

DOCKET NO. FST-CV-15-5014808-S : SUPERIOR COURT  
WILLIAM A. LOMAS : J.D. OF STAMFORD/NORWALK  
v. : AT STAMFORD  
PARTNER WEALTH MANAGEMENT, LLC, :  
etal. : OCTOBER 29, 2015

**PLAINTIFF’S OBJECTIONS AND RESPONSES TO DEFENDANTS’  
REQUEST TO REVISE COMPLAINT**

Pursuant to Practice Book § 10-37, the Plaintiff William A. Lomas (“Lomas”) objects to the Request to Revise dated October 16, 2015, filed by Partner Wealth Management, LLC (“PWM”), Kevin G. Burns, James Pratt-Heaney and William Loftus (the “Individual Defendants” and together with PWM, “the Defendants”).

**A. 1. The portion of the Complaint to be revised:**

**“FIRST COUNT (Breach of Contract)**

33. By their foregoing acts, and their failure to make payment, or at least begin making payments, to Lomas as required by the Agreement, PWM, Burns, Pratt-Heaney and Loftus breached the Agreement.”

**2. The Requested Revision:**

Please include an allegation of the date on which the Plaintiff claims the Defendants were contractually obligated to make payment or begin making payments under the Agreement.

**3. Reasons for the Requested Revision:**

The requested revision is necessary in order for the Defendants to be able to fairly plead to the breach of contract claim asserted in the First Count of the Complaint. It is axiomatic that there are four essential elements of a breach of contract claim. They are “the formation of an agreement, performance by one party, breach of the agreement by the other party and damages.”

*Rosato v. Mascardo*, 82 Conn.App. 396, 411 (2004). In the Complaint, however, while the Plaintiff alleges that the Defendants breached the Agreement, he simultaneously acknowledges that the Agreement permitted payments to be made over time,<sup>1</sup> without ever alleging when he claims the payment was to be made or the permitted payments were to commence under the terms of the contract. The absence of this material fact being alleged in the Complaint violates the rules of pleading set forth in the Practice Book.

Connecticut is a fact-based pleading state. *See, Practice Book* § 10-1, entitled “Fact Pleading:” “Each pleading shall contain a plain and concise statement of the material facts upon which the pleader relies ....” The Plaintiff necessarily has to prove and, therefore, plead that the Defendants breached the Agreement by not making payment or payments on a date or dates certain under the Agreement. If the time for the payment(s) has not commenced, then there can be no breach of the Agreement. The Defendants have a right to know the Plaintiffs belief regarding this material fact and, therefore, the same should be pleaded in the Complaint.

Accordingly, the Plaintiff should revise the First Count of the Complaint to include an allegation of the date on which the Plaintiff claims the Defendants were to make payment or begin making payments under the Agreement.

#### **4. Objections, if any, and reasons therefor:**

Lomas objects to the requested revision on the grounds that he has alleged sufficient facts to state a cause of action in breach of contract, the defendants are seeking evidentiary facts, and it is not necessary for Lomas to allege the date on which the Defendants were contractually obligated to make payment or begin making payments under the Agreement. The test to be applied in a motion for a request to revise is “not whether the pleadings disclose all the adversary

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<sup>1</sup> In paragraph number 29 of the First Count, the Plaintiff alleges that the Defendants had the right to “elect[] under the Agreement to pay the sums due over a five year period ... ,” without alleging any date on which the payments are to commence.

desires to know in aid of his own cause, but whether it discloses the material facts which constitute the cause of action or grounds of defense.” *Kileen v. General Motors Corporation*, 36 Conn. Sup. 347, 348, 421 A.2d 874 (Conn. Super. 1980). *See also, Bank v. Riverview E. Associates*, 2000 WL 1207295 at \*1 (Conn. Super. Ct. Aug. 10, 2000)(Hickey, J.)<sup>2</sup> (“The request to revise may not be used as a substitute for discovery.”) A request to revise “is permissible to obtain information so that a defendant may intelligently plead and prepare his case for trial, **but it is never appropriate where the information sought is merely evidential.**” *Id.*, 349 (emphasis added). Pursuant to *Itzkowitz v. Markow*, 12 Conn. Sup. 68, 69 (1943), a more definite statement should only be ordered with caution and never for reasons which are not substantial. Furthermore, it must be noted that a “Request to Revise does not give the adverse party unfettered editorial rights with respect to the [opposition's pleading]. The [Plaintiff is] entitled, consistent with the Rules of Practice to make [its Pleading as it sees] fit.” The Plaintiff has the right to plead its case as it desires, so long as it complies with the Rules of Practice. *See Wilmot v. McPadden*, 78 Conn. 276, 61 A. 1069 (1905); *First National Bank v. Blakeslee*, 4 Conn. Sup. 354 (1936); *Miller v. Presidents and Directors of Hartford Retreat*, 4 Conn Sup. 382 (1936).

By alleging in the Complaint that (1) Defendants and Lomas entered into the Agreement; (2) Lomas performed all of his obligations under the Agreement; (3) Defendants breached by failing to repurchase Lomas’ membership interest following his withdrawal from PWM pursuant to the express terms of the Agreement; (4) and Lomas suffered damages, Lomas has sufficiently plead the material facts on which he relies in bringing his breach of contract action. Paragraphs 1-38 of the Complaint sufficiently cite to the Agreement, including its repurchase terms and terms regarding membership withdrawal, which govern the date Defendants were required to

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<sup>2</sup> All unreported cases are attached hereto as Exhibit A.

make payment, or at least begin making payments to Lomas, and consequently, the information Defendants seek is as readily available to them as it is to Lomas. Thus, the Agreement speaks for itself and Lomas is not required to plead a specific date upon which the breach occurred. Nothing more is required at this stage. Any other information is merely evidential and, therefore, beyond the permissible scope of a request to revise. Defendants are free to explore the veracity of Lomas' allegations in discovery.

