

NO. HHD CV 12-6031858-S : SUPERIOR COURT
STATE OF CONNECTICUT : J.D. OF HARTFORD
V. : AT HARTFORD
DOUGLAS MACKO : AUGUST 1, 2016

MEMORANDUM OF DECISION

In this action, commenced on May 15, 2012, the plaintiff, state of Connecticut,¹ seeks restitution, civil penalties and injunctive relief against the defendants, Douglas Macko, D.M.D. (Dr. Macko) and Douglas Macko, D.M.D., P.C., based on allegations of unfair or deceptive acts and practices, pursuant to the Connecticut Unfair Trade Practices Act (CUTPA), General Statutes § 42-110a, et seq., more particularly, General Statutes §§ 42-110m (a) and 42-110o (b). A hearing in damages to the court was held after default² on May 20, 2015, June 3, 2015, June 4,

¹ The state of Connecticut brings this action through Attorney General George Jepsen, acting at the request of Jonathan A. Harris, Commissioner of Consumer Protection, pursuant to General Statutes § 42-110m (a).

² Upon motion by the plaintiff filed on August 21, 2012 (# 102), the clerk entered a default for failure to plead, pursuant to Practice Book § 10-8, on August 29, 2012 (# 102.86). On August 13, 2013, a certificate of closed pleadings and claim for the trial list was filed by the plaintiff (# 105). Also on August 13, 2013, an answer was filed by the defendants (# 106). A motion to open the default was filed by the defendants on September 27, 2013 (# 108). A memorandum in opposition was filed by the plaintiff on October 2, 2013 (# 109). The court, *Robaina, J.*, denied the motion to open on October 16, 2013 (# 108.86). A timely motion to reargue/reconsider was filed by the defendants on October 25, 2013 (# 110). A memorandum in

cc: AAG Karen S. Haabestad (P)
AG Gregory Kyle O'Connell (P)
Susan Dixon, Esq. (D)
Rptr. Judicial Decisions
8/1/16 (alb)

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2015, June 5, 2015 and June 9, 2015, October 6, 2015 and February 25, 2016. Thereafter, pursuant to an order of the court issued during closing argument on February 25, 2016, the defendant, Dr. Macko, filed a personal financial affidavit on April 11, 2016.

I

PLAINTIFF'S ALLEGATIONS

The plaintiff alleges that between April 2002, and December 2009, the defendants provided dental services to various individuals, including pediatric patients, and billed the Department of Social Services (DSS) for those services. During that time frame, Dr. Macko was enrolled as a provider of dental services through the Connecticut Medical Assistance Program (CMAP), which includes the Connecticut Medicaid Program. In accordance with the CMAP provider agreement signed by Dr. Macko, Dr. Macko was required to adhere to all program rules, laws, and regulations as a condition of payment and participation. Notably, the statutes governing the practice of dentistry in Connecticut; see General Statutes § 20-103a, et seq.; require licensed dentists and licensed dental hygienists to perform the practice of “dental

opposition was filed by the plaintiff on November 4, 2013 (# 111). The court, *Robaina, J.*, denied the motion to reargue/reconsider on November 7, 2013 (# 110.86). See Practice Book § 17-32 (b) (once claim for hearing in damages has been filed, default may be set aside only by judicial authority).

hygiene.” See General Statutes § 20-126/ (b).

During the aforementioned time frame, Dr. Macko employed various individuals at his office who were neither licensed dentists nor licensed dental hygienists. Rather, many of these unlicensed individuals were dental assistants trained by Dr. Macko to perform various procedures, namely, “prophylaxis treatments” and “fluoride applications,” which, pursuant to statute, are “dental hygiene” practices. See General Statutes § 20-126/ (a) (3). Between April 2002, and December 2009, these unlicensed employees would perform prophylaxis treatments and fluoride applications on individual patients and, thereafter, the defendants would receive compensation from the plaintiff under the CMAP “fee-for-service” (FSS) and “managed care organization” (MCO) programs. In essence, the plaintiff claims that the defendants engaged in a pattern and practice of billing the plaintiff for dental procedures wrongfully performed by unlicensed individuals. As a result of these activities, the plaintiff further alleges that the defendants were paid approximately \$931,508.30, to which they were not entitled.

II

APPLICABLE LAW³

Statutes

The General Assembly has enacted specific legislation governing the practice of dentistry. See General Statutes § 20-103a, et seq. General Statutes § 20-123 (a) provides in relevant part that “[n]o person shall engage in the practice of dentistry unless he or she is licensed pursuant to the provisions of this chapter. The practice of dentistry or dental medicine is defined as the diagnosis, evaluation, prevention or treatment by surgical or other means, of an injury, deformity, disease or condition of the oral cavity or its contents, or the jaws or the associated structures of the jaws.”

General Statutes § 20-112a, entitled “[d]ental assistants,” provides in relevant part that “[a] licensed dentist may delegate to dental assistants such dental procedures as the dentist may deem advisable . . . but such procedures shall be performed under the dentist’s supervision and control and the dentist shall assume responsibility for such procedures; *provided such assistants may not engage in:* (1) Diagnosis for dental procedures or dental treatment . . . (5) the taking of

³ This section includes applicable statutes and regulations only. Case law is addressed elsewhere in this memorandum.

any impression of the teeth or jaws or the relationship of the teeth or jaws for the purpose of fabricating any appliance or prosthesis; (6) the placing, finishing and adjustment of temporary or final restorations, capping materials and cement bases; or (7) *the practice of dental hygiene* as defined in [§] 20-126*l*. (Emphasis added.) Moreover, General Statutes § 20-126 provides in relevant part that “[a]ny person who violates any provision of this chapter shall be guilty of a class D felony. . . . For purposes of this section, each instance of patient contact or consultation which is in violation of any provision of this section shall constitute a separate offense.”

General Statutes § 20-126*l* (a) provides in relevant part that “[a]s used in this section: (1) ‘General supervision of a licensed dentist’ means supervision that authorizes dental hygiene procedures to be performed with knowledge of said licensed dentist, whether or not the dentist is on the premises when such procedures are being performed . . . (3) The ‘*practice of dental hygiene*’ means the performance of educational, preventive and therapeutic services *including: Complete prophylaxis; the removal of calcerous deposits, accretions and stains from the supragingival and subgingival surfaces of the teeth by scaling, root planing and polishing; the application of pit and fissure sealants and topical solutions to exposed portions of the teeth; dental hygiene examinations and the charting of oral conditions; dental hygiene assessment, treatment planning and evaluation. . . .*” (Emphasis added.) Finally, General Statutes § 20-126*l*

(b) provides that “[n]o person shall engage in the practice of dental hygiene unless such person (1) has a dental hygiene license issued by the Department of Public Health and (A) is under the general supervision of a licensed dentist . . . or (2) has a dental license.”

Regulations

The DSS administers the CMAP, which includes the Connecticut Medicaid Program. General Statutes § 17b-2 (6). The Commissioner of the Department of Social Services has promulgated the following regulations that are necessary to administer the CMAP. General Statutes § 17b-262; see also Regs., Conn. State Agencies § 17b-262-522, et seq.

