the sale was completed, the buyer repudiated the contract and returned the restaurant to the sellers. Id. at 654. On the seller's action for breach of contract, the Court found that the proper measure of damages for the seller of a business was the amount of the sale price under the contract, less the value of the stock at the time the buyer repudiated the contract and returned the restaurant. Id. at 657. Here, the plaintiff buyer lost the opportunity of owning a business rather than ridding himself of one. Given these facts, Peck is not remotely on point here.

Ed Lally & Assocs, Inc., 145 Conn. App. at 733 (citations and internal quotation marks omitted in original.) "In a case tried before a court, the trial judge is the sole arbiter of the credibility of the witnesses and the weight to be given specific testimony.... On appeal, we will give the evidence the most favorable reasonable construction in support of the verdict to which it is entitled...." D'Amato Investments, LLC v. Sutton, 117 Conn. App. 418,426 (2009). Moreover, "[T]he plaintiff need not provide such proof [of damages] with [m]athematical exactitude"; rather the plaintiff need only "provide sufficient evidence for the trier to make a fair and reasonable estimate." Naples v. Keystone Building & Development Corp., 295 Conn. 214, 224 (2010) (emphasis added); see also Landry v. Spitz, 102 Conn. App. 34, 50 (2007) (affirming award of damages alleged to be different than the "bargain" struck by the parties on the grounds that the award was supported by the evidence and designed to give the plaintiff what he would have received had the defendants acted in good faith.)

At trial, the plaintiff presented extensive evidence of his damages for defendants' breach of the SOPA. First, plaintiff presented testimony by Sean Mathis, who testified as to the value of the value of the lost business opportunity caused by defendants' breach of the SOPA. As found by the trial court, "the plaintiff asserts that the 'benefit of the bargain' under the SOPA is $4 million, based on the value of the balance of the SSP stock he would have acquired, i.e., the value of ninety percent of the SSP stock, less the purchase price in the SOPA, together with income he reasonably expected to earn as owner of SSP." (MOD at 54; Defs.' Br. at A96.) Plaintiff also presented an alternative calculation of the amount of damages for defendants' breach of the SOPA that was based on the actual salary plaintiff was paid while he was employed at SSP, for the ten year period he planned to own the

company, less the amount plaintiff actually earned following his termination from SSP. (MOD at 55; Defs.' Br. at A97.) The trial court found as follows:

> As of October 1, 2002, the plaintiff was being paid $142,153, plus benefits values at $32,850. See PX 21, ¶ 4. Thus, the plaintiff's total annual compensation package was $175,003. That figure, over ten years, equals $1,750,030. The plaintiff's substitute employment and unemployment compensation after his employment was terminated totaled $408,970.60. That figure, subtracted from $1,750,030, equals $1,341,059.40. The court finds that the latter figure is an appropriate measure of the 'benefit of the bargain' owed to the plaintiff as damages resulting from the defendants' breach of the SOPA. (Id.) (Emphasis added).

The trial court concluded that "the evidence as to what the plaintiff 'reasonably expected to earn' as owner of SSP is too speculative to form the basis for an award of damages." (Id.) The trial court then held that "[a] more reliable damage calculation lies with the plaintiff's alternate 'benefit of the bargain' contention. The latter calculation is based on the salary the plaintiff was paid during his employment with SSP, plus benefits, for the ten-year period he planned to own SSP after he purchased it in 2007, reduced by the earnings he acquired from substitute employment and unemployment compensation." (Id.) (Emphasis added).

The defendants' claim that the trial court awarded damages for a "different bargain" also mischaracterizes the court's award. Contrary to the defendants' assertions, the trial court found that a reliable measure of Whitney's expectation interest *as the owner of SSP* was calculated by multiplying Whitney's *actual* salary and benefits earned as an employee of SSP for the ten year period he planned to own SSP, and subtracting from that figure Whitney's *actual* earnings from the time of the defendants' breach until trial. (MOD at 55; Defs.' App. at A97; Tr. 5/21/13 at 89-90, 163; Pl. App. at A-118-19; A-121.) This calculation was based on Whitney's actual earnings as an employee of SSP minus his actual earnings from substitute employment and unemployment compensation. As such, it is a fair,

reasonable, and frankly conservative estimate of what Whitney's earnings *as the owner of SSP* would have been for a ten year period.[10]

Finally, although the plaintiff believes that the contract damages awarded by the trial court easily meet the controlling standards, the defendants' bad faith and fraudulent conduct permit the court to award damages under a relaxed standard of proof. In Meadowbrook Center, Inc. v. Buchman, 149 Conn. App. 177 (2014), this Court set forth at length this well-recognized principle. In that case, this Court cited to the United States Supreme Court decision in Bigelow v. RKO Radio Pictures, 327 U.S. 251, 264-65 (1946):

> [E]ven where the defendant by his own wrong has prevented a more precise computation, the jury may not render a verdict based on speculation or guesswork. But the jury may make a just and reasonable estimate of the damage based on relevant data, and render its verdict accordingly. In such circumstances juries are allowed to act on probable and inferential, as well as direct and positive proof.... Any other rule would enable the wrongdoer to profit by his wrongdoing at the expense of his victim. It would be an inducement to make wrongdoing so effective and complete in every case as to preclude any recovery, by rendering the measure of damages uncertain.

Meadowbrook, 149 Conn. App. at 189 (emphasis added). This is particularly true in a case such as this one, in which the defendants' intentional, wrongful and fraudulent actions prevented the plaintiff from more precisely calculating the damage they caused. "The defendant who has wrongfully broken a contract should not be permitted to reap advantage from his own wrong by insisting on proof which by reason of his breach is unobtainable." Id., citing, Locke v. United States, 283 F.2d 521, 524 (Ct. Cl. 1960).

> Doubts are generally resolved against the party in breach. A party who has, by his breach, forced the injured party to seek compensation in damages should not be

[10] The reasonableness of this award is bolstered by the undisputed evidence that SSP's annual gross receipts were "consistently in the $5-7 million range, and that Scott averaged $200,000 per year in compensation," as well as the hundreds of thousands of dollars in additional "services" provided to Scott by SSP. (MOD at 6; Defs.' App. at A48.)

> allowed to profit from his breach where it is established that a significant loss has occurred. A court may take into account all the circumstances of the breach, including willfulness, in deciding whether to require a lesser degree of certainty, giving greater discretion to the trier of the facts.

Id. at 190-91, citing 3 Restatement (Second) of Contracts § 352, comment (a) (1981) (emphasis added). It is indeed difficult to conceive of a case in which the application of this principle would be more warranted. Here, there can be no question that the defendants' fraudulent conduct not only caused substantial harm to the plaintiff, but that their actions created the very uncertainty about which they now complain. Permitting the defendants to profit by their egregious behavior would be unjust in the extreme. The trial court's award of damages was entirely proper, and should be affirmed.

C. The Trial Court Did Not Abuse its Discretion in Denying the Defendants' Claim for Specific Performance Under the SOPA.

1. Standard of Review

The trial court's decision about whether to order the remedy of specific performance in a breach of contract action is subject to review under an abuse of discretion standard. Landmark Investment Group, LLC v. Chung Family Realty Partnership, 125 Conn. App. 678, 695 (2010), citing, Hill v. Raffone, 103 Conn. App. 737, 742 (2007).[11]

2. Specific Performance is an Equitable Remedy Within the Trial Court's Discretion.

The defendants claim that the trial court erred in failing to order the remedy of specific performance requiring plaintiff to return his shares of SSP stock to the defendants.

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[11] The defendants illogically claim that the trial court's order denying the remedy of specific performance is subject to plenary review by this Court on the grounds that the relevant issue is the "interpretation of definitive written contract language." (Defs.' Br. at 10.) It is clear from the Memorandum, however, that the trial court did not decline to order specific performance based on the court's interpretation of the applicable language in the SOPA, but rather because the trial court found that the defendants had fraudulently terminated the plaintiff's employment. (MOD at 38, n. 19; Defs.' App. at A80.)

(Defs.' Br. at 10-12.) In the Memorandum, the trial court found that "in view of the court's findings that the [plaintiff's] termination was fraudulent, the defendants cannot prevail on the second count of their counterclaim." (MOD at 38, n. 19; Defs.' App. at A80.) The defendants argue that the trial court's citation to Phoenix Leasing, Inc. v. Kosinski, 47 Conn. App. 650 (1998) in support of its decision was error because that case dealt with enforcement of a forum selection clause, rather than a breach of contract action. (Defs.' Br. at 11-12.) This claim misses the point.

It is well settled that "[t]he availability of specific performance is not a matter of right, but depends rather upon an evaluation of equitable considerations ... The determination of what equity requires in a particular case, the balancing of the equities, is a matter for the discretion of the trial court. In balancing the equities, the court is not bound by a formula but is free to fashion relief molded to the needs of justice." Gager v. Gager & Peterson, LLP, 76 Conn. App. 552, 560-61 (2003). See also, Webster Trust v. Roly, 261 Conn. 278, 284 (2002)(holding that "[i]f, under the circumstances, specific performance would be inequitable, the relief to be afforded rests in the trial court's sound discretion, to be exercised in light of the equities of the case and using reason and sound judgment.")

It is equally well-settled that in an action for specific performance, "the plaintiff has the burden of proving all of the essential elements of his cause of action and the burden is primarily on him to show his right in equity and good conscience to the relief sought." Cutter Dev. Corp. v. Peluso, 212 Conn. 107, 114-15 (1989) (emphasis added). Here, the trial court unequivocally found that the defendants breached every contract they made with the plaintiff, that they never had any intention of honoring their agreements, and that they committed fraud throughout the duration of the parties' relationship, up to and including

their termination of plaintiff's employment. The defendants do not dispute any of these findings. It would be an understatement at best to say that the defendants have failed to prove that the equities lie in their favor, or that in "good conscience" they are entitled to the equitable relief of specific performance.

Finally, the defendants' argument that "[t]he Plaintiff cannot seek to obtain the benefits of the contract on the one hand and seek to be relieved of its terms on the other" (Defs.' Br. at 12) is, under the circumstances, simply fantastical. "The primary purpose of a decree of specific performance, which is always an equitable remedy, is to place an injured [party] in a position that replicates, as nearly as possible, that which it would have enjoyed but for the [other party's] unexcused breach." State v. Lex Associates, 248 Conn. 612, 631 (1999). To be clear, the plaintiff has breached no obligation to the defendants that would entitle the defendants to an award of specific performance. As set forth above, just the opposite is true - it is the defendants who have been found to have breached every contract they made with the plaintiff. Not only did the trial court conclude that the defendants committed fraud when they terminated plaintiff's employment, the court also concluded that defendants never had any intention of honoring their obligations to plaintiff. (MOD at 23; Defs.' App. at A65.) It is respectfully submitted that it is the defendants who are seeking to obtain the benefit of contracts that they admittedly breached. Such a result would work the exact opposite of equity, and the trial court's decision denying the defendants specific performance under the SOPA should be affirmed.

D. The Trial Court's Award of Punitive Damages Was Proper.

The defendants' next claim that the trial court's award of punitive damages was improper because it was based on a lodestar method, rather than actual litigation costs,

and that plaintiff failed to submit sufficient proof at trial to support the award. (Defs.' Br. at 12-14). These claims, too, are without merit, and the trial court certainly did not abuse its discretion in making the award.[12]

The defendants cite to this Court's decision in R.I. Pools, Inc. v. Paramount Concrete, Inc., 149 Conn. App. 839 (2014), in support of their argument that the trial court improperly awarded plaintiff punitive damages. As an initial matter, that case was decided on May 6, 2014, approximately six weeks after the trial court here issued its Memorandum. Moreover, that case is factually distinguishable from this one. In R.I. Pools, the defendant claimed that "the court's punitive damage award was improper because it exceeded the amount of punitive damages supported by the evidence." 149 Conn. App. at 873. There, the plaintiff's attorney had submitted an affidavit stating that his "customary" hourly rate was $325.00, but that he had agreed to a reduced hourly fee in that particular case of $150.00. Id. The trial court reasoned that "the discount was intended to inure to the benefit of the plaintiff, not the defendant. For purposes of this order... the court also finds that the regular hourly rate of $325.00 ... is both reasonable and appropriate." Id. at 873-74. The court thereafter awarded punitive damages of $442,000, based on the $325.00 hourly rate, as opposed to the rate actually charged in the case. The defendant claimed error, arguing that the evidence clearly established that the plaintiff had only actually been charged $204,000. Id. at 874. This Court agreed, holding that "it is clear from the evidence presented to the court that the plaintiff's expenses were limited to the fees it incurred pursuant to its agreement with [its attorney], namely fees billed at an hourly rate of $150." Id. at 877. The court remanded the matter for a new hearing in order to "reassess" the amount of punitive

[12] The plaintiff agrees that this claim is reviewed under an abuse of discretion standard.

damages. Id. at 878. That is not remotely the case here.

Early in the trial, the plaintiff offered exhibits which set forth the amount of attorneys' fees incurred through June 19, 2013, but which did not include specific bills. (Tr. 5/22/13 at 90-97; Defs.' App. at A187-194; see e.g., Tr. Exs. 55 and 150; Pl. App. at A-39-42, A-43-44.) The defendants objected to the admission of that evidence and to the admission of any further specific fee information, arguing that the parties had agreed to address the issue of attorney's fees post-judgment. (Tr. 5/22/13 at 90-97; Defs.' App. at A187-A194.) The Court summarized its purpose in allowing the plaintiff to present limited evidence of attorney's fees during the trial: "[s]o, you're making a record as to the figure, you're not expecting any kind of an award, if at all, until liability is found, if liability is found, and after there be a subsequent hearing that would detail the source of those bills, however, we agree to do that with Mr. Elstein having the opportunity to oppose the ultimate figure." (Tr. 5/22/15 at 95-96; Defs.' App. at A192-193.)

After the trial court's judgment was rendered and punitive damages awarded, no hearing was held on the appropriateness of plaintiff's claimed attorney's fees. Instead, defendants moved for an articulation of the basis of the punitive damages award. In its Order of November 14, 2014, the trial court gave the defendants notice that it intended to hold a hearing on the motion for articulation and noted that the parties would be given "the opportunity to introduce evidence relative to the motion" at that hearing. (Order 11/14/14; Defs.' App. at A123). The Order also instructed the plaintiff to produce "evidence regarding all attorney's fees and ordinary litigation expenses that the plaintiff has paid, or owes, in connection with this litigation" for review. (Id.) At the hearing, the trial court accepted into evidence plaintiff's Exhibits 1 through 4 (Pl. App. at A-45-107), which detailed the precise

amount of plaintiff's actual attorneys' fees and costs. The defendants were given the opportunity to cross-examine a witness as to the exhibits, but declined to do so. (Tr. 12/11/14 at 16; Defs.' App. at A214-15). Thereafter, the trial court confirmed the earlier order, awarding plaintiff $250,000 in punitive damages. The court's award clearly did not constitute an abuse of discretion, as it was based on plaintiff's actual costs and fees, and should be affirmed.

E. The Court's Articulation Was Legally Proper.

The defendants' next claim of error arises from the proceedings surrounding the Trial Court's December 12, 2014 articulation of issues relating to its punitive damages award. The defendants argue that the trial court improperly admitted evidence at the articulation hearing in support of its award of punitive damages, and used this evidence to impermissibly "change" its earlier decision. (Defs.' Br. at pp. 15-19).[13] Neither of these claims is supported by the facts or the law, since it is well established that a trial court has the authority to take evidence on a motion for articulation, and none of the evidence taken at the hearing in this case changed the underlying judgment in any way.

A trial court may take evidence during a hearing on a motion for articulation. See Bowman v. 1477 Cent. Ave. Apartments, Inc., 203 Conn. 246, 253-54 (1987) (Supreme Court relying on evidence adduced at hearing held on motion for articulation to uphold trial court's judgment); Standish v. Standish, 40 Conn. App. 298, 300 (1996) (reversing the trial court's decision to modify its memorandum of decision in a dissolution action in response to a motion for articulation and noting that at the hearing on the motion for articulation, "[n]o testimony was heard and no new evidence was either elicited or entered into the record"

[13] Plaintiff agrees that the interpretation of P.B. § 66-5 is subject to plenary review.

which would have allowed the Court to determine that a substantial change in circumstances had occurred to warrant the changes made by the Court); Wimpfheimer v. Wimpfheimer, No. FA920102132S, 2001 WL 1199238, at *3 (Conn. Super. Ct. Sept. 7, 2001) (hearing on motion for articulation at which evidence from outside the record, including evidence of payments made by defendant, was discussed). (Pl. App. at A-2-5.) In light of this clear case law, it is not surprising that none of the cases cited by the defendants hold that it is impermissible to take evidence at a hearing on a motion for articulation. Indeed, plaintiff's own research has revealed no such law.

Consistent with the decisional law, nothing in the plain language of Practice Book § 66-5 limits the introduction of evidence to a hearing on a motion for rectification, and this plain language is controlling absent any ambiguity in the text of the statute. It is a "fundamental tenet of statutory construction...that statutes are to be considered to give effect to the apparent intention of the lawmaking body.... The meaning of a statute shall, in the first instance, be ascertained from the text of the statute itself and its relationship to other statutes." Tocco v. Wesleyan Univ., 112 Conn. App. 28, 31(2009), citing General Statutes § 1–2z.[14] "If, after examining such text and considering such relationship, the meaning of such text is plain and unambiguous and does not yield absurd or unworkable results, extratextual evidence of the meaning of the statute shall not be considered." Tocco, 112 Conn. App. at 31.

The plain language of Section 66-5 does not differentiate between motions for rectification and motions for articulation, and instead states unambiguously and without

[14] Connecticut's Supreme Court has "determined that our rules of statutory construction apply with equal force to interpretations of the rules of practice." State v. McCahill, 265 Conn. 437, 446 (2003).

qualification that "[i]f any party requests it and it is deemed necessary by the trial court, the trial court shall hold a hearing at which arguments may be heard, evidence taken or a stipulation of counsel received and approved." This sentence of the rule is immediately preceded by a sentence in which motions for rectification and articulation are both specifically mentioned, dispelling any notion that this paragraph is somehow not applicable to both types of motions. Quite clearly, the text of the rule as drafted by the legislature makes this provision equally applicable to both motions for articulation and rectification.

Absent any case law or textual evidence stating that the taking of evidence is not proper on a motion for articulation, the defendants resort to arguing that doing so should not be necessary "in the normal course of things" and goes against the "purpose" of an articulation. (Defs.' Br. at 16-17.) None of the cases cited by the defendants support these broad statements. Instead, the defendants' cases stand for the proposition that a trial court may not use the articulation process to drastically change its decision or the grounds therefor. (Id. at 17-18). While drastic changes may not be appropriate, a trial court is given significant latitude to expound upon its prior holdings in response to a motion for articulation, and an articulation will only be found to be improper where the Appellate Court "cannot reconcile an articulation with the original decision" because the "crucial findings of fact in the memorandum of decision are inconsistent and irreconcilable, and the articulation obfuscates rather than clarifies the court's reasoning." Lusa v. Grunberg, 101 Conn. App. 739, 743 (2007). In Lusa, the trial court issued an oral ruling regarding the amount of child support owed by the defendant. The defendant moved for articulation of that order, following which the court issued a written memorandum which the defendant claimed was inconsistent with the court's prior oral ruling. Id., at 742. The written memorandum

elaborated on the grounds for the child support order but did not alter the amount of the ordered payments. This Court disagreed that this constituted an "irreconcilable change" to the prior holding, and rejected the defendant's claim. Id., at 749.

The Court should find no differently here. The trial court's articulation did not amend or alter the amount of or basis for the punitive damages awarded. Instead, the trial court explained as follows:

> the ruling did award punitive damages, number one. That's not being changed. It awarded punitive damages in the amount of $250,000, and that's not being changed. The basis for that figure was the Court's approximation of the attorney's fees that were generated and for which the plaintiff was responsible. To that—to the extent that's an articulation, I'm making that now. I didn't state that in the opinion, but that was my thought process. And because I don't believe Rule 66-5 precludes a reflection of what those attorney's fees—evidence of what those attorney's fees were, I will admit Plaintiff's Exhibits 1, 2, 3 and 4 as full exhibits.

(Tr. 12/11/14 at 22; Defs.' App. at A220.) As the trial court made clear, the additional evidence adduced at the hearing on the motion for articulation did not affect the court's decision. The trial court merely admitted evidence of fees actually incurred to serve as a reflection of--or benchmark for—the appropriateness of the court's prior award.

Moreover, under no circumstances can the trial court's articulation be viewed as irreconcilable or inconsistent with its Memorandum. The trial court did not add any new categories of damages. It did not change the amount of damages awarded. It did not change the basis for the damages that were awarded. It merely cited to additional evidence which serves to bolster the amount of punitive damages awarded. The articulation is thus entirely consistent with the crucial facts relating to the award of punitive damages set forth in the Memorandum, and is proper under the applicable law.

1. Any Error in the Articulation Process was Harmless.

If the trial court erred by admitting evidence of plaintiff's actual attorneys' fees at the

hearing on the motion for articulation, this error was harmless for a number of reasons. First, as the trial court has itself stated, the additional evidence did not affect the amount awarded as punitive damages. (Tr. 12/11/14 at 22; Defs.' App. at A220.) It bears noting that there is no dispute that the plaintiff is entitled to an award of some punitive damages. Indeed, the defendants have not challenged the trial court's finding that the defendants committed fraud, and thus impliedly concede that an award of punitive damages is proper. Defendants only complaint is with the trial court's admission of additional evidence relating to attorney's fees as part of the articulation process.

This question of whether the trial court properly admitted evidence relating to attorney's fees is entitled to great deference:

> ... [T]he trial court has broad discretion in ruling on the admissibility ... of evidence ... [and its] ruling on evidentiary matters will be overturned only upon a showing of a clear abuse of the court's discretion.... We will make every reasonable presumption in favor of upholding the trial court's ruling, and only upset it for a manifest abuse of discretion.... even if a court has acted improperly in connection with the introduction of evidence, reversal of a judgment is not necessarily mandated because there must not only be an evidentiary [impropriety], there also must be harm....

Rosa v. Lawrence & Mem'l Hosp., 145 Conn. App. 275, 291 (2013). No harm has occurred here, since the additional evidence adduced by the trial court was not used to amend or alter the judgment in this case. (Tr. 12/11/14 at 22; Defs.' App. at A220.)

Second, any error is harmless because the defendants have waived their right to further contest plaintiff's attorney's fees. As set forth above, during the hearing on the defendants' motion for articulation, the trial court took into evidence exhibits that established the amount of plaintiff's attorneys' fees and costs. The defendants were given the opportunity at the hearing to cross examine a witness regarding the attorneys' fees and litigation costs incurred by the plaintiff and declined to do so. (Tr. 12/11/14 at 16; Defs.'

App. at A214-15.) Defendants therefore waived their right to contest those fees, and cannot be heard to complain that the fees submitted at that hearing were in any way improper.

Third, any error in the trial court's articulation procedure is harmless because the proper remedy, even if this Court found error, would be a remand for a hearing on plaintiff's actual attorneys' fees and litigation expenses—not a complete reversal of the award as defendants suggest. Munson v. Munson, 98 Conn. App. 869, 875 (2006); R.I. Pools, Inc., 149 Conn. App. at 878 (reversing trial court's punitive damages award and remanding for a hearing on the actual costs incurred); see also Lusa, 101 Conn. App.at 743 ("If, on appeal, this court cannot reconcile an articulation with the original decision, a remand for a new trial is the appropriate remedy.") Here, that hearing has already been held as part of the articulation process, and remand to simply present that same evidence would be a waste of judicial resources. For these reasons, any error in the trial court's articulation process is harmless, and does not require any corrective action by this Court.

F. The Trial Court's Award of Prejudgment Interest Under C.G.S. § 37-3a Was Proper.

Prejudgment interest is available in civil actions "for the detention of money after it becomes payable." C.G.S. § 37-3a. The defendants attempt to circumscribe the statute by reading in a limitation that prejudgment interest may only be awarded pursuant to an undisputed liquidated damages clause. (Defs.' Br. at 19-21.) This argument eviscerates the statute and has no basis in law.

1. Standard of Review

The decision of whether to grant interest under C.G.S. § 37-3a is reviewed under an abuse of discretion standard. Sosin v. Sosin, 300 Conn. 205, 227 (2011). Whether the trial court misconstrued the standard of § 37-3a, however, is an issue of law. See DiLieto v.

Cnty. Obstetrics & Gynecology Grp., P.C., 310 Conn. 38, 49 (2013).

2. An Award of Prejudgment Interest is Not Limited to Cases where Damages Are Not Disputed Pursuant to a Liquidated Damages Clause.

It is well settled that whether to grant interest under § 37-3a is "factbound determination" that "lies within the trial court's discretion." Spearhead Const. Corp. v. Bianco, 39 Conn. App. 122, 135 (1995); see also O'Hara v. State, 218 Conn. 628, 643 (1991) ("The allowance of interest as an element of damages is...primarily an equitable determination and a matter lying within the discretion of the trial court.") This determination "should be made in view of the demands of justice rather than through the application of any arbitrary rule." Sosin, 300 Conn. at 229. "The real question in each case is whether the detention of the money is or is not wrongful." Bertozzi v. McCarthy, 164 Conn. 463, 466 (1973), citing Cecio Bros. Inc. v. Feldman, 161 Conn. 265, 275 (1971). In reviewing a trial court's award of interest, this Court must make every reasonable presumption in favor of the correctness of the award. Chapman Lumber, Inc. v. Tager, 288 Conn. 69, 99-100 (2008). "We have seldom found an abuse of discretion in the determination by a trial court of whether a detention of money was 'wrongful. '" O'Hara, supra, 218 Conn. at 643.

The trial court unquestionably applied the correct legal standard in its discretionary award of prejudgment interest. Nonetheless, the defendants attempt to sidestep the trial court's discretion by asserting that any award of prejudgment interest is limited to cases where damages are not disputed pursuant to a liquidated damages clause in a contract. (Defs.' Br. at 20-21.) Such a limited reading of § 37-3a would render the statute ineffective in nearly all cases, and is, unsurprisingly, inconsistent with the case law.

General Statutes § 37-3a allows interest in a variety of circumstances, including "where there is a written contract for the payment of money on a certain day . . . ; or where

there has been an express contract; or where a contract can be presumed; or where it can be proved that money has been used, and interest actually made." DiLieto, 310 Conn. at 49 n.11. Prejudgment interest may also be awarded on equitable claims. See Nation Elec. Contracting, LLC v. St. Dimitrie Romanian Orthodox Church, 144 Conn. App. 808, 821 (2013) (prejudgment interest awarded on unjust enrichment claim).

Here, the defendants have not challenged either the trial court's factual basis for awarding prejudgment interest on the breach of contract damages, or its discretion in making the award.[15] Instead, the defendants attempt to avoid the deferential review this Court gives to those determinations, and argue that they are entitled to plenary review as to the standard applicable to § 37-3a. Specifically, the defendants argue that neither the damages awarded for breach of the SOPA nor breach of the arbitration agreement "were the result of liquidated damages clauses or were undisputed" (Defs.' Br. at 20), and that under Foley v. Huntington Co., 42 Conn. App. 712 (1996), those damages fall outside the scope of § 37-3a (Defs.' Br. at 21). This argument significantly misapprehends the scope of § 37-3a as discussed in Foley and in cases after Foley.

First, in Foley, the court noted that neither party claimed to have performed fully or substantially under the contract so as to invoke the other's obligation to pay a liquidated sum or to provide services under the contract. Id. at 742. Here, the facts are distinguishable because the trial court found that the defendants anticipatorily breached the SOPA by repudiating their obligations before plaintiff's time for performance was due. (MOD at 38; Defs.' App. at A80.) Thus, plaintiff's damages were immediately due and payable upon the

[15] The defendants have also not challenged the award of interest with respect to the EA. The trial court stated that interest would run on all claims "until the judgment is paid." (Articulation at 5; Defs.' App. at A134.) Thus, at a minimum, interest runs on damages awarded for breach of the EA at least from the date of the judgment until it is satisfied.

defendants' repudiation of the SOPA.

Second, the courts in this state have consistently held that in determining an award of prejudgment interest pursuant to C.G.S. § 37-3a, "[w]hether a sum in certain circumstances has been liquidated may, of course, be a useful although not necessarily controlling criterion." Bertozzi, 164 Conn.at 467. Likewise, in Sosin, supra, the Connecticut Supreme Court made clear that whether the amount of damages was disputed does not foreclose an award of prejudgment interest under § 37-3a. 300 Conn. at 230. Thus, even though defendants disputed their debt here, "the trial court was not foreclosed from awarding interest pursuant to § 37-3a." Id.

Third, this Court itself has said that "the proper inquiry in determining whether interest may be awarded pursuant to § 37-3a is whether the claim at issue involves wrongful detention of money after it becomes due and payable." Nation Elec. Contracting, LLC, 144 Conn. App. at 820-21 (citing Foley, 42 Conn. App at 740). Thus, defendants' argument that § 37-3a is limited to situations where damages are undisputed pursuant to a liquidated damages clause is contrary to the law of this state. The trial court was well within its discretion to award prejudgment interest because the defendants withheld money owed for their breaches of the express contracts at issue. (Articulation at 5; A134.)

In addition to the fact that the trial court's award of prejudgment interest was well within its discretion, the court can consider the defendants' bad faith in a breach of contract action when making an award of prejudgment interest. In Sosin, supra, the Court held that detention of money can be wrongful even where the defendant has acted in good faith: "neither this court nor the Appellate Court has held .... that the detention of money cannot be wrongful if the liable party had a good faith basis for nonpayment." 300 Conn. at 229.

"Although bad faith is one factor that the court may look at when deciding whether to award interest under § 37-3a ... in the context of the statute, 'wrongful' is not synonymous with bad faith conduct." Id. at 229-230, quoting Ferrato v. Webster Bank, 67 Conn. App.588, 596, cert. denied, 259 Conn. 930 (2002). Here, the evidence of defendants' bad faith and fraudulent conduct is overwhelming, and undisputed by the defendants. The plaintiff's employment was fraudulently terminated by the defendants in December 2006. The defendants acted fraudulently in refusing to pay their share of the costs of the arbitration hearings in 2009, requiring the plaintiff to bring this action. The defendants' conduct has caused the plaintiff to incur years of extraordinary effort and financial burden. Because the trial court applied the correct standard, and the defendants have not challenged the trial court's factual findings or discretion in making that award, the judgment awarding prejudgment interest from March 1, 2007 until the judgment is paid should be affirmed.

III. CONCLUSION

The trial court's decision should be affirmed in full. In the event that this Court finds error regarding the trial court's award of punitive damages or the articulation hearing, the plaintiff requests that this issue be remanded to the trial court for further proceedings on the issue of attorneys' fees and litigation costs.

Respectfully submitted,

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CERTIFICATION

Pursuant to Practice Book § 67-2(g), the undersigned certifies that the electronically submitted brief and part two appendix were emailed on July 8, 2015, to counsel of record listed below, and that the brief and part two appendix do not contain names or personally identifiable information that is prohibited from disclosure or that any such information has been redacted.