Furthermore, and as Defendants are well aware, the Agreement specifies that payment for repurchase of a withdrawn member's interest is due and payable on one of two different dates: "(1) that date when the Management Committee has determined that the withdrawing Member has substantially completed the transition of his clients to remaining Members, or (2) that date which is one (1) year from the date of notice of such Member's withdrawal...." *See*, Agreement, Art. 8.7(a) (attached to the Complaint as Exhibit A). The latter date is known to both Plaintiff and Defendants -- October 13, 2015. The former date is very much in question in this litigation and is unknown to Plaintiff, even assuming, *arguendo*, that the Management Committee did its duty.

For all of the foregoing reasons, Defendants' Request to Revise must be denied and Lomas' objection thereto sustained.

**B. 1. The portion of the Complaint to be revised:**

**"SECOND COUNT (Breach of Fiduciary Duty)**

40. As co-members and officers of PWM, Burns, Pratt-Heaney and Loftus were in positions of superiority and influence relative to Lomas requiring that they deal with him fairly, in good faith, and in accordance with the terms mutually agreed to among them as set forth in the Agreement."

## **2. The Requested Revision:**

Please include allegations of the facts upon which the Plaintiff relies to conclude that the individual defendants “were in a position of superiority and influence relative to Lomas,” as alleged.

## **3. Reason for the Requested Revision:**

The requested revision is necessary in order for the Defendants to be able to fairly plead to the quoted allegation, which, as it presently stands, is entirely conclusory and without any factual basis or support. Indeed, in paragraphs numbers “1” through “4” of the Complaint, the individual defendants are all expressly identified as equal “25% member[s]” of PWM. It is impossible for the Defendants to know, therefore, on what basis the Plaintiff concludes that the three named individual defendants, who, like the Plaintiff, are identified as 25% members of the limited liability company defendant, are allegedly “in a position of superiority and influence relative to Lomas.” This is a critical fact to know, moreover, because, under Connecticut law, a fiduciary relationship is defined as a relationship that is “characterized by a unique degree of trust and confidence between the parties, one of whom has superior knowledge, skill or expertise and is under a duty to represent the interests of the other.” *Dunham v. Dunham*, 204 Conn. 303, 322 (1987), overruled in part by *Santopietro v. New Haven*, 239 Conn. 207, 213, n. 8 (1996).

The allegation, as pleaded, therefore, violates the rules of pleading set forth in *Practice Book* § 10-1, which mandates that a complaint “contain a plain and concise statement of the material facts upon which the pleader relies ...” There must be some factual basis for the Plaintiff to conclude that Burns, Pratt-Heaney and Loftus were in positons of superiority and influence relative to him, or were under a duty to represent his interests, and the same must be alleged (or the claim should be withdrawn).

Accordingly, the Plaintiff should revise the Second Count of the Complaint to include allegations of the facts upon which the Plaintiff relies to conclude that the individual defendants “were in a position of superiority and influence relative to” him.

**4. Objections, if any, and reasons therefor:**

Lomas objects to this Request to Revise for the reasons set forth in his objection to the Request to Revise the breach of contract claim, which is incorporated by reference as though fully set forth herein. In particular, the allegations of the Second Count, as written, comply with Practice Book § 10-1 and sufficiently apprise the Defendants of the fiduciary duty they owed to Lomas as a co-member and officer of PWM. Moreover, the Defendants ignore the Complaint’s other factual allegations concerning the parties’ relationship. The Court should not consider the Second Count in a vacuum, but rather in the context of the other allegations. *See Hartford Restoration Services, Inc.*, 2007 WL 1976110 at \*3. Lomas has sufficiently pled the material facts on which he relies in bringing his breach of fiduciary duty claim. As a member of a limited liability company, the Defendants, who together held a 75% interest in PWM, owed a fiduciary duty to the other members, including Lomas who held a 25% interest in PWM. *See Clinton v. Aspinwall*, 2014 WL 1190079, \*5 (Conn. Sup. Ct. Feb. 24, 2014)(“members and managers of a limited liability company generally owe a fiduciary duty to other members.”) Therefore, nothing more is required at this stage. Any other information, such as additional details regarding the relationship between the parties, is merely evidential and, therefore, beyond the permissible scope of a request to revise. The Defendants are free to explore the veracity of Lomas’ allegations in discovery.

**C. 1. The portion of the Complaint to be revised:**

**“FIFTH COUNT (Declaratory Judgment)”.**

**2. The Requested Revision:**

Please include an allegation of whether the Plaintiff claims that all persons who have an interest in the subject matter of the requested declaratory judgment that is direct, immediate and adverse to the interests of the Plaintiff or Defendants have been made parties to the action or given reasonable notice thereof. In addition, please append to the Complaint a certificate stating that all such interested persons have been joined as parties to the action or have been given reasonable notice thereof.

**3. Reasons for the Requested Revision:**

Practice Book § 17-56(b) requires that “[a]ll persons who have an interest in the subject matter of the requested declaratory judgment that is direct, immediate and adverse to the interests of the one or more plaintiffs or defendants in the action shall be made parties to the action or shall be given reasonable notice thereof.” Practice Book § 17-56(b) also provides that the “party seeking the declaratory judgment shall append to its complaint or counterclaim a certificate stating that all such interested persons have been joined as parties to the action or have been given reasonable notice thereof.”

The Plaintiff has failed to abide by these mandatory rules of practice. Further, Practice Book § 10-35(4) specifically authorizes a request to revise a complaint to obtain “any ... appropriate correction in an adverse party’s pleading.”

Accordingly, the Fifth Count of the Complaint should be revised to comply with Practice Book § 17-56’s mandatory requirements.