Section 17b-262-526 of the Regulations of Connecticut State Agencies provides that “[t]o maintain enrollment in the Connecticut Medical Assistance Program, a provider shall abide by all federal and state statutes regulations and operational procedures promulgated by the department which govern the Medical Assistance Program and shall . . . (5) meet and adhere to all applicable licensing, accreditation, and certification requirements and all applicable state and local zoning and safety requirements pertaining to the provider’s assigned type and specialty in the jurisdiction where the Medical Assistance Program goods or services are furnished; [and] (6) meet and adhere to any additional department requirements, after enrollment, promulgated in conformance with federal and state statutes, regulations and operational procedures which

govern the provider's assigned provider type and specialty. . . ." Accordingly, pursuant to § 17b-262-526 of the Regulations of Connecticut State Agencies, providers must practice in accordance with all applicable licensing requirements.

Section 17b-262-523 (22) of the Regulations of Connecticut State Agencies defines a "provider" as "any individual or entity that furnishes Medical Assistance Program goods or services pursuant to a provider agreement with the department and is duly enrolled and in good standing or, as the context may require, an individual or entity applying for enrollment in the Medical Assistance Program."

III

ENTRY OF DEFAULT

As previously noted, a default entered against the defendants on August 29, 2012, based on a failure to plead. "A default admits the material facts that constitute a cause of action . . . and entry of default, when appropriately made, conclusively determines the liability of the defendant. . . . If the allegations of the plaintiff's complaint are sufficient on their face to make out a valid claim for the relief requested, the plaintiff, on the entry of a default against the defendant, need not offer evidence to support those allegations. . . . Therefore, the only issue before the court following a default is the determination of damages . . .

“[T]he rule is that the entry of default operates as a confession by the defaulted defendant of the truth of the material facts alleged in the complaint which are essential to entitle the plaintiff to some of the relief prayed. It is not the equivalent of an admission of all of the facts pleaded. The limit of its effect is to preclude the defaulted defendant from making any further defense and to permit the entry of a judgment against him on the theory that he has admitted such of the facts alleged in the complaint as are essential to such a judgment. It does not follow that the plaintiff is entitled to a judgment for the full amount of the relief claimed. The plaintiff must still prove how much of the judgment prayed for in the complaint he is entitled to receive.”

(Emphasis in original; internal quotation marks omitted.) *Bank of New York v. National Funding*, 97 Conn. App. 133, 138-39, 902 A.2d 1073, cert. denied, 280 Conn. 925, 908 A.2d 1087 (2006), cert. denied, 549 U.S. 1265, 127 S. Ct. 1493, 167 L. Ed. 2d 229 (2007); cf. *State v. Ritz Realty Corp.*, 63 Conn. App. 544, 548, 776 A.2d 1195 (2001) (entry of default in action brought by Attorney General based on CUTPA violations).

“When a default for failure to plead has been entered, there are two paths. Under Practice Book § 17-32, a defaulting party may file a motion to set aside the default within fifteen days, or anytime prior to the filing of a claim for a hearing in damages, and the clerk may set aside the default. If the defaulting party fails to file a motion to set aside before a claim to a

hearing in damages is filed and thereafter files a motion to set aside, only the judicial authority may set aside the default. The opening of a default when a claim for a hearing in damages has been filed is controlled by Practice Book § 17-42. Significantly, Practice Book § 17-42 refers to Practice Book § 17-32, noting that certain defaults may be set aside by the clerk. The distinction between whether Practice Book § 17-32 applies or Practice Book § 17-42 applies is whether a claim for a hearing in damages is filed before, or after, a motion to set aside the default is filed.” *Snowdon v. Grillo*, 114 Conn. App. 131, 138, 968 A.2d 984 (2009).

The plaintiff made a claim for a hearing in damages on August 13, 2013, nearly one year after the entry of default (# 105). On that same day, the defendants filed an answer to the plaintiff’s complaint (# 106). On September 27, 2013, the defendant filed a motion to open default, which was denied by the court, *Robaina, J.*, on October 16, 2013. Because the plaintiff made its claim for a hearing in damages before an answer was filed by the defendants,⁴ the opening of the default is governed by Practice Book § 17-42. In this instance, the court, *Robaina, J.*, denied the defendants’ motion to open the entry of default, the legal effect of which

⁴ The plaintiff filed a certificate of closed pleadings and claim for the trial list (# 105), and the defendants filed their answer (# 106), on the same day, August 13, 2013, a few days short of a full year after the default was entered by the clerk on August 29, 2012. Based on the order of these pleadings on the docket sheet, presumably the plaintiff’s pleading was filed first.

established the defendants' liability as to the CUTPA violations.

IV

HEARING IN DAMAGES

Practice Book § 17-34 provides in relevant part that “[i]n any hearing in damages upon default, the defendant shall not be permitted to offer evidence to contradict any allegations in the plaintiff’s complaint, except such as relate to the amount of damages, unless notice has been given to the plaintiff of the intention to contradict such allegations and of the subject matter which the defendant intends to contradict. . . .” No such notice was filed by the defendants in this case. Accordingly, the only issue before this court is a determination of the appropriate remedy in the context of a hearing in damages.

At the hearing in damages, the plaintiff presented the testimony of several former employees of the defendants including: Maria Gonzalez, a former dental assistant employed by the defendants from 2003-2006; Linda Malone, a former dental assistant employed by the defendants from 1983-2009; Admar Idlibbi, D.M.D., a dentist, who worked for the defendants as an independent contractor from 2004-2007; Pamela Szymanoski, a former clerical office employee and office manager from 1992-2007, when she was fired for fraudulent practices; Lawrence Marini, a forensic fraud examiner who works for the Attorney General’s Office;

Patricia Cronin, a lead planning analyst for DSS who oversees the Medicaid program; and Douglas Shannon, a principal of Mercer, a global consulting firm that provides actuarial services for government medicaid agencies including DSS. Mercer assisted Cronin in the retrieval of data concerning Dr. Macko. The plaintiff also presented a transcript of the testimony of Leslie Perrotti before the state of Connecticut Dental Commission (Dental Commission). Perrotti, now deceased, was a former dental assistant employed by the defendants from 2002-2003. The defendants presented the testimony of Dr. Macko and Nancy Simone, a former employee of the defendants from 1998-2015, who did billing and insurance and was the office manager at the time the defendants closed the office. Notably, the plaintiff introduced exhibits 23 and 24 through Cronin, the DSS employee who compiled the information contained therein. Exhibits 23 and 24 are “ad hoc” reports reflecting records of FSS payments by DSS to the defendants, and records of payments by MCOs, to the defendants, for the dental procedure codes for “child prophylaxis” (D1120) and “fluoride applications” (D1203) by year, commencing in April 1, 2002 through December 31, 2009.⁵

⁵ The testimony and exhibits combined reflect the impracticality of submitting all the supporting paper records, consisting of thousands of pages, and also contain confidential health care information and patient identifying information. The FFS original records were derived from electronic records maintained by DSS. The MCO records of payments to the defendants were derived from Mercer Health & Benefits, LLC, which maintains the data repository of the

Plaintiff's exhibits 23 and 24 reflect that the average amount paid to the defendants by MCOs for procedure code D1120 from 2002 to 2008, when the program was discontinued, was \$24.60, and the average amount paid for procedure code D1203, during the same period, was \$18.92. The FSS payments to the defendants for the time period 2002 to 2009 averaged \$44.62 for procedure code D1120 and \$28.75 for procedure code D1203.