Pursuant to Practice Book § 67-2(i), the undersigned certifies that: (1) in accordance with Practice Book § 62-7, a copy of the foregoing brief and part two appendix were mailed, postage prepaid, to the Honorable John A. Danaher, III, and the counsel of record listed below, on July 8, 2015; (2) that the brief and part two appendix are true copies of the brief and part two appendix electronically filed pursuant to Practice Book § 67-2(g); (3) that the brief and part two appendix do not contain any names or personally identifiable information that is prohibited from disclosure or that any such information has been redacted; and (4) that the brief complies with all of the requirements of Practice Book § 67-2.

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APPELLATE COURT OF THE STATE OF CONNECTICUT

NO. A.C. 36912

WALTER WHITNEY

Plaintiff – Appellee

VS.

J.M. SCOTT ASSOCIATES, INC., ET AL.

Defendants – Appellants

On Appeal From The Superior Court
For the Judicial District Of Litchfield
(Hon. John A. Danaher, III, J.)

PART TWO APPENDIX OF PLAINTIFF – APPELLEE

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§ 1-2z. Plain meaning rule

Currentness

The meaning of a statute shall, in the first instance, be ascertained from the text of the statute itself and its relationship to other statutes. If, after examining such text and considering such relationship, the meaning of such text is plain and unambiguous and does not yield absurd or unworkable results, extratextual evidence of the meaning of the statute shall not be considered.

Credits
(2003, P.A. 03-154, § 1.)

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End of Document

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Only the Westlaw citation is currently available.

Superior Court of Connecticut.

James WIMPFHEIMER,
v.
Patricia WIMPFHEIMER.

No. FA920102132S. | Sept. 7, 2001.

Memorandum

DYER, J.

*1 THE COURT: Good morning, Ladies and Gentlemen.

All right. This is docket number FA92-0102132, Janet Wimpfheimer-I'm sorry. James Wimpfheimer versus Patricia Wimpfheimer. All right.

Will counsel please identify themselves for the record?

MS. ECKERT: Lorraine Eckert for the plaintiff James Wimpfheimer.

MS. HARKINS: Kathleen Harkins representing Patricia Wimpfheimer, the defendant.

THE COURT: All right, thank you. Let me just do a little procedural history here.

This hearing relates to a motion for articulation and clarification filed by Attorney Eckert on behalf of Plaintiff Wimpfheimer on June 6th, 2001.

This past Monday this matter for the first time was brought to my attention at approximately five p.m. by way of a written stipulation signed by Attorney Eckert and Attorney Harkins. Attorney Harkins was present on August 27th when this was given to the Court; Attorney Eckert was not.

The stipulation indicated that the parties agree that this Court would articulate its decision, or file an articulation concerning its decision in late May on a contempt citation brought against Mr. Wimpfheimer by Mrs. Wimpfheimer, five p.m., on August 27, 2001, which was the first time that I was even aware that this motion for articulation had been pending.

I denied the motion without prejudice, frankly because I wanted both counsel present, and I wanted a precise explanation of the motion for articulation from both counsel.

I had first thought that it might be necessary to bring counsel up to Hartford, because that's where I'm being assigned starting next Tuesday. In examining my schedule, I noticed a hole in my schedule this morning, so I thought I would come over here and save you both a trip to Hartford and see if we couldn't clear this up this morning.

And with that procedural history in mind, let me ask you, Ms. Eckert, what is it specifically that you want this Court to articulate?

MS. ECKERT: Okay, your Honor, if I begin with your Memorandum of Decision, May 31st, 2001, you attached Exhibit A, which explained the computation of the child support arrearages and the timing question that has to do with 1/1/01 through 5/28/01.

And you noted on Exhibit A that the payments for that period of time were zero. And you indicated in your memo of decision that Mr. Wimpfheimer owed $1710 for unreimbursed medical expenses.

I think those are the two starting points. First of all, in the hearing that we had, there were representations made-

THE COURT: By whom?

MS. ECKERT:-by Attorney Harkins, for the defendant, that there were unreimbursed medical expenses of $3420.

And then there was testimony from both parties that Mr. Wimpfheimer had paid some amount towards that sum and that reduced the amount to $1710 that was due to Mrs. Wimpfheimer for unreimbursed medicals.

And hence, your Honor ordered in the memo of decision that he would pay $1710 for unreimbursed medical expenses.

Then on the question of the arrearage for that period of time, January 1st, 2001 to 5/2/01.

*2 THE COURT: I'm sorry, 1/20-sorry-

MS. ECKERT: 1/1/01 through 5/29/01, you stated on your Exhibit A attached to the memo of decision that he had paid no money towards support during that period of time.

THE COURT: Okay.

MS. ECKERT: And Mr. Wimpfheimer did make some payments starting in January at the rate of $70 a week, and he also made a lump sum payment towards his former spouse of $1288 during the month of January.

THE COURT: And was that for support or were those medical expenses?

MS. ECKERT: That was towards support.

THE COURT: Okay.

MS. ECKERT: My only thoughts at this point in time, these amounts are not reflected in Exhibit A, for whatever reason.

THE COURT: I've gone over my notes, and I may be able to help you address your articulation. But I want to get it clear for everyone on the record what you're looking for.

MS. ECKERT: Those are the two issues, payment of the 1288 lump sum and whatever weekly payments made for the year 2001.

And my suggestion was going to be that simply the support arrearage would be reduced by those amounts. And if there was a question as to whether he paid it, perhaps he could produce cancelled checks.

THE COURT: Now, do you have any quarrel with the 3420, which is apparently divided in the half by the Court and made 1710?

MS. ECKERT: No I don't have any problem with that. No, no.

THE COURT: Okay. That's what I wanted to understand. Ms. Harkins, let me just address you:

Do you know whether the 1288 lump sum in support was made?

MS. HARKINS: I have to apologize to the Court, your Honor, I've been through my file, I took it apart. My client, generally, when she received payment would make a copy of the check and send it on to me. I cannot find it in my file. That does not mean that she did not receive it, it simply means if she did, she did not send a copy to me.

One of the difficulties I have is that when I filed my revised proposed orders on April 19th, one of the things I did was, hoping to aid the Court in terms of the kind of claim for relief that I thought was appropriate on, I listed those payments that she had confirmed to me.

And in reviewing that exhibit, and speaking with Attorney Eckert yesterday, I definitely have determined that there are three separate payments that were listed on this exhibit that was reviewed between myself and my client for 2001 for the period in question. And they total $980.

When your Honor entered his orders, the total amount that was ordered was $15,925. My client received a check. And I have had, unfortunately, returned to me yesterday a check in the amount of $11,527. And that was received on June-July 5th.

THE COURT: So that appears to be in compliance with my order that he was trying to make some lump sum towards arrearage.

MS. HARKINS: What it was, your Honor, the amount of child support, 9,715, and the medical unreimbursed of 1710, which totals fifteen thousand-I mean $11,425. So it was off by a hundred and two dollars for those two figures, but did not include the $4500 that your Honor awards as attorneys fees.

*3 THE COURT: Okay.

MS. HARKINS: So, when that check came in, and I went back to the file and did the math off of the judgment. I said to my client, oh, yes, it appears that he was slightly off by a hundred dollars. But he's paid the support and unreimbursed as ordered.

I then filed a motion for contempt dated July 31 saying he had not paid the $4500 that you ordered.

THE COURT: And counsel fees?

MS. HARKINS: There was no explanation with this check as to what it was or what it wasn't.

THE COURT: But that's a good sign that some large chunk of this has been paid and that's commendable. All right. Here is what I can tell you. And again, I wasn't aware of the pendency of this motion for articulation, which was apparently filed on-approximately 5:00 on August 27th.

I've gone over my notes, which I do keep on trial. I have not gone over transcripts. What I am going to do today-and let me tell you before I do it-is what I'm going to do in a moment is grant the motion for articulation as best I can with my notes, and make a couple suggestions or orders as to how this matter could possibly be cleared up.

Does that sound about right to everybody?

MS. ECKERT: Yes, your Honor, fine.

THE COURT: I'm not going to deal with the contempt today, because frankly, I haven't got evidence in front of me, and hopefully given this past compliance that maybe you can also reclaim your motion before another judge. I'm trying to do as much as I can before I leave so this matter will be cleaned up.

My notes show a reference to a $1,288 lump sum payment. I did not make a finding of fact with respect to that payment, and it was not encompassed in the arrearages that I set out in the exhibit that I appended to my orders.

Again, I'm working off notes, and I have not had the benefit of a review of the transcript for the logistical reasons I just cited. It is the Court's belief and would be the Court's intention that if in fact that $1,288 support payment was made, it should be deducted from the support arrearage owed by Mr. Wimpfheimer to Mrs. Wimpfheimer.

To that extent, I grant Mr. Wimpfheimer's motion for articulation, and I've articulated as best I can based on my notes.

It would be the Court's intention that Mr. Wimpfheimer verify this to Mrs. Wimpfheimer's satisfaction. If, in fact, he's overpaid his support payments, that can be adjusted.

If there is a dispute about this, it should be brought to the attention of the superior court based on the articulation that I will sign as my-I'll get a transcript of this and sign this as my written memo of decision in this matter.

I don't think it necessarily has to come back to this Court if there is a dispute. I will file this as an articulation. If there is a dispute about that-which I hope there won't be-you can bring it back to the attention of the superior court in this district, this judicial district.

Now, I clearly did not make findings with respect to-as best I can determine, again from my notes-on the $70 I had a note in there that he hadn't made any payments. And I was reacting, I believe, to that note.

*4 Therefore, it's clear to me I didn't make a finding-again, clear to me as best I can determine from my notes-that I did not make a finding about $70 a week payments.

I therefore grant your motion for articulation and state the following: To the best of this Court's knowledge, it did not take into consideration the $70 payment that Mr. Wimpfheimer purports to have made. If, in fact, Mr. Wimpfheimer can substantiate those payments, those also should be reduced from the arrearage I determined in my memorandum of decision.

Again, as with other lump sums, if it cannot be determined by competent verification that those were made, then they shouldn't be reduced.

Here too I suggest that the parties meet or their counsel meet and go over the verification and do an accounting. And if you have a dispute about that, it can be brought back to the attention of this Court in this district here too. I don't think it has to come before this judge, now that I have articulated to the best of my ability.

Secondly, if you wish to order transcripts, the transcripts would be the best record or at least would be a good record; but I did not have the benefit of the transcript, so I'm working off notes.

Again, I do not believe that this Court considered either the lump sum payment or the purported $70 a week payments in its decision. It is not clear to the Court that I made findings that those payments were made. And I believe the matter should be resolved in the manner I have just set forth for you, to that extent I am hereby articulating and clarifying to the best of my ability the decision I rendered in May.

I will hereby request a written transcript of what I have just said and of this proceeding, which will be the Court's written Memorandum of Decision.

Does anyone have any questions about what I have just done?

MS. HARKINS: No, your Honor.

MS. ECKERT: No, your Honor.

THE COURT: Okay. I will sign this. I hope it is somewhat helpful to you. Does it appear to counsel that this matter then can therefore be resolved?

MS. ECKERT: I would hope so. I would hope that my client could simply produce cancelled checks.

THE COURT: Counsel?

MS. HARKINS: Your Honor, certainly if she has been paid this amount, I'm hopeful that she has information with regards to it. As I indicated to the Court, I do believe that we did at the time of the hearing in April indicate to the Court that some $980 had been paid.

THE COURT: I'm not saying that you didn't. I'm not saying that you didn't. I'm just saying that based on my notes, I don't find that I incorporated those into my finding on the arrearage. And again, it's to the best of my ability based on my notes.

This motion for articulation was pending since June 7th. I got it-the first time I became aware of it was on August 27th. What I have tried to do is go over the notes to the best of my ability.

I think it should be-I think the burden should be on Mr. Wimpfheimer to show if he made the payments. What's the matter Ms. Harkins?

*5 MS. HARKINS: Nothing, your Honor. We simply-in terms of my client, we simply get a check with no explanation. The money has been disbursed to my client, and unfortunately, $4,500 of your order has not been paid. And you know, it's-it's unfortunate.

THE COURT: That's for another day. It's clear. And you know, I was reacting-I can only react to today to your stipulation. And if there is a contempt motion outstanding for the non-payment of that, that's going to have to be brought to the attention of the Court.

I would urge, through counsel, Mr. Wimpfheimer, that if there is not an appeal being taken here, that this order should be complied with, including what I consider to be a just award-and I note both sides probably disagree on the amount I awarded there-but what I consider to be a just award of counsel fees. And I think they should be-I think they should be paid.

Now, if somebody has a legal defense to that, they can raise it in the appropriate manner, but I think I've complied to the best of my ability today with-the best I can with the articulation.

I think the Exhibit and my notes would seem to indicate that I didn't credit any payments for those periods and figured out the arrearages as best I could, computing in what I considered to be the new rate of support from a particular point in time.

It's the best I can do by way of articulation.

MS. ECKERT: Thank you, your Honor.

THE COURT: All right. Good luck to both of you. Thank you.

MS. HARKINS: Thank you, your Honor.

(Court adjourned.)

All Citations

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End of Document

DOCKET NO. LLI-CV09-5007099-S	:	SUPERIOR COURT
WALTER WHITNEY PLAINTIFF.	:	J. D. OF LITCHFIELD
V.	:	AT LITCHFIELD
SCOTT SWIMMING POOLS, INC., ET AL	:	
DEFENDANTS.	:	

PLAINTIFF'S POST TRIAL BRIEF

DECEMBER 4, 2013

FOR PLAINTIFF, WALTER WHITNEY

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(2010)(affirming judgment finding violation of CUTPA where the defendant who had agreed to sell property to the plaintiff "engaged in a pattern of bad faith conduct, seeking to escape its contractual obligations unfairly while negotiating a more favorable offer with . . . a third party."); Willow Springs Condo. Ass'n, Inc. v. Seventh BRT Dev. Corp., 245 Conn. 1, 39-47 (1998) (developer's breaches of warranties, fraudulent concealment of defects in the construction and fraudulent misrepresentation violated CUTPA); Meyers, 41 Conn. App. at 35-36 (holding a CUTPA claim could be supported by a fraudulent misrepresentation.)

Defendants' conduct also violates the third CUTPA criterion: (i) the injury was substantial, (ii) the injury was not outweighed by any countervailing benefits to consumers or competition that the practice produces, and (iii) the injury was one that consumers themselves could not reasonably have avoided. McLaughlin Ford, Inc. v. Ford Motor Co., 192 Conn. 558, 569 (1984). The injury suffered by Whitney was substantial. See Section II.F. supra. Defendants can advance no plausible argument that the injury to Whitney is outweighed by a benefit to a third party. Whitney did everything in his power to comply with the agreements. He simply could not have avoided the injury caused by the defendants. Accordingly, this Court should find that the defendants violated CUTPA.

V. WHITNEY IS ENTITLED TO DAMAGES

A. Breaches of SOPA, SLA

Whitney claims damages for breach of the SOPA, the SLA, and the covenant of good faith and fair dealing (Counts 4 and 7). The Court should award Whitney "benefit of the bargain" damages for defendants' anticipatory breach of the SOPA, in the amount of $4 million. Little Mountains Enterprises, Inc. v. Groom, 141 Conn. App. 804, 809 (2013)("contract damages are ordinarily based on the injured party's expectation interest and are intended to give him the

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benefit of the bargain by awarding a sum of money that will, to the extent possible, put him in as good a position as he would have been in had the contract been performed"); Foley v. Huntington, 42 Conn. App. 712, 743-44(1996)("plaintiff received . . . damages, which constituted . . . the benefit of the bargain, namely, the difference between the contract price and the fair market value of the land and building," which value "took into account anticipated profits in the future operation of the nursing homes"). Whitney proved that the value of 90 percent of the stock of SSP, less the purchase price stated in the SOPA, together with the income he reasonably expected to earn as owner of SSP, was about $4 million. (V.8. at 74-87; Exs. 78-84.) Mathis testified the value of 90 percent of the stock of SSP, less the purchase price stated in the SOPA, alone was $2.34 million. (V.12A at 35-36.) Whitney is also entitled to interest from the date of breach (3/07) at the legal rate of 10 percent, under Conn. Gen. Stat.§37-3a.

Even if the Court calculates the "benefit of the bargain" differently, in the alternative it should award Whitney damages based on (1) the salary he gave up in reliance on defendants' broken promises; (2) Whitney's salary from SSP; or (3) Scott's salary from SSP. First, Whitney gave up an annual salary of $89,356.73 plus benefits to enter into the EA and SOPA. (V.2 at 142-43; V.3 at 11; Ex. 53.) He planned to own SSP for at least 10 years. (V.8 at 75.) Whitney therefore claims alternative damages in the amount of $893,567.30 plus benefits, less his earnings from substitute employment and unemployment compensation (which amounts to $408,970.16), or $484,597 plus benefits. See Section II.F. supra. Second, SSP agreed to pay Whitney $142,153 annually plus benefits valued at $32,850 (totaling $175,000), for the period 10/02 through 3/07. (V.8 at 75-76; V.9A at 23-25, 69-72; Ex. 21, §4.) Under this calculation, Whitney should be awarded damages in the amount of $1,750,000 (10 years times $175,000), less his earnings from substitute employment ($391,330.60; Ex. 53) and unemployment

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compensation ($17,640.00; Ex. 53), or $1,341,030. Under the third alternative, based on Scott's salary, which varied between $250,000 and $300,000 plus benefits from 2001 through 2008 (Ex. 74; V.1 at 64-65; V. 9A at 70-71), Whitney should be awarded damages of at least $2.5 million (10 years times $250,000), less other earnings ($408,970.16), or $2.09 million plus benefits.

B. Breaches of Arbitration Clauses

Whitney claims his arbitration costs and attorney's fees as damages for breach of the arbitration provision of the SOPA. These total approximately $65,000 to 80,000 (Exs. 54, 55; V.8 at 93; V.2 at 126-27), plus statutory interest from the date of breach (8/14/2009; Ex. 42).

C. Breaches of the EA

Whitney claims damages under the termination provisions of the EA (Counts 5 and 6; Ex. 21, § 8.4) of $141,000.00,[13] plus statutory interest from the date of termination.

D. Fraud and Violation Of CUTPA

Whitney claims "benefit of the bargain" damages for fraud and violation of CUTPA (Counts 1 and 10), of $4 million (V.12A, at 35-36), plus interest at the legal rate from the date of breach in March 2007. See Miller, 183 Conn. at 57(damages for fraud are "'benefit of the bargain' damages, together with any consequential damages resulting directly from the fraud"); Macalpine v. Holiday Homes, No. 336634, 1990 WL 271873, at *5 (Conn. Super. Ct. May 7, 1990)("In either fraud or contract breach, the plaintiff would be entitled to recover that amount which represents the loss of the benefit of her bargain"). Alternatively, Whitney claims damages for fraud and violation of CUTPA calculated in the same manner as his "benefit of the bargain" damages for breach of the SOPA and SLA, as set forth in detail in Section V.A, above.

[13] EA §8.4 provides for damages as "the lesser of his actual damages or the sum of $150,000 plus the amount of the purchase price provided for in the Section 2.3(f) of the Stock Option Purchase Agreement among the President, Employee and the Corporation of even date herewith." These damages "shall be reduced by the amount of the Unconditional Payment...as set forth in Section 8.3 above."

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In addition, the Court should award plaintiff his legal fees and costs of prosecuting this action (Ex. 150) in an amount to be determined by the Court. C.G.S. §42-110g(d)(attorneys' fees recoverable under CUPTA); Jacques All Trades Corp. v. Brown, 57 Conn. App. 189 (2000) (same); Wedig, 1 Conn. App. at 134 (attorney's fees are recoverable in an action for fraud). Interest at the statutory rate of 10 percent for the period after March 2007 should be added to the award of attorneys' fees and costs. Conn. Gen. Stat. §37-3a.

Finally, Whitney testified to the distress he suffered and the health problems he developed because of defendants' breaches. (V.9A at 36-39, 44.) Connecticut law authorizes the recovery of damages for emotional distress in fraud cases such as this case. Kilduff v. Adams, Inc., 219 Conn. 314 (1991).

VI. CONCLUSION

The evidence presented at trial proves that the defendants committed numerous breaches of their agreements, fraud and violations of CUTPA. As such, this Court should award Whitney just damages as set forth above.

THE PLAINTIFF,
WALTER WHITNEY

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DOCKET NUMBER: LLI-CV09-5007099-S	: SUPERIOR COURT
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DEFENDANTS' POST TRIAL BRIEF

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procedure and to take his (Robb's) input so much so that he stopped attending because it became a waste of his time. Tr. 7/17/13, 50:20 – 52:9.

Dave Scarritt testified that between 2002 and 2004, when he worked at SSP, he did not consult Whitney on service related issues because he did not believe that Whitney possessed the same level of expertise as Scott or Van Veghel. Tr. 5/22/13, 45:12 – 46:6.

As the time approached to determine if Whitney would be retained and permitted to have the ability to exercise an option, Scott was faced with the fact SSP had performed poorly under Whitney's tenure. The prospect of obtaining even the consulting fee and promissory note were doubtful. At that point, he terminated Whitney extinguishing his option.

C. Damages – If Whitney has Proved Any Breach of the Agreements, His Damages Are Limited To Those Provided For In The Liquidated Damages Clause

The fourth and seventh counts concern the claims of breach of contract based upon the SOPA and Supplemental Letter. These agreements, by their own terms, are unenforceable to the extent that they seek specific performance or damages beyond those provided for therein.

Numerous provisions of the Employment Agreement and SOPA specifically spell out the rights, if any, held by Whitney. None of them include the right to an option to purchase stock if Whitney were to be terminated before the completion date of his contract of employment. The plaintiff admits as much with his convoluted claim that SSP and Scott "fraudulently" changed the prior discussions into an option agreement

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rather than a straight sale. What the plaintiff seeks to do is re-write the agreements after the fact to make the deal what he claims he wanted, not what the parties agreed to in writing. When the agreements are read together, the only fair interpretation is that the SOPA does not survive a termination regardless of the cause. A review of the agreements makes this point clear.

Section 2.3(a) of the SOPA requires Whitney to sell his stock back to Scott and/or SSP upon termination for any reason, except death. Plaintiff's Exhibit 3, p. 5. Section 2.3(f) of the SOPA provides Whitney with the price to be paid for the stock if the termination is without "adequate cause". Plaintiff's Exhibit 3, p. 6. Section 8.4 of the Employment Agreement provides Whitney with a payment if the termination is without "adequate cause. Plaintiff's Exhibit 21, p. 10.

Two sections of the SOPA make perfectly clear that Whitney has no rights to exercise an option pursuant to the SOPA if his employment is terminated for any reason. Section 3.1(a) of the SOPA grants Whitney a "Post Initial Employment Option" exercisable from April 1, 2007 – July 1, 2007. Plaintiff's Exhibit 3, p. 9. Section 3.1(c) of the SOPA requires Whitney to sell his stock (10%) to SSP if he fails to exercise the option. Plaintiff's Exhibit 3, p. 10. Thus, it is clear that the option to purchase exists only if the plaintiff were continuously employed as of April 1, 2007. Otherwise, why would Whitney have to resell his stock to Scott in §3.1(c), when 2.3(a) and 2.3(f) already ***required*** him to resell it on termination? How can Whitney be required to transfer his stock to SSP if he fails to exercise his post employment option if he was already required to transfer his shares upon termination, leaving him nothing to transfer?

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No one clause of the agreement should be interpreted to be meaningless. Rogal v. Randall, 115 Conn. App. 89, 96 (Conn. App. Ct. 2009). Section 3.1(c) would be rendered meaningless if Plaintiff's position were accepted. Whitney and his lawyer, as the authors of the agreements, must have them construed against them. Cantonbury Heights Condo. Assoc., Inc. v. Local Land Dev., LLC, 273 Conn. 724, 735 (Conn. 2005). The only interpretation that harmonizes the various provisions and provides meaning to each clause is that Whitney only has an option when and if he remained employed as of April 1, 2007.

1. **The Employment Agreement**

The determinative issue on the amount of Whitney's monetary award is whether he was terminated for "adequate cause." As discussed in Section III.B.2.b) above, Whitney was terminated for "adequate cause." This "cause" determination relates directly to the monetary benefit Whitney is entitled.

a) If For Adequate Cause

If the termination was for "adequate cause", Whitney is entitled to 26 weeks of pay (Plaintiff's Exhibit 21, p. 10, ¶ 8.3) and he must transfer his 10% share in SSP without payment (Plaintiff's Exhibit 3, p. 6, ¶ 2.3(e).

The proof admitted showed that Whitney was getting paid that sum until March, 2007 when he demanded rights to exercise the option to purchase the stock. In total, Whitney received $35,538.23 after termination. Defendants' Exhibit WW. At the time of termination, Whitney earned $2,733.71 weekly. Id., p. 8. Thus, if the termination was for "adequate cause", Whitney would have been entitled, by agreement, to $71,076.46 less $35,538.23 which equals (coincidentally) $35,538.23.

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b) If For Inadequate Cause

Assuming, but not conceding, the termination was without "adequate cause", Whitney is then entitled to the "lesser of his actual damages or the sum of $150,000 plus the amount of the purchase price provided for in the in Section 2.3(f) of the Stock Option Purchase Agreement." Plaintiff's Exhibit 21, p. 10, ¶ 8.4.

After his termination, Whitney agreed that he believed he had the option to purchase SSP's stock. Thus, his efforts to look for work were limited. He submitted Plaintiff's Exhibit 52. In total, he supplied documentary evidence of four (4) people contacted to look for work. One of those people ("Michael") is simply an email from and to Whitney. There is no evidence it was sent to "Michael". Plaintiff's Exhibit 52, p. 8.

The contractual requirement to prove the "lesser of actual damages or the sum of $150,000" means Whitney must prove his actual damages so it can be determined if they were less than $150,000. He failed to prove his actual damages because his mitigation efforts were too meager.

Assuming Whitney proved damages in an amount greater than $150,000 for any reason, his damages are limited by SOPA to $150,000 plus $26,000 for his SSP stock (Plaintiff's Exhibit 3, p. 6, ¶ 2.3(f)) less the payments made of $35,538.23 for a total of $140,461.77. Whitney failed to produce any evidence on the amount of any tax that may be due for the transfer of the SSP stock. Plaintiff's Exhibit 3, p. 6, ¶ 2.3(f).

2. <u>The Liquidated Damages Provision in the Agreements Prevents Whitney's Claims Of Additional Damages</u>

Whitney has pursued substantial additional damages despite his agreements otherwise. He pursues various theories in his effort to avoid the plain language of the

contract. All such damage evidence was either Whitney's speculation of the future or based upon an inexplicable measurement of time and inappropriate adjustments. Whitney did not plead nor did he present any evidence in an effort to prove that the liquidated damages were unreasonable and unenforceable.

"A provision for liquidated damages . . . is one the real purpose of which is to fix fair compensation to the injured party for a breach of the contract." Berger v. Shanahan, 142 Conn. 726, 731 (Conn. 1955); Bill v. Cusano, 48 Conn. L. Rptr. 18, *2 (Conn. Super. Ct. June 8, 2009). Although such provisions are often deemed illegal penalties, they will be construed as one for liquidated damages if:

> (1) The damage which was to be expected as a result of a breach fo the contract was uncertain in amount or difficult to prove; (2) there was an intent on the part of the parties to liquidate damages in advance; and (3) the amount stipulated was reasonable in the sense that it was not greatly disproportionate to the amount of the damage which, as the parties looked forward, seemed to be the presumable loss which would be sustained by the contractee in the even to of a breach of the contract.

Bill v. Cusano, 48 Conn. L. Rptr. 18 at *2. Liquidated damages provisions are presumptively valid, Amer. Car Rental, Inc. v. Comm'n of Consumer Prot., 273 Conn. 296, 313 (Conn. 2005), and the legality of same can only be challenged if specifically pleaded by the party intending to so challenge. Norwalk Door Closer Co. v. Eagle Lock & Screw Co., 153 Conn. 681, 686 (Conn. 1966). Therefore, if the prospective challenge to a liquidated damages provision is not specifically disclosed on a party's pleading, it cannot be raised at trial because neither the court nor opposing counsel was sufficiently apprised of such challenge. Id.; Crown Linen Serv., Inc. v. CT Appliance & Fireplace

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Distrib., No. HHDCV075011439S, 2009 WL 765531, *3 (Conn. Super. Ct. Feb. 24, 2009).

Whitney has argued damages of $2,400,000 for the loss of his future income and asset. Tr. 5/22/13, 134:5 – 138:9. H. Sean Mathis ("Mathis") was presented as an expert on business valuation. Most striking about his testimony was his process for evaluating the value. He testified he ignored 2007 to create a base year, using 1996 – 2006 only. Tr. 7/18/13 AM, 43:22 – 43:27. He agreed that his valuation was effective March 2006 because he omitted 2007 as an "outlier" year and made no effort to adjust for 2006 – 2007. Tr. 7/18/13 PM, 12:1 – 13:10. There is no accounting term known as "outlier" year nor does any valuation method recognize this.

As the testimony proves, Mathis made adjustments based upon Whitney's unsubstantiated projections, not his own expertise or investigation. Tr. 7/18/13 PM, 16:20 – 18:14 and 20:2 – 22:15. Further, he ignored expenses (like paying the note) that were certain to be incurred by the going concern following Whitney's acquisition of the business. Finally, he testified that he calculated the "enterprise value" of the business. Tr. 7/18/13 PM, 6:22 – 8:8. That valuation ignores the balance sheet. Tr. 7/18/13 PM, 27:9 – 28:4. Here, the asset to be valued was 90% of the stock.

Warren Burkholder ("Burkholder"), the defendants' expert to critique Mathis, testified that Mathis failed to follow generally accepted appraisal practice in not identifying the "standard of value". Tr. 7/19/13, 22:12 – 23:10. Mathis did not value the 90% stock Whitney claims he had an option to purchase. Tr. 7/19/13, 214:9 – 24:18. Burkholder disagreed with the components used by Mathis to determine the "WACC"

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found in Plaintiff's Exhibit 159 and testified that it was not in accordance with generally accepted practices. Tr. 7/19/13, 34:14 – 34:23. Burkholder then proceeded to analyze each element of Mathis' WACC and provided his opinions on why they were incorrectly calculated. Tr. 7/19/13, 34:24 – 42:6. Burkholder also disagreed with Mathis' analysis which ignored the balance sheet. Tr. 7/19/13, 42:26 – 43:13. By establishing that the basic premises of Mathis' valuation was flawed, the conclusion lacks any logical basis.

Moreover, Ostroske testified to the tax impacts ignored by Mathis if the officer loans, deferred compensation and accounts payable to affiliates were all "written off" pursuant to the Supplemental Letter. Tr. 7/23/13, 76:14 – 78:18. Mathis ignored the impact of such tax on SSP.