**4. Objections, if any, and reasons therefor:**

Lomas will file an Amended Complaint, appending the requisite certificate, in compliance with this requested revision following the Court's ruling on the objections contained herein.

Dated: October 29, 2015  
Hartford, Connecticut

THE PLAINTIFF,  
WILLIAM A. LOMAS

By: /s/ Thomas J. Rechen  
Thomas J. Rechen  
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**CERTIFICATE OF SERVICE**

This is to certify that on October 29, 2015, a copy of the foregoing was served by e-mail and first class mail, postage prepaid, to all counsel of record as follows:

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/s/Thomas J. Rechen  
Thomas J. Rechen

# **Exhibit A**

2000 WL 1207295

Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK  
COURT RULES BEFORE CITING.

Superior Court of Connecticut.

Summit BANK,

v.

RIVERVIEW EAST ASSOCIATES et al.

No. CV 990173369S. | Aug. 10, 2000.

**ORDER**

HICKEY

\*1 The plaintiff, Summit Bank, filed a request to revise the special defenses, recoupment claims, counterclaims and set-off claims of the defendants, Riverview East Associates, Inc., Jens Hermann, Theodore Kramer, Morton Brod, Ernest Arnow and Joel Singer (the defendants), and the defendants have objected thereto. “The purpose of the request to revise is to secure a statement of the material facts upon which the pleader is based ... The test is not whether the pleading discloses all that the adversary desires to know in aid of his own cause, but whether it discloses the material facts which constitute the cause of action ... Whether a more particular statement is required is largely within the discretion of the court. The request to revise may not be used as a substitute for discovery.” (Citations omitted; internal quotation marks omitted.) *Golino v. MacDonald*, Superior Court, judicial district of New Haven at New Haven, Docket No. 269058, 2 CONN.L.RPTR. 682 (October 30, 1990) (Dorsey, J.).

In its first request to revise, the plaintiff seeks to revise the first special defense to “state whether the alleged Settlement Agreement is in writing, who on behalf of the Plaintiff entered into the Settlement Agreement, and the date the Settlement Agreement was made.” “A request to revise is permissible to obtain information so that a defendant may intelligently plead and prepare his case for trial but it is never appropriate where the information sought is merely evidential ... The defendant is not entitled to know the plaintiff's proof but only what he claims as his cause of action.” (Citation omitted; internal quotation marks omitted.) *Wilder v. Brewer*, Superior Court, judicial district of Hartford

New Britain at Hartford, Docket No. 538573 (September 19, 1994) (Mulcahy, J.) (9 CONN.L.RPTR. 1099). Here, the defendants give the plaintiff sufficient notice that the defendants allege a settlement agreement constitutes a special defense to the action. Accordingly, the court denies the plaintiff's first request to revise.

In its second request to revise, the plaintiff seeks to revise the recoupment claim into a counterclaim on the ground that a recoupment claim does not constitute an independent cause of action and may only be asserted as a counterclaim. “Recoupment is more properly filed as a special defense and not an independent action; it is essentially a defense ... [A] defendant should clearly claim recoupment by special defense, and caption its allegations ‘by way of recoupment only,’ ...” (Citations omitted; internal quotation marks omitted.) *Vile v. Chamberlain*, Superior Court, judicial district of New London at New London, Docket No. 542830 (July 1, 1999) (Martin, J.). Here, the defendants captioned their recoupment defense with “by way of recoupment.” Accordingly, the court denies the plaintiff's second request to revise.

In its third request to revise, the plaintiff seeks to revise the first counterclaim on the same ground it sought to revise the first special defense. Accordingly, the court denies the third request to revise for the reasons set forth in denying the first request to revise.

\*2 With respect to the remaining requests to revise, the plaintiff seeks to revise the first claim for set-off, second claim for set-off, third claim for set-off and forth claim for set-off to state the source of a liquidated obligation on the ground that a claim for set-off must be for a presently due and owing liquidated amount. Here, the defendants sufficiently specified the factual basis for their set-off claims. Moreover, the court will not address whether the set-off claims are legally sufficient, See. *McMaster v. High Ridge Oil Co.*, Superior Court, judicial district of Stamford/Norwalk at Stamford, Docket No. 148154 (January 21, 1997) (D'Andrea, J.) (“Claims regarding the legal sufficiency of the allegations ... are more properly raised in a motion to strike rather than a request to revise”). Accordingly, the court denies the forth, fifth, sixth and seventh requests to revise.

In summary, the court denies the plaintiff's request to revise in its entirety and sustains the defendants' objection thereto.

**All Citations**

Not Reported in A.2d, 2000 WL 1207295

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2007 WL 1976110

Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK  
COURT RULES BEFORE CITING.

Superior Court of Connecticut,  
Judicial District of Tolland.

HARTFORD RESTORATION SERVICES, INC.

v.

12-20 COTTAGE STREET, LLC et al.

No. TTDCV044000508S. | June 14, 2007.

**Attorneys and Law Firms**

Salvatore Petrella, Cromwell, for Hartford Restoration Services Inc.

Reiner Reiner & Bendett PC, Farmington, for Twelve-Twenty Cottage Street LLC, John C. Samulis, Anna Marie Samulis.

**Opinion**

ROBERT F. VACCHELLI, Judge.

\*1 This case is an action for foreclosure of a mechanics lien, with additional counts for breach of contract and violation of the Connecticut Unfair Trade Practices Act (“CUTPA”). The dispute focuses on money allegedly owed to the plaintiff by the defendant 12-20 Cottage Street, LLC for roofing and siding at 12-20 Cottage Street, Rockville, CT. By Amended Complaint dated March 23, 2007, plaintiff added Anna Marie Samulis, wife of the defendant John Samulis, as a party defendant. Anna Marie Samulis (“the defendant”) has filed a Request to Revise on ten points. The plaintiff has filed timely objections to each Request.