By way of remedy, the plaintiff seeks restitution, civil penalties and injunctive relief against the defendants. The plaintiff contends that the defendants' pattern and practice of billing for dental procedures performed by unlicensed individuals violated Connecticut law and, pursuant to General Statutes § 42-110m (a), the plaintiff is entitled to an "order for restitution that *disgorges* [the defendants'] ill-gotten gains," in the amount of \$791,668.60, plus civil penalties of \$580,024, and a permanent injunction "prohibiting Dr. Macko from engaging in future violations of CUTPA, violations of federal and state laws relating to the practice of dentistry and provider participation in the CMAP, and illegally submitting claims for

managed care organizations with whom DSS contracted to manage and deliver services to patients enrolled in the DSS medical assistance program. Cronin represented that she contacted Mercer to request an "extraction" of the relevant data concerning payments to the defendants during the time period, April 1, 2002 to December 31, 2009. These records have also been maintained in electronic form by DSS.

reimbursement for dental services.”⁶ The defendants counter that the plaintiff has failed to prove by a preponderance of the evidence that Dr. Macko, or other licensed individuals, did not, in fact, perform any of the challenged services for which they received payment, and therefore, the plaintiff has failed to meet its burden of proof to establish its entitlement to restitution or civil penalties.

V

FINDINGS OF FACT

Dr. Macko is a licensed, board certified pediatric dentist. From 1975 to 1982, he served on the faculty of the University of Connecticut Dental School where he was an assistant professor and the director of the residency program for pediatric dentistry. He opened a private practice specializing in pediatric and adolescent dentistry in 1982. During the period April 1, 2002 to least until June 1, 2009, unlicensed dental assistants, employed by the defendants, performed services during child recall appointments including prophylaxis treatments and fluoride applications they were not licensed to perform. These services were submitted for reimbursement to DSS using codes D1120 (Prophylaxis Child) and D1203 (Topical Application of Fluoride). A different treatment code was submitted for a dental examination of the patient

⁶ Plaintiff’s post-trial memorandum, p. 37.

during a recall appointment.

Although the defendants argue generally that the plaintiff has not sustained its burden of proof that Dr. Macko failed to perform the services in question during the foregoing time period, specifically the time period following the Dental Commission hearing in 2006, they have failed to come forward with any sustained evidence to counter the substantial testimonial and documentary evidence that tends to prove that neither Dr. Macko nor any other licensed person actually performed prophylaxis treatments and fluoride applications as claimed by the defendants,⁷ including use of the prophy cup or toothbrush prophy, applying disclosing solution or fluoride applications, during any portion of the time period in question.⁸ In fact, the credible

⁷ The court notes that the defendants' proposed findings of fact contain no citations to specific testimony or exhibits. For example proposed finding ¶ 33 states: "The assistants learned sometime after 2003, that they were not supposed to be doing cleanings and fluoride treatments unless they were licensed hygienists." Proposed finding ¶ 36 states: "The assistants stopped performing toothbrush prophys and fluorides altogether in 2006." Proposed finding ¶ 38 states: "After 2006, no assistants did toothbrush prophys or handed the child fluoride trays. Proposed finding ¶ 39 states: "Dr. Macko or a licensed professional performed all of the dental procedures in the office after 2006." The court is unable to identify any witness whose testimony supports these proposed findings. While Malone's testimony supports these statements once a hygienist became employed by the defendants in June 2009, there is no evidence supporting these statements that relates to 2007, 2008 and January to May 2009.

⁸ Although the defendants also argue that the manner or means of prophylaxis is nowhere specified in the Connecticut State Regulations or provider manuals, General Statutes § 20-112a provides that dental assistants may not engage in the practice of dental hygiene, which includes

testimony of Dr. Idlibbi indicates that during the entire time of his employment from 2004 to sometime in 2007, the dentists did not participate in cleaning the patient's teeth or apply the fluoride solution. Despite the initiation of proceedings against Dr. Macko by the Dental Commission commencing in March 2006, the defendants did not employ a dental hygienist until June 2009. Accordingly, the court finds that the plaintiff has established by a preponderance of the evidence, during the time period from April 2002, until on or about June 1, 2009, the defendants maintained a standard operating procedure whereby unlicensed dental assistants performed most or all of these prophylaxis services and fluoride treatments, with or without the assistance of parents of the youngest patients. Said differently, the court finds that the more credible evidence reflects that the plaintiff has established by a preponderance of the evidence that the standard operating procedure of the defendants during the time period in question was that licensed personnel did not perform child prophylaxis or fluoride applications as represented in claims submitted by them to DSS. Dr. Macko's testimony, both at the hearing in damages

prophylaxis and "the application of topical solutions to exposed portions of the teeth." Since there are separate treatment codes for child prophylaxis, topical application of fluoride, x-rays and dental examination, all activities that occur in the course of a child recall appointment, the court finds that the evidence establishes that although there is no formal definition in the statutes and regulations, all the witnesses understood that the activities relating to the cleaning of the child's teeth, including the application of the disclosing solution, use of the "prophy cup" and "toothbrush prophylaxis" together constituted prophylaxis.

before this court and the Dental Commission, was a weak attempt to defend himself and his office practices and was confusing at best.

The court also finds that a cogent presentation of the evidence was undermined by the poor credibility of the defendants' former employees, which included falsified affidavits, a history of felonious behavior and unreliable testimony, with the exception of Dr. Idlibbi. The dental assistants and clerical employees all admittedly signed false affidavits⁹ submitted to the Dental Commission and performed services that they were not authorized by law to perform over extended periods of time. Two of the three longest serving employees, Szymanoski and Malone, had substantial reasons to remember or forget the details of their employment. Szymanoski is an admitted thief who forged prescriptions and Malone was likely motivated at various times during the last ten years (from 2006 to the present) by fear of personal exposure to criminal prosecution or state enforcement action. Nonetheless, the court does accept portions of their testimony as presented in court, which, at least in part, attempted to rectify their previous false affidavits and testimony before the Dental Commission and which, by all indications, was given reluctantly

⁹ It remains a mystery as to who drafted the false affidavits. The defendants proposed findings of fact ¶ 58 states that it was Szymanoski who drafted the affidavits, yet she testified that it was not her. Proposed finding ¶ 62 denies that it was Dr. Macko as did Dr. Macko himself during his testimony.

against Dr. Macko, to whom they bear some remnant of loyalty.