In sum, the damage claims made by Whitney and Mathis lacked reliability and credibility. Even if the proffered opinions have validity, the limitation clause in SOPA measures the damages at the lesser of actual or $140,461.77.

D. **The Failure Of The Option Does Not Violate CUTPA.**

Whitney alleges that Scott's alleged "roadblocks to Mr. Whitney's ownership of Scott Swimming Pools, Inc." was an unfair and deceptive trade practice. Complaint, Tenth Count, ¶ 52. Contrarily, however, "a CUTPA violation may not be alleged for activities that are incidental to an entity's primary trade or commerce." Biro v. Matz, 132 Conn. App. 272, 290 (Conn. App. Ct. 201); Southport Crossing, LLC v. RBC Cap. Markets Corp., No. 3:10cv1975 (AWT), 2013 WL 5442204, *10 (D. Conn. Sept. 27, 2013). The Defendants are not in the business of selling businesses or options but, rather, are in the business of selling and building pools. Therefore, even if Whitney has

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Whitney, through his lawyer, failed to do so. Accordingly, the Court should schedule a hearing to determine the amount of damages to which the defendants are entitled.

VI. CONCLUSION

WHEREFORE, the Court should enter judgment for the defendants' on the plaintiff's complaint and for the defendants on the second and fourth, fifth and sixth counts of the counterclaims.

THE DEFENDANTS

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CERTIFICATION

I hereby certify that a copy of the foregoing was sent on the above date to all counsel and pro se parties of record as follows:

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DOCKET NUMBER: LLI-CV09-5007099-S	: SUPERIOR COURT
WHITNEY, WALTER	: JUDICIAL DISTRICT OF LITCHFIELD
V.	: AT LITCHFIELD
J. M. SCOTT ASSOCIATES INC., ET AL	: DECEMBER 18, 2013

DEFENDANTS' REPLY TO PLAINTIFF'S POST TRIAL BRIEF

I. FACTS

Whitney entered SSP's employment for a three month probationary period and terminated his bank employment. Plaintiff's Exhibit 21, ¶8.2, p. 10. During the three month probationary period, Whitney could have been terminated for any reason with or without cause and without any severance. Id. The Employment Agreement thereafter provided that if he were terminated without cause, there would be defined severance. Id., ¶8.3 and 8.4, pp. 10 – 11.

His compensation at SSP greatly exceeded his previous salary at his bank job. In 2001 (his last full year at NewMil Bank), he earned total compensation of $99,598.64. Plaintiff's Exhibit 53, p. 1. Commencing at SSP, Whitney earned base salary of $122,153.00 plus benefits and after six (6) months with SSP, it increased to $142,153.00 plus benefits. Plaintiff's Exhibit 21, ¶4.1A and 4.1B, p. 5.

Whitney's claim that SSP for the period 1996 - 2000 showed no profitability is inaccurate. Due to the newly instituted growth and succession program including salaries for Jonathan Scott, William Drakeley, Robert Gwathney, Arnold Gundersen, the modernization of company computers, expansion costs of the supply discount business, the training and implementation of new project managers, increased advertising and promotions, as well as the expansion of newly acquired vehicles and equipment

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violation of CUTPA. Whitney is well aware of this and now seeks to circumvent the rules of practice by changing his theory of the case after trial thereof. This would clearly prejudice the Defendants and, therefore, should not be permitted.

VIII. WHITNEY'S DAMAGES ARE GOVERNED BY WHAT THE PARTIES CONTRACTED FOR

The Defendants have an extensive discussion of damages in their Post Trial Brief, which they incorporate herein through reference. However, as with many of the arguments made in Whitney's Brief, Whitney alleges for the first time therein, that he suffers from emotional distress as a direct result of the alleged frauds committed by the Defendants and that he is entitled to recover for damages that resulted therefrom. In support of this argument, Whitney cites Kilduff v. Adams, Inc., 219 Conn. 314 (Conn. 1991). However, in so doing, he leaves out a critical portion of the holding – that "such damages must be specially pleaded." Id. at 326. There are no allegations of emotional distress in Whitney's complaint, nor any prayer for relief for such. In fact, the defendants objected to the evidence attempted to be elicited on this issue. Tr. 7/11/2013 AM, 39:4 – 44:7. As they were not specially pleaded, they must be denied.

IX. ALL OF WHITNEY'S CLAIMS ARE BARRED BY THE APPLICABLE STATUTES OF LIMITATION

Any and all conceivable frauds or breaches by the Defendants occurred on or before March 23, 2007 and probably most relevantly in 2001. However, Whitney did not commence the above-captioned action until April 14, 2011, long after any cause of action alleged herein arose. As set forth is extensive detail in the Defendants' Post Trial Brief (incorporated herein by reference), as a result of extensive delay, all of Whitney's claims are barred of the applicable statutes of limitation.

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Whitney would prefer to be awarded the profits he could not prove he would have ever legitimately made through litigation, as opposed to onerous labor and enterprise.

For all of the foregoing reasons, judgment should enter in favor of the defendants on the plaintiff's claims and in favor of the defendants on their counterclaims.

THE DEFENDANTS

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CERTIFICATION

I hereby certify that a copy of the foregoing was sent on the above date to all counsel and pro se parties of record as follows:

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DOCKET NUMBER: LLI-CV 09-5007099-S	: SUPERIOR COURT
WHITNEY, WALTER	: JUDICIAL DISTRICT OF LITCHFIELD
V.	: AT LITCHFIELD
J. M. SCOTT ASSOCIATES INC., ET AL	: JANUARY 20, 2015

SUGGESTION OF BANKRUPTCY

This is to give notice that James M. Scott, a defendant in this action, has filed a Chapter 11 Bankruptcy case on January 20, 2015 with the United States Bankruptcy Court, District of Connecticut, at Bridgeport. As a result, the automatic stay provisions of the bankruptcy code apply. See 11 U.S.C. §362.

In accordance with Practice Book §14-1, an affidavit of bankruptcy is submitted herewith.

THE DEFENDANT,
JAMES M. SCOTT

By: /s/ 305547

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CERTIFICATION

This is to certify that a copy of the foregoing has been mailed, this 20th day of January, 2015, to:

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AFFIDAVIT RE: BANKRUPTCY

Counsel for the defendant hereby submits this affidavit concerning the bankruptcy petition of the defendant, James M. Scott:

1. A petition of bankruptcy under Chapter 11 of the United States Code was filed on January 20, 2015 by the defendant, James M. Scott, with the Bankruptcy Court, District of Connecticut, 915 Lafayette Blvd., Bridgeport, Connecticut 06604, Telephone: (203) 579-5808.
2. The number of the bankruptcy case is 15-50083.
3. A copy of the notice of bankruptcy is attached.

The Affiant

Danielle E. Duprey

Subscribed and sworn to before me this January 20, 2015.

Notary Public

CAROLINE A. TOMAC
NOTARY PUBLIC
My Commission Expires: 7/31/15

GOLDMAN, GRUDER & WOODS, LLC • ATTORNEYS AT LAW
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JURIS NO. 035172

United States Bankruptcy Court
District of Connecticut

Notice of Bankruptcy Case Filing

A bankruptcy case concerning the debtor(s) listed below was filed under Chapter 11 of the United States Bankruptcy Code, entered on 01/20/2015 at 08:55 AM and filed on 01/20/2015.

James M. Scott
45 Tanner Hill Road
Warren, CT 06777
SSN / ITIN: xxx-xx-3434

The case was filed by the debtor's attorney:

Douglas S. Skalka
Neubert, Pepe, and Monteith
195 Church Street, 13th Floor
New Haven, CT 06510
(203) 821-2000

The case was assigned case number 15-50083.

In most instances, the filing of the bankruptcy case automatically stays certain collection and other actions against the debtor and the debtor's property. Under certain circumstances, the stay may be limited to 30 days or not exist at all, although the debtor can request the court to extend or impose a stay. If you attempt to collect a debt or take other action in violation of the Bankruptcy Code, you may be penalized. Consult a lawyer to determine your rights in this case.

If you would like to view the bankruptcy petition and other documents filed by the debtor, they are available at our *Internet* home page http://www.ecf.ctb.uscourts.gov/ or at the Clerk's Office, 915 Lafayette Blvd, Bridgeport, CT 06604.

You may be a creditor of the debtor. If so, you will receive an additional notice from the court setting forth important deadlines.

Gary M. Gfeller
Clerk, U.S. Bankruptcy Court

PACER Service Center			
Transaction Receipt			
01/20/2015 08:58:16			
PACER Login:	np0036:2607982:0	Client Code:	
Description:	Notice of Filing	Search Criteria:	15-50083
Billable Pages:	1	Cost:	0.10

DOCKET NUMBER: LLI-CV 09-5007099-S	: SUPERIOR COURT
WHITNEY, WALTER	: JUDICIAL DISTRICT OF LITCHFIELD
V.	: AT LITCHFIELD
J. M. SCOTT ASSOCIATES INC., ET AL	: JANUARY 22, 2015

SUGGESTION OF BANKRUPTCY

This is to give notice that Scott Swimming Pools, Inc., a defendant in this action, has filed a Chapter 11 Bankruptcy case on January 22, 2015 with the United States Bankruptcy Court, District of Connecticut, at Bridgeport. As a result, the automatic stay provisions of the bankruptcy code apply. See 11 U.S.C. §362.

In accordance with Practice Book §14-1, an affidavit of bankruptcy is submitted herewith.

THE DEFENDANT,
SCOTT SWIMMING POOLS, INC.

By: /s/ 305547

Bruce L. Elstein, Esq.
Goldman, Gruder & Woods, LLC
105 Technology Drive
Trumbull, CT 06611
Telephone # 203.880-5333
Fax #: 203.880-5332
belstein@goldmangruderwoods.com

CERTIFICATION

This is to certify that a copy of the foregoing has been mailed, this 22nd day of January, 2015, to:

Ann H. Rubin, Esq.
Carmody Torrance Sandak & Hennessy LLP
P.O. Box 1110
Waterbury, CT 06721-1110

/s/ 305547
Bruce L. Elstein, Esq.

GOLDMAN, GRUDER & WOODS, LLC • ATTORNEYS AT LAW
105 TECHNOLOGY DRIVE • TRUMBULL, CONNECTICUT 06611 • (203) 880-5333 •
JURIS NO. 035172

AFFIDAVIT RE: BANKRUPTCY

Counsel for the defendant hereby submits this affidavit concerning the bankruptcy petition of the defendant, Scott Swimming Pools, Inc.:

1. A petition of bankruptcy under Chapter 11 of the United States Code was filed on January 22, 2015 by the defendant, Scott Swimming Pools, Inc., with the Bankruptcy Court, District of Connecticut, 915 Lafayette Blvd., Bridgeport, Connecticut 06604, Telephone: (203) 579-5808.
2. The number of the bankruptcy case is 15-50094.
3. A copy of the notice of bankruptcy is attached.

The Affiant

Danielle E. Duprey

Subscribed and sworn to before me this January 22, 2015.

Notary Public

CAROLINE A. TOMAC
NOTARY PUBLIC
My Commission Expires: 7/31/15

GOLDMAN, GRUDER & WOODS, LLC • ATTORNEYS AT LAW
105 TECHNOLOGY DRIVE • TRUMBULL, CONNECTICUT 06611 • (203) 880-5333 •
JURIS NO. 035172

Open New Bankruptcy Case

U.S. Bankruptcy Court

District of Connecticut

Notice of Bankruptcy Case Filing

The following transaction was received from James M. Nugent entered on 1/22/2015 at 8:46 AM EST and filed on 1/22/2015
Case Name: Scott Swimming Pools, Inc.
Case Number: 15-50094
Document Number: 1

Docket Text:
Chapter 11 Voluntary Petition . Fee Amount $1717. Fee to be Paid by Internet Credit Card. Filed by Scott Swimming Pools, Inc.. (Nugent, James)

The following document(s) are associated with this transaction:

Document description: Main Document
Original filename:C:\ECF\Scott Swimming Pools, Inc\Petition.PDF
Electronic document Stamp:
[STAMP bkecfStamp_ID=1018027260 [Date=1/22/2015] [FileNumber=10658232-0] [392397217207ecd8618c96ae200fa375760e3f36e6f1b587ac8cbfff45c7efb5a4b9a3ca55b411adfdb21bcb547f5de8f76e46de72a30146a3faaa59edc19f17]]

15-50094 Notice will be electronically mailed to:

James M. Nugent on behalf of Debtor Scott Swimming Pools, Inc.
jmn@quidproquo.com, talba@harlowadamsfriedman.com

U. S. Trustee
USTPRegion02.NH.ECF@USDOJ.GOV

15-50094 Notice will not be electronically mailed to:

SCOTT®

December 18, 2006

Walter Whitney

RE: Employment Agreement
March 31, 2002

Under your Employment Agreement Explanatory Statement Item "C": Assistant to the President to render certain management services and Paragraph 2 (a) I-1 through 15, 3 (b).

You have been notified for failure to comply with your performances numerous times verbally and numerous times in writing as further outlined in the attached SYNOPSIS OF MEMOS issued by me and for me by Lisa Burns, Bob Tata, and Fay. These issues have not been corrected by you to-date.

These conditions have continually deteriorated the moral and efficiency of the assistant management working force, the service technician force, the supply management force, and the lack of confidence and following of the construction force, even to the level of many employees leaving the Corporation. The level of management and supervisory of employees have fallen and currently more have given notice to leave.

In 4-1/2 years, the Corporation Business and net profit has been reduced to the point that Performance Bonds are not currently obtainable from our customary surety.

The Service and Sales Departments have been unable to satisfy your customers and service provided to the point of causing numerous adjustments or elimination of invoicing or non-collection of invoices and the agreed method of meeting with the Customers upon completion of the work or personally contacting them within 1 day of servicing them have not been complied with. This has brought the level of dissatisfaction to the point of lost customers. Either they leave us or we find them some professional that will provide the level of service they have been promised.

You are given five days to provide proof that all the issues which we consider to be continuing breaches of your Employment Agreement, are corrected to the level of the published Corporation History, Procedures, and Practices, and as outlined in the SYNOPSIS OF MEMOS.

Respectfully submitted,

SCOTT SWIMMING POOLS, INC.

James M. Scott, President

Scott Swimming Pools, Inc.
Distinguished Swimming Environments Since 1937
75 Washington Road, Woodbury, Connecticut 06798
(203) 263-2108 • Fax (203) 266-0822 • Westport 227-7559
www.scottpools.com

SCOTT

MEMO

Date: December 4, 2006

From: James M. Scott **To:** Walter A. Whitney

RE: Synopsis of Memos issued by James M. Scott and for James M. Scott by Lisa Burns and by Bob Tata (250+ memos)

Ongoing performance items previously notified by written memos not completed, correct, verified by customers and all found to be unacceptable:

Service

- Work performed and not invoiced
- Invoices approved and sent out with errors
- Repeat calls to maintain and repair
- Calls not made to customers: collections, follow-up to invoicing, etc.
- Cash receipts and credits not applied to correct amounts due
- Customer paperwork not filed in customer files
- Missing customer files
- Customer PDS have not been updated for memo'ed changes to pools
- Service/Maint unable to prepare monthly aging and sales tax reports
- Job costing only done on Winterizing and Summerizing
- Winter covers not quoted or sales administered by Service
- Customer issues not resolved in a timely manner
- Set up customer accounts with no contact information
- Service personnel taking time off contrary to policy

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Phone: (203) 263-2108, Fax: (203) 266-0822
www.scottpools.com

MEMO

Date: December 4, 2006

From: James M. Scott **To:** Walter A. Whitney

RE: Synopsis of Memos issued by James M. Scott and for James M. Scott By Fay (24 memos)

Ongoing performance items previously notified by written memos not completed, correct, verified by customers and all found to be unacceptable:

4/26/02 – samples of required Computer reports, 5/24/02 – Mrs. Shapiro/Grief complaint on pool, 6/9/02 Posnick service Invoice complaint, 8/7/02 Mrs. Bloch complaint on service and supply accounts, 2/10/03 – Mrs. Rossi re "no show" of workman, 9/5/03 service contract – customer name not readable – suggested customer name typed before sending out, 9/15/03 – who is in charge of measuring covers from ?, 10/6/03 McNaughton customer complaint on invoicing – maintenance, Kracher 5/24/02 customer complaint on new supply policies, 6/3/02 O'Keefe supply deliveries, 1/30/05 Robb's time for a re-instruct – who billed?, Tudor Ridge service invoices to install new filter – no filter billed, 8/25/05 service invoicing/ warrantees, etc., 9/2/05 – service manager work orders, 9/19/05 service meeting on refunds, Memo on overpayment procedures, 9/28/05 Letter from Robb to Davis – who bills, 10/16 memo to Andrea on when covers were installed so I can bill, 4/27/06 memo to Andrea & Walter on status of covers, Memos 9/17/05, 4/11/06, 6/27/06 – all on proper filling out of time sheets, memo 7/6/06 on parts issues, 7/11/06 parts issues

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SCOTT®

MEMO

Date: December 4, 2006

From: James M. Scott **To:** Walter

RE: Synopsis of Memos issued by James M. Scott and for James M. Scott.

Ongoing performance items previously notified by written memos not completed, correct, verified by customers and all found to be unacceptable:

Review of service procedure from Walter to staff 10/28, Minutes of service meeting 11/9, letters fro water chemistry problems – calls by Walter, Adjustments of bills with customers notes, problem with charges – Fay to Walter 2/3/06 (J. C. Mechanical, Rizzo, Nucci Bros., Forrester), Memo last years covers to Walter 4/27/06, service invoice 7/18 – Anbinder, customer bill – A. Kiser 7/10/06, memo from Andrea to Walter 7/12/06 – Jim fires service department and hires Mike Gilbert, Jim requires training seminar for service techs on Auto fill and Ozone, list of ozone clients – no service contact, customer complaint Gallo – 7/28/06 for service bill, Andrea memo to Walter – Jim request number of visits to Harvey Schein – unsatisfied customer, Jim/Andrea memo to Walter about Ilpoggio ozone red line – what happened – no answer 9/15/06, memo to Walter from Jim – service customer second request – 9/26/06, second request for list of customers called and their response to verify goals set for satisfied customer – no response from Walter, Customer complaint on service contract from Mr. Howat on sloppy processing and accounting 9/1/06, memo Jim to Walter 10/4/06, service company transfers, service company transfers – second request, training – numerous previous requests, Parker pool cover, failed training, Dan Curetin – crying and quitting, invoice contacts, audit of invoice errors from Lisa, Accounts receivable – keeping accounts current and collecting money
Service techs down to one (Dan Allen) and loss of three service managers, Bump meeting extra – hydrozzo finish not in Contract, Vandergeest cover sent to the wrong place,

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MEMO December 4, 2006

Memo from List to Jim and Walter in reference to Vandergeest emails, 10/4/06 Memo Vandergeest emails complaint poor handling of cover, Memo Fay to Jim and Walter – Jimmy's Pool Water Rubler job 10/11, letter Vantage (Rubler) complaint about invoicing duplicate cases inappropriate 9/11, Robb to Walter from Jim 10/30 – McGee job water loss through skimmer, letter James Co. – service overflow not operating correctly and high spots – 10/4, James Co. to Walter Invoice from service techs not being on job and

not operating pool correctly as claimed 8/24/06, City of Waterbury invoice 10/4 – wrong name, no such company, never sent out, found in Sales Tax audit by Fay, Customer Kasperson complaint message for Scott dumping them as customer 10/11 (Walter did not call), Invoice complaint from Ford Pool Service – no follow through from supply, Ford Pool service 11/2/06 price gouging for antifreeze, letter from Feinberg 11/606 stating we do not deserve payment for maintenance work, draft of letter from Walter to Wykehem Partners (Rubler) 9/28 and 11/30 – trying to explain away horrible service – Jim would not allow letter to go out for fear totally alien ting customer, complaint from Hilton in Southbury 11/27/02 – shipping hot chlorine – Fire Marshal involved.

December 21, 2006

TO: JAMES M. SCOTT

From: WALTERWHITNEY

RE: EMPLOYMENT AGREEMENT of MARCH 31, 2002

On December 18, 2006, I received your alleged notice that you intend to terminate my employment for cause. At that time, you have given me three memos dated December 4, 2006, totaling 5 pages.

I hereby invoke my right to dispute my termination by way of arbitration under P. 8.3, 8.4, and 9. I hereby invoke my right to receive the Unconditional Payment referenced in P. 8.3.

In addition to the said Unconditional Payment referenced in 8.3, I expect to be paid for my 2 weeks vacation pursuant to section 5.1 of the said agreement, as my planned vacation begins tomorrow, on Friday.

When I return from vacation, my lawyer will contact your corporate counsel to arrange the arbitration.

I continue to stand on my stock purchase option and expect to own the company in the spring.

Walter Whitney

12/21/06 received in Jim Scott's absence

Jay B. Platt

American Arbitration Association
Dispute Resolution Services Worldwide

950 Warren Avenue
East Providence,RI 02914

#1

STMT DATE	AMOUNT DUE
10/27/2009	$14,400.00
CASE#	
12-166-00556-07 01 CAPL-C	

Payment Due Upon Receipt

INVOICE

JOSEPH PAUL SECOLA
as trustee for Walter Whitney
Secola Law Firm
P.O. Box 5122
BROOKFIELD CT 06804-5122

Representing Walter Whitney
Re: James Scott - Scott Swimming Pools, Inc.

Please Detach and Return with Payment to the Above Address **Please Indicate Case No. on check**

American Arbitration Association
Dispute Resolution Services Worldwide

950 Warren Avenue
East Providence,RI 02914

NAME JOSEPH PAUL SECOLA
as trustee for Walter Whitney
Secola Law Firm
P.O. Box 5122
BROOKFIELD CT 06804-5122

Representing Walter Whitney
Re: James Scott - Scott Swimming Pools, Inc.

STMT DT	CASE#	PREVIOUS BALANCE	CURRENT CREDITS	CURRENT CHARGES	BALANCE DUE
10/27/2009	12-166-00556-07 01 CAPL-C	14,400.00	0.00	0.00	14,400.00

DATE	INV#/REF#	TRANSACTIONS	CHARGES	CREDITS
		Balance carried from Previous Billing Period	14,400.00	
Totals		Transactions from 09/28/2009 to 10/27/2009	14,400.00	0.00

ALL-STATE LEGAL PLAINTIFF'S EXHIBIT 55

Remarks: For any inquiry please call: 401-431-4890. This invoice reflects financial activity for this party only, for the period stated above.

EIN: 13-0429745

American Arbitration Association
Dispute Resolution Services Worldwide

INFORMATION ON COMMON CHARGES

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- **Initial Administrative Fee / Administrative Fee for Counterclaim:** *This administrative fee is calculated on the amount of the claim or counterclaim. The filing fee must be paid in full at the time of filing in order for a claim or counterclaim to be considered properly filed. This fee is not applied toward arbitrator compensation. A portion of this fee may be refundable – please refer to the refund schedule of the applicable rules.*
- **Fee for Increased Claim:** *If you increase your claim or counterclaim amount, you may be charged an additional fee based on the new total claim amount. Until payment of this fee is made, the increased claim is not considered properly filed.*
- **Case Service Fee:** *This administrative fee is charged to parties who have filed claims or counterclaims and is due prior to the first hearing. This fee is not applied toward arbitrator compensation. This fee will be refunded at the conclusion of the case if no hearings have occurred. However, if the Association is not notified of cancellation at least 24 hours before the time of the scheduled hearing, the case service fee will remain due and will not be refunded.*
- **Room Rental Fee:** *Parties are charged a daily room rental fee for use of hearing rooms in AAA offices. You may contact your case manager for a listing of current room rental rates.*
- **Arbitrator (or Mediator) Compensation*:** *This fee is charged in accordance with the rates of compensation indicated on the neutral's panel biography. A neutral may charge for both hearing and study time, either on a daily or hourly rate. "Study time" may include conference calls, reviewing documents, drafting orders, and writing the award. "Hearing time" includes actual time spent in the arbitration hearing or mediation conference. This is usually billed as a deposit after consultation with the neutral. Any unused portions are returned at the conclusion of the case, subject to apportionment by the arbitrator in the final award. Additionally, parties may be billed neutral compensation to cover the cancellation of hearings as indicated on the neutral's resume.*
- **Arbitrator (or Mediator) Expense:** *Expenses are charged based on the arbitrator's anticipated reimbursable expenses, such as mileage, parking, tolls, and lunch. A neutral may only charge for reasonable expenses, and must submit appropriate receipts in order to receive reimbursement. Like neutral compensation, expenses are usually billed as a deposit after consultation with the neutral. Any unused portions are returned at the conclusion of the case, subject to apportionment by the arbitrator in the final award.*

FREQUENTLY ASKED QUESTIONS

- **What if I am unable to pay?** *If you cannot pay due to financial hardship, the AAA may waive, defer, or reduce its fees. In addition, we have neutrals who may serve at reduced rates or for free. To learn more about obtaining a financial hardship waiver, deferral, or reduction visit our website at www.adr.org, or contact your case manager.*
- **What happens if deposits from either party remain outstanding?** *In the event that a party has not paid its invoice, the Association may so inform the other parties in order that one of them may advance the required payment. If requested deposits are not made, the arbitrator will be notified and may order the suspension or termination of the proceedings. Please refer to the rules that apply to your proceeding for additional information.*
- **How can I pay?** *Parties may pay their invoices via check, credit card, or wire transfer. Please include the top portion of your invoice with your method of payment and forward payments directly to your case manager. Should you have any questions regarding payment, please contact the case manager assigned to your case.*

* *Under some of the AAA's rules the arbitrator serves at a standardized daily rate, regardless of the compensation rate stated on the panel biography.*

950 Warren Avenue
East Providence,RI 02914

American Arbitration Association
Dispute Resolution Services Worldwide

This is Not an Invoice

FINANCIAL HISTORY

History of transactions thru 10/27/2009

CASE# 12-168-00556-07 01 BALANCE $14,400 00

NAME JOSEPH PAUL SECOLA
as trustee for Walter Whitney
Secola Law Firm
P.O. Box 5122
BROOKFIELD CT 06804

Representing Walter Whitney
Re: James Scott - Scott Swimming Pools, Inc.

Administrative Fees

Invoice#	Date	Description	Amount
9526823	09/28/2007	Initial Administrative Fee	2,750 00
9569763	01/08/2008	Case Service Fee	1,250 00
		Subtotal - Administrative Fees :	4,000 00

Neutral Fees and Expenses

Invoice#	Date	Description	Amount
9559713	12/11/2007	Your Share of the Neutral Compensation Deposit covering 2 hours of Preliminary Matters	300.00
9569757	01/08/2008	Your Share of the Neutral Compensation Deposit covering 2 days of Hearing	1,500.00
	09/15/2009	Cancellation : Reallocated to expenses	-384 65
9569759	01/08/2008	Your Share of the Neutral Compensation Deposit covering 2 days of Study	1,500.00
9624054	04/29/2008	Your Share of the Neutral Compensation Deposit covering 4 days of Hearing	3,000.00
	09/15/2009	Cancellation : Refund of unused deposits per claimant request	-3,000.00
9624056	04/29/2008	Your Share of the Neutral Compensation Deposit covering 4 days of Study	3,000.00
	09/15/2009	Cancellation : Refund of unused deposits per claimant request	-2,510.42
9637632	05/29/2008	Your Share of the Neutral Compensation Deposit covering 2 additional days of Hearing	1,500.00
9670145	08/06/2008	Your share of the arbitrator expense deposit (mileage)	24 57
9713894	11/06/2008	Your Share of the Neutral Compensation Deposit covering 2 days of Study	2,100.00
9733407	12/22/2008	Your Share of the Neutral Compensation Deposit covering 6 days of Hearing	7,200 00
9793383	05/04/2009	Your share of the arbitrator expense deposit	75 90
9809181	06/08/2009	Your share of the arbitrator expense deposit (mileage for 5 5,6,8,13 & 14 hearings)	208.25
9820487	06/30/2009	Your share of the arbitrator expense deposit (mileage for 6 2 and 4 09 hearings)	82.50
9826455	07/15/2009	Your Share of the Neutral Compensation Deposit covering 2 days of Hearing Aug 26-27, 09	2,400.00
9826460	07/15/2009	Your Share of the Neutral Compensation Deposit covering 2 days of Hearing - Sept 2-3, 09	2,400.00
9826462	07/15/2009	Your Share of the Neutral Compensation Deposit covering 1 day of Hearing - Sept 10, 09	1,200.00
9826467	07/15/2009	Your Share of the Neutral Compensation Deposit covering 2 days of Hearing - Sept. 17-18,09	2,400.00
9826471	07/15/2009	Your Share of the Neutral Compensation Deposit covering 5 days of Study	6,000 00
		Subtotal - Neutral Fees and Expenses :	29,014.15
		Net Total of All Charges :	33,014.15

Payments and Refunds

Check#/Ref#	Date	Description	Amount
VLEF1DB32D43	09/28/2007	Payment recvd from : WALTER WHITNEY	2,750.00
15626	12/19/2007	Payment recvd from : WALTER WHITNEY & KATHLEEN WHITNEY	300.00
1003	02/25/2008	Payment recvd from : WALTER WHITNEY & KATHLEEN WHITNEY	4,250.00
1028	05/21/2008	Payment recvd from : WALTER WHITNEY & KATHLEEN WHITNEY	6,000.00
1142	10/07/2008	Payment recvd from : WALTER WHITNEY & KATHLEEN WHITNEY	1,524.57
1272	02/06/2009	Payment recvd from : WALTER WHITNEY & KATHLEEN WHITNEY	2,100.00
1283	03/16/2009	Payment recvd from : WALTER WHITNEY & KATHLEEN WHITNEY	7,200.00
3120517	09/22/2009	Refund	-5,510.42
		Net Total of All Payments :	18,814.15
		CASE BALANCE	$14,400.00

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Dispute Resolution Services Worldwide

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FREQUENTLY ASKED QUESTIONS

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* *Under some of the AAA's rules the arbitrator serves at a standardized daily rate, regardless of the compensation rate stated on the panel biography.*

Matter Ledger Card

Client: 28961 WHITNEY, WALTER

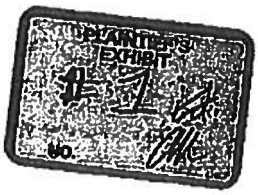
Matter: 28961-1 WHITNEY, WALTER v. J.M. SCOTT ASSOCIATES et al

Check Number	*Inv/Pmt Date*	*Trans.*	*Invoice Number*	*Fees Due*	*Costs Due*	*Retainer Due*	*Other Due*	*Total Amount*	*Balance Forward*
	04/03/12	BILL	239966	14,519.00	343.07	0.00	0.00	14,862.07	14,862.07
105	04/10/12	Pmt	239966	-14,519.00	-343.07	0.00	0.00	-14,862.07	0.00
	05/23/12	BILL	241397	7,337.00	221.82	0.00	0.00	7,558.82	7,558.82
107	06/01/12	Pmt	241397	-7,337.00	-221.82	0.00	0.00	-7,558.82	0.00
	06/05/12	BILL	241846	3,209.50	175.18	0.00	0.00	3,384.68	3,384.68
109	06/11/12	Pmt	241846	-3,209.50	-175.18	0.00	0.00	-3,384.68	0.00
	07/03/12	BILL	242634	8,894.00	27.17	0.00	0.00	8,921.17	8,921.17
110	07/10/12	Pmt	242634	-8,894.00	-27.17	0.00	0.00	-8,921.17	0.00
	08/06/12	BILL	243601	2,541.00	48.10	0.00	0.00	2,589.10	2,589.10
112	08/13/12	Pmt	243601	-2,541.00	-48.10	0.00	0.00	-2,589.10	0.00
	09/06/12	BILL	244438	1,988.50	0.00	0.00	0.00	1,988.50	1,988.50
113	09/13/12	Pmt	244438	-1,988.50	0.00	0.00	0.00	-1,988.50	0.00
	10/19/12	BILL	245766	1,826.00	0.00	0.00	0.00	1,826.00	1,826.00
117	11/02/12	Pmt	245766	-1,826.00	0.00	0.00	0.00	-1,826.00	0.00
	11/05/12	BILL	246226	1,026.50	0.00	0.00	0.00	1,026.50	1,026.50
118	11/19/12	Pmt	246226	-1,026.50	0.00	0.00	0.00	-1,026.50	0.00
	12/06/12	BILL	247337	1,305.00	0.00	0.00	0.00	1,305.00	1,305.00
120	12/19/12	Pmt	247337	-1,305.00	0.00	0.00	0.00	-1,305.00	0.00
	01/07/13	BILL	248177	2,301.00	35.04	0.00	0.00	2,336.04	2,336.04
15074	01/11/13	Pmt	248177	-2,301.00	-35.04	0.00	0.00	-2,336.04	0.00
	02/05/13	BILL	249029	4,937.50	22.60	0.00	0.00	4,960.10	4,960.10
15096	02/13/13	Pmt	249029	-4,937.50	-22.60	0.00	0.00	-4,960.10	0.00
	03/05/13	BILL	249982	273.00	0.00	0.00	0.00	273.00	273.00
15106	03/20/13	Pmt	249982	-273.00	0.00	0.00	0.00	-273.00	0.00
	04/03/13	BILL	250948	6,000.00	22.60	0.00	0.00	6,022.60	6,022.60
15115	04/09/13	Pmt	250948	-6,000.00	-22.60	0.00	0.00	-6,022.60	0.00
	05/07/13	BILL	252371	14,702.50	2,015.50	0.00	0.00	16,718.00	16,718.00
15138	05/13/13	Pmt	252371	-14,702.50	-2,015.50	0.00	0.00	-16,718.00	0.00
	06/07/13	BILL	253322	63,159.00	1,685.61	0.00	0.00	64,844.61	64,844.61
15143	06/19/13	Pmt	253322	-18,314.39	-1,685.61	0.00	0.00	-20,000.00	44,844.61
	Balances Outstanding			44,844.61	0.00	0.00	0.00	44,844.61	
	Billed Summary			134,019.50	4,596.69	0.00	0.00	138,616.19	
	Paid Summary			-89,174.89	-4,596.69	0.00	0.00	-93,771.58	
	Written Off Summary			0.00	0.00	0.00	0.00	0.00	
	Balances Outstanding			44,844.61	0.00	0.00	0.00	44,844.61	

Matter Ledger Card

Report Totals

	Fees Due	Costs Due	Retainer Due	Other Due	Total Amount
	44,844.61	0.00	0.00	0.00	44,844.61
Total Billed Summary	134,019.50	4,596.69	0.00	0.00	138,616.19
Total Paid Summary	-89,174.89	-4,596.69	0.00	0.00	-93,771.58
Total Written Off Summary	0.00	0.00	0.00	0.00	0.00



C & T Draft: March 2, 2012
8:32 AM
Ann H. Rubin
Partner
Direct: 203-578-4201
arubin@carmodylaw.com

March __, 2012

Walter Whitney
Vice President and Commercial Loan Officer
Union Savings Bank
225 Main Street
Danbury, CT 06810

Re: **Engagement of Carmody & Torrance to Evaluate and Make Recommendations Re: Walter Whitney v. J.M. Scott Associates, Inc., et al., Docket No. CV-09-5007099-S and J.M. Scott Associates, Inc. v. Walter Whitney, et al., Docket No. CV-12-6006095-S**

Dear Mr. Whitney:

We are very pleased that you have decided to retain Carmody & Torrance to evaluate and make recommendations concerning your claims as plaintiff in the action captioned Walter Whitney v. J. M. Scott Associates, Inc., et al.; and concerning the claims against you as a defendant in the action captioned J.M. Scott Associates, Inc. v. Walter Whitney, et al.