Practice Book § 10-35 permits a party to file a Request to Revise to obtain revisions to an adversary's pleadings. Revisions may be sought to obtain a more complete or particular statement of the allegations. *Grimes v. Housing Authority*, 242 Conn. 236, 255 n. 11, 698 A.2d 302 (1997). Whether a more particular statement is required is within the trial court's discretion. *Cervino v. Coratti*, 131 Conn. 518, 520, 41 A.2d 95 (1945). The test is not whether the pleading discloses all that the adversary desires to know in aid of its own cause; rather, the test is whether the pleadings disclose

the material facts which constitute the cause of action or ground of the pleadings disclose the material facts which constitute the cause of action or ground of defense. *Kileen v. General Motors Corp.*, 36 Conn.Sup. 347, 348, 421 A.2d 874 (1980). A Request to Revise is one way to challenge the legal sufficiency of the allegations in the amended complaint. *Arnone v. Conn. Light & Power Co.*, 90 Conn.App. 188, 205, 878 A.2d 874 (2005). Its purpose is not to supply a party with all that might be available in exercise of the discovery procedures:

The purpose of the request to revise is to secure a statement of the material facts upon which the pleader is based ... The test is not whether the pleading discloses all that the adversary desires to know in aid of his own cause, but whether it discloses the material facts which constitute the cause of action ... Whether a more particular statement is required is largely within the discretion of the court. The request to revise may not be used as a substitute for discovery

*Golino v. MacDonald*, Superior Court, Judicial District of New Haven at New Haven, Docket No. 269058, 2 Conn. L. Rptr. 682 (October 30, 1990) (Dorsey, J.) (Citations omitted; internal quotation marks omitted.)

The complaint must contain “... a statement of the facts constituting the cause of action ...” Conn. Gen.Stat. § 52-91. It must contain “... a plain and concise statement of the material facts on which the pleader relies, but not of the evidence by which they are to be proved ...” Practice Book § 10-1. Some facts are necessary; bare conclusions do not suffice. See Stephenson's Conn. Civil Procedure (3rd Ed., 1997) at p. 133 citing *Research Associates, Inc. v. New Haven Redevelopment Agency*, 157 Conn. 587, 248 A.2d 927 (1968). With these principles in mind, the objections are addressed *seriatim*:

**FIRST REQUESTED REVISION**

\*2 Here, the defendant seeks a revision requiring the plaintiff to articulate the factual basis for its allegation in paragraph 7 of the First Count, seeking foreclosure of a mechanics lien. The paragraph states, “The sixth named defendant, Anna Marie Samulis, was a de facto member of

12-20 Cottage Street, LLC and was the wife of defendant John Casimir Samulis during all relevant times in this complaint.” Defendant requests the plaintiff to state the basis for alleging that she was a “de facto member.” Plaintiff objects, arguing that this is an introductory paragraph, the purpose of which is to identify the parties, not to allege facts; and that the facts supporting the allegation that she was a de facto member of the business are set forth in paragraphs 18,<sup>1</sup> 23<sup>2</sup> and 24,<sup>3</sup> describing her alleged involvement in securing financing and creating her obligation on the loans for the business and the subject project, thereby evidencing her status as a critical part of the subject project and de facto member of the limited liability company. The court agrees that these facts, together with the allegations of personal use of funds and personal payments of business expenses alleged in Count Two, paragraphs 29<sup>4</sup> and 30,<sup>5</sup> suffice to satisfy the “plain and concise statement of the material facts” requirement of [Practice Book Sec. 10-1](#). Accordingly, the objection is sustained.

#### ***SECOND REQUESTED REVISION***

On this point, defendant seeks a revision to paragraph 24 of the Second Count, alleging breach of contracts. The paragraph reads, “12-20 Cottage Street, LLC and John Casimir Samulis, and Anna Marie Samulis by virtue of her de facto membership in the LLC and her actions enabling her and her husband, John Casimir Samulis, to obtain funding for the rehabilitation of property at 12-20 Cottage Street in Rockville (Vernon), CT, have breached their written contracts with the plaintiff.” Plaintiff seeks a revision to explain how the defendant is a “de facto member” of the business. Plaintiff objects for the same reasons stated above. The court agrees with the plaintiff, for the same reasons. The objection is sustained.

#### ***THIRD REQUESTED REVISION***

Defendant here challenges a second aspect of paragraph 24 of the Second Count, this time focusing on that part that alleges that she breached her written contracts with plaintiff “by virtue of her ... actions enabling her and her husband ... to obtain funding for the rehabilitation of the property ...” Defendant seeks a revision to specify what is meant by “her actions enabling her and her husband to obtain funding for the rehabilitation of” the subject property. Plaintiff points,

again, to the detail in paragraphs 18, 23 and 24 as supplying a sufficient factual basis for the claim of her personal involvement in the events. The court finds sufficient detail in paragraphs 18, 23, 24, and in paragraphs 29 and 30 discussed above, and therefore agrees with the plaintiff. The objection is sustained.

#### ***FOURTH REQUESTED REVISION***

\*3 Here, defendant argues a third reason for seeking a revision of paragraph 24, contending that it is insufficiently clear as to whether the plaintiff is alleging that the defendant signed a contract. Two contracts for the roofing and siding work in issue in this case are discussed in paragraph 9 of the Amended Complaint, and defendant professes confusion as to whether paragraph 24 involves the contracts alleged in paragraph 9, or another contract altogether. Plaintiff provides an explanation and clarification in its objection. The court agrees with the defendant that paragraph 24 is unclear in this regard. The explanation provided by defendant evidences the need for further factual detail, particularly as to whether it is being alleged that the defendant signed a written contract with the plaintiff. That detail must be in the Amended Complaint to permit defendant to know what kind of claim she is defending against. See *Kileen v. General Motors Corp.*, *supra*, 36 Conn.Sup. at 349. Accordingly, the objection is overruled.