In sum, although the defendants argued that Dr. Macko performed a majority of the prophylaxis treatments and fluoride applications, there is little credible evidence that he did. Dr. Macko's own testimony was evasive, substantially not credible and contradicted his prior testimony before the Dental Commission. The evidence also does not support the claim that the defendants ceased the practice of having unlicensed personnel perform prophylaxis treatment and the application of fluoride in 2006. Although there is little or no evidence that unlicensed personnel caused injury to any member of the defendants' underserved population of pediatric patients, most of whom were covered by the Husky Program or Medicaid, as it pertains to having dental assistants perform prophylaxis treatments and fluoride applications, there is substantial evidence that the defendants departed from the requirements of the law.

Beginning June 1, 2009 through December 31, 2009, when Margaret Horvay, a licensed hygienist, was employed by the defendants, prophylaxis treatments and fluoride applications were legitimately provided by her. During the period of her employment, Horvay performed each of the prophylaxis and fluoride treatments billed to DSS.¹⁰

¹⁰ In its post-trial memorandum and during final argument, the plaintiff agreed to this finding.

The plaintiff introduced, as a full exhibit, the decision in Dr. Macko's appeal to the Superior Court from the Dental Commission. See *Macko v. Connecticut State Dental Commission*, Superior Court, judicial district of New Britain, Docket No. CV-08-4016782 (January 26, 2010, *Schuman, J.*).¹¹ Notably, Judge Schuman stated the following, which this court deems relevant in the present proceeding: "In March 2006, the department of public health (department) filed a four-count statement of charges against the plaintiff. Counts one and two alleged deficiencies in the care of two children under the age of three. In count three, the department claimed that the plaintiff's dental records, treatment, and billing practices concerning AP, an eight-year-old, fell below the standard of care. Count four alleged that the plaintiff was responsible for the improper practice of using dental assistants to take impressions and to perform services that required a licensed dental hygienist. . . .

"The full commission reviewed [a three-person panel of commission member's proposed decision] and rendered a final decision on February 20, 2008. The commission found that the department had proven many, although not all, of the allegations in counts three and four. Based on these findings, the commission ordered that the plaintiff pay a civil penalty of \$10,000 on each of the two counts. The commission also placed the plaintiff's license on probation for two

¹¹ Plaintiff's exhibit 7.

years, during which time the plaintiff must employ another dentist to monitor his work and must attend courses in record-keeping and ethics.” *Macko v. Connecticut State Dental Commission*, supra, Superior Court, Docket No. CV-08-4016782.

Based on a preponderance of all the evidence presented, the court finds that for most of the seven to eight year period claimed by the plaintiff, the defendants devised and followed an illegal standard operating procedure whereby they sought and obtained reimbursement for dental services that only licensed dentists or licensed dental hygienists may provide, “Prophylaxis Child (D1120)” and “Topical Application of Fluoride (D1203),” when in fact, unlicensed personnel, patients, or patients’ parents actually performed the “services.”

The plaintiff’s proposed findings of fact state that for the “vast majority” of the defendants’ child recall appointments during the time period in question, Dr. Macko, himself, provided no services to the patients other than the dental examination. In making this statement, the plaintiff essentially concedes that an award of 100% of the payments to defendants is not a reasonable basis for restitution. The only other percentage claimed by the plaintiff is for restitution for 75 percent of the amounts paid for “Prophylaxis Child (D1120)” and “Topical Application of Fluoride (D1203),” less a credit for the procedures performed by Horvay for the seven month period between June 1, 2009 through December 31, 2009, an amount which totals

\$593,751.45.¹² The court finds that this amount as claimed by the plaintiff constitutes a reasonable approximation of the amount of restitution for the time period from April 1, 2002 through May 31, 2009.

In the course of Dr. Macko's career as a pediatric dentist, he regularly participated in continuing education and professional development programs for dentists including annual conferences of the American Academy of Pediatric Dentistry. Certain of the continuing education and professional development programs attended by Dr. Macko over the years addressed the subject of treatments or services that may be delegated to unlicensed employees of

¹² In its post trial memorandum, the state explains the basis of its calculations as follows: "Based upon the [sic] Dr. Macko's admissions by default and the evidence adduced at the Hearing in Damages, the logical and reasonable deduction is that Dr. Macko improperly obtained reimbursement for Prophylaxis Child (D1120) and Topical Application of Fluoride (D1203) during the relevant time period, except perhaps for the limited universe of claims when Horvay properly provided the services. The total reimbursement for both Prophylaxis Child (D1120) and Topical Application of Fluoride (D1203) during the relevant time period was \$931,508.30. The reimbursement for claims for which Horvay properly provided the services is unknown, but the State respectfully requests that the Court credit Dr. Macko for Horvay's work by subtracting \$139,839.70 (seventy percent (70%) of the 2009 payments) from \$931,508.30 (the total reimbursement during the relevant time period), which results in the sum of \$791,668.60." See Plaintiff's post-trial memorandum, pp. 18-19. Although the plaintiff's basis for the 70 percent reduction applied to the 2009 payments from DSS is unclear, because that percentage inures to the benefit of the defendants, the court accepts 70 percent as a reasonable deduction under all the circumstances.

a dental practice. As of 2002, Dr. Macko had been in private practice for twenty years. Based on his education, continuing education, training and experience, he knew or should have known that a standard operating procedure of having unlicensed personnel perform procedures which only licensed dentists or dental hygienists are authorized to perform was illegal and, in fact, pursuant to General Statutes § 20-126, is a Class D felony. Further, the defendants knew or should have known that they were not entitled by law and/or contract to seek reimbursement from DSS for such services pursuant to their provider agreements.

Dr. Macko or someone on his behalf caused false affidavits of his office staff and dental assistants to be drafted and submitted to the Dental Commission. The evidence at the hearing in damages clearly established that the affidavits were substantially false, yet, at the close of evidence, it was unclear as to who was responsible for drafting them. Dr. Macko knew or should have known that his employees' testimony before the Dental Commission was also false on the subject of the scope of dental services provided by unlicensed personnel. His testimony on these subjects and others was evasive, inconsistent and not credible. In a letter from Attorney Jonathan J. Einhorn, submitted on behalf of Dr. Macko to the Office of Legal Counsel, Regulations and Administrative Hearings of DSS dated October 19, 2010, Dr. Macko admitted to the allegations set forth in the DSS Notice of Regulatory Violations and Proposed Sanctions

dated October 6, 2009. Among the violations concerning which he admitted liability were allegations of illegal practices by unlicensed dental assistants. As a penalty, Dr. Macko accepted a suspension from the “Medicaid Program” and any other DSS program for a period of ten years.¹³

The defendants wilfully engaged in the foregoing illegal practices when they knew or should have known that their conduct was false and deceptive in violation of General Statutes §42-110b (a). Supplemental facts may be found as necessary in the course of this memorandum.