This letter and the attached Terms and Conditions describe the scope of our firm's legal services in this matter, the basis on which we will provide those services, and how we will be compensated.

We will not appear on your behalf in the two lawsuits referenced above at this time. If you request that we do so in the future, and we agree, we will enter into a new engagement letter.

Be assured that we will endeavor to serve you effectively. While we cannot guarantee the success of any given engagement, we will strive to represent your interests professionally and efficiently. I will have primary responsibility for your representation and will utilize other attorneys and legal assistants in the office in the best exercise of my professional judgment. My current hourly rate is $370.00. If, at any time, you have questions, concerns, or criticisms, please contact me at once.

If the foregoing, together with the attached Terms and Conditions, meet with your approval, please sign a copy of this letter and return it to me in the enclosed envelope. If you have any questions, please feel free to call me.

{W2067183,2}

On a personal note, I am very pleased that you have selected our firm to represent you. We look forward to serving you.

Very truly yours,

Ann H. Rubin

AHR/cre
Enclosures

I have read the foregoing and the attached, incorporated Terms and Conditions, and accept and agree to all of their terms.

By: Walter Whitney
Walter Whitney

Date: 3/3/12

{W2067183;2}

WALTER WHITNEY
KATHLEEN WHITNEY
9 CHURCH HILL ROAD
WASHINGTON DEPOT, CT 06794

103

51-309/111
8004

PAY TO THE ORDER OF

3/3/2010

DATE

$ 12,500.00

DOLLARS

TD Bank
America's Most Convenient Bank

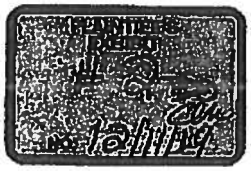
Home Equity

FOR

REDACTED

⑆011103093⑆ REDACTED

8/10/03



Ann H. Rubin
Partner
Direct: 203-578-4201
arubin@carmodylaw.com

Confidential Attorney-Client Communication

September 25, 2013

Mr. Walter Whitney
9 Church Hill Road
Washington, CT 06794

Re: Revised Engagement Letter: Carmody & Torrance and Walter Whitney; Whitney v. Scott et al, Docket No. LLI-CV-09-5007099-S

Dear Mr. Whitney:

We are very pleased to represent you in the captioned lawsuit. This letter describes the revised financial terms for our engagement on the captioned matter only.

As you know, legal fees in the amount of $100,610.50 are due on this matter, for time recorded through August 31, 2013 and billed through September of 2013. We are pleased to accept payment in the amount of $66,000.00 by December 1, 2013 (a discount of roughly one-third) in full satisfaction of the listed legal fees due and owing. You agree to reimburse us for out-of-pocket expenses such as travel, long distance telephone and fax charges, filing fees, etc.; and to pay any extraordinary expenses such as deposition costs, printing costs, advertising costs, etc. billed directly to you. The costs billed and unpaid through September 2013 total $2,355.32, which amount you agree to pay no later than December 1, 2013.

With respect to fees for legal services rendered on the captioned matter from and after October 1, 2013 through a settlement or the entry of judgment by the Superior Court, if our legal services do not result in a recovery of any sums by you, we will be due no additional legal fees. However, you will be expected to reimburse Carmody & Torrance LLP for all expenses incurred by Carmody & Torrance LLP in connection with your case.

If our services result in a recovery of any sums greater than $150,000.00 for you, you agree to pay Carmody & Torrance LLP ten percent of the amount of any award or settlement greater than $150,000.00 in connection with the captioned lawsuit, in addition to the expenses referred to above. You further agree to pay the fee for services rendered to Carmody & Torrance LLP immediately upon and from the proceeds of any settlement or the recovery of money damages, whether those damages are to be paid in a lump sum at the time judgment is entered or in periodic installment payments.

(W2304535)

This fee agreement does not pertain to any appeals taken after an award, to either the Appellate or Supreme Court of the State of Connecticut or any other Appellate Court.

You will have the right to terminate our representation at any time. We will have the same right to discontinue the provision of legal services if our fee agreement is not honored, provided that, in doing so, no material adverse effects to your interests would result from such termination. Moreover, our ability to terminate our representation in any litigation would be subject to the court's approval.

Please review the foregoing and, if it meets with your approval, return an executed copy of this letter to me. If you have any questions, please feel free to call me.

Very truly yours,

Ann H. Rubin

AHR:lem

AGREED TO AND ACCEPTED
this 1 day of October, 2013.

Walter Whitney

Walter Whitney

{W2304535}

Matter Ledger Card

Client: 28961 WHITNEY, WALTER

Matter: 28961-1 WHITNEY, WALTER v. J.M. SCOTT ASSOCIATES et al

Check Number	Inv/Pmt Date	Trans.	Invoice Number	Fees Due	Costs Due	Retainer Due	Other Due	Total Amount	Balance Forward
	04/03/12	BILL	239966	14,519.00	343.07	0.00	0.00	14,862.07	14,862.07
105	04/10/12	Pmt	239966	-14,519.00	-343.07	0.00	0.00	-14,862.07	0.00
	05/23/12	BILL	241397	7,337.00	221.82	0.00	0.00	7,558.82	7,558.82
107	06/01/12	Pmt	241397	-7,337.00	-221.82	0.00	0.00	-7,558.82	0.00
	06/05/12	BILL	241846	3,209.50	175.18	0.00	0.00	3,384.68	3,384.68
109	06/11/12	Pmt	241846	-3,209.50	-175.18	0.00	0.00	-3,384.68	0.00
	07/03/12	BILL	242634	8,894.00	27.17	0.00	0.00	8,921.17	8,921.17
110	07/10/12	Pmt	242634	-8,894.00	-27.17	0.00	0.00	-8,921.17	0.00
	08/06/12	BILL	243601	2,541.00	48.10	0.00	0.00	2,589.10	2,589.10
112	08/13/12	Pmt	243601	-2,541.00	-48.10	0.00	0.00	-2,589.10	0.00
	09/06/12	BILL	244438	1,988.50	0.00	0.00	0.00	1,988.50	1,988.50
113	09/13/12	Pmt	244438	-1,988.50	0.00	0.00	0.00	-1,988.50	0.00
	10/19/12	BILL	245766	1,826.00	0.00	0.00	0.00	1,826.00	1,826.00
117	11/02/12	Pmt	245766	-1,826.00	0.00	0.00	0.00	-1,826.00	0.00
	11/05/12	BILL	246226	1,026.50	0.00	0.00	0.00	1,026.50	1,026.50
118	11/19/12	Pmt	246226	-1,026.50	0.00	0.00	0.00	-1,026.50	0.00
	12/06/12	BILL	247337	1,305.00	0.00	0.00	0.00	1,305.00	1,305.00
120	12/19/12	Pmt	247337	-1,305.00	0.00	0.00	0.00	-1,305.00	0.00
	01/07/13	BILL	248177	2,301.00	35.04	0.00	0.00	2,336.04	2,336.04
15074	01/11/13	Pmt	248177	-2,301.00	-35.04	0.00	0.00	-2,336.04	0.00
	02/05/13	BILL	249029	4,937.50	22.60	0.00	0.00	4,960.10	4,960.10
15096	02/13/13	Pmt	249029	-4,937.50	-22.60	0.00	0.00	-4,960.10	0.00
	03/05/13	BILL	249982	273.00	0.00	0.00	0.00	273.00	273.00
15106	03/20/13	Pmt	249982	-273.00	0.00	0.00	0.00	-273.00	0.00
	04/03/13	BILL	250948	6,000.00	22.60	0.00	0.00	6,022.60	6,022.60
15115	04/09/13	Pmt	250948	-6,000.00	-22.60	0.00	0.00	-6,022.60	0.00
	05/07/13	BILL	252371	14,702.50	2,015.50	0.00	0.00	16,718.00	16,718.00
15138	05/13/13	Pmt	252371	-14,702.50	-2,015.50	0.00	0.00	-16,718.00	0.00
	06/07/13	BILL	253322	63,159.00	1,685.61	0.00	0.00	64,844.61	64,844.61
15143	06/19/13	Pmt	253322	-18,314.39	-1,685.61	0.00	0.00	-20,000.00	44,844.61
	07/09/13	BILL	254433	37,937.50	1,836.38	0.00	0.00	39,773.88	84,618.49
15192	07/16/13	Pmt	253322	-20,000.00	0.00	0.00	0.00	-20,000.00	64,618.49
	08/07/13	BILL	255261	59,534.50	425.73	0.00	0.00	59,960.23	124,578.72
878	08/20/13	Pmt	253322	-24,844.61	0.00	0.00	0.00	-24,844.61	99,734.11
878	08/20/13	Pmt	254433	0.00	-155.39	0.00	0.00	-155.39	99,578.72
	09/05/13	BILL	256187	3,138.50	248.60	0.00	0.00	3,387.10	102,965.82
102	11/26/13	Pmt	254433	-37,937.50	-1,680.99	0.00	0.00	-39,618.49	63,347.33
102	11/26/13	Pmt	255261	-25,955.78	-425.73	0.00	0.00	-26,381.51	36,965.82
	Balances Outstanding			36,717.22	248.60	0.00	0.00	36,965.82	

Matter Ledger Card

	$226,576.5				
Billed Summary	~~234,630.00~~	7,107.40	0.00	0.00	241,737.40
Paid Summary	-197,912.78	-6,858.80	0.00	0.00	-204,771.58
Written Off Summary	0.00	0.00	0.00	0.00	0.00
Balances Outstanding	36,717.22	248.60	0.00	0.00	36,965.82

Report Totals

	Fees Due	*Costs Due*	*Retainer Due*	*Other Due*	*Total Amount*
	36,717.22	248.60	0.00	0.00	36,965.82
	$226,576.5				$233,683.9
Total Billed Summary	~~234,630.00~~	7,107.40	0.00	0.00	~~241,737.40~~
Total Paid Summary	-197,912.78	-6,858.80	0.00	0.00	-204,771.58
Total Written Off Summary	0.00	0.00	0.00	0.00	0.00

CARMODY
TORRANCE | SANDAK | HENNESSEY LLP

50 Leavenworth Street
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203.573.1200
Tax I.D. # 06-0691344

WALTER WHITNEY
9 CHURCH HILL ROAD
WASHINGTON DEPOT, CT 06754

April 3, 2012
Invoice 239986
Page 1

For Services Through March 31, 2012

Our Matter # 28961-1
WHITNEY, WALTER v. J.M. SCOTT ASSOCIATES et al

PARTNER 02/28/12	AHR	review documents provided by client; analysis of claims	1.50 hrs.	370.00/hr	555.00
PARTNER 02/29/12	AHR	preparation for and meeting with Walter Whitney	1.50 hrs.	370.00/hr	555.00
PARTNER 03/01/12	AHR	email W. Whitney re: strategy	0.20 hrs.	370.00/hr	74.00
PARTNER 03/02/12	AHR	draft letter to Atty. Secola; telephone call with W. Whitney	0.30 hrs.	370.00/hr	111.00
PARTNER 03/05/12	AHR	review memos from client	0.20 hrs.	370.00/hr	74.00
PARTNER 03/06/12	AHR	begin case outline	0.50 hrs.	370.00/hr	185.00
PARTNER 03/07/12	AHR	[redacted]	0.60 hrs.	370.00/hr	(222.00)
PARTNER 03/08/12	AHR	[redacted]	1.50 hrs.	370.00/hr	(555.00)
PARTNER 03/09/12	AHR	[redacted]	0.30 hrs.	370.00/hr	(111.00)
PARALEGAL 03/09/12	CMH	organization of various arbitration and deposition transcripts, memoranda, correspondence pertaining to case	1.00 hrs.	165.00/hr	165.00

A-52

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WALTER WHITNEY
9 CHURCH HILL ROAD
WASHINGTON DEPOT, CT 06754

April 3, 2012
Invoice 239966

PARTNER 03/12/12	AHR [redacted]	0.50 hrs.	370.00/hr	(185.00)
PARTNER 03/13/12	AHR [redacted]	1.30 hrs.	370.00/hr	(481.00)
PARALEGAL 03/13/12	CMH create and revise index of deposition transcripts; e-mail communication to A. H. Rubin re: index	0.60 hrs.	0.00/hr	0.00
PARTNER 03/14/12	AHR [redacted]	0.30 hrs.	370.00/hr	(111.00)
PARALEGAL 03/14/12	CMH e-mail communication to and conference with S. Healy re: deposition index and exhibits; review each deposition transcript and all exhibits; revise deposition transcript and exhibit index	1.00 hrs.	165.00/hr	165.00
ASSOC 03/14/12	SS analyze complaint; analyze elements of each cause of action; analyze second day of deposition of J. Scott	2.50 hrs.	205.00/hr	512.50
PARTNER 03/15/12	AHR [redacted]	0.60 hrs.	370.00/hr	(222.00)
ASSOC 03/15/12	SS analyze second day of deposition of J. Scott; analyze Whitney deposition transcript	2.50 hrs.	205.00/hr	512.50
PARTNER 03/16/12	AHR [redacted]	0.20 hrs.	370.00/hr	(74.00)
ASSOC 03/16/12	CJL review of documents from previous counsel to determine completeness of file;	3.20 hrs.	0.00/hr	0.00

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WALTER WHITNEY
9 CHURCH HILL ROAD
WASHINGTON DEPOT, CT 06754

April 3, 2012
Invoice 239866

	drafting of document re: completeness of file			
ASSOC 03/16/12	SZ [redacted]	1.00 hrs.	190.00/hr	(190.00)
PARTNER 03/18/12	AHR begin to review/annotate Scott arbitration hearing testimony	0.60 hrs.	370.00/hr	222.00
ASSOC 03/18/12	SS analyze deposition transcript of W. Whitney	2.50 hrs.	205.00/hr	512.50
ASSOC 03/19/12	CJL review of documents from previous counsel to determine completeness of file; drafting of document re: completeness of file	1.00 hrs.	190.00/hr	190.00
PARTNER 03/20/12	AHR review email from Atty. Secola re: pleadings	0.20 hrs.	370.00/hr	74.00
ASSOC 03/20/12	CJL review of documents from previous counsel to determine completeness of file; drafting of document re: completeness of file; compiling pleadings binder	4.00 hrs.	190.00/hr	760.00
ASSOC 03/20/12	SZ [redacted]	2.00 hrs.	190.00/hr	(380.00)
ASSOC 03/21/12	CJL compiling pleadings binder	1.30 hrs.	190.00/hr	247.00
ASSOC 03/21/12	SS analyze employment agreement; analyze stock option purchase agreement; analyze supplemental letter agreement	1.50 hrs.	205.00/hr	307.50
PARTNER 03/22/12	AHR email client re: missing documents and meeting; review list of missing documents	0.20 hrs.	370.00/hr	74.00
ASSOC	SZ	1.00 hrs.	190.00/hr	(190.00)

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WALTER WHITNEY
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WASHINGTON DEPOT, CT 06754

April 3, 2012
Invoice 239966

03/22/12	[redacted]			
ASSOC 03/22/12	SS analyze first day of K. Ostroske deposition	4.40 hrs.	205.00/hr	902.00
ASSOC 03/23/12	SS analyze second day of K. Ostroske deposition transcript	1.50 hrs.	205.00/hr	307.50
ASSOC 03/25/12	SS analyze W. Drakely deposition; analyze J. Scott deposition in Drakely matter; analyze defendant's motion for summary judgment; analyze Whitney's objection to summary judgment motion	3.50 hrs.	205.00/hr	717.50
PARTNER 03/26/12	AHR review pleadings	0.20 hrs.	370.00/hr	74.00
ASSOC 03/26/12	SS analyze Whitney's motion to amend complaint; analyze thumb drive from attorney Secola (2.0)	3.00 hrs.	205.00/hr	615.00
PARTNER 03/27/12	AHR analysis of potential additional claims	0.60 hrs.	370.00/hr	222.00
ASSOC 03/27/12	CJL research re: the tort of abuse of process in Connecticut; research re: the validity of a CUTPA claim when the actions of the defendant fall outside the trade or commerce of his business	0.60 hrs.	190.00/hr	114.00
ASSOC 03/27/12	SS analyze special defenses presented by defendants; analyze counterclaims presented by defendants	1.00 hrs.	205.00/hr	205.00
ASSOC 03/27/12	TRMI analysis with A.H. Rubin re: potential causes of action	0.30 hrs.	200.00/hr	60.00
PARTNER 03/28/12	AHR analysis of claims, damages; review email from Attorney Weldon's office re: conflict waiver; preparation of follow up analysis	1.80 hrs.	370.00/hr	666.00

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Tax I.D. # 06-0691344

WALTER WHITNEY
9 CHURCH HILL ROAD
WASHINGTON DEPOT, CT 06754

April 3, 2012
Invoice 239966
Page 5

ASSOC 03/28/12	CJL research re: the validity of a CUTPA claim [redacted]	3.10 hrs.	190.00/hr	589.00 Privileged
ASSOC 03/28/12	SS analyze CUTPA claim; research re: statute of limitations for claim of breach of the covenant of good faith and fair dealing	1.30 hrs.	205.00/hr	266.50
ASSOC 03/28/12	TRM analysis with S.S. Healey re: basis for CUTPA claim; legal research [redacted]	0.40 hrs.	200.00/hr	80.00 Privileged
PARTNER 03/29/12	AHR meeting with clients re: case evaluation, [redacted] strategy	2.30 hrs.	370.00/hr	851.00 (296)
ASSOC 03/29/12	SS research tolling the statute of limitations; research re: statute of frauds special defense; research re: elements to prove abuse of process; attend meeting W. Whitney and K. Whitney	3.70 hrs.	205.00/hr	758.50
PARTNER 03/30/12	AHR litigation strategy	0.20 hrs.	370.00/hr	74.00

Total Fees for Professional Services ~~$14,519.00~~ $11502

Reimbursable Costs

03/20/12	RESEARCH WESTLAW	1.12
03/20/12	RESEARCH WESTLAW	227.46
03/21/12	RESEARCH WESTLAW	57.17
03/22/12	RESEARCH WESTLAW	56.02
03/31/12	PHOTOCOPIES	1.30

Total Reimbursable Costs $343.07

TOTAL DUE FOR THIS MATTER ~~$14,862.07~~ $11,845.07

CARMODY
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50 Leavenworth Street
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Tax I.D. # 06-0691344

WALTER WHITNEY
9 CHURCH HILL ROAD
WASHINGTON DEPOT, CT 06754

May 23, 2012
Invoice 241397
Page 1

For Services Through April 30, 2012

Our Matter # 28961-1
WHITNEY, WALTER v. J.M. SCOTT ASSOCIATES et al

ASSOC 04/02/12	SS [redacted]	0.20 hrs.	205.00/hr	(41.00)
PARTNER 04/03/12	AHR [redacted]	0.30 hrs.	370.00/hr	(111.00)
ASSOC 04/03/12	CJL review of arbitration correspondence	0.10 hrs.	190.00/hr	19.00
ASSOC 04/04/12	CJL review of arbitration correspondence; telephone conference with American Arbitration Association re: obtaining arbitration pleadings from previous arbitration	0.50 hrs.	190.00/hr	95.00
PARTNER 04/05/12	AHR [redacted]	0.30 hrs.	370.00/hr	(111.00)
ASSOC 04/05/12	SS analyze documents provided by W. Whitney; update list of missing documents	1.00 hrs.	205.00/hr	205.00
PARTNER 04/16/12	AHR [redacted]	0.40 hrs.	370.00/hr	(148.00)
ASSOC 04/16/12	SS analyze documents provided by J. Secola; prepare defense strategy; contact W. Walter re: motion for summary judgment; analyze defendant's request to amend counterclaims	2.00 hrs.	205.00/hr	410.00
PARTNER 04/17/12	AHR analysis of amendment, motion for summary judgment; outline litigation strategy	0.40 hrs.	370.00/hr	148.00

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May 23, 2012
Invoice 241397

ASSOC 04/17/12	CJL research re: arbitration and tolling the statute of limitations in Connecticut	0.40 hrs.	190.00/hr		76.00
ASSOC 04/17/12	SS analyze abuse of process claims; analyze defendants' motion for summary judgment	3.30 hrs.	205.00/hr		676.50
PARTNER 04/18/12	AHR analysis of claims for new amended complaint; review email from client; telephone call from Attorney Elstein re: status of matter; review arbitration decision re: fraudulent inducement	0.40 hrs.	370.00/hr		148.00
ASSOC 04/18/12	SS amend complaint; analyze fraudulent conveyance statute [redacted]	5.00 hrs.	205.00/hr		1025.00 (717.5)
PARTNER 04/19/12	AHR review/analysis of proposed amended complaint; email Attorney Elstein re: extension	0.30 hrs.	370.00/hr		111.00
ASSOC 04/19/12	SS [redacted]	3.00 hrs.	205.00/hr		(615.00)
PARTNER 04/20/12	AHR review proposed amended complaint adding new claims	0.20 hrs.	370.00/hr		74.00
ASSOC 04/20/12	CJL research re: the statute of limitations and whether it can be tolled during arbitration proceedings; research re: whether a lawsuit can relate back to the initial filing of arbitration	2.00 hrs.	190.00/hr		380.00
ASSOC 04/20/12	SS prepare motion for extension of time re: responding to summary judgment [redacted]	1.70 hrs.	205.00/hr		348.50 (307.5)
PARTNER 04/23/12	AHR [redacted]	0.30 hrs.	370.00/hr		(111.00)

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May 23, 2012
Invoice 241397

ASSOC 04/23/12	SS review W. Whitney's comments re: insolvency; research re: statute of frauds claim brought by defendants in motion for summary judgment; analyze case law re: arbitration is not an action for purposes of statute of limitations	4.00 hrs.	205.00/hr	820.00
PARTNER 04/24/12	AHR attention to proposed amended counterclaims; analysis; strategy	0.20 hrs.	370.00/hr	74.00
ASSOC 04/24/12	CJL review of defendant's request to amend setoffs and counterclaims; research re: whether a vexatious litigation claim can be based on an action pursued in arbitration; research re: the statute of limitations on a vexatious litigation claim	2.00 hrs.	190.00/hr	380.00
ASSOC 04/24/12	SS analyze research re: vexatious litigation premised on arbitration	0.50 hrs.	205.00/hr	102.50
PARTNER 04/25/12	AHR telephone calls (2) with Scott counsel re: amendments; email re: same	0.20 hrs.	370.00/hr	74.00
ASSOC 04/25/12	CJL research re: whether a cause of action for abuse of process can be brought as a counterclaim in Connecticut; research re: whether a cause of action for vexatious litigation can be brought if summary judgment has been granted on only some of the counts in one party's favor	1.00 hrs.	190.00/hr	190.00
ASSOC 04/25/12	SS revised amended complaint	0.90 hrs.	205.00/hr	184.50
ASSOC 04/26/12	CJL research re: whether a grant of summary judgment constitutes termination of a civil action in the plaintiff's favor for a vexatious litigation claim in Connecticut; research re: whether a vexatious litigation claim can be based on an action pursued in arbitration	1.00 hrs.	190.00/hr	190.00
ASSOC 04/26/12	SS review fraudulent conveyances statute of limitation compared to filing of suit; revise motion to stay; research re: case law re: importance of attorney client privilege for motion to stay; analyze research re: effect of summary judgment as basis for vexatious litigation	1.00 hrs.	205.00/hr	205.00

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PARTNER 04/27/12	AHR review/analysis of email from Scott counsel	0.20 hrs.	370.00/hr	74.00
ASSOC 04/27/12	CJL research re: a cause of action for fraudulent conveyance in Connecticut and a lacking indispensable party	1.00 hrs.	190.00/hr	190.00

Total Fees for Professional Services ~~$7,337.00~~ $5175

Reimbursable Costs

03/28/12	User Name LISI,CHRISTOPHER J (10627902) 03/28/2012 RESEARCH WESTLAW	32.01
03/30/12	User Name ZUBERI,SAIMA (10627904) 03/30/2012 RESEARCH WESTLAW	89.50
04/19/12	User Name LISI,CHRISTOPHER J (10627902) 04/19/2012 RESEARCH WESTLAW	16.49
04/24/12	LEXIS-NEXIS: COMPUTER RESEARCH	46.64
04/24/12	User Name LISI,CHRISTOPHER J (10627902) 04/24/2012 RESEARCH WESTLAW	28.23
04/25/12	User Name LISI,CHRISTOPHER J (10627902) 04/25/2012 RESEARCH WESTLAW	8.95

Total Reimbursable Costs $221.82

TOTAL DUE FOR THIS MATTER ~~$7,558.82~~ $5396.82

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For Services Through May 31, 2012

Our Matter # 28961-1
WHITNEY, WALTER v. J.M. SCOTT ASSOCIATES et al

PARTNER 05/01/12	AHR [redacted] attention to motion to strike vexatious counterclaims	0.50 hrs.	370.00/hr	185.00 (111)
ASSOC 05/01/12	CJL review of defendants' counterclaims, plaintiff's motion to amend revised complaint, defendants' motion for summary judgment, and plaintiff's revised complaint; drafting outline of motion to strike	2.10 hrs.	0.00/hr	0.00
ASSOC 05/02/12	CJL drafting argument section for motion to strike re: arbitration not being able to form the basis of a vexatious litigation suit	1.00 hrs.	190.00/hr	190.00
PARTNER 05/03/12	AHR [redacted]	0.20 hrs.	370.00/hr	(74.00)
ASSOC 05/03/12	CJL drafting argument section for motion to strike re: arbitration not being able to form the basis of a vexatious litigation suit	1.00 hrs.	190.00/hr	190.00
ASSOC 05/04/12	SS research re: standards for tolling statute of limitations; analyze pending claims to determine which may be tolled and evidence necessary to do so	1.00 hrs.	205.00/hr	205.00
PARTNER 05/07/12	AHR review pending motions and pleadings re: strategy; review law for motion to strike	0.50 hrs.	370.00/hr	185.00
ASSOC 05/07/12	SS prepare memorandum of law in support of motion to strike vexatious litigation counter claims; research re: case law concluding that arbitration is not a civil action	2.00 hrs.	205.00/hr	410.00
PARTNER 05/08/12	AHR review and revise motion to strike and memorandum of law re: vexatious claims;	0.30 hrs.	370.00/hr	111.00