#### ***FIFTH REQUESTED REVISION***

Paragraph 27 of the Second Count alleges that the defendant was “instrumental in providing collateral and signing personal obligations in order to secure a loan for John Casimir Samulis and 12-20 Cottage Street, LLC from defendant Homeowner’s Finance Company, 530 Silas Deane Highway, Wethersfield, Connecticut as denoted in paragraph 18.” Defendant seeks a revision contending that the “instrumental in providing collateral and signing personal obligations” allegation is “vague and open ended.” Plaintiff argues that the allegation is clear and that the paragraph clearly and specifically references the promissory note she executed as alleged in Amended Complaint, para. 18. The court agrees with the plaintiff. The plaintiff need not set out all of its evidence in the Amended Complaint and may incorporate earlier allegations by reference rather than continuously repeating allegations. The objection is sustained.

### ***SIXTH REQUESTED REVISION***

This Request concerns paragraph 30 of the Second Count, which reads as follows: “On or about March 17, 2004, as a result of a small claim court action number SCAH-149929, against Casimir Samulis, incident to his acquisition of the property at 12-20 Cottage Street in Rockville (Vernon) CT and the subsequent attendant financial transactions, Anna Marie Samulis paid the previous owner of the property, Edward Yeomans, by a personal check in the name of Anna Marie Samulis, one thousand three hundred fifty dollars (\$1,350 .00), representing funds paid by Yeomans.” Defendant requests the plaintiff to revise its Amended Complaint to specify what is meant by “subsequent attendant financial transactions” of Mr. Samulis referenced in the paragraph. Plaintiff contends that the reference is clear enough to the financial transactions detailed elsewhere in the Amended Complaint, particularly as to how Mr. Samulis acquired the property in issue (from Edward Yeomans, Amended Complaint, para. 30), how he obtained an assignment of the mortgage on the property to the business (Amended Complaint, para. 17,<sup>6</sup> how he subordinated that mortgage (Amended Complaint, para. 17), and how he obtained labor and materials from numerous contractors (Amended Complaint, paras. 19-22<sup>7</sup>). The court agrees with the plaintiff. The objection is sustained.

### ***SEVENTH REQUESTED REVISION***

\*4 This request concerns paragraph 31 of the Second Count, alleging a CUTPA violation. The paragraph alleges, “The actions of Anna Marie Samulis, as alleged above, denote a unity of interest, ownership and control in 12-20 Cottage Street, LLC with her husband, John Casimir Samulis. The commingling of funds further supports this allegation, when the LLC form of Business organization was used by the defendants to commit fraud or wrongdoing and to avoid personal liability for their actions.” Defendant seeks a revision to specify what is meant by “commingling of funds.” Defendant argues that this allegation is factually too vague to suffice under the pleading standards of [Practice Book Sec. 10-1](#). Plaintiff points to the various financial transactions ascribed to the defendant and chronicled in the Amended Complaint as constituting “commingling of funds,” such as signing the loan agreement (Amended Complaint, paras. 18, 28), paying a small claims judgment for her

husband (Amended Complaint, para 30) and receiving funds intended for the project (Amended Complaint, para. 29). The explanation suffices to demonstrate the sufficiency of the pleadings in this matter and justifies the objection to the Request to Revise. The objection is sustained.

### ***EIGHTH REQUESTED REVISION***

Here, defendant states another reason for seeking a revision to paragraph 31 of the Second Count contending that it is too vague where it alleges that the business “was used by the defendants to commit fraud or wrongdoing and to avoid personal liability for their actions.” Plaintiff objects, but agrees to make revisions, including removal of the words “to commit fraud and wrongdoing.” The Objection is, therefore, overruled as moot

### ***NINTH REQUESTED REVISION***

The defendant's Ninth Request seeks a revision to the entire Second Count insofar as the Count is for Breach of Contract, but the language concerns fraud. Defendant requests that the allegations of fraud be deleted, or in the alternative, that they be re-alleged in a separate count. As with regard to the Eighth Request to Revise, the plaintiff's objection responds that it will be revising this Count to remove the words referring to fraud and wrongdoing. The objection is, therefore, overruled as moot.

### ***TENTH REQUESTED REVISION***

This Request concerns paragraph 33 of the Third Count. The paragraph alleges, “All of the defendants' actions, including those of Anna Marie Samulis, individually and as a de facto member of the LLC, enabling and assisting her husband, John Casimir Samulis, individually and as a member of the LLC, and 12-20 Cottage Street, LLC, to intentionally obtain material and services from legitimate subcontractors, including the plaintiff herein, without fully paying for said materials and services, is immoral, unethical and unscrupulous and constituted an unfair trade or practice within the meaning of [Connecticut General Statutes, Section 42-110b](#).” Defendant complains that the allegations are too vague and seeks clarification of what is meant by “to intentionally obtain materials and services from legitimate subcontractors, including the plaintiff herein, without fully

paying for said materials and services.” Plaintiff counters that the conduct constituting the wrongful conduct is set forth in detail in paragraphs 20, 21 and 22 of the Amended Complaint, chronicling the alleged defaults and plaintiff’s reasoning for holding the defendant equally liable. Those allegations are

sufficient for purposes of [Practice Book § 10-1](#). The objection is sustained.