VI

DISCUSSION

A

Restitution

The plaintiff contends that the defendants’ pattern and practice of billing for dental procedures that were performed by unlicensed individuals violated Connecticut law and, pursuant to General Statutes § 42-110m (a), the plaintiff is entitled to restitution. Specifically, the plaintiff seeks an “order for restitution that *disgorges* [the defendants’] ill-gotten gains.”¹⁴ In

¹³ See plaintiff’s exhibits 10 and 11.

¹⁴ Plaintiff’s post trial memorandum of law, p. 14.

opposition to the plaintiff's contention, the defendants claim that the plaintiff has failed to prove by a preponderance of the evidence that Dr. Macko, or otherwise licensed individuals, did not, in fact, perform any of the challenged procedures. Thus, the defendants claim that the plaintiff has failed to meet its burden of proof to establish its entitlement to restitution.

General Statutes § 42-110m (a) provides in relevant part that “[w]henver the commissioner has reason to believe that any person has been engaged or is engaged in an alleged violation of any provision of this chapter said commissioner . . . may request the Attorney General to apply in the name of the state of Connecticut to the Superior Court for an order temporarily or permanently restraining and enjoining the continuance of such act or acts or for an order directing restitution and the appointment of a receiver in appropriate circumstances, or both. . . . The court may award the relief applied for or so much as it may deem proper including reasonable attorney’s fees, accounting and *such other relief as may be granted in equity.*”

(Emphasis added.) This statute affords the court with the discretion to fashion appropriate relief. *State v. Cardwell*, 246 Conn. 721, 742, 718 A.2d 954 (1998). Further, even when the underlying claim is fraud, “the general rule in this state is that when a civil statute is silent as to the applicable standard of proof, the preponderance of the evidence standard governs factual determinations required by that statute.” *State v. Davis*, 229 Conn. 285, 295-96, 641 A.2d 370

(1994); accord *Goldstar Medical v. Dept. of Social Services*, 288 Conn. 790, 819, 955 A.2d 15 (2008).

In support of disgorgement as a form of restitution, the plaintiff refers to the portion of § 42-110m (a) that affords the court with authority to award “such other relief as may be granted in equity.” Broadly speaking, the plaintiff seeks “restitution” for the defendants’ CUTPA violations. More specifically, however, the plaintiff seeks the *equitable* remedy of disgorgement. “Like other equitable remedies . . . disgorgement is a method of forcing a defendant to give up the amount by which he was unjustly enriched.” (Internal quotation marks omitted.) *F.T.C. v. Bronson Partners, LLC*, 654 F.3d 359, 372 (2d Cir. 2011).

“[D]isgorgement is a distinctly public-regarding remedy, available only to government entities seeking to enforce explicit statutory provisions.” *Id.* Moreover, “when a public entity seeks disgorgement it does not claim any entitlement to particular property; it seeks only to deter violations of the [] laws by depriving violators of their ill-gotten gains.” (Internal quotation marks omitted.) *Id.*, 373.

Our appellate courts have not yet had the opportunity to comment on the availability of disgorgement relief within the context of a sovereign enforcement action brought pursuant to § 42-110m (a). Research of decisions of the Superior Court reveal somewhat conflicting results

in this regard. Compare *State v. Royal Financial Services, LLC*, Superior Court, judicial district of Hartford, Docket No. CV-07-4032754-S (October 3, 2008, *Rittenband, J.T.R.*) (§ 42-110m (a) does not authorize court to “disgorge all ill-gotten proceeds”) with *State v. Tomasso*, Superior Court, judicial district of Waterbury, Complex Litigation Docket, Docket No. X02-CV-04-4002651-S (April 1, 2005, *Schuman, J.*) (39 Conn. L. Rptr. 127, 129) (citing § 42-110m (a) and § 42-110o (b) to indicate that disgorgement relief is “authorized by [CUTPA]” as support for finding case justiciable). Although reasonable minds have diverged on this particular issue, this court concludes that such relief is permissible under § 42-110m (a). Section 42-110m (a) expressly bestows on the court the authority to award “such other relief as may be granted in equity” and the availability of relief in the form of disgorgement is consistent with the remedial nature of CUTPA. See, e.g., *Associated Investment Co. Ltd. Partnership v. Williams Associates IV*, 230 Conn. 148, 156, 645 A.2d 505 (1994); *Hinchliffe v. American Motors Corp.*, 184 Conn. 607, 615, 440 A.2d 810 (1981); General Statutes § 42-110b (d).

Additionally, it is well established “that Federal Trade Commission . . . rulings and cases under the Federal Trade Commission Act . . . serve as a lodestar for interpretation of the open-ended language of CUTPA.” *Russell v. Dean Witter Reynolds, Inc.*, 200 Conn. 172, 179, 510 A.2d 972 (1986); see also *Associated Investment Co. Ltd. Partnership v. Williams Associates IV*,

supra, 230 Conn. 156 (recognizing that CUTPA “may be traced directly to § 5 (a) (1) of the Federal Trade Commission Act”); General Statutes §§ 42-110b (b), (c). Considering the close connection between CUTPA and the Federal Trade Commission Act (FTCA), 15 U.S.C. § 41, et seq., the court turns to federal precedent for assessing the plaintiff’s claim for equitable disgorgement.

In *F.T.C. v. Verity International, Ltd.*, 443 F.3d 48 (2d Cir. 2006), cert denied, 549 U.S. 1278, 127 S. Ct. 1868, 167 L. Ed. 2d 317 (2007), the Second Circuit Court of Appeals reviewed an order by the district court that imposed monetary penalties on defendants who had violated the FTCA by fraudulently billing consumers’ telephone bills. The Second Circuit affirmed the district court’s finding that the defendants had violated 15 U.S.C. § 45 (a) (1)¹⁵; *id.*, 65; and adopted a two step burden-shifting framework for calculating monetary relief under 15 U.S.C. § 53 (b).¹⁶ *Id.* 67. Specifically, this framework related to “calculating the size of disgorgement

¹⁵ Title 15 of the United States Code, § 45 (a) (1), provides that “[u]nfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful.”

¹⁶ Title 15 of the United States Code, § 53 (b), provides in relevant part that “in proper cases the Commission may seek, and after proper proof, the court may issue, a permanent injunction.” “While the provision’s express text refers only to injunctive relief, courts have consistently held that the unqualified grant of statutory authority to issue an injunction under [S]ection 13 (b) carries with it the full range of equitable remedies, including the power to grant

relief.” Id. “This framework requires the FTC to first show that its calculations reasonably approximated the amount of the defendant’s unjust enrichment, after which the burden shifts to the defendants to show that those figures were inaccurate.” (Internal quotation marks omitted.) Id.; accord *F.T.C. v. Bronson Partners, LLC*, supra, 654 F.3d 368. “After the burden shifts, the risk of uncertainty fall[s] on the wrongdoer whose illegal conduct created the uncertainty.” *F.T.C. v. Bronson Partners, LLC*, supra, 368; cf. *Gratz v. Claughton*, 187 F.2d 46, 51-52 (2d Cir. 1951) (“[W]hen damages are at some unascertainable amount below an upper limit and when the uncertainty arises from the defendant’s wrong, the upper limit will be taken as the proper amount.”), cert. denied, 341 U.S. 920, 71 S. Ct. 741, 95 L. Ed. 1353 (1951).