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	review motion to extend time and motion to stay			
PARTNER 05/09/12	AHR	0.30 hrs.	370.00/hr	(111.00)
[redacted]				
ASSOC 05/09/12	SS revise and cite check motion to strike	0.50 hrs.	205.00/hr	102.50
PARTNER 05/15/12	AHR return call to B. Elstein; attention to short calendar	0.20 hrs.	370.00/hr	74.00
PARTNER 05/16/12	AHR analysis of ways around the statute of limitations problems as to fraud and CUTPA claims	0.20 hrs.	370.00/hr	74.00
PARTNER 05/18/12	AHR analysis of amended claims and accusation of vexatious litigation; email client re: same	0.30 hrs.	370.00/hr	111.00
ASSOC 05/18/12	SS research re: whether statute of frauds may be estopped; research re: whether estoppel must be pled	0.50 hrs.	205.00/hr	102.50
ASSOC 05/21/12	SS research re: fiduciary relationship re: continuing course of conduct doctrine	0.50 hrs.	205.00/hr	102.50
PARTNER 05/22/12	AHR finalize proposed amended complaint; preparation for and meeting with client re: amended complaint, status of various cases	1.00 hrs.	370.00/hr	370.00
ASSOC 05/22/12	SS research re: whether shareholder relationship satisfies tolling doctrine standards	1.00 hrs.	205.00/hr	205.00
PARTNER 05/23/12	AHR revision of amended complaint per meeting with client; follow-up letter to Attorney Secola; call to Attorney Elstein re: marking pending motions	0.70 hrs.	370.00/hr	259.00
PARTNER	AHR	0.20 hrs.	370.00/hr	74.00

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05/24/12	attention to calendar markings; review cases re: continuing course of conduct doctrine and CUTPA			
PARTNER 05/30/12	AHR review court order	0.20 hrs.	370.00/hr	74.00
		Total Fees for Professional Services		~~$3,209.50~~ $2913.5

Reimbursable Costs

03/28/12	User Name LISI,CHRISTOPHER J (10627902) 03/28/2012 RESEARCH WESTLAW	32.01
03/30/12	User Name ZUBERI,SAIMA (10627904) 03/30/2012 RESEARCH WESTLAW	89.50
04/19/12	User Name LISI,CHRISTOPHER J (10627902) 04/19/2012 RESEARCH WESTLAW	16.49
04/24/12	User Name LISI,CHRISTOPHER J (10627902) 04/24/2012 RESEARCH WESTLAW	28.23
04/25/12	User Name LISI,CHRISTOPHER J (10627902) 04/25/2012 RESEARCH WESTLAW	8.95
	Total Reimbursable Costs	$175.18
	TOTAL DUE FOR THIS MATTER	~~$3,384.68~~ $3088.68

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For Services Through June 30, 2012

Our Matter # 28961-1
WHITNEY, WALTER v. J.M. SCOTT ASSOCIATES et al

PARTNER 06/01/12	AHR [redacted]	0.20 hrs.	370.00/hr	(74.00)
PARTNER 06/04/12	AHR attention to amended complaint	0.20 hrs.	370.00/hr	74.00
ASSOC 06/04/12	SS revise amended complaint; prepare request for leave to amend; prepare withdrawal of claim; outline objection to summary judgment	1.60 hrs.	205.00/hr	328.00
ASSOC 06/05/12	SS prepare fact section re: objection to motion for summary judgment; prepare motion to seal complaint	3.20 hrs.	205.00/hr	656.00
ASSOC 06/06/12	SS continue preparing facts re: motion for summary judgment; prepare section of brief re: legal standard; prepare section of brief re: anticipatory breach of contract	2.90 hrs.	205.00/hr	594.50
LAW CLERK 06/08/12	EMS [redacted]	0.80 hrs.	170.00/hr	(136.00)
ASSOC 06/10/12	SS prepare section of summary judgment re: anticipatory breach; prepare section of summary judgment re: breach of covenant of good faith and fair dealing	4.50 hrs.	205.00/hr	922.50
PARTNER 06/11/12	AHR analysis of arguments for opposition to summary judgment	0.30 hrs.	370.00/hr	111.00
ASSOC 06/11/12	CJL review of arbitration hearing transcript to provide citations in plaintiff's objection to defendants' motion for summary judgment and to indicate further relevant facts for the plaintiff	2.50 hrs.	190.00/hr	475.00

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LAW CLERK 06/11/12	EMS	1.90 hrs.	0.00/hr	0.00
ASSOC 06/11/12	SS continue preparing objection to summary judgment motion; analyze documents to support objection to summary judgment motion	4.30 hrs.	205.00/hr	881.50
PARTNER 06/12/12	AHR review and revise opposition to summary judgment	0.50 hrs.	370.00/hr	185.00
ASSOC 06/12/12	CJL review of arbitration hearing transcript to provide citations in plaintiff's objection to defendants' motion for summary judgment and to indicate further relevant facts for the plaintiff	2.50 hrs.	190.00/hr	475.00
LAW CLERK 06/12/12	EMS assist with preparation of objection to motion for summary judgment	0.20 hrs.	0.00/hr	0.00
ASSOC 06/12/12	SS continue preparing objection to summary judgment motion	6.00 hrs.	205.00/hr	1230.00
PARTNER 06/13/12	AHR review and revise summary judgment brief and affidavit	0.50 hrs.	370.00/hr	185.00
ASSOC 06/13/12	CJL review of arbitration hearing transcript to provide citations in plaintiff's objection to defendants' motion for summary judgment and to indicate further relevant facts for the plaintiff	4.50 hrs.	0.00/hr	0.00
LAW CLERK 06/13/12	EMS research regarding the application of the continuing course of conduct doctrine to this case	2.50 hrs.	0.00/hr	0.00
LAW CLERK 06/13/12	EMS application of Watts continuing course of conduct doctrine to the facts of Whitney	1.40 hrs.	0.00/hr	0.00
LAW CLERK 06/14/12	EMS analysis of continuing course of conduct in the context of a CUTPA claim	1.50 hrs.	0.00/hr	0.00

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LAW CLERK 06/14/12	EMS reviewing standard of law in objection to motion for summary judgment	0.80 hrs.	0.00/hr		0.00
ASSOC 06/14/12	SS discuss affidavit with W. Whitney; continue preparing objection to summary judgment motion; prepare motion to seal unredacted version of objection and exhibits; prepare memorandum of law re: same	6.00 hrs.	205.00/hr		1230.00
PARTNER 06/15/12	AHR attention to opposition to summary judgment	0.20 hrs.	370.00/hr		74.00
ASSOC 06/15/12	CJL review of plaintiff's objection to defendants' motion for summary judgment	0.70 hrs.	0.00/hr		0.00
ASSOC 06/15/12	SS finalize objection to motion for summary judgment and exhibits in support of same; prepare redaction version of objection of summary judgment	2.50 hrs.	205.00/hr		512.50
ASSOC 06/18/12	SS attend short calendar in Litchfield re: motion to seal complaint	1.50 hrs.	205.00/hr		307.50
LAW CLERK 06/22/12	EMS [redacted]	1.00 hrs.	0.00/hr		0.00
ASSOC 06/22/12	SS [redacted]	0.50 hrs.	205.00/hr		(102.50)
LAW CLERK 06/25/12	EMS [redacted]	0.30 hrs.	0.00/hr		0.00
LAW CLERK 06/25/12	EMS [redacted]	2.00 hrs.	170.00/hr		(340.00)
LAW CLERK 06/29/12	EMS [redacted]	0.30 hrs.	0.00/hr		0.00

Total Fees for Professional Services ~~$8,894.00~~ $8241.5

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Reimbursable Costs

06/15/12	User Name SCHULTZ,SARAH (6717636) 06/15/2012 RESEARCH WESTLAW	27.17
	Total Reimbursable Costs	$27.17
	TOTAL DUE FOR THIS MATTER	~~$8,921.17~~ $8268.67

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For Services Through July 31, 2012

Our Matter # 28961-1
WHITNEY, WALTER v. J.M. SCOTT ASSOCIATES et al

ASSOC 07/02/12	SS [redacted]	1.00 hrs.	205.00/hr	(205.00)
PARTNER 07/03/12	AHR [redacted]	0.20 hrs.	370.00/hr	(74.00)
ASSOC 07/03/12	SS [redacted]	0.50 hrs.	205.00/hr	(102.50)
LAW CLERK 07/06/12	EMS research re: piercing corporate veil claim	1.00 hrs.	0.00/hr	0.00
ASSOC 07/06/12	SS analyze research re: piercing the corporate veil	0.40 hrs.	205.00/hr	82.00
PARTNER 07/09/12	AHR attention to deadline to file responsive pleading	0.20 hrs.	370.00/hr	74.00
PARTNER 07/11/12	AHR attention to status of pleadings	0.20 hrs.	370.00/hr	74.00
PARTNER 07/13/12	AHR [redacted]	0.50 hrs.	370.00/hr	(185.00)
PARTNER 07/16/12	AHR [redacted]	0.30 hrs.	370.00/hr	(111.00)
LAW CLERK 07/16/12	EMS [redacted]	1.40 hrs.	0.00/hr	0.00

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August 6, 2012
Invoice 243601

PARTNER 07/17/12	AHR attention to pleadings	0.20 hrs.	370.00/hr	74.00
PARTNER 07/18/12	AHR attention to pleading extension; [redacted]	0.60 hrs.	370.00/hr	222.00 (148)
ASSOC 07/18/12	SS prepare motion for extension of time to plead; prepare requests for production to Scott Swimming Pools; prepare same re: J. Scott; requests to admit	2.00 hrs.	205.00/hr	410.00
PARTNER 07/19/12	AHR attention to pleadings; review new discovery requests; [redacted]	0.50 hrs.	370.00/hr	185.00 (74)
ASSOC 07/19/12	SS [redacted]	1.00 hrs.	205.00/hr	(205.00)
PARTNER 07/20/12	AHR attention to new complaint, litigation hold; finalize draft complaint and letter to counsel	0.40 hrs.	370.00/hr	148.00
ASSOC 07/20/12	SS [redacted]	1.00 hrs.	205.00/hr	(205.00)
ASSOC 07/23/12	SS discuss J. Secola's advice re: compelling arbitration with W. Whitney; prepare discovery requests with exhibits directed to defendants in final; prepare notice of filing of requests for admission	0.70 hrs.	205.00/hr	143.50
ASSOC 07/31/12	SS respond to defense counsel's requests re: scheduling hearing on motions; claim motions for hearing	0.20 hrs.	205.00/hr	41.00

Total Fees for Professional Services ~~$2,641.00~~ $1231.5

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August 6, 2012
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Reimbursable Costs

07/31/12	PHOTOCOPIES	48.10
	Total Reimbursable Costs	$48.10
	TOTAL DUE FOR THIS MATTER	~~$2,589.40~~ $1,279.60

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For Services Through August 31, 2012

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WHITNEY, WALTER v. J.M. SCOTT ASSOCIATES et al

ASSOC 07/17/12	SS [redacted]	0.80 hrs.	205.00/hr	(164.00)
ASSOC 08/10/12	SS analyze objection to motion to strike vexatious litigation counterclaims; prepare reply in response to same; analyze arguments with A. H. Rubin re: same and defendant's motion for summary judgment; prepare outline of argument re: motion to strike counterclaims	2.60 hrs.	205.00/hr	533.00
ASSOC 08/12/12	SS analyze case law cited in objection for motion for summary judgment; analyze case law cited in motion for summary judgment; prepare outline re: argument re: objection to motion for summary judgment	2.30 hrs.	205.00/hr	471.50
ASSOC 08/13/12	SS continuing preparing outline re: argument re: objection to summary judgment; attend oral argument re: motion to strike and motion for summary judgment in Litchfield Court	3.50 hrs.	205.00/hr	717.50
ASSOC 08/23/12	SS review responses to requests to admit; contact B. Elstein re: status of remaining discovery compliance	0.30 hrs.	205.00/hr	61.50
ASSOC 08/28/12	SS respond to W. Whitney's inquiries re: status of discovery compliance	0.20 hrs.	205.00/hr	41.00

Total Fees for Professional Services ~~$1,988.50~~ $1824.5

TOTAL DUE FOR THIS MATTER ~~$1,988.50~~ $1824.5

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Invoice 245766
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For Services Through September 30, 2012

Our Matter # 28961-1
WHITNEY, WALTER v. J.M. SCOTT ASSOCIATES et al

ASSOC 09/11/12	SS analyze decision issued on plaintiff's motion to strike vexatious litigation counterclaims; forward same to W. Whitney	0.30 hrs.	205.00/hr	61.50
PARTNER 09/24/12	AHR review Scott answer and special defenses; attention to pleadings and discovery status	0.30 hrs.	370.00/hr	111.00
ASSOC 09/24/12	SS analyze answer and special defenses filed by defendants; prepare plaintiff's reply to special defenses and answer to counterclaims	2.10 hrs.	205.00/hr	430.50
PARTNER 09/25/12	AHR review and revise proposed reply to special defenses and answer to counterclaims	0.40 hrs.	370.00/hr	148.00
ASSOC 09/27/12	SS prepare answer, special defenses; contact W. Whitney re: response to a few allegations in defendants' special defenses; research re: defenses to abuse of process	2.30 hrs.	205.00/hr	471.50
PARTNER 09/28/12	AHR review and revise answer and defenses to counterclaim; attention to status of Scott discovery responses	0.50 hrs.	370.00/hr	185.00
ASSOC 09/28/12	SS discuss answer with W. Whitney; research re: defenses to abuse of process claims	1.50 hrs.	205.00/hr	307.50
PARTNER 09/30/12	AHR review and revise answer	0.30 hrs.	370.00/hr	111.00

Total Fees for Professional Services $1,826.00

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October 19, 2012
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TOTAL DUE FOR THIS MATTER $1,626.00

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WALTER WHITNEY
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Our Matter # 28961-1
WHITNEY, WALTER v. J.M. SCOTT ASSOCIATES et al

ASSOC 10/02/12	SS review and respond to W. Whitney's questions re: discovery; prepare objection to defendants' motion to extend discovery compliance	0.50 hrs.	205.00/hr	102.50
ASSOC 10/11/12	SS review memorandum of decision denying motion for summary judgment	0.20 hrs.	205.00/hr	41.00
PARTNER 10/12/12	AHR review summary judgment decision	0.20 hrs.	370.00/hr	74.00
PARTNER 10/19/12	AHR attention to discovery and pleadings status	0.20 hrs.	370.00/hr	74.00
PARTNER 10/25/12	AHR [redacted]	0.20 hrs.	370.00/hr	(74.00)
PARTNER 10/26/12	AHR prepare for and telephone call with client re: trial to court or jury	0.50 hrs.	370.00/hr	185.00
ASSOC 10/26/12	SS [redacted] contact E. Ronan re: serving as expert; contact S. Mathis re: same; discussion with A.H. Rubin, W. Whitney and K. Whitney; analyze defendants' partial production of documents	1.60 hrs.	205.00/hr	328.00 (41)
PARTNER 10/30/12	AHR attention to trial list claim	0.20 hrs.	370.00/hr	74.00
PARTNER 10/31/12	AHR [redacted]	0.20 hrs.	370.00/hr	(74.00)

Total Fees for Professional Services ~~$1,026.50~~ $837.5

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TOTAL DUE FOR THIS MATTER ~~$1,026.50~~ $837.5

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For Services Through November 30, 2012

Our Matter # 28961-1
WHITNEY, WALTER v. J.M. SCOTT ASSOCIATES et al

PARTNER 11/01/12	AHR [redacted]	0.30 hrs.	370.00/hr	(111.00)
PARTNER 11/05/12	AHR [redacted]	0.30 hrs.	370.00/hr	(111.00)
PARTNER 11/13/12	AHR review court calendar	0.20 hrs.	370.00/hr	74.00
ASSOC 11/16/12	SS prepare for telephone conference with B. Elstein re: objections	0.50 hrs.	205.00/hr	102.50
ASSOC 11/20/12	SS participate in meet and confer telephone conference with B. Elstein re: objections to discovery	0.50 hrs.	205.00/hr	102.50
ASSOC 11/21/12	SS prepare summary of agreements with counsel re: discovery compliance	0.80 hrs.	205.00/hr	164.00
PARTNER 11/28/12	AHR preparation for pretrial conference	0.40 hrs.	370.00/hr	148.00
ASSOC 11/28/12	SS prepare damages analysis; discuss same with A. H. Rubin	0.80 hrs.	205.00/hr	164.00
ASSOC 11/29/12	SS prepare pre-trial form	1.60 hrs.	205.00/hr	328.00

Total Fees for Professional Services ~~$1,306.00~~ $1083

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TOTAL DUE FOR THIS MATTER ~~$1,305.00~~ $1083

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For Services Through December 31, 2012

Our Matter # 28961-1
WHITNEY, WALTER v. J.M. SCOTT ASSOCIATES et al

PARTNER 12/03/12	AHR review and revise pretrial memo; attention to discovery status	1.00 hrs.	370.00/hr		370.00
ASSOC 12/03/12	SS revise pretrial memorandum	0.50 hrs.	205.00/hr		102.50
ASSOC 12/05/12	SS review deeds of transfer re: JMSA; review W. Whitney's affidavit re: damages	0.40 hrs.	205.00/hr		82.00
ASSOC 12/05/12	SS analyze pre-trial conference strategy with A.H. Rubin; review pleadings re: temporary restraining order; prepare statement re: liability	1.20 hrs.	205.00/hr		246.00
ASSOC 12/06/12	SS attend pre-trial at Litchfield courthouse; revise confidentiality order; [redacted]	3.50 hrs.	205.00/hr		717.50 (41)
ASSOC 12/08/12	SS revise confidentiality order; respond to B. Elstein re: production and scheduling; review deposition exhibits to K. Ostroske deposition to confirm whether accountant papers were produced as indicated by B. Elstein	1.50 hrs.	205.00/hr		307.50
ASSOC 12/11/12	SS review B. Elstein's revisions to the confidentiality agreement; respond to B. Elstein re: document production	0.30 hrs.	205.00/hr		61.50
ASSOC 12/17/12	SS respond to B. Elstein re: confidentiality order	0.20 hrs.	205.00/hr		41.00
PARTNER 12/19/12	AHR revise confidentiality order; email Elstein re: same; attention to enforcement of TRO	0.30 hrs.	370.00/hr		111.00

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ASSOC 12/19/12	RK discuss drafting motion to have court grant plaintiff's version of confidentiality agreement	0.30 hrs.	190.00/hr	57.00
ASSOC 12/19/12	RK research and draft plaintiff's motion for protective order to have court grant plaintiff permission to use confidential material in this action and the two related matters	1.90 hrs.	0.00/hr	0.00
ASSOC 12/21/12	SS revise motion re: confidentiality agreement	1.00 hrs.	205.00/hr	205.00

Total Fees for Professional Services ~~$2,361.00~~ $2260

Reimbursable Costs

12/13/12	ANN H. RUBIN: TRAVEL TO LITCHFIELD 12/6 - 40 MILES @ .555	22.20
12/19/12	User Name KORNHAAS,ROBERT J (11037830) 12/19/2012 RESEARCH WESTLAW	12.84

Total Reimbursable Costs $35.04

TOTAL DUE FOR THIS MATTER ~~$2,836.04~~ $2295.04

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For Services Through January 31, 2013

Our Matter # 28961-1
WHITNEY, WALTER v. J.M. SCOTT ASSOCIATES et al

ASSOC 01/02/13	SS prepare motion to compel	1.80 hrs.	210.00/hr	378.00
ASSOC 01/03/13	SS prepare motion to compel	1.50 hrs.	210.00/hr	315.00
ASSOC 01/07/13	SS research re: legal standards for protecting confidential information; prepare motion for entry of protective order	2.90 hrs.	210.00/hr	609.00
PARTNER 01/08/13	AHR review and revise motion to compel discovery and motion for protective order	0.40 hrs.	375.00/hr	150.00
ASSOC 01/08/13	SS prepare motion to compel; prepare affidavit re: good faith conference	4.50 hrs.	210.00/hr	945.00
ASSOC 01/14/13	RK review and cite check motions to be submitted to the court; print and attach unreported cases to be submitted with the motions	1.00 hrs.	190.00/hr	190.00
ASSOC 01/14/13	SS revise motion to compel; review motion for protective order; revise affidavit; contact S. Mathis re: trial dates and scheduling review of opinion; contact E. Ronan re: trial dates	2.00 hrs.	210.00/hr	420.00
PARTNER 01/15/13	AHR attention to meeting with S. Mathis; review/revise motion to compel	0.30 hrs.	370.00/hr	111.00
ASSOC 01/16/13	SS prepare exhibits for filing; prepare proposed protective order	0.40 hrs.	210.00/hr	84.00
PARTNER 01/18/13	AHR begin preparation for meeting with S. Mathis	0.40 hrs.	375.00/hr	150.00

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February 5, 2013
Invoice 249029

ASSOC 01/18/13	SS research re: matters in which S. Mathis has served as an expert witness	0.50 hrs.	210.00/hr	105.00
PARTNER 01/22/13	AHR review S. Mathis deposition transcript; meeting with S. Mathis re: expert opinion on valuation	3.50 hrs.	375.00/hr	1312.50
ASSOC 01/22/13	SS contact court re: submission of mediation statements; contact B. Elstein re: motions on short calendar	0.20 hrs.	210.00/hr	42.00
ASSOC 01/22/13	SS review J. Secola's thumb drive for documents relevant to S. Mathis' opinions	0.50 hrs.	0.00/hr	0.00
ASSOC 01/23/13	SS discussion with court re: moving mediation date; contact W. Whitney re: same; contact B. Elstein re: same	0.20 hrs.	210.00/hr	42.00
ASSOC 01/25/13	SS communications with B. Elstein and L. Eaton re: mediation	0.20 hrs.	210.00/hr	42.00
ASSOC 01/29/13	SS confer with clerk re: scheduling mediation; contact opposing counsel re: same	0.20 hrs.	210.00/hr	42.00

Total Fees for Professional Services	$4,937.50

Reimbursable Costs

01/31/13	ANN H. RUBIN: TRAVEL TO LITCHFIELD 1/22 - 40 MILES @ .565	22.60
	Total Reimbursable Costs	$22.60
	TOTAL DUE FOR THIS MATTER	**$4,960.10**

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March 5, 2013
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For Services Through February 28, 2013

Our Matter # 28961-1
WHITNEY, WALTER v. J.M. SCOTT ASSOCIATES et al

ASSOC 02/05/13	SS prepare caseflow request for mediation	0.20 hrs.	210.00/hr	42.00
ASSOC 02/08/13	SS analyze defendants' objections to plaintiff's motion for a protective order and motion to compel production of documents	0.50 hrs.	210.00/hr	105.00
ASSOC 02/11/13	SS discussion with W. Whitney re: defendants' objections to motion to compel	0.20 hrs.	210.00/hr	42.00
ASSOC 02/19/13	SS analyze order on motion to compel document production	0.20 hrs.	210.00/hr	42.00
ASSOC 02/26/13	SS respond to B. Elsteins' request re: expert disclosures	0.20 hrs.	210.00/hr	42.00

Total Fees for Professional Services $273.00

TOTAL DUE FOR THIS MATTER **$273.00**

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April 3, 2013
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For Services Through March 31, 2013

Our Matter # 28961-1
WHITNEY, WALTER v. J.M. SCOTT ASSOCIATES et al

PARTNER 03/07/13	AHR plan out strategy for mediation and trial	0.50 hrs.	375.00/hr	187.50
ASSOC 03/07/13	SS prepare strategy re: trial and settlement; analyze same with A. H. Rubin	0.50 hrs.	210.00/hr	105.00
ASSOC 03/08/13	SS research re: standards for seeking sanctions; research re: types of sanctions available; prepare motion for sanctions	2.10 hrs.	210.00/hr	441.00
PARTNER 03/11/13	AHR review and revise motion for sanctions; attention to requesting additional sanctions; initial review of Scott expert disclosure	0.50 hrs.	375.00/hr	187.50
ASSOC 03/11/13	SS prepare motion for sanctions; analyze expert disclosure	1.40 hrs.	210.00/hr	294.00
PARTNER 03/13/13	AHR attention to scheduling matters, defendants' expert disclosure; attention to mediation preparation	0.30 hrs.	375.00/hr	112.50
ASSOC 03/14/13	SS prepare mediation position statement	1.80 hrs.	210.00/hr	378.00
PARTNER 03/15/13	AHR review and revise ex parte mediation statement	0.50 hrs.	375.00/hr	187.50
PARTNER 03/18/13	AHR prepare for mediation; meeting with client to prepare for mediation; review defendants' expert disclosures and opinions	2.20 hrs.	375.00/hr	825.00
ASSOC 03/18/13	SS prepare for meeting with Whitney; attend same	1.50 hrs.	210.00/hr	315.00

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PARTNER 03/19/13	AHR prepare for and attend mediation at Litchfield Superior Court	4.80 hrs.	375.00/hr	1800.00
ASSOC 03/19/13	SS review J. Scott testimony re: intention to sell the pool company; analyze documents allegedly supporting W. Whitney's termination; attend mediation at Litchfield Courthouse	5.00 hrs.	210.00/hr	1050.00
PARTNER 03/20/13	AHR review Elstein objection to motion for sanctions	0.20 hrs.	375.00/hr	75.00
ASSOC 03/27/13	SS review order from court re: motion for sanctions	0.20 hrs.	210.00/hr	42.00
		Total Fees for Professional Services		$6,000.00
	Reimbursable Costs			
03/28/13	ANN H. RUBIN: TRAVEL TO LITCHFIELD 3/19 - 40 MILES @ .565			22.60
		Total Reimbursable Costs		$22.60
		TOTAL DUE FOR THIS MATTER		**$6,022.60**

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May 7, 2013
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For Services Through April 30, 2013

Our Matter # 28961-1

WHITNEY, WALTER v. J.M. SCOTT ASSOCIATES et al

ASSOC 04/02/13	SS prepare deposition notice for experts and document requests; analyze trial management conference order; plan strategy; prepare letter seeking attorneys fees for sanctions; analyze supplemental production by defendants	3.80 hrs.	210.00/hr	798.00
ASSOC 04/03/13	SS revise document requests to K. Ostroske and W. Burkholder; analyze notice of deposition to W. Whitney	1.90 hrs.	210.00/hr	399.00
ASSOC 04/04/13	SS review revised notice of deposition directed to W. Whitney; contact W. Whitney re: deposition of experts and document requests	0.20 hrs.	210.00/hr	42.00
ASSOC 04/07/13	SS analyze W. Whitney deposition transcript; prepare trial testimony outline re: W. Whitney	5.00 hrs.	210.00/hr	1050.00
ASSOC 04/08/13	SSX reviewed 24 page second amended complaint and Jonathan Scott's deposition	0.50 hrs.	190.00/hr	95.00
ASSOC 04/09/13	SS finalize letter re: sanctions; prepare follow-letter re: discovery compliance; analyze second revised notice for deposition; prepare objections to discovery requests; discuss scheduling depositions with B. Eistein	3.20 hrs.	210.00/hr	672.00
ASSOC 04/09/13	SSX attempt to retrieve Drakeley v. Scott file; reviewed summary judgment opposition memorandum of law	1.10 hrs.	0.00/hr	0.00
ASSOC 04/10/13	SS review arbitration testimony of C. Shanahan; review of arbitration testimony of L. Potter; review arbitration testimony of G. Numberger; review arbitration testimony of William Drakeley; review arbitration testimony of Andrea Nixon; prepare Whitney direct examination outline; [illegible]	7.00 hrs.	210.00/hr	1470.00

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ASSOC 04/10/13	SSX summarized Jonathan Scott's deposition	0.50 hrs.	190.00/hr	95.00
ASSOC 04/11/13	SS discussion with W. Whitney re: discovery requests and trial strategy	1.10 hrs.	210.00/hr	231.00
ASSOC 04/11/13	SSX reviewed Gunderson deposition exhibits (0.5 hours); reviewed and summarized Gunderson deposition transcript (3.2 hours)	1.00 hrs.	190.00/hr	190.00
PARTNER 04/15/13	AHR review and revise renewed motion for sanctions	0.20 hrs.	375.00/hr	75.00
ASSOC 04/15/13	SS organize K. Ostroske deposition transcript and exhibits; organize and prepare J. Marsalisi deposition transcript	1.30 hrs.	210.00/hr	273.00
ASSOC 04/15/13	SS review motion for protective order re: preparing renewed motion for sanctions; review defendants' supplemental responses to discovery requests re: preparing renewed motion for sanctions; prepare renewed motion for sanctions	2.80 hrs.	210.00/hr	588.00
PARTNER 04/16/13	AHR attention to discovery from defendants	0.20 hrs.	375.00/hr	75.00
ASSOC 04/16/13	SS review B. Elstein's e-mail re: outstanding production of documents; review e-mails re: B. Elstein's prior agreements; prepare response to B. Elstein re: the same	0.80 hrs.	210.00/hr	168.00
ASSOC 04/18/13	SS meet with W. Whitney re: document production and documents in file for trial; review Arnold Gunderson summary	3.80 hrs.	210.00/hr	798.00
PARTNER 04/22/13	AHR attention to expert depositions, Scott discovery compliance, Whitney document production, trial preparation; begin review of documents in Mathis file for disclosure, testimony	1.40 hrs.	375.00/hr	525.00

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ASSOC 04/22/13	SS review B. Elstein's e-mail re: sanctions and expert depositions; prepare response to same	0.20 hrs.	210.00/hr		42.00
PARTNER 04/23/13	AHR emails re: expert depositions; email Ronan re: testimony; telephone conference with E. Ronan re: expert opinions; outline deposition examination of Burkholder	1.50 hrs.	375.00/hr		562.50
PARTNER 04/24/13	AHR prepare for Ostroske and Burkholder depositions, trial management conference	1.30 hrs.	375.00/hr		487.50
ASSOC 04/24/13	SS prepare trial management report	2.90 hrs.	210.00/hr		609.00
PARTNER 04/25/13	AHR continue preparation for and attend Burkholder deposition; continue preparation for Ostroske deposition	5.40 hrs.	375.00/hr		2025.00
ASSOC 04/25/13	SS prepare objections and responses to document requests to W. Whitney; prepare document production	0.70 hrs.	210.00/hr		147.00
PARTNER 04/26/13	AHR revision of trial management order compliance	0.50 hrs.	375.00/hr		187.50
ASSOC 04/26/13	SS analyze witness list with W. Whitney; finalize pre-trial management report; correspond re: same with Elstein; analyze documents obtained, reviewed and relied upon by Mathis for production	3.90 hrs.	210.00/hr		819.00
PARTNER 04/29/13	AHR renotice Ostrowski deposition; compile trial exhibits; attention to finalizing trial management order compliance; attention to Mathis documents; review documents to be produced to defendants	1.00 hrs.	375.00/hr		375.00
ASSOC 04/29/13	SS prepare valuation documents for production; review B. Elstein's changes to pretrial memorandum	1.50 hrs.	210.00/hr		315.00