#### All Citations

Not Reported in A.2d, 2007 WL 1976110

#### Footnotes

- 1 Paragraph 18 references a mortgage deed concerning 12-20 Cottage Street securing a promissory note “from 12-20 Cottage Street, LLC, John Casimir Samulis and Anna Marie Samulis.”
- 2 Paragraph 23 incorporates paragraph 18 into the Second Count for Breach of Contract.
- 3 Paragraph 24 implies that the financing, described in paragraph 18 enabled the wrongful activity alleged in the Amended Complaint and evidences conduct that caused the defendant to become a de facto member of the LLC.
- 4 Paragraph 29 alleges that the defendant personally received \$8,500 from the loan described in paragraph 18 that was intended for the 12-20 Cottage Street property.
- 5 Paragraph 30, in essence, alleges that the defendant paid a small claims judgment related to the 12-20 Cottage Street property, by personal check, after the plaintiff’s mechanics lien was filed.
- 6 Paragraph 17 provides:

The second named defendant, John Casimir Samulis, may claim an interest in the property by virtue of a mortgage in the original principal amount of \$150,000.00 from 12-20 Cottage Street, LLC to Edward Yeomans dated April 20, 2001 and recorded April 20, 2001 in Volume 1304 at Page 219 of the Vernon/Rockville Land Records. The mortgage was assigned to John Casimir Samulis by an assignment dated January 10, 2003, and recorded in Volume 1463 at Page 196 of the Vernon/Rockville Land Records. This mortgage was subordinated to the mortgage of Homeowners Finance Company in Volume 1481 at Page 22 of the Vernon/Rockville Land Records. This mortgage interest will be contested.
- 7 Paragraphs 19-22 describe encumbrances by Accounting Resources, Inc., Charter Painting and Restorations, LLC, Dunn-Rite Construction, Inc., and American Materials Corporation.

2014 WL 1190079

Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK  
COURT RULES BEFORE CITING.Superior Court of Connecticut,  
Judicial District of Hartford.

John B. CLINTON

v.

Michael E. ASPINWALL et al.

No. HHDCV136042758S. | Feb. 24, 2014.

**Attorneys and Law Firms**

Day Pitney LLP, Hartford, for John B. Clinton.

Garrett S. Flynn, Law Office G.S. Flynn, LLC, West  
Hartford, for Michael E. Aspinwall et al.**Opinion**

PECK, J.

\*1 On June 18, 2013, the plaintiff, John B. Clinton, filed a three-count complaint against the defendants, Michael E. Aspinwall, Steven F. Piaker, and David W. Young. In support of his complaint the plaintiff alleges the following facts. CCP Equity Partners, LLC (CCP) is a limited liability company organized in accordance with the Delaware Limited Liability Company Act. CCP provides management services to, and serves as general partner of, certain private equity funds. CCP is registered to do business in the State of Connecticut and has its principal place of business in Hartford, Connecticut. The defendants are members, and the plaintiff is a former member, of CCP. From the formation of CCP in 2003 until on or about March 11, 2008, Clinton was the Managing Partner of CCP.

On or about December 29, 2003, the members of CCP entered into the Amended and Restated Limited Liability Company Agreement of CCP Fund Managers, LLC (the LLC Agreement). At the time the LLC Agreement was entered into, the members of CCP were Clinton, Aspinwall, Piaker, Young, Preston Kavanagh, and Gerard Vecchio.<sup>1</sup> The LLC Agreement provided that there would be established on the books of CCP a capital account for each member that would consist of such member's initial capital contribution to CCP, subject to certain identified increases and decreases. The LLC

Agreement provided for the possible creation of "a capital reserve for future expenses of the Company." On or about August 11, 2005, the Executive Committee of CCP created a capital reserve of \$3,000,000. In 2006, the members of CCP decided not to raise investor capital to create another private equity fund, and they expected substantially all the operations of CCP to close and substantially all the portfolio companies to be liquidated by the end of 2012.

On or about September 1, 2006, the members of CCP unanimously amended the LLC agreement (2006 amendments).<sup>2</sup> On or around September 1, 2006, the defendants represented to the plaintiff that the 2006 amendments would lock in all of the members' economics, such that no member's distributions, allocations, or Percentage Interest could be changed without the unanimous agreement of all members. On or about March 2, 2008, the plaintiff and Kavanagh proposed to the defendants that a capital reserve was not needed and should be eliminated immediately. On or about March 11, 2008, notwithstanding their representation to the plaintiff that the 2006 amendments would lock in the members' economics, the defendants, collectively controlling 61 percent of the Percentage Interests in CCP, voted (over the objections of the plaintiff and Kavanagh) to amend the LLC Agreement (2008 amendments).<sup>3</sup> The 2008 amendments were made effective retroactively to January 1, 2007, materially changing the individual members' economics for more than fourteen months prior and forever thereafter. The 2008 amendments reduced the plaintiff's and Kavanagh's Percentage Interests and the balances of their capital accounts, while increasing the Percentage Interests of the defendants and the balances of their capital accounts.

\*2 On or about September 8, 2008, Kavanagh filed a complaint in the Connecticut Superior Court, against CCP, Aspinwall, Piaker, and Young (the Kavanagh Lawsuit). On or about October 31, 2008, at a meeting of the members of CCP, CCP passed a resolution by a three-to-two vote removing Kavanagh as a member. At this same meeting, the plaintiff challenged the necessity of a \$3,000,000 capital reserve in the event that Kavanagh's lawsuit were to be settled. Furthermore, the plaintiff stated that a \$3,000,000 capital reserve was inappropriate at that time because CCP was not incurring any significant ongoing expenses, and CCP's only outstanding litigation was Kavanagh's lawsuit. The defendants took the position that a \$3,000,000 capital reserve was necessitated at that time by the course that Kavanagh's lawsuit might take, and the possibility of legal action by the plaintiff.