As noted by the Second Circuit in *Verity International, Ltd.*, “[t]he appropriate measure for restitution is the benefit unjustly received by the defendants.” *F.T.C. v. Verity International, Ltd.*, supra, 443 F.3d 67; accord *United Coastal Industries, Inc. v. Clearheart Construction Co., Inc.*, 71 Conn. App. 506, 512, 802 A.2d 901 (2002) (“In the absence of a benefit to the defendant, there can be no liability in restitution; nor can the measure of liability in restitution exceed the measure of the defendant’s enrichment.” [Internal quotation marks omitted.]); 1 D.

consumer redress and compel disgorgement of profits. . . . We join these courts and hold that Section 13 (b) of the FTC Act permits courts to grant ancillary equitable relief, including equitable monetary relief.” *F.T.C. v. Bronson Partners, LLC*, 654 F.3d 359, 365 (2d Cir. 2011).

Dobbs, Law of Remedies (2d Ed. 1993) § 4.5 (1), p. 628 (“Restitution is measured by the defendant’s unjust enrichment, not by the plaintiff’s loss.”) For that reason, the Second Circuit remanded the case to the district court “to revise its computations to focus on the benefits unjustly obtained by the defendants rather than the losses of consumers and to entertain only reasonable approximations of the [defendants’] unjust gains, rather than their overall gains, before shifting the burden to the [defendants] to refute the approximation. . . .” *F.T.C. v. Verity International, Ltd.*, supra, 70.

The Second Circuit recently applied this framework to the award of equitable disgorgement relief based upon the deceptive advertising of two specific weight loss products. *F.T.C. v. Bronson Partners, LLC*, supra, 654 F.3d 368. There, “[t]he district court arrived at its baseline calculation of [the defendants’] unjust gains using sales figures and pricing information that neither party disputed.” *Id.*, 369.¹⁷ Additionally, the parties agreed that the defendants provided some consumers with refunds and, therefore, the district court discounted the “presumptive amount” of the defendants’ unjust gains by such refunds “without putting the defendants to their proof.” *Id.* Nonetheless, the Second Circuit affirmed the district court’s

¹⁷ The court also noted, however, that “the district court is also obliged to take account of systematic divergences between the victims’ losses and the defendants gains from wrongdoing.” *F.T.C. v. Bronson Partners, LLC*, supra, 654 F.3d 369.

award of \$1,942,325, which was the total revenues generated by the defendants for the two weight loss products less the defendants' refunds to consumers, because the defendants failed to meet their burden of showing that the \$1,942,325 figure was inaccurate. *Id.* Although the defendants claimed that they were "entitled to a reduction of the award on account of bounced checks and credit card chargebacks," the defendants' incomplete record keeping failed to connect those bounced checks and credit card chargebacks to the specific weight loss products at issue. *Id.* Thus, the defendants failed to meet their burden of proving what portion of the \$1,942,325 figure was truly an unjust gain.

Without guidance from our own appellate courts, this court adopts the two step burden-shifting framework established in *Verity International, Ltd.* for assessing the plaintiff's claim for equitable disgorgement under § 42-110m (a), which specifically permits equitable relief. The plaintiff has met its initial burden under this framework. As noted, based on the findings of fact, the court finds that the plaintiff has established that the defendants were not lawfully entitled to at least 75 percent of the reimbursement it received from DSS under the procedure codes for "child prophylaxis" (D1120) and "fluoride applications" (D1203) from April 1, 2002 through May 31, 2009. Notably, our courts have described a similar standard to the "reasonable approximation" standard in *Verity International, Ltd.* when a plaintiff seeks restitution but it is

difficult to ascertain the precise value of the benefits wrongfully in the defendant's possession. See, e.g., *Hartford Whalers Hockey Club v. Uniroyal Goodrich Tire Co.*, 231 Conn. 276, 285, 649 A.2d 518 (1994) ("Where damages are appropriate but difficult to prove the law eschews the necessity of mathematical exactitude. Such exactitude in the proof of damages is often impossible, and . . . all that can be required is that the evidence, with such certainty as the nature of the particular case may permit, lay a foundation which will enable the trier to make a fair and reasonable estimate." [Internal quotation marks omitted.]

Because the plaintiff met its preliminary burden of establishing a reasonably approximate value of the amount of the defendant's unjust enrichment, the burden shifted to the defendants to show that this figure was inaccurate. *F.T.C. v. Verity International, Ltd.*, supra, 443 F.3d 67. As noted, the defendants failed to come forward with any specific or sustained evidence to counter the substantial testimonial and documentary evidence supporting the plaintiff's calculations of the reasonably approximate value of the defendant's unjust enrichment.¹⁸ As with the defendants in *Bronson Partners, LLC*, the defendants in the present case did not present an accurate record of which dental procedures were performed by Dr. Macko or other licensed individuals. "After the burden shifts, the risk of uncertainty fall[s] on the wrongdoer whose

¹⁸ See plaintiff's exhibits 23 and 24.

illegal conduct created the uncertainty.” *F.T.C. v. Bronson Partners, LLC*, supra, 654 F.3d 368. Accordingly, based on the evidence adduced during the hearing in damages, as previously calculated, this court concludes that the value of proceeds unjustly within the defendants’ possession that are properly subject to equitable disgorgement is \$593,751.45.¹⁹

B

Civil Penalties

The plaintiff also seeks a civil penalty pursuant to General Statutes § 42-110o (b) for each instance of the defendants’ improper billing practices. The defendant opposes the plaintiff’s contention for the same reasons previously discussed, namely, the plaintiff has failed to prove by a preponderance of the evidence that Dr. Macko, or other licensed individuals, did not, in fact, perform any of the challenged procedures.

Section 42-110o (b) provides in relevant part that “[i]n any action brought under [§] 42-110m, if the court finds that the person is wilfully using or has wilfully used a method, act or practice prohibited by [§] 42-110b, the Attorney General . . . may recover, on behalf of the state, a civil penalty of not more than five thousand dollars for each violation. For purposes of this

¹⁹ For the sake of accuracy, the calculations offered by the plaintiff were a few dollars off in favor of the defendant. Because the amount is de minimus, the court accepts the plaintiff’s calculations as is.

section, a wilful violation occurs when the party committing the violation knew or should have known that his conduct was a violation of [§] 42-110b.” This provision “vests the trial court with discretion . . . to impose penalties as it deems appropriate under the circumstances of each case.” *State v. Cardwell*, supra, 246 Conn. 742. “Indeed, [§ 42-110o (b)] does not require that anyone was actually harmed by the unfair or deceptive trade practice. . . . In addition, the section does not require that the defendant have had actual knowledge that the practice was unfair or deceptive.” *Id.*, 745. As previously noted, this court is “guided by the general rule that when a civil statute is silent as to the applicable standard of proof, the preponderance of the evidence standard governs factual determinations required by that statute.” *State v. Davis*, supra, 229 Conn. 295-96.