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PARTNER 04/30/13	AHR attendance at trial management conference and settlement conference at Litchfield Superior Court; telephone call with client to report on court appearance, discuss trial preparation	3.20 hrs.	375.00/hr	1200.00
ASSOC 04/30/13	SS analyze defense strategy going forward with A.H. Rubin; discussion of same with W. Whitney and A.H. Rubin; review of potential trial exhibits	1.40 hrs.	210.00/hr	294.00
ASSOC 04/30/13	SSX research re: authentication of property assessment documents	0.50 hrs.	190.00/hr	95.00
			Total Fees for Professional Services	$14,702.50

Reimbursable Costs

04/24/13	WARREN BURKHOLDER: EXPERT WITNESS FEE	1,600.00
04/30/13	PHOTOCOPIES	415.50
	Total Reimbursable Costs	$2,015.50
	TOTAL DUE FOR THIS MATTER	**$16,718.00**

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June 7, 2013
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For Services Through May 31, 2013

Our Matter # 28961-1
WHITNEY, WALTER v. J.M. SCOTT ASSOCIATES et al

PARTNER 05/01/13	AHR continue review of Ostroske testimony	0.40 hrs.	375.00/hr	150.00
ASSOC 05/01/13	SS outline W. Whitney direct testimony; discuss objections to W. Whitney's production with H. Elstein	3.60 hrs.	210.00/hr	756.00
ASSOC 05/02/13	SS review W. Whitney memoranda re: factual background; prepare outline re: W. Whitney direct examination	3.80 hrs.	210.00/hr	798.00
ASSOC 05/04/13	SS prepare W. Whitney's direct examination outline	4.10 hrs.	210.00/hr	861.00
ASSOC 05/06/13	SS review defendants' request for adjudication re: objections to documents directed to W. Whitney; prepare response to B. Elstein re: same	2.60 hrs.	210.00/hr	546.00
PARTNER 05/07/13	AHR attention to discovery/court order issues, trial preparation	0.20 hrs.	375.00/hr	75.00
ASSOC 05/07/13	SS review court order re: adjudication of plaintiff's discovery objections; discussion with B. Elstein re: discovery objections; discussion with court re: trial schedule; discussion with W. Whitney re: requests for production; prepare scripts for discussions with potential fact witnesses; discussion with Andrea Nixon re: employment at Scott Swimming Pools; review Scott arbitration testimony; prepare J. Scott cross examination outline; analyze defendant's subpoenas re: personnel files	5.70 hrs.	210.00/hr	1197.00
ASSOC 05/08/13	SS discussion with E. Olsen re: employment with Scott Swimming Pools; discussion with W. Drakeley re: employment with Scott Swimming Pools; correspond with B. Elstein re: subpoenas, personnel files and depositions re: J. Scott	3.50 hrs.	210.00/hr	735.00

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	arbitration testimony; prepare cross examination outline re: J. Scott			
PARTNER 05/09/13	AHR attention to trial preparation (Ostroske, Ronan, subpoenas for Whitney personnel files); email Mathis re: trial; continue review of SSP financials for trial	0.80 hrs.	375.00/hr	300.00
PARALEGAL 05/09/13	NW correspondence with S.S. Healey re: assignment	0.20 hrs.	0.00/hr	0.00
ASSOC 05/09/13	SS respond to B. Elstein re: Whitney production; e-mail B. Elstein re: missing financial statements	0.40 hrs.	210.00/hr	84.00
ASSOC 05/10/13	SS discussion with D. Scarritt re: employment at Scott Swimming Pools; discussion with G. Numberger re: employment at Scott Swimming Pools; research re: whether witness are available under Connecticut law	0.80 hrs.	210.00/hr	168.00
ASSOC 05/13/13	SSX research re: J. Scott car racing and BVI activities; research re: trial subpoenas and witness addresses	1.50 hrs.	190.00/hr	285.00
PARALEGAL 05/14/13	NW review of Roxbury and Woodbury land records and Tax Assessor records; correspondence with S.S. Healey outlining research; conference with S.S. Healey re: materials	4.00 hrs.	180.00/hr	720.00
ASSOC 05/14/13	SS review land records concerning J. Scott's cars and property transfers; prepare W. Whitney direct examination	2.20 hrs.	210.00/hr	462.00
ASSOC 05/14/13	SSX preparation of proposed trial exhibit list	2.20 hrs.	190.00/hr	418.00
ASSOC 05/14/13	SSX drafted subpoenas and accompanying letters	0.70 hrs.	190.00/hr	133.00
ASSOC 05/14/13	SSX reviewed defendants' motion in limine; research re: objection to motion in limine	3.00 hrs.	190.00/hr	570.00

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WALTER WHITNEY
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ASSOC 05/14/13	SSX prepared J. Scott car racing exhibits	0.30 hrs.	190.00/hr	57.00
PARTNER 05/15/13	AHR redact Whitney tax returns for production; prepare chart of SSP financial information for hearing; designate financial exhibits for hearing; trial preparation; prepare Ronan examination	4.30 hrs.	375.00/hr	1612.50
ASSOC 05/15/13	SS prepare for meetings; document production; review outline re: objection to motion in limine; prepare Scott cross	4.00 hrs.	210.00/hr	840.00
PARTNER 05/16/13	AHR prepare for and meet with Ronan re: trial testimony (4 hours); trial preparation (damages analysis) (.5 hours); meeting with client to prepare for trial (2 hours)	6.50 hrs.	375.00/hr	2437.50
ASSOC 05/16/13	SS meet with W. Whitney re: preparing for direct examination; prepare exhibits for trial	8.20 hrs.	210.00/hr	1722.00
ASSOC 05/16/13	SSX research re: admissibility of expert report and expert deposition; research re: providing copies of subpoena; preparation of trial materials; identified materials for Ronan's review; identified Marsalisi's deposition exhibits	4.00 hrs.	190.00/hr	760.00
PARTNER 05/17/13	AHR preparation of Mathis testimony; meeting with Mathis to prepare testimony; begin outline of Ostroske cross-examination; review Marsalisi deposition transcript; attention to Marsalisi testimony; telephone conference with B. Elstein re: trial issues, settlement; continue work on trial testimony, witnesses, proof matters	8.00 hrs.	375.00/hr	3000.00
ASSOC 05/17/13	SS revise W. Whitney direct examination; prepare additional documents for production to defendants; prepare trial exhibits; contact E. Olsen re: service of subpoena, contact W. Drakeley re: service subpoena, contact D. Scarritt re: service of subpoena	10.10 hrs.	210.00/hr	2121.00
ASSOC 05/17/13	SSX research re: admissibility of Marsalisi transcripts and reports; preparation of trial exhibits; [illegible]	4.50 hrs.	190.00/hr	855.00

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PARTNER 05/18/13	AHR trial preparation	8.00 hrs.	375.00/hr	3000.00
ASSOC 05/18/13	SS revise W. Whitney direct examination, prepare trial exhibits, analyze damages claim with A. H. Rubin	13.70 hrs.	210.00/hr	2877.00
ASSOC 05/18/13	SSX drafted objection to motion in limine; identified and prepared trial exhibits	3.00 hrs.	190.00/hr	570.00
PARTNER 05/19/13	AHR trial preparation	5.00 hrs.	375.00/hr	1875.00
ASSOC 05/19/13	SS review W. Drakeley's former testimony; prepare direct examination of W. Drakeley	2.40 hrs.	210.00/hr	504.00
ASSOC 05/19/13	SSX research re: preclusion of late disclosure of expert opinion; preparation of trial documents	2.30 hrs.	190.00/hr	437.00
PARTNER 05/20/13	AHR trial preparation; deposition of Ostroske	12.00 hrs.	375.00/hr	4500.00
PARALEGAL 05/20/13	NW review Town of Warren online land records for evidence of ownership of Tanner Hill property	0.20 hrs.	180.00/hr	36.00
ASSOC 05/20/13	SZ research legal rate of interest and definition of corporate insolvency based on case law and statute	1.40 hrs.	195.00/hr	273.00
ASSOC 05/20/13	SS prepare D. Scarritt direct examination; revise objection to motion in limine; meet with W. Whitney re: trial preparation; discuss trial testimony with W. Drakeley; analyze Scott Swimming Pools' trial exhibits	14.30 hrs.	210.00/hr	3003.00
ASSOC 05/20/13	SSX draft objection to motion to preclude defendant's untimely expert	3.20 hrs.	190.00/hr	608.00

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Disclosure; identified and prepared trial exhibits

PARTNER 05/21/13	AHR attendance at trial; preparation for trial	12.00 hrs.	375.00/hr	4500.00
ASSOC 05/21/13	SS attend trial; discuss direct examination with W. Drakeley; discuss direct examination with E. Olsen; discuss direct examination with D. Scarritt; prepare outline re: D. Scarritt direct examination; revise outline re: W. Drakeley outline; prepare list of what trial exhibits to which the plaintiff objects	15.40 hrs.	210.00/hr	3234.00
ASSOC 05/21/13	SSX updated objections to defendants' proposed exhibits	0.50 hrs.	190.00/hr	95.00
PARTNER 05/22/13	AHR attendance at trial; preparation for trial	9.00 hrs.	375.00/hr	3375.00
ASSOC 05/22/13	SS attend trial; analyze defendants' trial exhibits; analyze defendant's document production; prepare outline re: argument to preclude non-disclosed evidence	14.70 hrs.	210.00/hr	3087.00
PARTNER 05/23/13	AHR preparation for and attendance at trial; preparation for next day of trial	8.20 hrs.	375.00/hr	3075.00
ASSOC 05/23/13	SS attend trial; prepare outline re: L. Potter cross examination; review potential exhibits for fact witnesses	7.80 hrs.	210.00/hr	1638.00
PARTNER 05/24/13	AHR attendance at trial; preparation for cross examination	8.00 hrs.	375.00/hr	3000.00
ASSOC 05/24/13	SS attend trial	7.60 hrs.	210.00/hr	1596.00
PARTNER 05/29/13	AHR email re Burkholder deposition; prepare renotice of deposition; prepare updated task list for trial and preparation	0.40 hrs.	375.00/hr	150.00
ASSOC	SS NEW HAVEN | STAMFORD | WATERBURY | SOUTHBOROUGH | carmodylaw.com	0.30 hrs.	210.00/hr	63.00

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05/30/13	prepare FOIA requests re: Scott Swimming Pools and James M. Scott	
	Total Fees for Professional Services	$63,159.00
	Reimbursable Costs	
05/02/13	ANN H. RUBIN: TRAVEL TO LITCHFIELD 4/30 - 50 MILES @ .565	28.25
05/02/13	ANN H. RUBIN: TRAVEL TO BRIDGEPORT 4/25 - 60 MILES @ .565	33.90
05/14/13	FEDERAL EXPRESS: EDWARDS F. RONAN, JR, CPA 4/23	7.84
05/14/13	GOFOR SERVICES, INC.: DELIVERY SERVICE 4/18	95.00
05/20/13	APPRAISAL FOUNDATION 4/25/13	60.00
05/20/13	User Name ZUBERI,SAIMA (10627904) 05/20/2013 RESEARCH WESTLAW	77.07
05/23/13	ANN H. RUBIN: TRAVEL TO DANBURY 5/16 - 60 MILES @ .565	33.90
05/28/13	SANDERS, GALE & RUSSELL: DEPOSITION OF WARREN BURKHOLDER	472.60
05/30/13	ANN H. RUBIN: TRAVEL TO LITCHFIELD 5/24 - 40 MILES @ .565	22.60
05/30/13	ANN H. RUBIN: TRAVEL TO LITCHFIELD 5/21 - 40 MILES @ .565	22.60
05/30/13	ANN H. RUBIN: TRAVEL TO LITCHFIELD 5/22 - 40 MILES @ .565	22.60
05/30/13	ANN H. RUBIN: TRAVEL TO LITCHFIELD 5/23 - 40 MILES @ .565	22.60
05/31/13	PHOTOCOPIES	786.65
	Total Reimbursable Costs	$1,685.61
	TOTAL DUE FOR THIS MATTER	**$64,844.61**

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For Services Through June 30, 2013

Our Matter # 28961-1
WHITNEY, WALTER v. J.M. SCOTT ASSOCIATES et al

PARTNER 06/03/13	AHR attention to Burkholder deposition	0.30 hrs.	375.00/hr	112.50
PARTNER 06/04/13	AHR review client email re: SSP work; attention to court calendar motion; preparation for resumed trial	0.80 hrs.	375.00/hr	300.00
ASSOC 06/04/13	SS review defendant's motion to seal; review e-mail from W. Whitney re: new information	0.30 hrs.	210.00/hr	63.00
ASSOC 06/04/13	SSX reorganized trial binders	1.00 hrs.	0.00/hr	0.00
PARTNER 06/05/13	AHR e-mail Mathis re: trial and opinion; email Ronan re: trial; preparation for Burkholder deposition and cross-examination; analysis of damages claim; analysis of SSP financial performance, prepare chart	3.20 hrs.	375.00/hr	1200.00
PARTNER 06/06/13	AHR continue preparation for Burkholder deposition; preparation for and call with Mathis re: testimony and damages; continue work on Whitney damages testimony, Scott cross exam	2.80 hrs.	375.00/hr	1050.00
PARTNER 06/07/13	AHR outline for Burkholder deposition and testimony; analysis of Mathis opinion for trial; review new Burkholder report; email Mathis; telephone call with client re: status, fees, next steps; telephone message for Ronan re: trial	3.40 hrs.	375.00/hr	1275.00
ASSOC 06/07/13	SS prepare exhibits re: trial	0.50 hrs.	210.00/hr	105.00
ASSOC	SSX	0.90 hrs.	0.00/hr	0.00

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06/10/13	identified and prepared documents for E. Ronan's review.			
PARTNER 06/11/13	AHR telephone call with S. Mathis re: Burkholder report and deposition; preparation of notes for Burkholder deposition/exam; trial preparation (prepare witness examinations and cross-examinations); trial schedule and emails re: same; analysis and update of exhibit list for trial	2.50 hrs.	375.00/hr	937.50
ASSOC 06/11/13	SS review various reports of W. Burkholder; prepare motion to preclude; prepare trial exhibits; prepare subpoena to Jonathan Scott	4.70 hrs.	210.00/hr	987.00
PARTNER 06/12/13	AHR analysis of complaint and proof; continue trial preparation; prepare Marsalisi deposition designations; review and revise motion to prelude late Burkholder disclosure	2.50 hrs.	375.00/hr	937.50
ASSOC 06/12/13	SS research re: whether disclosure of E. Ronan prevents Marsalisi deposition transcript from being admitted at trial; prepare motion to preclude	2.50 hrs.	210.00/hr	525.00
ASSOC 06/12/13	SSX annotated complaint with defendant's answers	1.00 hrs.	190.00/hr	190.00
PARTNER 06/13/13	AHR review annotated complaint for trial preparation; emails re: depositions of experts; trial preparation; continue preparation of Marsalisi deposition designations for trial; attention to evidence issues, exhibits for trial; emails to Ronan re: opinions; continue to prepare cross examinations	5.40 hrs.	375.00/hr	2025.00
ASSOC 06/13/13	SSX identified and located relevant documents in preparation for trial; updated trial exhibit indices	0.50 hrs.	190.00/hr	95.00
PARTNER 06/14/13	AHR continue trial preparation	4.00 hrs.	375.00/hr	1500.00
ASSOC	SS	2.00 hrs.	210.00/hr	420.00

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06/14/13	analyze operative complaint re: proof for each claim			
ASSOC 06/15/13	SS prepare testimony re: W. Whitney's activities performed at Scott Swimming Pools; review Scott testimony re: value of SSP; review prejudgment remedy testimony re: damages and Scott's representations re: profitability of SSP	4.50 hrs.	210.00/hr	945.00
PARTNER 06/16/13	AHR Burkholder preparation; Whitney preparation; Scott trial preparation	2.00 hrs.	375.00/hr	750.00
PARTNER 06/17/13	AHR trial preparation; Burkholder deposition	7.00 hrs.	375.00/hr	2625.00
ASSOC 06/17/13	SS review additional documents produced by defendants as exhibits; revise outline re: W. Whitney testimony; e-mail N. Russell re: additional property records to obtain for trial	2.80 hrs.	210.00/hr	588.00
ASSOC 06/17/13	SSX processed new trial exhibits	1.20 hrs.	0.00/hr	0.00
PARTNER 06/18/13	AHR preparation for Ronan testimony; preparation call with Ronan; preparation meeting with Whitney; trial preparation	6.80 hrs.	375.00/hr	2550.00
PARALEGAL 06/18/13	NW review Woodbury Assessor's records and obtain certified copies of field cards	0.40 hrs.	180.00/hr	72.00
ASSOC 06/18/13	SS meet with W. Whitney re: potential new exhibits and trial testimony; revise trial testimony outline; prepare new exhibits	4.80 hrs.	210.00/hr	1008.00
ASSOC 06/18/13	SSX research re: admissibility of responses to requests for admissions	1.00 hrs.	190.00/hr	190.00
PARTNER 06/19/13	AHR attendance at trial; preparation for trial	11.00 hrs.	375.00/hr	4125.00
ASSOC	SS	9.60 hrs.	210.00/hr	2016.00

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06/19/13	attend trial; review documents re: Jonathan Scott's testimony as a fact witness; prepare outline re: Jonathan Scott's testimony as a fact witness			
PARTNER 06/20/13	AHR attendance at trial; preparation for trial	10.00 hrs.	375.00/hr	3750.00
ASSOC 06/20/13	SS attend trial; revise outline re: Jonathan Scott's testimony; prepare new exhibits for W. Whitney's direct examination	6.90 hrs.	210.00/hr	1449.00
PARTNER 06/21/13	AHR preparation for and attendance at trial	9.00 hrs.	375.00/hr	3375.00
ASSOC 06/21/13	SZ research admissibility of evidence of poor performance and employment termination to prove witness poorly performed and to impeach witness re: same	0.60 hrs.	195.00/hr	117.00
ASSOC 06/21/13	SS attend trial; research re: whether W. Whitney's employment file from Union Saving's Bank and CHRO complaint may be admitted into evidence	8.20 hrs.	210.00/hr	1722.00
PARTNER 06/24/13	AHR review Scott title records; review Ronan email	0.30 hrs.	375.00/hr	112.50
PARTNER 06/25/13	AHR emails to expert witnesses re: trial schedule; analysis of legal issue re: effect of arbitration ruling; update task list for trial	0.40 hrs.	375.00/hr	150.00
ASSOC 06/25/13	SS review arbitration ruling research issue; prepare summary of same for summer associate research	0.50 hrs.	210.00/hr	105.00
PARTNER 06/27/13	AHR attention to email from counsel for defendants re: trial dates; attention to Ronan statement	0.30 hrs.	375.00/hr	112.50
PARTNER 06/28/13	AHR review and respond to email from Elstein; attention to trial preparation	0.20 hrs.	375.00/hr	75.00

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ASSOC 06/28/13	SS update exhibit lists; prepare motion re: introducing into evidence the requests for admissions	1.80 hrs.	210.00/hr	378.00

Total Fees for Professional Services $37,937.50

Reimbursable Costs

06/04/13	GOFOR SERVICES, INC.: DELIVERY SERVICE 5/3	75.00
06/06/13	NANCY RUSSELL: EXTERNAL COPIES FROM LAND RECORDS AND ASSESSOR - ROXBURY & WOODBURY 5/14	28.50
06/06/13	NANCY RUSSELL: TRAVEL TO ROXBURY/WOODBURY FROM LITCHFIELD 5/14 - 38 MILES @ .565	21.47
06/11/13	RAYMOND BROWN: SUBPOENA / ERIC OLSEN	123.80
06/11/13	RAYMOND BROWN: SUBPOENA / DANIEL ALLEN	45.40
06/11/13	RAYMOND BROWN: SUBPOENA / ERIC OLSEN	90.20
06/11/13	RAYMOND BROWN: SUBPOENA / WILLIAM DRAKELEY	67.80
06/11/13	RAYMOND BROWN: SUBPOENA / DAVID SCARRITT	79.00
06/18/13	DEL VECCHIO REPORTING SERVICES: DEPOSITION TRANSCRIPT / KENNETH OSTROSKE	626.67
06/20/13	SARAH HEALEY: TRAVEL TO LITCHFIELD 5/21 - 40 MILES @ .565	22.60
06/20/13	SARAH HEALEY: TRAVEL TO LITCHFIELD 5/22 - 40 MILES @ .565	22.60
06/20/13	SARAH HEALEY: TRAVEL TO LITCHFIELD 5/23 - 40 MILES @ .565	22.60
06/20/13	SARAH HEALEY: TRAVEL TO LITCHFIELD 5/24 - 40 MILES @ .565	22.60
06/21/13	User Name ZUBERI,SAIMA (10627904) 06/21/2013 RESEARCH WESTLAW	350.04
06/27/13	ANN H. RUBIN: TRAVEL TO LITCHFIELD 6/21 - 40 MILES @ .565	22.60
06/27/13	ANN H. RUBIN: TRAVEL TO LITCHFIELD 6/19 - 40 MILES @ .565	22.60
06/27/13	ANN H. RUBIN: RAVEL TO LITCHFIELD 6/20 - 40 MILES @ .565	22.60
06/30/13	PHOTOCOPIES	170.30

Total Reimbursable Costs $1,836.38

TOTAL DUE FOR THIS MATTER $39,773.88

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For Services Through July 31, 2013

Our Matter # 28961-1
WHITNEY, WALTER v. J.M. SCOTT ASSOCIATES et al

PARTNER 07/01/13	AHR attention to trial preparation; Ronan scheduling; review continuance motion; emails from Elstein; prepare trial examinations	1.00 hrs.	375.00/hr		375.00
ASSOC 07/01/13	SSX organize and prepare trial exhibits	1.00 hrs.	190.00/hr		190.00
LAW CLERK 07/02/13	MMR research case law on preclusion doctrines of res judicata and collateral estoppel re: whether fraudulent inducement claim can be litigated despite arbitrator's decision to grant summary judgment	1.00 hrs.	170.00/hr		170.00
ASSOC 07/02/13	SSX organize and prepare trial exhibits	0.60 hrs.	190.00/hr		114.00
LAW CLERK 07/03/13	MMR research case law on preclusion doctrines of res judicata and collateral estoppel re: whether fraudulent inducement claim can be litigated despite arbitrator's decision to grant summary judgment	1.00 hrs.	170.00/hr		170.00
LAW CLERK 07/05/13	MMR review case law research and analysis with S.S. Healey; synthesized research; wrote outline of argument for motion hearing on preclusion doctrines of res judicata and collateral estoppel re: whether fraudulent inducement claim can be litigated despite arbitrator's decision to grant summary judgment	1.00 hrs.	170.00/hr		170.00
ASSOC 07/05/13	SS analyze research re: arbitration ruling with M.M. Royston	0.70 hrs.	210.00/hr		147.00
PARTNER 07/08/13	AHR preparation for trial (Whitney re-direct and exhibits; motion re: requests to admit; exhibits; legal argument re: arbitration ruling; expert schedule); attention to trial schedule re: caseflow call, review order re: motion for continuance	3.50 hrs.	375.00/hr		1312.50

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LAW CLERK 07/08/13	MMR revise outline of argument per edits received from S.S. Healey for motion hearing on preclusion doctrines of res judicata and collateral estoppel re: whether fraudulent inducement claim can be litigated despite arbitrator's decision to grant summary judgment; reviewed outline with A.H. Rubin	1.00 hrs.	170.00/hr	170.00
ASSOC 07/08/13	SS analyze M.M. Royston's analysis re: collateral estoppel effect of arbitration decision; edit same and suggest additional research	0.80 hrs.	210.00/hr	168.00
PARTNER 07/09/13	AHR revise Ronan examination; prepare Ronan exhibits; meeting with Ronan to prepare trial testimony; continue trial preparation (Whitney exam; Mathis preparation); emails to defense counsel re: trial	5.80 hrs.	375.00/hr	2175.00
LAW CLERK 07/09/13	MMR finalize outline of argument for motion hearing on preclusion doctrines of res judicata and collateral estoppel re: whether fraudulent inducement claim can be litigated despite arbitrator's decision to grant summary judgment; compiled case law, statutory provisions, and treatises for reference during oral arguments	1.00 hrs.	170.00/hr	170.00
ASSOC 07/09/13	SSX trial preparation: review redirect examination and expert examinations, identify and prepare documents and exhibits	1.00 hrs.	190.00/hr	190.00
PARTNER 07/10/13	AHR preparation for and attendance at trial; review objection re: motion to preclude Burkholder; preparation for next day of trial	9.00 hrs.	375.00/hr	3375.00
ASSOC 07/10/13	SSX identify and organize trial exhibits and documents; provide assistance at trial	4.00 hrs.	190.00/hr	760.00
PARTNER 07/11/13	AHR trial preparation; attendance at full day of trial; preparation for Ronan and Scott testimony; communications with Mathis re: testimony	9.50 hrs.	375.00/hr	3562.50
ASSOC 07/11/13	SSX provide trial assistance; identify and prepare further trial exhibits and documents	3.00 hrs.	190.00/hr	570.00
PARTNER	AHR	7.00 hrs.	375.00/hr	2625.00

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07/12/13	attendance at trial			
ASSOC 07/12/13	SSX provide assistance at trial and in preparation for upcoming trial days	2.00 hrs.	190.00/hr	380.00
PARTNER 07/15/13	AHR preparation for trial (Mathis, Burkholder; Tata, Van Veghel, Platt); legal argument re: arbitration order	4.20 hrs.	375.00/hr	1575.00
PARTNER 07/16/13	AHR trial preparation (Burkholder, Mathis, Platt, Van Veghel, Tata, Potter etc.); review defendants' motions to preclude Mathis and Marsalisi; outline objections to motions	4.50 hrs.	375.00/hr	1687.50
ASSOC 07/16/13	SS prepare questions for fact witnesses; prepare exhibits for fact witnesses; review motion to preclude S. Mathis; review motion to preclude Marsalisi; review motion to amend requests for admission; draft objection to motion to preclude Marsalisi	4.80 hrs.	210.00/hr	1008.00
ASSOC 07/16/13	SSX prepare documents for trial; review defendants' motion to preclude Mathis testimony; perform research re: defendants' Porter challenge; draft objection to defendants' motion to preclude; perform research re: Drexel	3.10 hrs.	190.00/hr	589.00
PARTNER 07/17/13	AHR attendance at trial; meeting with Mathis; review and revise briefs in opposition to motions to preclude	8.50 hrs.	375.00/hr	3187.50
ASSOC 07/17/13	SS revise objection to motion to preclude S. Mathis; attend trial; prepare draft of objection to preclude Marsalisi	8.20 hrs.	210.00/hr	1722.00
PARTNER 07/18/13	AHR attendance at trial; preparation for Burkholder cross examination	6.00 hrs.	375.00/hr	2250.00
ASSOC 07/18/13	SS attend trial	7.50 hrs.	210.00/hr	1575.00
PARTNER 07/19/13	AHR attendance at trial	9.00 hrs.	375.00/hr	3375.00

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ASSOC 07/19/13	SS attend trial	7.50 hrs.	210.00/hr	1575.00
ASSOC 07/21/13	SS analyze defendant's list of documents to supplement admission to request to admit number 20; analyse defendant's motion for permission to amend responses to requests to admit; prepare objection in response thereto	2.60 hrs.	210.00/hr	546.00
PARTNER 07/22/13	AHR preparation for trial (Platt, Ostroske, Scott cross examinations; object to amend request to admit; Marsalisi exhibits; Ronan); email Ronan re: testimony; telephone conference with E. Ronan re: testimony and Ostroske cross examination; call and email with Secola counsel re: subpoena	6.00 hrs.	375.00/hr	2250.00
ASSOC 07/22/13	SS prepare objection to defendants' motion for permission to revise requests to admit; update exhibits; prepare exhibits for F. Platt testimony	4.40 hrs.	210.00/hr	924.00
PARTNER 07/23/13	AHR attendance at trial	9.00 hrs.	375.00/hr	3375.00
ASSOC 07/23/13	SS attend trial in Litchfield	8.00 hrs.	210.00/hr	1680.00
PARTNER 07/24/13	AHR attendance at trial; preparation for trial following day	9.50 hrs.	375.00/hr	3562.50
ASSOC 07/24/13	SS attend trial in Litchfield; review J. Scott's arbitration testimony re: potential impeachment; prepare exhibits re: cross of J. Scott	10.60 hrs.	210.00/hr	2226.00
ASSOC 07/24/13	SSX research re: Scott Swimming Pools AAA invoice	0.90 hrs.	0.00/hr	0.00
PARTNER 07/25/13	AHR attendance at trial	8.00 hrs.	375.00/hr	3000.00
ASSOC	SS	8.00 hrs.	210.00/hr	1680.00

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Invoice 255261

07/25/13	attend trial in Litchfield			
ASSOC 07/25/13	SSX research re: suits against J. Scott by banking institutions	0.90 hrs.	0.00/hr	0.00
PARTNER 07/29/13	AHR review documents for Scott cross examination; finalize preparation for J. Scott cross examination; review updated exhibit lists to confirm admitted evidence	1.00 hrs.	375.00/hr	375.00
LAW CLERK 07/29/13	MMR update research on preclusion doctrines of res judicata and collateral estoppel re: whether fraudulent inducement claim can be litigated despite arbitrator's decision to grant summary judgment for post-trial briefing	1.00 hrs.	0.00/hr	0.00
ASSOC 07/29/13	SS update trial exhibit list; review proposed stipulations; discuss same with L. Eaton; research re: discovery rule for purposes of tolling statute of limitations	4.30 hrs.	210.00/hr	903.00
PARTNER 07/30/13	AHR attendance at trial	7.00 hrs.	375.00/hr	2625.00
ASSOC 07/30/13	SS attend trial	5.00 hrs.	210.00/hr	1050.00

Total Fees for Professional Services $59,534.50

Reimbursable Costs

07/02/13	FEDERAL EXPRESS: ED RONAN 6/10	19.43
07/03/13	NANCY RUSSELL: EXTERNAL COPIES FROM LAND RECORDS AND TAX ASSESSOR - WOODBURY & WARREN 6/18 & 6/19	29.00
07/09/13	RAYMOND BROWN: SERVICE OF SUBPOENA / JONATHAN M. SCOTT	67.80
07/11/13	ANN H. RUBIN: TRAVEL TO DANBURY 7/9 - 60 MILES @ .565	33.90
07/11/13	ANN H. RUBIN: TRAVEL TO LITCHFIELD 7/10 - 40 MILES @ .565	22.60
07/18/13	ANN H. RUBIN: TRAVEL TO LITCHFIELD - 40 MILES AT $0.565	22.60
7/11/13		

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WALTER WHITNEY
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WASHINGTON DEPOT, CT 06794