On or about February 26, 2013, the defendants voted to remove the plaintiff as a member of CCP. The LLC Agreement provides that the removal of a member of CCP is a “Repurchase Event” and states that “upon a Repurchase Event with respect to any Member, CCP shall be obligated to repurchase, and such Member shall be obligated to sell, as promptly as reasonably practicable following the date of such Repurchase Event, all of the Interests held by such member as of the date of the Repurchase Event.” The LLC Agreement further provides that when a member's interests are repurchased pursuant to this provision, the member “shall receive, as consideration for the Interests, an amount equal to the aggregate amount in the Capital Account of such ... Member with respect to such Interests as of the date of the Repurchase Event, less such ... Member's pro rata share (based on his Percentage Interest) of the then current capital reserve for future expenses established by the Board of Managers.” On or about February 28, 2013, the balance of the plaintiff's capital account was \$939,918.33. At that time, CCP was in active liquidation and wind down and none of the members of CCP were working full time on the operations of CCP.

On or about March 15, 2013, CCP's attorney sent the plaintiff a “Reconciliation of the John Clinton Capital Account,” which stated that the total consideration that the plaintiff would receive for the repurchase of his interests in CCP was a cash payment of \$16,447.21 and a five-year promissory note in the amount of \$151,934.66. This reconciliation indicated that the total consideration the plaintiff would receive for the repurchase of his interests in CCP had been reduced by \$750,000 to account for one-fourth of CCP's \$3,000,000 capital reserve. On or about March 28, 2013, the plaintiff's attorney asked CCP's attorney to explain the basis for a \$3,000,000 capital reserve in light of CCP's current operating status, but CCP's attorney did not provide this explanation. Furthermore, on or about March 28, 2013, the plaintiff's attorney informed CCP's attorney that the plaintiff was prepared to accept \$600,000 in full satisfaction of his interest in CCP. On or about May 6, 2013, CCP's attorney sent the plaintiff a check in the amount of \$16,447.21 and a promissory note in the amount of \$151,934.66.<sup>4</sup>

\*3 In the second amended complaint (the operative complaint), the plaintiff alleges that the defendants breached their fiduciary duties under Connecticut law, breached the implied covenant of good faith and fair dealing arising under Delaware law, and violated the Connecticut Unfair Trade

Practices Act, [General Statutes § 42-110b\(a\) \(CUTPA\)](#). In his prayer for relief, the plaintiff seeks compensatory damages, consequential damages, punitive damages, and attorneys fees and costs.

### MOTION TO STRIKE

The defendants move to strike the first count, the claim for breach of fiduciary duty, on the grounds that the plaintiff's allegations are conclusory, contradicted by the facts actually alleged in the complaint, and incorrect as a matter of law. Next, the defendants move to strike the second count, the claim for breach of the implied covenant of good faith and fair dealing, because it seeks to impose obligations on the defendants that contradict the express terms of the LLC Agreement. Further, the defendants move to strike the third count, the CUTPA claim, on the grounds that the plaintiff fails to specify the alleged deceptive conduct, improperly seeks to apply CUTPA to an intracorporate dispute, and fails to plead facts to justify the tolling of CUTPA's limitations period. Finally, the defendants move to strike the plaintiff's claims for attorneys fees and punitive damages in counts one and two because the statutes cited in these counts do not authorize the award of such damages or fees. The matter has been fully briefed and was argued at the short calendar on October 28, 2013.

“The purpose of a motion to strike is to contest ... the legal sufficiency of the allegations of any complaint ... to state a claim upon which relief can be granted.” (Internal quotation marks omitted.) [Fort Trumbull Conservancy, LLC v. Alves](#), 262 Conn. 480, 498, 815 A.2d 1188 (2003). “The role of the trial court in ruling on a motion to strike is to examine the [complaint], construed in favor of the [plaintiff], to determine whether the [pleading party has] stated a legally sufficient cause of action.” (Internal quotation marks omitted.) [Coe v. Board of Education](#), 301 Conn. 112, 117, 19 A.3d 640 (2011). “In ruling on a motion to strike, the court is limited to the facts alleged in the complaint.” (Internal quotation marks omitted.) [Faulkner v. United Technologies Corp.](#), 240 Conn. 576, 580, 693 A.2d 293 (1997). “If any facts provable under the express and implied allegations in the plaintiff's complaint support a cause of action ... the complaint is not vulnerable to a motion to strike.” [Bouchard v. People's Bank](#), 219 Conn. 465, 471, 594 A.2d 1 (1991); see also [Sturm v. Harb Development, LLC](#), 298 Conn. 124, 130, 2 A.3d 859 (2010) (motion must be denied where provable facts support a cause of action). “A motion to strike is properly granted if the complaint

alleges mere conclusions of law that are unsupported by the facts alleged.” (Internal quotation marks omitted.) *Santorso v. Bristol Hospital*, 308 Conn. 338, 349, 63 A.3d 940 (2013).

## I

### BREACH OF FIDUCIARY DUTY

\*4 The defendants argue in their memorandum of law that CCP is organized under Delaware law and, therefore, the alleged fiduciary duties of the defendants must be governed by Delaware law rather than Connecticut statutory or common law. The defendants maintain that CCP is organized under Delaware law and that the Connecticut Limited Liability Act, specifically *General Statutes § 34-141*, cannot establish the defendants' alleged fiduciary duty. Further, the defendants contend that Connecticut common law does not govern their alleged fiduciary duties because “Connecticut courts have long relied on an entity's state of incorporation to determine rights among the entity's members.” The plaintiff counters that it does not matter which state's law applies because the plaintiff has alleged sufficient facts to state a claim for breach of fiduciary duty under either Connecticut or Delaware law. The plaintiff maintains that under either Connecticut or Delaware law, the members of a limited liability company owe “default fiduciary duties” to one another and, therefore, the court need not conduct any choice-of-law analysis in adjudicating this motion. Further, the plaintiff contends that the defendants have not met their burden for a motion to strike, as they have merely argued for the applicability of Delaware law without arguing that the plaintiff could not state a claim under that law. The defendants respond that the plaintiff's reliance on Delaware law contradicts his express reference to Connecticut law as to the first count of the second amended complaint, that the court should not consider the plaintiff's argument concerning Delaware law as the complaint does not allege it, and, that the plaintiff has failed to state a claim for breach of fiduciary duty under Connecticut law because the defendants have no fiduciary duty to the plaintiff under Connecticut law.<sup>5</sup>