Where the legislature has not specifically defined the factors that a court is to consider in imposing a civil penalty, courts are often guided by those factors established by related federal law. See, e.g., *Carothers v. Capozziello*, 215 Conn. 82, 103-104, 574 A.2d 1268 (1990) (absent guidance from legislature, court was persuaded by factors considered by federal law, which was cited by parties, in imposing penalties for violations of solid waste management statutes). As stated, “Federal Trade Commission . . . rulings and cases under the Federal Trade Commission Act . . . serve as a lodestar for interpretation of the open-ended language of CUTPA.” *Russell v.*

Dean Witter Reynolds, Inc., supra, 200 Conn. 179; see also General Statutes §§ 42-110b (b), (c). Finally, the burden is generally on the defendant to establish mitigating financial circumstances surrounding the ability to pay a civil penalty. See, e.g., *Keeney v. L & S Construction*, 226 Conn. 205, 216-17, 626 A.2d 1299 (1993) (“[E]specially after flagrant and knowing statutory violations have been shown, the trial court may place the burden of establishing mitigating financial circumstances on the defendants.”)

This court finds by a preponderance of the evidence that the defendants knew or should have known that they used a method, act or practice prohibited by § 42-110b. As an initial matter, it is a class D felony to violate any of the statutes relating to the practice of dentistry. See General Statutes § 20-126. “[E]veryone is presumed to know the law and . . . ignorance of the law excuses no one from criminal sanction.” *State v. Knybel*, 281 Conn. 707, 713, 916 A.2d 816 (2007). Dr. Macko opened his dental practice in 1982, after having been licensed and board certified as a pediatric dentist in Connecticut since 1975. By 2002, the first year of the illegal conduct claimed by the plaintiff in this lawsuit, presumably, Dr. Macko knew it was a criminal offense for an unlicensed dental assistant to engage in the practice of dental hygiene as defined by § 20-126/. Additionally, at least three former employees of the defendants testified at the hearing in damages that the affidavits, executed by them in 2006 and thereafter presented to the

Dental Commission, stating that they did not engage in any unlawful activities, were false. Although Dr. Macko testified that he did not draft the affidavits, unquestionably, they were submitted on his behalf and he knew that they were false when they were filed. Therefore, the responsibility for these false documents rests squarely with him. For these reasons, the court concludes that Dr. Macko knew, or should have known, that it was illegal for unlicensed dental assistants to perform activities reserved for licensed dental hygienists or dentists and that billing DSS for these activities was prohibited by § 42-110b.

Further, the legislature has not defined the factors that this court is to consider in imposing a civil penalty pursuant to § 42-110o (b). The plaintiff directs this court's attention to *U.S. v. J.B. Williams Co., Inc.*, 498 F.2d 414, 438 (2d Cir. 1974), for the factors that this court is to consider. In that case, the Second Circuit Court of Appeals addressed a claim for civil penalties brought under the FTCA, 15 U.S.C. § 45 (I), following the violation of a cease and desist order related to the defendants' advertising of certain drugs. There, the Second Circuit determined that "the size of the penalty should be based on a number of factors including the good or bad faith of the defendants, the injury to the public, and the defendants' ability to pay." *Id.*; accord *Advance Pharmaceutical, Inc. v. U.S.*, 391 F.3d 377, 399 (2d Cir. 2004). The court also considers additional factors referenced by the court in *United States v. Reader's Digest*

Assn., Inc., 662 F.2d 955, 967 (3d Cir. 1981), cert. denied, 455 U.S. 908, 102 S. Ct. 1253, 71 L. Ed. 2d 446 (1982), including the necessity to vindicate the authority of the state and the need to deter future violations. In *Reader's Digest Assn., Inc.*, the Third Circuit Court of Appeals addressed a claim for civil penalties brought under the FTCA, following the violation of a cease and desist order related to the defendant's direct-mail solicitation campaigns. Without guidance from either the legislature or our appellate courts regarding the factors that this court is to consider; see *State v. Cardwell*, supra, 246 Conn. 743 (affirming civil penalty award, but not defining factors to be considered); this court is persuaded that the factors established by the Second Circuit in *J. B. Williams Co., Inc.*, and by the Third Circuit in *Reader's Digest Assn., Inc.*, are relevant to the imposition of a civil penalty in this case.

In addition to the factors identified in the *J.B. Williams Co., Inc.*, and *Reader's Digest Assn., Inc.* cases, the court considers other compelling circumstances rooted in the specific circumstances of this case, which mitigate in favor of the defendants. As a matter of equity, the court cannot ignore the fact during the time period in question (2002-2009), Dr. Macko has been exposed to discipline and sanctions as a result of proceedings brought by the Dental Commission in 2006, DSS in 2009, and the present lawsuit involving CUTPA, brought by the Attorney General's Office on behalf of the Department of Consumer Protection in 2012. In sum, Dr.

Macko has been subjected to several prosecutions by different arms of the state for essentially the same underlying misconduct during overlapping periods of time. Admittedly, other misconduct was also alleged in the Dental Commission and DSS administrative proceedings. Nevertheless, much of the focus of all three proceedings has been on the illegal conduct of the defendants' employees.

On March 9, 2006, the Dental Commission brought charges against Dr. Macko and, after a hearing, sanctioned and penalized Dr. Macko for having unlicensed persons provide treatments that only a licensed dentist or dental hygienist may lawfully perform during the time period April 2002 to April 2003. On February 20, 2008, the Dental Commission ordered that Dr. Macko pay a \$20,000 civil penalty and that his license be placed on probation for two years subject to conditions including that Dr. Macko obtain the services of a licensed dentist to supervise his practice and conduct random reviews of his patient records. Further, Dr. Macko was required to successfully complete courses in record keeping and ethics and engage in certain components of continuing education approved by DPH, all at his own expense.²⁰ DSS initiated an administrative action in the form of a "Notice of Regulatory Violations and Proposed Sanctions

²⁰ A complete list of the sanctions is contained in the plaintiff's exhibit 4, the February 20, 2008 memorandum of decision.

dated October 6, 2009.” In response to that action, on October 19, 2010, through his attorney, Dr. Macko admitted to the allegations and accepted a ten year suspension from the Medicaid program and others overseen by DSS.²¹ Notably, the “Regulatory Violations” prosecuted in the DSS administrative action referenced the same unlawful conduct that is subject of the present CUTPA action.

Moreover, Dr. Macko closed his practice in May 2015 and no longer works as a dentist. There is no record that any patient suffered harm relating to the prophylaxis treatment and fluoride applications performed by unlicensed employees of the defendants.²² Moreover, in the thirty plus years that he was in private practice, Dr. Macko was one of a very few pediatric dentists who served children in the Husky and Medicaid programs. Further, in accordance with an order of the court issued on February 25, 2016, Dr. Macko submitted a financial affidavit (#

²¹ See plaintiff’s exhibits 9 and 10. Dr. Macko’s admission to the regulatory violations proposed by DSS are separate and distinct from the disciplinary proceedings brought by the Dental Commission, which is a disciplinary board under the aegis of the state of Connecticut Department of Health (DPH). The defendant contested the disciplinary proceedings brought by the Dental Commission, but as evidenced by the referenced exhibits, Dr. Macko admitted to the regulatory violations proposed by DSS.