August 7, 2013
Invoice 255261
Page 6

Reimbursable Costs

07/18/13	ANN H. RUBIN: TRAVEL TO LITCHFIELD - 40 MILES AT $0.565 PER MILE - 7/12/13	22.60
07/18/13	SHERRY XIA: TRAVEL FROM WATERBURY TO LITCHFIELD - 40 MILES @ $0.565 PER MILE - 7/10/13	22.60
07/18/13	SHERRY XIA: TRAVEL FROM WATERBURY TO LITCHFIELD - 40 MILES @ $0.565 PER MILE - 7/11/13	22.60
07/18/13	SHERRY XIA: TRAVEL FROM WATERBURY TO LITCHFIELD - 40 MILES @ $0.565 PER MILE - 7/12/13	22.60
07/25/13	ANN H. RUBIN: TRAVEL TO LITCHFIELD 7/17 - 40 MILES @ .565	22.60
07/25/13	ANN H. RUBIN: TRAVEL TO LITCHFIELD 7/18 - 40 MILES @ .565	22.60
07/25/13	ANN H. RUBIN: TRAVEL TO LITCHFIELD 7/19 - 40 MILES @ .565	22.60
07/31/13	PHOTOCOPIES	72.20
	Total Reimbursable Costs	$425.73
	TOTAL DUE FOR THIS MATTER	**$59,960.23**

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September 5, 2013
Invoice 256187
Page 1

For Services Through August 31, 2013

Our Matter # 28961-1
WHITNEY, WALTER v. J.M. SCOTT ASSOCIATES et al

PARTNER 08/01/13	AHR preparation of notes concerning trial brief, references to existing briefs	0.30 hrs.	375.00/hr		112.50
ASSOC 08/06/13	SS outline issues to be researched re: defense of abuse of process claims; outline post trial brief	2.00 hrs.	210.00/hr		420.00
ASSOC 08/07/13	SS prepare fact section of post trial brief re: the parties	1.10 hrs.	210.00/hr		231.00
ASSOC 08/14/13	SSX research re: abuse of process	2.00 hrs.	190.00/hr		380.00
ASSOC 08/16/13	SS analyze defense of abuse of process claims with S.S. Xia	0.20 hrs.	210.00/hr		42.00
ASSOC 08/23/13	SS prepare fact section of brief re: Scott Swimming Pool's employment of J. Scott and W. Drakeley; reivew transcript of W. Drakeley testimony	3.20 hrs.	210.00/hr		672.00
ASSOC 08/26/13	SS prepare fact section re: J. Scott's offer of employment to W. Whitney	0.80 hrs.	210.00/hr		168.00
ASSOC 08/27/13	SS prepare fact section of post trial brief re: hiring and firing of A. Gunderson; prepare same re: agreements entered into between the parties; review revised exhibits of corporate records	4.20 hrs.	210.00/hr		882.00
ASSOC 08/29/13	SS prepare fact section of brief re: the employment of W. Whitney by Scott Swimming Pools	1.10 hrs.	210.00/hr		231.00

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WALTER WHITNEY
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September 5, 2013
Invoice 256187

	Total Fees for Professional Services	$3,138.50

Reimbursable Costs

08/01/13	ANN H. RUBIN: TRAVEL TO LITCHFIELD 7/25 - 40 MILES @ .565	22.60
08/01/13	ANN H. RUBIN: TRAVEL TO LITCHFIELD 7/26 - 40 MILES @ .565	22.60
08/01/13	ANN H. RUBIN: TRAVEL TO LITCHFIELD 7/24 - 40 MILES @ .565	22.60
08/08/13	ANN H. RUBIN: TRAVEL TO LITCHFIELD 7/31 - 40 MILES @ .565	22.60
08/27/13	SARAH HEALEY: TRAVEL TO LITCHFIELD 7/24 - 40 MILES @ .565	22.60
08/27/13	SARAH HEALEY: TRAVEL TO LITCHFIELD 7/15 - 40 MILES @ .565	22.60
08/27/13	SARAH HEALEY: TRAVEL TO LITCHFIELD 7/30 - 40 MILES @ .565	22.60
08/27/13	SARAH HEALEY: TRAVEL TO LITCHFIELD 7/17 - 40 MILES @ .565	22.60
08/27/13	SARAH HEALEY: TRAVEL TO LITCHFIELD 7/18 - 40 MILES @ .565	22.60
08/27/13	SARAH HEALEY: TRAVEL TO LITCHFIELD 7/19 - 40 MILES @ .565	22.60
08/27/13	SARAH HEALEY: TRAVEL TO LITCHFIELD 7/23 - 40 MILES @ .565	22.60
	Total Reimbursable Costs	$248.60
	TOTAL DUE FOR THIS MATTER	**$3,387.10**

NO: LLI CV09-5007099S	:	SUPERIOR COURT
WALTER WHITNEY	:	JUDICIAL DISTRICT OF LITCHFIELD
VS.	:	AT LITCHFIELD, CONNECTICUT
J.M. SCOTT ASSOCIATES, INC., SCOTT SWIMMING POOLS, INC., AND JAMES M. SCOTT	:	MAY 21, 2013

BEFORE THE HONORABLE JOHN A. DANAHER, III

A P P E A R A N C E S :

Representing the Plaintiff:

ATTORNEY ANN H. RUBIN - (Ordering party)
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Representing the Defendants:

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ATTORNEY STEPHEN P. WRIGHT
Goldman Gruder & Woods, LLC
105 Technology Drive
Trumbull, CT 06611

Reported by:
Robin Mitchell

Transcribed by:
Robin Mitchell
Certified Court Reporter
Superior Court
15 West Street
Litchfield, CT 06759

A Yes.

Q And did there come a point in time when you and James Scott had discussions about matters other than installing a pool on your own property?

A Yes, there did.

Q And can you describe for the Court approximately when that occurred?

A In January of 2001 I called on Jim Scott and -- I called on him on behalf of the bank.

Q You were working -- you were employed where at that time?

A At New Milford Savings Bank.

Q And about how long had you been working at New Milford Savings Bank as of 2001?

A Ten years.

Q I'm sorry, I think I interrupted you, you said you called on Mr. Scott at that time. Can you describe for the Court -- well, withdrawn.

Did you have any discussions with Mr. Scott when you called on him?

A I did. It was a typical call on a customer. I knocked on the door when Jim met me. There was no one else in the building. Jim invited me into his office, we walked through the -- through one building, into another building, into a private room. It was dark in the building, no one else was there. And Jim asked me to sit and talk with him about his business. He told me that he had recently lost his senior

management in the company and that he was without the leadership to continue the business, that he needed help to supplement the -- what he had, and that he was tired of building -- or tired -- just period tired, he was tired, wanted someone to help him out, and asked me if I could help him out.

Q And -- withdrawn.

This office -- excuse me. This meeting took place at what location?

A At the offices of Scott Swimming Pools.

Q In what town were those offices located?

A In Woodbury, Connecticut.

Q When you went to call on Mr. Scott that day, what was your purpose?

A I was calling on a customer of the bank to find out whether there were any other uh, uh, services that the bank could provide to him.

Q What was your reaction to Mr. Scott's comments to you?

A Well, I was enthusiastic about the opportunity. I was sympathetic with his state of what appeared to be a very distressed state that he was in. And so I was, you know -- because of my feeling about construction and swimming pools, I sensed that there was a great opportunity there.

Q Did Mr. Scott say anything further to you that day beyond describing his own concerns at that point?

A Well, he described the business to me a little bit more, and that it was a fine business and that it was, uh, a business that, uh, frankly was very lucrative. Yes.

Q Did you and Mr. Scott have any -- withdrawn.

Did Mr. Scott extend what you understood to be any offer to you at that meeting?

A He asked if I could help him. That's the offer that he extended to me.

Q Did you and Mr. Scott have any further discussions on that topic at that initial meeting?

A I don't think that we had any -- no, to answer your question, no.

Q You and Mr. Scott did not discuss any more specifics about what Mr. Scott meant by whether you could help him at that time?

A Uh, he -- no, he told me that he was looking for someone to run the company and to -- to, uh, eventually own the company, that, uh, he had -- he had just lost, uh, his son and his nephew that were designated as the successors to him in the company, and he needed to replace them. He didn't want to continue to do it and that he wanted to spend more time in Tortola. He, uh, didn't have any other family members that he could call upon, and that was very significant to me, because, um, I -- you know, it made me understand and believe that the ownership of the company which he was talking about, uh, could very really become -- you know, I could really become the owner of the company.

Q Was it your understanding that Mr. Scott was offering to enter into a business arrangement with you during that meeting?

A Yes.

Q Did you and he have any discussions about potential terms of such an arrangement at that meeting?

A Other than for him to say that he would teach me the business and that, um, I would, uh -- I would be well compensated, um, there were no specifics, uh, uh -- but that very soon thereafter followed.

Q When you met with Mr. Scott that day, did you and he have any discussions about your position at New Milford Bank?

A Well, um, yeah, I think I shared with him that I had a very secure position at New Milford Savings Bank, I had been working there for ten years, I had a pension that I was qualified for, I was one of the senior managers of the bank and well regarded, had good security and, uh, uh, that, uh, given my age, which at the time was I think 51 years -- 50 or 51 years of age, and my family, my responsibilities to my family, that I would need to have, you know, a good security, good package if I were to consider leaving New Milford Savings Bank.

Q And do you recall, Mr. Whitney, whether you discussed those issues with Mr. Scott at your initial meeting or sometime thereafter?

A The parts of what I just said were at the initial meeting, and then, uh, there was continuing conversation immediately following that.

Q In this meeting -- remind me if you would, Mr. Whitney, when did this meeting with Mr. Scott take place?

A In January of -- of, uh, 2001.

* * *

* * *

A Ten years.
Q And what was the payment schedule that -- does Exhibit 3 state how often you would make the payments under the note?
A Yes. Once per year.
Q And does Exhibit 3 state the rate of interest applicable to the note that you were to give to Mr. Scott?
A Yes.
THE COURT: Didn't he say 7 percent?
ATTY. RUBIN: He did, your Honor. I apologize. I wanted to make sure that his testimony was clear on that point, but apparently it was.
THE COURT: Okay.
ATTY. RUBIN: Thank you, your Honor.
BY ATTY. RUBIN:
Q Mr. Whitney, the 7 percent interest rate is contained on page 10 of Exhibit 3?
A It is.
Q Was that an interest rate that you and Mr. Scott agreed upon?
A Yes.
Q That's why it's contained in Exhibit 3, correct?
A Yes.
Q Who suggested the interest rate of 7 percent?
A Jim Scott.
Q And you agreed to that?
A Yes.
Q And turning to page 11 of Exhibit 3, please. Would you

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* * *

an opinion by an unqualified person.

THE COURT: He testified I believe he had a master's degree in finance. Overruled.

ATTY. ELSTEIN: He has not been disclosed as an expert, your Honor.

ATTY. RUBIN: He's not being claimed as an expert, your Honor. My question was whether based on the documents in evidence the company showed a profit.

THE COURT: I overruled the objection. You could answer.

THE WITNESS: Yes, it did. Excuse me, it did not show a paper profit. On paper.

BY ATTY. RUBIN:

Q Did you give any consideration, Mr. Whitney, to reconciling the purchase price of the company as stated in Exhibit 3, with the fact that the company was not, to use your term, "profitable on paper," based on the financial records you just explained?

A Yes.

Q Could you explain that for the Court.

A Very simply, the purchase price of the business was part -- what Jim and I discussed was the company paying for the payments on the note, his income, my income. Those three items added up to more than $500,000. The payments on the note were 180,000 per annum. Jim told me that he was taking out upwards of $250,000 per annum. My compensation was, uh, approximately 142,000. Uh, those three items alone added up to more than

* * *

* * *

THE WITNESS: I'm sorry, could you please repeat the question.

BY ATTY. RUBIN:

Q Did you calculate a dollar amount of expenses that you expected to modify or save after you took ownership of Scott Swimming Pools?

A Not discretely.

Q You didn't come up with a number per se?

A No. I just --

Q Is that right?

A -- as I said, made sure that I could confirm the representations that Jim Scott was making to me as being plausible, as being part of the expenses that I read in the financial statements.

Q And do I understand you correctly to say that you concluded that there were expenses reported by Scott Swimming Pools under James Scott's ownership, that you felt -- or you planned to avoid when you were the owner of the company?

A Yes, there were.

Q You planned to reduce the expenses of the company when you took ownership?

A Yes, I did.

Q And that was based on the items that Mr. Scott told you were included within the company's expenses prior to the time that you signed Exhibit 3?

A Yes, and there were other ways that I also expected to save on expenses and ways, of course, to enhance the income.

Q Could you explain to the Court the other ways that you planned to save on expenses?

ATTY. ELSTEIN: Objection. Lack of foundation.

THE COURT: Overruled. Go ahead.

THE WITNESS: Could I look at the financial statement?

ATTY. RUBIN: Sure.

BY ATTY. RUBIN:

Q So I'm giving you Exhibits 9, 10, 11, and 12, Mr. Whitney.

A Thank you. It would take me a while to be exhaustive, but some of the things are, that there was rent paid to related entities, and, of course, I wouldn't be -- I would be paying rent on the buildings, but not some of the other rental amounts.

Q All right.

A There were leases for equipment that were being paid by Scott Swimming Pools to another company that Jim Scott owned, and our agreement provided for all of the leases to be cancelled at the time that I took ownership, so there would not have been payments on those leases.

There were bad debt expense that I didn't anticipate to be at the same level. Again, advertising, I knew I was going to reduce. Depreciation would have been lessened, because we had agreed that he was going to sell the building. Employee benefits would have -- that is to say, the workmen's compensation would have changed by virtue of the institute of

more safe practices. He was in the highest level of workmen's compensation and was paying, in my opinion, very high amounts for workmen's compensation. There were office expenses that I felt I could reduce from the level of approximately -- well, it's 93,000 here in March 31st of 2000. Um, professional services, uh, again, I did not anticipate the level of professional service expense that Mr. Scott was accustomed to. Travel and entertainment of 68,000. I wasn't going to take trips to Tortola or to Daytona to race a car. Data processing of 48,000, I knew that I could reduce that. And there are others, but.

Q Thank you, Mr. Whitney. Were you provided with any additional financial statements of Scott Swimming Pools after you signed Exhibit 3?

A During the arbitration I was.

Q Between the time that you signed Exhibit 3 and the time that you -- withdrawn.

There came a point in time when you were employed by Scott Pools?

A Yes.

Q And we have not gotten to that yet, but did there also come a point in time when that employment concluded?

A Yes.

Q Can you tell the Court when it concluded?

A On December the 21st, maybe the 22nd. December 22nd of 2006.

Q Between the time that you signed Exhibit 3 in March of

* * *

* * *

Q And I think you had answered some questions that I had for you about year one and on pages 1 -- 3 and 4, and can you explain for the Court generally what work you were going to do at Scott Swimming Pools in years two through five?

A Yes. I was going to work with the president to develop strategies for the company to increase its net income. That was the general objective.

Q And you were going to work through some of the other -- work through the other specific tasks that are laid out at pages 4 and 5 describing your work during years two through five, is that right?

A Yes.

Q And were these activities, items that you discussed with anyone at Scott Swimming Pools before Exhibit 21 was signed?

The work described under years two through five.

A Well, of course, I discussed it with Jim Scott. I don't recall discussing it with any other persons.

Q And so you went through with -- withdrawn.

Before you signed Exhibit 21, you discussed with Mr. Scott what activities you were going to perform during the term of your employment?

A Yes, that's right.

Q All right. And Mr. Scott agreed to the activities, is that right?

A Yes, he did.

Q And could you take a look at page 5 of Exhibit 21.

Section 4, can you -- that indicates compensation, is that the heading?

A Yes.

Q Please describe generally for the Court what your salary was going to be under this agreement?

A Yes, it says that it was to start at $122,153, and then on October the 1st, 2002 it would increase to $142,153, and then there's provision for additional compensation in the form of a bonus.

Q Thank you. And during the time that you worked for Scott Swimming Pools, did the company pay you the compensation provided in Exhibit 21?

A As far as I know, it paid the salaries that are described here. I never had an accounting for whether the bonus was paid or -- I was paid a bonus, I had no accounting of whether it was in accordance with this formula.

Q Okay, thank you. And you could take a look at page 9 of Exhibit 21, please. At the bottom of page 9, the heading, "8, termination of employment," do you see that section?

A Yes, I do.

Q And that carries over onto page 10?

A Yes.

Q Can you describe for the Court, generally, what the employment agreement provided regarding termination of employment?

ATTY. ELSTEIN: Can I hear the question? I'm sorry, I missed the beginning.

* * *

By 2006, you had worked at Scott Swimming Pools for roughly four years, right?

A Yes.

Q And in your view, at that point based on your knowledge of Scott Swimming Pools, was the decision to close the service business beneficial to the company?

A Not in my opinion.

Q And what about the decision to close the supply business?

A I -- I felt that it was a mistake to do that.

Q Now, did Mr. Scott share with you any of the financial information regarding the -- regarding the performance of the company during the time that you were employed there?

A No. Not as a whole.

Q What financial information were you allowed access to during the time that you worked at Scott Swimming Pools?

A Income and expense for the supply and the service department.

Q And was that the only financial information about the whole company that you were provided during the time that you worked there?

A I was sometimes aware of the accounts receivable on sold pools.

Q I'm sorry?

A Accounts receivable on sold pools occasionally. Particularly those pools that I had sold.

Q Mr. Whitney, during the first year that you were

employed by Scott Swimming Pools, did Mr. Scott ever give you a performance review?

A No.

Q Did he ever give you a performance evaluation?

A No.

Q Did anyone else give you a performance review during the first year that you were at the company other than Mr. Scott?

A No.

Q And your employment contract, which we looked at earlier, provided what your salary would be during the time that you were employed at the company, correct?

A Yes.

Q That's Exhibit 21?

A Yes.

Q And it also provided for certain bonuses?

A Yes.

Q And I think your testimony earlier was that in general that you know that your compensation was paid and you received some bonuses, but not in any accounting was your testimony?

A I received bonuses each year I was there, except my final year, and I never received an accounting for however it was calculated or if it was calculated based on the formula in our agreement.

Q All right. Okay. And did the -- during any of the subsequent years of your employment, that is, 2003, 2004, 2005, or 2006, did James Scott ever give you a performance

review?
A No.
Q Did he ever give you a performance evaluation during any of those years?
A No.
Q Did anyone else ever give you an evaluation of your performance in your employment at Scott Swimming Pools during the entire time that you worked there?
A No.
Q During the time that you worked at Scott Pools from 2002 to 2006, did Mr. Scott ever request a meeting with you to discuss your performance of your job?
A No.
Q During the entire time that you were employed by Scott Swimming Pools, did Mr. Scott ever give you any warning that your performance of your duties was deficient in any way?
A No.
Q He didn't do that in writing?
A No.
Q Or, orally?
A No.

ATTY. ELSTEIN: I'm sorry, did he answer no?

THE COURT: The answer was no.

ATTY. ELSTEIN: Thank you. Two questions ago, were you ever given a warning.

THE COURT: The answers to all of the questions were no.

ATTY. ELSTEIN: Thank you.

THE WITNESS: There was a warning on December 18th.

BY ATTY. RUBIN:

Q Of what year, Mr. Whitney?

A 2006.

Q All right, we'll -- we'll get to more of an explanation of that.

For the time that you were employed by Scott Swimming Pools in 2002 until the time that you left the company in December of 2006, were you ever provided with any sort of disciplinary notice regarding your performance of your job for Scott Swimming Pools?

A No.

Q Not by Mr. Scott?

A No.

Q Were you given such a disciplinary notice by anyone else?

A No.

Q And you understand, Mr. Whitney, and I should have clarified that, when I asked you about performance evaluations, disciplinary notices and warnings, that I -- I intended to include not only any documents that you were given, but any, um, you know, oral evaluation that you were given by Mr. Scott or anyone else?

A No.

Q You still -- your answer is still no?

A Not in the sense that I know you're meaning this. If somebody said, good job, and slapped me on the back, that happened. Not -- that's not a performance evaluation.

Q Okay. From --

A And that would not have been Mr. Scott.

Q All right. And from the time that you began your employment at Scott Swimming Pools in 2002 until the time that you left the company in December of 2006, did Mr. Scott ever tell you that you had failed to perform under your employment contract?

A I -- I think except for December 18th, no. Certainly, no. And there was an occurrence on December the 18th, 2006 that may be a yes.

Q So from the time that you began your employment under the agreement on March -- let me get the exact date, March 20th of -- I'm sorry, March 31st of 2002 until the day -- until that day, December, the 15th, of 2006, Mr. Scott never told you that -- that in his view you were failing to perform under your employment contract?

ATTY. ELSTEIN: Objection. Leading.

THE COURT: Well, it is leading. But I'm going to allow it.

ATTY. RUBIN: Thank you, your Honor.

THE WITNESS: That is correct.

BY ATTY. RUBIN:

Q And did Mr. Scott communicate to you between March 31st of 2002 and December 15th of 2006, in words or in substance,

that anything about your performance under your employment contract?

A No.

Q At any time during which you were employed at Scott Swimming Pools, Mr. Whitney, did Mr. Scott counsel you about any improvements in your performance for any reason?

A No.

Q Did anyone else do that during the time that you worked at Scott Swimming Pools?

A No.

Q Did Mr. Scott ever tell you that you weren't entitled to the bonuses called for under your employment agreement, Exhibit 21?

A No.

Q Mr. Whitney, during the time that you worked at Scott Swimming Pools, did you ever make any mistakes?

A I'm sure that I did.

Q Do you remember any as you sit here today?

A Well, there were mistakes of judgment, mistakes regarding individuals that I had hired that, uh, you know, you could characterize as a mistake. Um, certainly there were, you know, in my activity, I -- you know, there were mistakes that I made generally speaking, yes.

Q And during the time that you worked at Scott Swimming Pools, did you at times realize that you had made a mistake?

A There were times that I did, yes.

Q And in those instances, when you made a mistake in your

* * *

you and then you and he spoke about scheduling an appointment, did Mr. Scott tell you why he wanted to talk with you?

A No.

Q And so please -- so tell the Court, if you would, what happened with respect to the meeting that you just identified?

A Um, we met in Mr. Scott's office. No one was there. He abruptly said that he wasn't going to sell the company to me. And I said, well, Jim, I'm sorry, but we have a contract which provides for you to sell the company to me. And he said, I'm gonna tear the contract up, I don't care. He said, I'll bankrupt the company before I sell it to you. And I said, Jim, you know, I -- you know, I asked him if he would reconsider. I told him that I intended to purchase the company in accordance with our agreements. And he said that he would speak with me the next day about it. Uh, I'm trying to remember what else.

Q Do you remember anything else about the conversation today, Mr. Whitney?

A He didn't tell me -- he didn't tell me the reason. He didn't tell me that it had anything to do with my performance. Um, it was just I'm not gonna sell you the company and, uh. Um, you know, I was just so taken aback and said, um, you know, we have an agreement. He said, well, tear the agreements up -- I'll tear the agreements up, he said, and I'll bankrupt the company. I'll start a company under a different name, he said. I'll run a different company under a different name, move all of the employees over there if I have to, I'm not gonna sell you the company.

* * *

NO: LLI CV09-5007099S	:	SUPERIOR COURT
WALTER WHITNEY	:	JUDICIAL DISTRICT OF LITCHFIELD
VS.	:	AT LITCHFIELD, CONNECTICUT
J.M. SCOTT ASSOCIATES, INC., SCOTT SWIMMING POOLS, INC., AND JAMES M. SCOTT	:	MAY 21, 2013

C E R T I F I C A T I O N

I hereby certify the electronic version is a true and correct transcription of the stenographic notes of the above-referenced case, heard in Superior Court, Judicial District of Litchfield, Litchfield, Connecticut, before the Honorable John A. Danaher, III, Judge, on the 21st day of May, 2013.

Dated this 29th day of June, 2014, in Litchfield, Connecticut.

_____

Robin Mitchell, RMR
Certified Court Reporter

NO: LLI CV09-5007099S	:	SUPERIOR COURT
WALTER WHITNEY	:	JUDICIAL DISTRICT OF LITCHFIELD
VS.	:	AT LITCHFIELD, CONNECTICUT
J.M. SCOTT ASSOCIATES, INC., SCOTT SWIMMING POOLS, INC., AND JAMES M. SCOTT	:	JULY 24, 2013

(AFTERNOON SESSION)

BEFORE THE HONORABLE JOHN A. DANAHER, III

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Q Now, after Walter started at the company, were there annual meetings of the corporation?

A Yes. There's always meetings.

Q And did you give notice of those meetings to Mr. Whitney?

A No, I -- he was an officer.

Q Okay. Under KKK, let me see, on page 2, it shows that Mr. Whitney would be getting 20 shares of Scott Pools. I'll show you where.

A Right. Yes.

Q So did you know at that time that he was a shareholder?

A Yes.

Q And did you give him notice of the shareholder meetings?

A Scott Pools has never given shareholders, um, just officers.

Q And is that true when you said always, in the past, have there been other owners, other than Mr. Scott, of Scott Swimming Pools?

A Shareholders, yes.

Q And in the past, notice was never given to those other folks?

A Only if they were an officer.

Q After Mr. Whitney started to work for the company, did he ever ask whether he could attend any corporate meetings?

A Not to me, no.

Q After Walter Whitney started working for the company,

shareholders/board of directors meeting, December 11, '06, correct?

A Yes.

Q And the first paragraph of text indicates -- actually, the second sentence, you -- you're the secretary at that point, right?

A Yes.

Q You called the roll, correct?

A Yes.

Q And the following shareholders, directors and officers were present, and then it lists James Scott, Susan Scott and you, right?

A Yes.

Q And did you send the notice of the December 11, '06 meeting to Walter Whitney?

A No.

Q But he was a shareholder on December 11, '06, wasn't he, Ms. Platt?

A Yes.

Q You knew that?

A A minor shareholder, yes.

Q But he was a shareholder?

A Yes, he was.

Q You don't dispute that?

A No.

Q Right. And so you didn't tell -- you didn't give Mr. Whitney the notice of the December 11, '06 meeting,

correct?

A Right.

Q And he didn't attend the meeting, correct?

A Yes.

Q And the directors and shareholders who were in attendance at the meeting took action at that time, correct?

A Yes.

Q In fact, they took action regarding Mr. Whitney's employment status at the company, didn't they?

A Yes.

Q Did you ever send Walter Whitney notice of a meeting of the board of directors or shareholders of Scott Swimming Pools, Inc.?

A No.

Q You never did, right?

A No.

Q And he never attended any such meetings, did he?

A No. Never requested.

Q And, presumably, he didn't request, Ms. Platt, because you didn't tell him about the meetings, right?

A No. I should have probably just read officers and board of directors.

Q But it's your -- is it your testimony that you told Walter Whitney about shareholder meetings?

A No.

Q You never told him?

A No.

* * *

NO: LLI CV09-5007099S	:	SUPERIOR COURT
WALTER WHITNEY	:	JUDICIAL DISTRICT OF LITCHFIELD
VS.	:	AT LITCHFIELD, CONNECTICUT
J.M. SCOTT ASSOCIATES, INC., SCOTT SWIMMING POOLS, INC., AND JAMES M. SCOTT	:	JULY 24, 2013

C E R T I F I C A T I O N

I hereby certify the electronic version is a true and correct transcription of the stenographic notes of the above-referenced case, heard in Superior Court, Judicial District of Litchfield, Litchfield, Connecticut, before the Honorable John A. Danaher, III, Judge, on the 24th day of July, 2013.

Dated this 30th day of June, 2014, in Litchfield, Connecticut.

Robin Mitchell, RMR
Certified Court Reporter

DOCKET NO: LLI-CV-09-5007099S	:	SUPERIOR COURT
WALTER WHITNEY	:	JUDICIAL DISTRICT OF LITCHFIELD
v.	:	AT LITCHFIELD, CONNECTICUT
J.M. SCOTT ASSOCIATES, INC., SCOTT SWIMMING POOL, INC., AND JAMES M. SCOTT	:	JULY 25, 2013

****Morning Session****

BEFORE THE HONORABLE JOHN A. DANAHER, III, JUDGE

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THE COURT: Good morning, Marshal. Good morning, everybody.

ATTY. ELSTEIN: Good morning, your Honor.

ATTY. RUBIN: Good morning, your Honor.

THE COURT: Please be seated.

THE COURT: All right. Ms. Platt, you can return to the stand.

(Witness Fay Platt resumes the witness stand)

was Scott Swimming Pools?

A Two hundred thousand dollars a year.

Q In revenue?

A Revenue, gross revenue.

Q And since you've been the owner, describe how that business has grown.

A Well, the company -- the swimming pool company has grown from two hundred thousand. I had a target. I finally got to two million within a short period of time, and then I got up to someplace in the ten million area when I had it all under control in the probably 70's, 80's, about.

Q Okay. And you've heard some questions and statements here in court about your wealth. I'm going to have to ask you some questions about that.

When you first started in business in 1961, how much money did you have in the bank?

A 1961?

Q Yes.

A Oh, I had some money in the back, because I saved everything from my Navy. So I probably had maybe ten, fifteen thousand dollars in the bank. That was a lot then.

Q And when you bought the business from your parents, did you obtain any loans in order to do so?

A No.

Q Did there come a point in time when you became interested in real estate?

A Yes.

Q How did you become interested in real estate?

A I worked with my father, and he always was involved in it a little bit. I helped him build buildings and work -- before I came out of the Navy, I was going to go to architectural school, so I was in design. I had an aptitude for it, so I found that -- once I got the company under control, which was a few years, I started looking at building some small buildings on my own.

Q And when you decided to go into real estate on your own, what kind of property is it that you pursued?

A One of the first pieces I had bought was a --

Q I don't need a long history. Just give us a brief history for the Court.

A All right, sorry.

Basically, I would buy a piece of property inexpensively, because I knew how to build roads, so, and then I would build a road, develop it. And then it was real estate and residential, and then I would build houses. And then I stopped buying property and building commercial property, Connecticut, and I started buying out of the state throughout the United States.

Q And when you were in that business of buying and developing property, did you have any partners?

A No.

Q In order to acquire those properties, did you have cash to pay it, or did you need to obtain loans?

A I got loans. I got good loans.

Q Did you pay your loans back?
A Absolutely.
Q And were you able to make money from that real estate?
A Yes. I was very fortunate that I would get a good loan, and the property became rental property, so the rental would pay off the loan. So I'd be out maybe ten years totally paid, and then I could sell it if I wanted to.
Q In terms of the money that you've earned in your lifetime, could you characterize what your earnings have been at Scott Pools even through to the present?
A My gross income? Gross, gross?
Q Yes. I'm not looking for a number.
A Oh.
Q I'm looking to characterize it. Was it something that made you wealthy? I want you to characterize that.
A I think my real estate made me wealthy, and I think my swimming pool business kept me at an income which kept me well-to-do while I was working.
Q Now, there's been some discussion about -- withdrawn.
I'm going to talk to you a few minutes about the Middle Quarter Mall. You heard Fay describe the property. Who's the one who built the buildings there?
A Originally, my father built them and my father owned the property. Then I bought the property from him, and I built more buildings on it. So -- and then I bought all of his buildings out. What buildings he owned or portions of

buildings, I bought that. So I became the -- I, meaning James Scott and also James Scott Associates. They own the buildings; I own the land.

Q Where the Middle Quarter Mall is?

A Yes.

Q So do I understand that you have split the buildings from the land?

A Yes.

Q And one person or one entity owns one and one entity owns the other?

A Yes.

Q And that was true also at the 75 Washington Road in Woodbury?

A Yes.

Q Now, Middle Quarter Mall, have you had any occasion to learn that it has any environmental problems on it?

ATTY. RUBIN: Objection, relevancy.

ATTY. ELSTEIN: I claim it on the issue of where monies were directed in 19 -- in 2009, I'm sorry.

ATTY. RUBIN: Your Honor, now we're back at Exhibit RRRR, which was admitted yesterday. If it's being offered to show Mr. Scott -- why Mr. Scott couldn't pay his arbitration fees in August of '09, then I object, because we asked for it and it wasn't produced.

THE COURT: All right. Let me review this.

Can I have Quadruple R, please.

* * *

STATE OF CONNECTICUT

APPELLATE COURT

A.C. 36912

WALTER WHITNEY

VS.

J.M. SCOTT ASSOCIATES, INC., ET AL.

DEFENDANTS' REPLY BRIEF

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FILED: JULY 28, 2015

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REPLY ARGUMENT

I. BREACH OF CONTRACT DAMAGES

The Defendants' argument on this issue is straight forward. To put the Plaintiff in the position he would have been but for the breach of the SOPA, i.e., to compensate for the loss of the benefit of the bargain, he had to show what he would have earned as owner of SSP less the amount that he spent to acquire the business. He attempted to do so, but the trial court found that the evidence pertaining to his income as owner was "too speculative to form the basis for an award of damages." (MOD at 55; Defs.' App. at A97.) Because he did not bargain to work for SSP as an employee for ten years after the term of the employment agreement expired, the court's alternate measure of damages was improper as it was unconnected to the contract the Plaintiff drafted and the parties signed. Therefore, despite ample opportunity to do so, the Plaintiff failed to prove his damages for the loss of the business opportunity.

Rather than engage this argument in a meaningful way, the Plaintiff recites nearly every adverse factual finding against the Defendants and offers a specious procedural argument in the apparent hope that the Court will dislike Mr. Scott and decline to review the trial court's improper application of the law. The former is irrelevant to the legal issues presented, and the latter is hardly the knock-out punch the Plaintiff needs it to be.

The Plaintiff relies on *Cedar Mountain, LLC v. D & M Screw Machine Products, LLC*, 135 Conn. App. 276 (2012), to argue that the Defendants' claim regarding the improper basis for calculating damages was not preserved. The Plaintiff discusses the factually dense *Cedar Mountain* decision at some length (Pl.'s Br. at 11-12), but he overlooks the critical aspect of that case that led this Court to deny review of the claim on appeal in that case. At trial in *Cedar Mountain*, a witness testified that the defendant's machines were "averaged to make about $20 an hour. So, over the course of time, we lost almost $64,000." 135 Conn. App. at 291. In its post-trial brief, the plaintiff characterized this testimony as encompassing the defendant's lost profits, even though the witness never used that term. The witness did use

the phrase "lost production," but in context that phrase was ambiguous. *Id.* The trial court awarded damages but never indicated whether it was awarding lost profits or lost revenues, and the plaintiff did not seek articulation. *Id.* at 292. On appeal, the plaintiff claimed for the first time that the court awarded gross revenue, even though it had previously characterized the testimony upon which the court awarded damages as lost profits. Thus, the plaintiff shifted theories on appeal from his express characterization of the damages at trial to a different characterization on appeal with different legal consequences. As this Court has stated many times, "[A] party cannot present a case to the trial court on one theory and then seek appellate relief on a different one . . . ." *Id.* at 293 (citation and internal quotations omitted).

Cedar Mountain is not analogous to this case because the Defendants did not affirmatively characterize ten years of the Plaintiff's salary as an employee as a measure of damages for loss of the benefit of the bargain and then take the opposite position on appeal. Rather, the Defendants claimed at trial that the Plaintiff failed to prove his damages and they claim on appeal that his alternate measure of damages does not cure his failure to prove his damages. The Defendants have not taken a contrary position to what they said at trial.[1]

Moreover, the Plaintiff conflates the failure to raise an issue with the failure to make every conceivable argument in support of a claim at trial. See *State v. Fernando A.*, 294 Conn. 1, 33 n.26 (2009) (rejecting dissent's conclusion that "a reviewing court may consider only those specific *arguments* made before the trial court on the given *issue*") (emphasis in original); *Rowe v. Superior Court*, 289 Conn. 649, 660-63 (2008) (reviewing claim even though all of the theories raised in it were not raised at trial because they all concerned a single claim). The Defendants' argument below was that the Plaintiff failed to prove his damages on the breach of the SOPA. They argue on appeal that they are entitled to directed judgment because of the trial court's conclusion that the Plaintiff failed to prove what he would

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[1] The Defendants' postjudgment motion to reargue merely pointed out a flaw in the alternate calculation. The Defendants did not affirmatively state that the alternate theory was proper. In any event, the trial court denied the motion to reargue, so it is not clear how the motion to reargue aids the Plaintiff's procedural claim.

earn as owner and that the award of ten years of salary is not a sufficient basis to make up for this failure. In other words, the argument on appeal is simply another argument in support of the Defendants' assertion that the Plaintiff failed to prove his damages.

The Plaintiff claims that reviewing this issue would be unfair to him because he did not have the opportunity to argue why his alternate theory of damages was proper. (Pl.'s Br. at 12.) First, the Plaintiff had the burden of establishing his case, which includes the legal authority for obtaining relief. For example, where a party has been defaulted and therefore cannot contest liability, the plaintiff still must plead facts showing an entitlement to relief. *Moran v. Morneau*, 140 Conn. App. 219, 225 (2013) (noting that "[a] default may settle many issues, but it does not operate to insulate a mistaken legal proposition from judicial review.") Thus, the Plaintiff had the obligation to establish why ten years of salary as an employee was an appropriate measure of damages when that was not the bargain the parties made. Having put on evidence of such in the trial court, he offered no legal basis for this claim. Indeed, his trial brief merely set out the calculation without offering any authority whatsoever, let alone an analysis showing the relationship of this analysis to the SOPA, to set forth the legal basis of his claim. (Pl.'s Tr. Br. at 33-34; Pl.'s App. at A-9 through A-10.) It was not up to the Defendants to argue against a legal theory the Plaintiff failed to present.

Second, the Plaintiff spends eight pages of his appellate brief explaining why his alternate theory is legally sound, so from a procedural standpoint, it is difficult to see how he is prejudiced.[2] After all, the evidence of his salary was before the court, so it is not a question of providing additional facts to support his claim. What the Plaintiff did not do was offer an explanation as to how the ten years of salary as an employee related to the breach of the stock option agreement. This is a legal question of applying the words of the parties'

[2] The Plaintiff does not claim that the trial court was ambushed. As the Supreme Court has noted, claims of ambuscade of the trial court arise when review of unpreserved issues require a new trial, thus frustrating judicial economy. *Fernando A.*, 294 Conn. at 33 n.26. Here, reversal would result in directed judgment, so judicial economy and ambuscade are not implicated.

agreement to the theory of damages the Plaintiff asserted.

The Plaintiff does complain in a footnote that he was deprived of the chance to show that the ten years of salary as an employee was a proper measure of consequential damages, citing *Milford v. Coppola Construction Co.*, 93 Conn. App. 704, 715 (2006). (Pl.'s Br. at 12 n.6.) "Consequential damages . . . include those damages that, although not an invariable result of every breach of this sort, were reasonably foreseeable or contemplated by the parties at the time the contract was entered into as a probably result of a breach." *Id.*

The plain language of the SOPA and the EA makes clear that the parties did not contemplate awarding 10 years of salary as consequential damages. Section 3.1(a) of the SOPA granted the Plaintiff "the right and option (the "Post Initial Employment Option" exercisable on or after April 1, 2007 to purchase his stock for the price of $1,270,873. The Post Initial Employment Option shall remain in effect until July 1, 2007 when it shall expire." (Pl.'s Ex. 3 at 9; Defs.' App. at A145.) Section 2 of the EA provides: "This agreement shall commence on the date hereof and, subject to further provisions of this Agreement, shall end on March 31, 2007." (Pl.'s Ex. 20 at 2-3; Defs.' App. at A164-A165.) Thus, the parties clearly contemplated that the Plaintiff's employment would end on March 31, 2007, at which point he had three months to exercise his option to purchase. Nothing in the agreement contemplates that the Plaintiff would work ten more years as an employee. Rather, the agreement shows the opposite. There is no basis for the Plaintiff to claim consequential damages or prejudice.[3]

The Plaintiff offers his specious procedural argument to distract from the weakness of his argument on the merits. He asserts that determining damages is a factual question,

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[3] That the Plaintiff testified to this calculation is of no moment.

> Evidence admitted without objection remains in the case subject to any infirmities due to any inherent weaknesses. . . . If the evidence has no probative force, or insufficient probative value to sustain the proposition for which it is offered, the want of objection adds nothing to its worth and will not support a finding.

Marshall v. Kleinman, 186 Conn. 67, 72 (1982) (citations and internal quotations omitted). As his testimony runs in stark contrast with the written agreements and bears no relation to the bargain the parties made, his testimony is irrelevant.

overlooking that "[w]hen, however, a damages award is challenged on the basis of a question of law, our review [of that question] is plenary." *Landry v. Sptiz*, 102 Conn. App. 34, 49-50 (2007). In *Landry*, the question concerned whether the court properly awarded damages for a breach of contract that provided for the payment of distributions from stock that the plaintiff sold during the year. *Id.* at 49. The court recognized that this claim was an attack on "the court's *method of determining damages* as having no explicit basis in the settlement agreement because the agreement did not overtly provide for partial year distributions." *Id.* (emphasis added.) The court rejected this claim, stating the award of damages

> was *legally correct* insofar as it resulted from application of the explicit terms of the settlement agreement to the certification figures and, otherwise, was designed to give the plaintiff what he would have received had the defendants acted in good faith and not attempted to accept the benefit of several months of the plaintiff's performance of his contract obligations while providing nothing in return.

Id. at 50 (emphasis added). Here, of course, the explicit terms of the agreements say nothing about ten additional years of salaried compensation, but instead state explicitly that the employment agreement terminated on March 31, 2007.[4]

The Plaintiff also claims that the Defendants' bad faith excused him from proving damages with precision as their purported fraudulent concealment caused the uncertainty in assessing damages.[5] (Pl.'s Br. at 21.) Other than this bald assertion, the Plaintiff fails to identify what this purported concealment was or how it prevented him from proving his case. See *In re Oreoluwa O.*, 157 Conn. App. 490, 496 n.4 (2015) (cursory statement regarding factual finding was abandoned as inadequately briefed).

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[4] The Plaintiff argues strenuously that the issue is not the "measure of damages" but the "calculation of damages." (Pl.'s Br. at 16.) This argument is puzzling in light of the trial court's statement that the salary calculation was "an appropriate *measure* of the 'benefit of the bargain' owed to the plaintiff as damages resulting from the defendant's breach of the SOPA." (MOD at 55 (emphasis added); Defs.' Br. at A97.)

[5] The Plaintiff cites boilerplate language from *Meadowbrook Center, Inc. v. Buchman*, 149 Conn. App. 177 (2014), in support. *Meadowbrook Center* goes on to say, "Even under a more relaxed standard, the plaintiff must furnish *some* proof that the breach caused the damages of which it complains." *Id.* at 191 (emphasis in original). In *Meadowbrook Center*, the plaintiff failed to prove causation under the relaxed standard. *Id.*

Although the Plaintiff recites a raft of adverse factual findings pertaining to liability (see Pl.'s Br. at 13-16), which the Defendants do not challenge given the limited appellate review afforded factual findings, none of those facts have anything to do with wrongful concealment of evidence of damages.[6] In broad strokes, the Plaintiff points to the following: the Plaintiff would leave secure employment to work for SSP and would return to the job market at age 56 if it did not work out (Pl.'s Br. at 13); the Plaintiff was motivated (*id.*); Scott had no intention of selling the business to the Plaintiff and had strung others along (*id.* at 14); Scott had difficulty firing the Plaintiff and papered the file (*id.* at 14-15); Scott failed to eliminate officer loans and failed to disclose them initially (*id.* at 15); and Scott lied about having sufficient funds to continue arbitration (*id.* at 15-16). *None* of these facts having anything to do with concealing the value of SSP or making it difficult to determine the value in this litigation. The Plaintiff does not even attempt to tie these facts to his claim. As his claim of concealment is nothing more than a bald assertion, unsupported by the record, it cannot support a calculation of damages based on a bargain the parties never made.

The judgment should be reversed and directed for the Defendants on this issue.

II. SPECIFIC PERFORMANCE

The Plaintiff does not appear to quarrel with the Defendants' argument regarding his obligation under the plain language of the agreements to return the shares of SSP to Scott. Instead, the Plaintiff argues, in essence, that the trial court had discretion to disregard the plain language of the contract based on the adverse findings on liability.[7] (Pl.'s Br. at 22-23.) However, decisional law makes clear that the expectations of the parties plays a significant

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[6] Whether these facts would have supported discretionary punitive damages under CUTPA, Conn. Gen. Stat. § 42a-110g, is not before the Court. The court ruled against the Plaintiff on his CUTPA count (MOD at 46; Defs.' App. at A88), and he withdrew his cross appeal challenging this ruling. (See Court file.)

[7] The Plaintiff wholly ignores the election of remedies argument the Defendants make. (Defs.' Br. at 12.)

role in determining whether to order specific performance.

For example, in *Webster Trust v. Roly*, 261 Conn. 278, 281 (2002), the plaintiff sought specific performance of an option to purchase land where the land was transferred to the defendants' daughter for substantially below market value. The language of the agreement ostensibly provided that the option holder could purchase the property on the same terms as another potential buyer, but the court concluded that "a sale, or really, an intrafamilial transfer, of the property for a price less than one third of its fair market value was not within the reasonable expectations of the parties."[8] *Id.* at 285. Thus, the court looked to the intent of the parties to determine whether specific performance was appropriate.

Here, however, the parties expressly anticipated the possibility that the Defendants would fire the Plaintiff without adequate cause and agreed that in those circumstances, as long as SSP paid the liquidated damages, the Plaintiff would return his shares of SSP to Scott.[9] (Defs.' Br. at 11.) Moreover, the SOPA required the Plaintiff to sell his stock back if his "employment by the Company terminates or Whitney terminated his employment for *any* reason other than death . . . ." (Pl.'s Ex. 3 at 6 (emphasis added); Defs.' App. at A142.) Thus, the parties planned for the possibility that the relationship would sour and provided for the return of the stock in that case. Accordingly, it is of no moment that the court found the Defendants in breach of the contract, because the parties anticipated this possibility.

Although the Plaintiff points to cases setting out the boilerplate language regarding the equitable nature of specific performance, two of the cases affirmed lower court decisions ordering specific performance. *State v. Lex Associates*, 248 Conn. 612, 621 (1999) (seller of land bound by terms of lease, which included option); *Cutter Development Corporation v. Peluso*, 212 Conn. 107, 115 (1989) (affirming specific performance without analysis of the

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[8] Moreover, the option remained on the land records so that the plaintiffs could exercise the option if the daughter decided to sell the land. *Id.*

[9] As previously noted (Defs.' Br. at 2 n.4), the Plaintiff stated at trial that he and his counsel drafted the agreements. The Plaintiff does not dispute this assertion on appeal.

facts and instead rejected defendant's claim that trial court improperly shifted burden to him). In *Webster Trust*, specific performance was not appropriate because the circumstances were not within the parties' contemplation and the plaintiff retained the option to purchase as a practical matter. 261 Conn. at 285. Finally, in *Gager v. Gager & Peterson, LLP*, 76 Conn. App. 552, 561-62 (2003), the court held that denial of specific performance of a request to remove "Gager" from the name of the law firm was not improper where the plaintiff was not harmed by the retention of the name and the law firm would be harmed by its removal.[10]

Here, by refusing to enforce the plain language of the parties' agreement, an agreement that the Plaintiff testified to drafting and that expressly contemplates dismissal without adequate cause, the trial court afforded the Plaintiff a windfall. Moreover, the Plaintiff remains a stock holder in SSP despite the order to be paid the agreed upon price for his stock. How this constitutes equity is not readily apparent. The order denying specific performance should be reversed and directed for the Defendants.

III. PUNITIVE DAMAGES

The Plaintiff notes that *R.I. Pools, Inc. v. Paramount Concrete, Inc.*, 149 Conn. App. 839, cert. denied, 312 Conn. 920 (2014), was decided after the trial court's decision in this case. (Pl.'s Br. at 24.) The Plaintiff fails to note that *R.I. Pools, Inc.* did not state a new rule of law but cited authority going back over a century. *Id.* at 875-76 (citing *Anastasia v. General Casualty Co. of Wisconsin*, 307 Conn. 706, 709 n.2 (2013); *Harty v. Cantor Fitzgerald & Co.*, 275 Conn. 72, 96-97 (2005); *Matthiessen v. Vanech*, 266 Conn. 822, 826 n.5 (2003); *Berry v. Loiseau*, 223 Conn. 786, 827 (1992); *Waterbury Petroleum Products, Inc. v. Canaan Oil & Fuel Co.*, 193 Conn. 208, 236 (1984); *Hanna v. Sweeney*, 78 Conn. 492, 494 (1906);

[10] It appears that the entire discussion of specific performance in *Gager* is dicta as the court also affirmed the lower court's finding that the plaintiff, as successor to the executor, lacked the power under the contract to compel the removal of the name. *Id.* at 555, 558. As the plaintiff lacked standing to enforce the contract, it was not necessary to discuss the propriety of the trial court's decision to deny specific performance.

Maisenbacker v. Society Concordia, 71 Conn. 369, 378 (1899)). Moreover, the Plaintiff entirely ignores *Smith v. Snyder*, 267 Conn. 456, 479 (2004), which required the Plaintiff to prove his litigation costs with specificity. Further, the Plaintiff does not address his failure to take any steps post-trial or within four months of the judgment to present the necessary evidence of his litigation costs or explain how he was foreclosed from doing so.

Instead, the Plaintiff argues that the evidence presented at the hearing on the motion for articulation supports the judgment. (Pl.' Br. at 26.) But of course, that evidence was not before the court when it decided to award $250,000 in punitive damages, and the trial court candidly explained that it relied on a lodestar analysis in fixing that amount. Further, even if it were properly before the court, which it is not, the evidence showed litigation costs less than the $250,000 the court ordered, so that post-hoc evidence does not, in fact, support the amount awarded.[11]

In addition, had the Defendants participated substantively in the improper evidentiary hearing during the articulation, the Plaintiff would now be claiming that the Defendants waived their objection to the procedural improprieties. See *In re Baby Girl B.*, 224 Conn. 263 (1992) (DCYS waived the four-month limitation of Conn. Gen. Stat. § 52-212a by filing an amended petition to terminate parental rights based on new evidence). Consequently, the Plaintiff cannot fairly claim that the Defendants should have attacked this belated presentation of evidence at the articulation hearing. See Part IV, *infra*.

The court improperly determined punitive damages and the Plaintiff failed to take the necessary steps to prove his claim. Accordingly, the order regarding punitive damages should be reversed and directed for the Defendants on this record.

IV. IMPROPER ARTICULATION

The Plaintiff wholly ignores the decisional law the Defendants discuss that makes it

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[11] This may explain the Plaintiff's failure to take any action post-judgment to present his actual costs.

clear that a trial court may not use an articulation to modify the judgment or its underlying findings. (See Defs.' Br. at 18-19.) Moreover, the cases the Plaintiff does cite do not support his assertion that a court may take evidence on a motion for modification. In *Bowman v. 1477 Central Avenue Apartments, Inc.*, 203 Conn. 246, 252 (1987), the issue was whether the trial court ruled on objections to a referee's report prior to entering judgment. The trial court held a hearing on the defendant's motion for articulation at which it explained that it normally ruled on such objections prior to entering judgment. *Id.* at 254. The court further stated: "Who can remember that far back, but I normally do that. So, I did it." *Id.* The court indicated that the transcript of the hearing would serve at its articulation. *Id.* This statement is the "evidence" that the trial court followed the proper procedure. Nothing in *Bowman* indicates that the court heard testimony or entered exhibits on the question of whether the judge followed the proper procedure. *Bowman* is inapposite.

Similarly, that the recitation of procedural history in *Standish v. Standish*, 40 Conn. App. 298, 300 (1996), notes the absence of evidence or testimony does not mean that new evidence would have been proper as there was no analysis explaining why that procedural fact was significant. Indeed, *Standish* reversed because the trial court improperly modified a dissolution judgment in response to a motion for articulation. *Id.* at 302.

Finally, it is not clear that *Wimpfheimer v. Wimpfheimer*, FA-92-0102132, 2001 WL 1199238 (Conn. Super. Ct. Sept. 7, 2001), involved a motion for articulation for an appeal or merely a postjudgment motion for clarification that was labeled a motion for articulation. In any event, the court took no evidence but merely explained what it intended in a prior order by reference to its notes. It is true that counsel made representations at the hearing (which reads like a status conference at times), but that is not evidence, *Aley v. Aley*, 101 Conn. App. 220, 229 (2007) ("representations of counsel are not evidence"), and no party in *Wimpfheimer* objected to the procedure.

The Plaintiff tries to avoid the foregoing by claiming that the evidence and finding in the articulation to which the Defendants object does not constitute an "irreconcilable change"

from the underlying decision. (Pl.'s Br. at 29.) First, he notes that the finding does not change the amount awarded or the basis for the award. (*Id.*) If that is correct, then the subsequent finding and evidence is irrelevant. Then he contradicts himself by saying the evidence "serves to bolster the amount of punitive damages awarded." (*Id.*) But if that is so, then it changes the basis of the award. Whether it is irrelevant or improper, the finding as to the amount of litigation costs based on the evidence presented at the articulation hearing should be stricken.

The Plaintiff then makes several claims of harmless error. While the Plaintiff correctly notes that the Defendants do not challenge the finding of fraud, they most certainly challenge the Plaintiff's failure to prove his damages. Because he failed to prove his punitive damages at trial, he is entitled only to nominal punitive damages. See *McDonnell v. Falco*, 66 Conn. App. 508, 516 (2001). Therefore, allowing a post-hoc presentation of evidence that contradicts this result is indeed harmful.

The Plaintiff next claims that the Defendants had the opportunity to cross examine the witness at the articulation hearing and waived that opportunity. (Pl.'s Br. at 30.) In other words, the Defendants should have participated in an improper hearing, which would have waived the objection to the impropriety. Here, the court had no authority to open the judgment as the hearing occurred more than four months after the judgment. (See Defs.' Br. at 18.) As the four-month rule set forth in Conn. Gen. Stat. § 52-212a and Practice Book § 17-4 implicates the court's authority, not its subject matter jurisdiction, the four-month rule can be waived. *In re Baby Girl B.*, 224 Conn. at 263. Participating in the hearing as the Plaintiff suggests would have waived the error. See *id.* The Defendants were not required to waive an error to avoid harmless error.

Lastly, the Plaintiff claims that the error is harmless because the court would remand for a new hearing on litigation costs. (Pl.'s Br. at 31.) The Defendants have already explained why this case is not like *R.I. Pools, Inc.*, in this regard and will not repeat that analysis. (Defs.' Br. at 14-15.) *Munson v. Munson*, 98 Conn. App. 869 (2006), and *Lusa v. Grundberg*, 101

Conn. App. 739 (2007), are domestic relations cases where the mosaic doctrine generally calls for a new trial of financial orders when an error in a part of the orders exists. E.g., *Standish*, 40 Conn. App. at 301-02. The mosaic doctrine does not apply to this breach of contract action, and so directed judgment is appropriate under these circumstances.

For these reasons, the finding as to the Plaintiff's litigation costs should be stricken.

V. IMPROPER PREJUDGMENT INTEREST AWARD

The Plaintiff is correct that strictly speaking, prejudgment interest is not limited only to cases involving liquidated damages. But it is still necessary to show that the amount was ascertainable at the time interest is supposed to begin running. None of the authority the Plaintiff cites contradicts this basic point. *Spearhead Construction Corp. v. Bianco*, 39 Conn. App. 122 (1995), concerned the date interest began on a specific amount awarded by an arbitrator. In *O'Hara v. State*, 218 Conn. 628, 642 (1991), the court affirmed the denial of prejudgment interest. Similarly, the trial court in *Bertozzi v. McCarthy*, 164 Conn. 463, 466-67 (1973), properly denied prejudgment interest where the damages were not liquidated until the date of trial. In *Cecio Bros., Inc. v. Feldmann*, 161 Conn. 265, 274 (1971), the trial court properly awarded interest from the date the plaintiff presented a bill for a specific amount to the defendant. *Chapman Lumber, Inc. v. Tager*, 288 Conn. 69, 99-100 (2008), involved prejudgment interest on a note that had matured. Likewise, *National Electrical Contracting, LLC v. St. Dimitrie Romanian Orthodox Church*, 144 Conn. App. 808, 821 (2013), concerned an award of prejudgment interest on an unpaid invoice. Finally, in *Ferrato v. Webster Bank*, 67 Conn. App. 588 (2002), the court held that on remand, the trial court consider whether to award prejudgment interest on a specific amount of a depositor's funds that the bank improperly failed to transfer upon an execution by judgment creditor.

DiLieto v. County Obstetrics & Gynecology Group, P.C., 310 Conn. 38 (2013), supports the Defendants' position by explaining the rationale for prejudgment interest. The Plaintiff quotes a portion of footnote 11 in *DiLieto*, but the footnote – which quotes *Foley v.*

Huntington Co., 42 Conn. App. 712, cert. denied, 239 Conn. 931 (1996), at length – actually makes clear that prejudgment interest is available only where the amount is ascertainable at the time of the breach.

> Section 37-3a also authorizes prejudgment interest involving tortious injury to property when the damages were capable of being ascertained *on the day of the injury*. See *Sosin v. Sosin*, 300 Conn. 205, 235, 14 A.3d 307 (2011) (award of prejudgment interest for damage to property "is limited to cases in which the damage is of a sort [that] could reasonably be ascertained by due inquiry and investigation on the date from which the interest is awarded" (internal quotation marks omitted)). Prejudgment interest is permitted in such cases on the theory that [a] loss of property having a *definite* money value is practically the same as the loss of so much money; the loss of the use of the property is practically the same as the loss of the use (or interest) of so much money. Thus, [§37-3a] does not allow prejudgment interest on claims that are not yet payable, such as awards for punitive damages or on claims that do not involve the wrongful detention of money such as personal injury claims . . . *Prejudgment interest is not permitted on such claims for the simple reason that, until a judgment is rendered, the person liable does not know what sum he owe[s], and therefore cannot be in default for not paying.*

DiLieto, 310 Conn. at 49-50 n.11 (quoting *Foley*, 42 Conn. App. at 739) (other citations and internal quotations omitted; emphasis added).

Here, the Defendants could not know the amount to pay for breach of the SOPA or for the breach of the arbitration provision until the trial court fixed the amounts. Notably, at trial the Plaintiff claimed damages from the breach of the SOPA in various amounts under various theories: $4 million for the lost business opportunity (Pl.'s Tr. Br. at 32; Pl.'s App. at A-8), $484,597 for reliance damages (*Id.* at 33; Pl.'s App. at A-9), $1.341 million for ten years of salary (*Id.* at 33-34; Pl.'s App. at A-9 through A-10), or $2.09 million based on Scott's salary (*Id.* at 34; App. at A-10). Similarly, the Plaintiff claimed damages related to the arbitration of "approximately $65,000 to $80,000." (MOD at 58; Defs.' App. at A100.)

The Plaintiff counters that whether to award prejudgment interest is reviewed for abuse of discretion. (Pl.'s Br. at 32.) But if a court misapplies the law, the court has not exercised its legal discretion. See *Austin-Casares v. Safeco Ins. Co. of America*, 310 Conn. 640, 654 (2013) (reversing decision on motion to intervene where court misapplied the law). Here, the argument is that the court misapplied the law by awarding prejudgment interest on damages that were not ascertainable until the judgment.

The Plaintiff attempts to evade the clear import of this authority by claiming that *Foley* is distinguishable because in that case neither party had substantially performed so as to invoke a claim for a liquidated sum. (Pl.'s Br. at 33.) That is correct, but it is beside the point because both in *Foley* and in this case, the damages awarded were for the loss of the benefit of the bargain, and in both cases those damages were uncertain until the court fixed the amount. See *Foley*, 42 Conn. App. at 742. The degree of performance is irrelevant to the determination of prejudgment interest.

Next, the Plaintiff claims that "whether the amount of damages was disputed does not foreclose an award of prejudgment interest under § 37-3a." (Pl.'s Br. at 34 (citing *Sosin*, 300 Conn. at 230).) *Sosin* concerned a postjudgment award of interest where the parties disputed the amount owed pursuant to financial orders incident to the dissolution of marriage. 300 Conn. at 226. The plaintiff withheld a specific amount of payments due to the defendant based on a good-faith belief that he did not owe the amount specified. *Id. Sosin* concerned whether a court may award § 37-3a interest where a party acts in good faith in disputing whether the money is owed. The amount itself was not disputed in *Sosin*.

The Plaintiff then asserts that the court could consider the Defendants' bad faith in awarding interest. (Pl.'s Br. at 34-35.) To the extent that a party's good faith or bad faith is relevant goes to whether to award interest, not when interest starts. After all, the court may not award prejudgment interest on punitive damages, *DiLieto*, 310 Conn. at 49-50 n.11, even though such damages necessarily arise from bad conduct, because the amount of punitive damages is unknown until fixed by the court. The Defendants' good faith or bad faith here does not authorize prejudgment interest on amounts that they could not have known until the judgment.

The order concerning prejudgment interest on the damages for the breach of the SOPA and the arbitration provision should be reversed and remanded for further proceedings.

Conclusion

For the foregoing reasons, and for the reasons stated in their opening brief, the judgment of the trial court should be reversed with direction as to Issues I, II, and III, and should be reversed and remanded for further proceedings with respect to Issue V. The improper portion of the articulation (Issue IV) should be stricken.

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CERTIFICATION

Pursuant to Practice Book § 67-2(h), I hereby certify that: (1) the electronically submitted brief and appendices were emailed on July 28, 2015, to counsel of record listed below; and (2) that the brief and appendices do not contain any names or personally identifiable information that is prohibited from disclosure or that any such information has been redacted.

Pursuant to Practice Book § 67-2(i), I hereby certify that: (1) in compliance with Practice Book § 62-7, a copy of the foregoing brief and appendices were mailed, postage prepaid, to the **Hon. John A. Danaher, III**, and the counsel of record listed below on July 28, 2015; (2) that the brief and appendices are true copies of the brief and appendices filed electronically pursuant to Practice Book § 67-2(g); (3) that the brief and appendices do not contain any names or personally identifiable information that is prohibited from disclosure or that any such information has been redacted; (4) and that the brief complies with all provisions of Practice Book § 67-2(i).

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