²² The Dental Commission proceedings did include claims of negligence of one patient. However, the allegations did not relate to either prophylaxis treatment or fluoride application. Although Dr. Macko’s standard operating procedure was in contravention of the law, none of the evidence presented suggested that such practices caused physical harm to patients.

136), dated April 8, 2016, the contents of which were not challenged by the plaintiff, which reflects that his home is currently in foreclosure, he has liabilities including a tax lien by the town of Winchester, which amount to \$73,097.73, and has very few assets.²³ Finally, the court is mindful of the substantial amount of restitution sought by the plaintiff and herein awarded by the court. Also, as he is approaching seventy years of age, deterrence as to Dr. Macko himself is not a significant consideration. All of these factors mitigate against a substantial penalty.

On the other hand, the court recognizes that there is a substantial need to vindicate the interests of the plaintiff and the general public as well as the necessity to deter others from engaging in this type of conduct. As previously found by the court, Dr. Macko's testimony at the hearing in damages was evasive, inconsistent and not credible. Also, the drafting and filing of false affidavits with the Dental Commission must be attributed to Dr. Macko, personally. All of this conduct underscores that for most, if not all of the period of time in question, the defendants acted in bad faith.

The plaintiff seeks a penalty of \$20 per violation for prophylaxis treatment (D1120) and

²³ The plaintiff has not contested Dr. Macko's financial affidavit, which was ordered by the court at the conclusion of final argument on February 25, 2016. Further, the court made it known to the plaintiff that Dr. Macko's ability to pay a penalty was a factor of importance to the court. Because the court relies on it in determining an appropriate penalty, it is hereby ordered to be marked the defendant's exhibit N, a full exhibit.

\$14 per violation for fluoride application (D1203), for a total penalty of \$580,000. Based on all the foregoing considerations, the court finds that in combination with the amount of restitution, under all the other circumstances as outlined above, a penalty in the amount of \$5.00 per procedure subject to restitution is a more appropriate penalty per violation.²⁴ The total number of illegal procedures for prophylaxis treatment (D1120), less 70 percent for 2009, is 17,027, and for fluoride application (D1203) is 17,106. As previously determined by the court, a reasonable approximation of these violations is 75 percent of the total number of procedures billed to DSS by the defendants for these services, or 12,300 for prophylaxis treatment (D1120), and 12,359 for fluoride application (D1203), for a grand total of 24,659 violations subject to penalty. The calculation of the penalty to be imposed is therefore, 24,659 x \$5.00, for a total penalty of \$123,295.²⁵

²⁴ The court is mindful that General Statutes § 42-110o (b) provides for a civil penalty of not more than \$5,000 per violation.

²⁵ As noted in the findings of fact, the plaintiff's exhibits 23 and 24 reflect that the average amount paid to the defendants by MCOs for procedure code D1120 from 2002 to 2008, when the program was discontinued, was \$24.60, and the average amount paid for procedure code D1203 during the same period was \$18.92. The CMAP payments to the defendants for the time period 2002 to 2009 averaged \$44.62 for procedure code D1120 and \$28.75 for procedure code D1203.

C

Injunction

Finally, the plaintiff requests that the court enter an order enjoining the defendants, specifically Dr. Macko, from engaging in future violations of CUTPA, future violations of federal and state laws related to the practice of dentistry and provider participation in CMAP, and from submitting illegal reimbursement claims for dental services. Such relief is expressly permitted by § 42-110m (a).

“[T]he issuance of an injunction is the exercise of an extraordinary power which rests in the sound discretion of the trial court and . . . ordinarily the party seeking injunctive relief has the burden of alleging and proving irreparable harm and lack of an adequate legal remedy. . . . An injunction sought pursuant to a statute by the public official charged with the responsibility of enforcing the law, however, is an exceptional case which stands on different footing.” (Citation omitted.) *Johnson v. Murzyn*, 1 Conn. App. 176, 179, 469 A.2d 1227, cert. denied, 192 Conn. 802, 471 A.2d 244 (1984). Where a public official seeks to enjoin a threatened or existing statutory or regulatory violation, the public official need not show irreparable harm or the unavailability of an adequate remedy at law before obtaining an injunction. *Id.*, 180; accord *Conservation Commission v. Price*, 193 Conn. 414, 429-30, 479 A.2d 187 (1984). “The rationale underlying this rule . . . is that the enactment of the statute by implication assumes that

no adequate alternative remedy exists and that the injury was irreparable, that is, the legislation was needed or else it would not have been enacted.” *Johnson v. Murzyn*, supra, 180-81.

Nonetheless, “the granting of injunctive relief, which must be compatible with the equities of the case, rests within the trial court’s sound discretion.” *Id.*, 183.

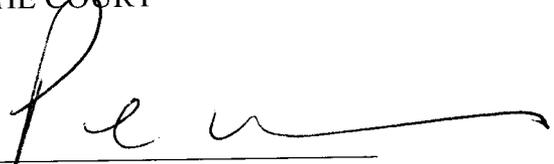
The court concludes that, under all the circumstances of this case, an injunction is not warranted.

IV

CONCLUSION

Accordingly, for all the foregoing reasons, the court hereby enters judgment in favor of the plaintiff and orders restitution in the amount of \$593,751.45, plus as civil penalty in the total amount of \$123,295, for a total judgment of \$717,046.45. The request for an injunction is hereby denied.

BY THE COURT



A. SUSAN PECK, J.T.R.

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Case Name State of Conn. v. Douglas
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Case: HHD-CV12-6031858-S STATE OF CONNECTICUT v. MACKO, DOUGLAS Et Al
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Case Information

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Disposition Information

Disposition Date:
 Disposition:
 Judge or Magistrate:

Party & Appearance Information

Party	No Fee Party	Category
P-01 STATE OF CONNECTICUT		Plaintiff
Attorney: AAG KAREN S HAABESTAD (410650) File Date: 05/18/2012 AG-ANTITRUST UNIT 4TH FL 55 ELM ST PO BOX 120 HARTFORD, CT 061410120		
Attorney: GREGORY KYLE O CONNELL (426801) File Date: 06/21/2012 AG-ANTITRUST UNIT 4TH FL 55 ELM ST PO BOX 120 HARTFORD, CT 061410120		
D-50 DOUGLAS J MACKO		Defendant
Attorney: DIXON SUSAN LAW OFFICE OF (101932) File Date: 06/21/2012 P.O.BOX 386 EAST CANAAN, CT 06024		
D-51 DOUGLAS J. MACKO DMD PC		Defendant
Attorney: DIXON SUSAN LAW OFFICE OF (101932) File Date: 06/21/2012 P.O.BOX 386 EAST CANAAN, CT 06024		

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