“[A]s a general rule, Connecticut courts have refused to address choice of law issues in a motion to strike because it is premature to conduct the requisite searching case-by-case inquiry into the significance of the interests that the law of competing jurisdictions may assert in [the] particular controversy ... Where a choice of law issue is present on

a motion to strike it is unusual to determine the issue at this procedural stage.” *Doe No. 2 v. Norwich Roman Catholic Diocesan Corp.*, Superior Court, judicial district of Hartford, Complex Litigation Docket, Docket No X01-CV-12-5036425-S (December 2, 2013, Dubay, J.) [57 Conn. L. Rptr. 342].

Although this court acknowledges the foregoing principle, in the interest of facilitating a resolution of the pending motion to strike and subsequent pleading issues that may arise in this case, it is worthwhile to consider the applicable rules for the limited purpose of determining whether a choice of law analysis will be necessary. “In determining the governing law, a forum applies its own conflict-of-law rules ...” *Gibson v. Fullin*, 172 Conn. 407, 411–12, 374 A.2d 1061 (1977). In applying those rules, “[t]he threshold choice of law issue in Connecticut, as it is elsewhere, is whether there is an outcome determinative conflict between applicable laws of the states with a potential interest in the case. If not, there is no need to perform a choice of law analysis, and the law common to the jurisdiction should be applied.” (Internal quotation marks omitted.) *Cohen v. Roll-A-Cover, LLC*, 131 Conn.App. 443, 465–66, 27 A.3d 1, cert. denied, 303 Conn. 915, 33 A.3d 739 (2011). “It is only after a determination is made that there is indeed an actual conflict between the laws of the particular jurisdictions that the interests of the respective jurisdictions are analyzed.” (Internal quotation marks omitted.) *Haymond v. Statewide Grievance Committee*, 45 Conn.Supp. 481, 489, 723 A.2d 821 (1997) (45 Conn.Supp. 481, 723 A.2d 821, 21 Conn. L. Rptr. 123, 125–26), aff'd, 247 Conn. 436, 723 A.2d 808 (1999).

\*5 In Connecticut, “[i]t is axiomatic that a party cannot breach a fiduciary duty to another party unless a fiduciary relationship exists between them.” (Internal quotation marks omitted.) *Sherwood v. Danbury Hospital*, 278 Conn. 163, 195, 896 A.2d 777 (2006). “[A] fiduciary or confidential relationship is characterized by a unique degree of trust and confidence between the parties, one of whom has superior knowledge, skill or expertise and is under a duty to represent the interests of the other ... The superior position of the fiduciary or dominant party affords him great opportunity for abuse of the confidence reposed in him ... [The Supreme Court has] not, however, defined that relationship in precise detail and in such a manner as to exclude new situations, choosing instead to leave the bars down for situations in which there is a justifiable trust confided on one side and a resulting superiority and influence on the other.” (Citation omitted, internal quotation marks omitted.) *Falls Church*

*Group, Ltd. v. Tyler, Cooper, & Alcorn, LLP*, 281 Conn. 84, 108, 912 A.2d 1019 (2007). Connecticut courts have interpreted [General Statutes § 34–141](#) and concluded that “[m]embers and managers of a limited liability company generally owe a fiduciary duty to other members.” *Zanker Group, LLC v. Summerville at Litchfield Hills, LLC*, Superior Court, judicial district of New Haven, Docket No. CV–04–4015238–S (October 24, 2005, Munro, J.). “[L]ike a partner in a partnership, a member of a limited liability company has a fiduciary duty to the other members.” (Citation omitted.) *Yavarone v. Jim Moroni's Oil Service, LLC*, Superior Court, judicial district of Middlesex, Docket No. CV–03–0102318–S (February 18, 2005, Aurigemma, J.).

Under Delaware law, “[t]he elements of breach of fiduciary duty ... are (i) *that a fiduciary duty exists*, and (ii) *that a fiduciary breached that duty*.” (Emphasis added.) *Heller v. Kiernan*, 2002 WL 385545, at \*3 (Del.Ch. February 27, 2002), *aff'd*, 806 A.2d 164 (Del.2002). “Numerous Court of Chancery decisions hold that the managers of an LLC owe fiduciary duties.” *Feeley v. NHAOCG, LLC*, 62 A.3d 649, 660 (Del.Ch.2012). These cases have interpreted Delaware’s Limited Liability Company Act (LLC Act)<sup>6</sup> and held that: “Section 18–1101(c) does not specify a statutory default provision as do other sections of the LLC Act, ... rather, it implies that some default fiduciary duties may exist at law or in equity, inviting Delaware courts to make an important policy decision and determine the default level of those duties.” (Footnote omitted, internal quotation marks omitted.) *Kelly v. Blum*, 2010 WL 629850, at \*10 (Del.Ch. February 24, 2010). “Accepting that invitation, Delaware cases interpreting Section 18–1101(c) have concluded that, despite the wide latitude of freedom of contract afforded to contracting parties in the LLC context, in the absence of a contrary provision in the LLC agreement, LLC managers and members owe traditional fiduciary duties of loyalty and care to each other and to the company ... Thus, unless the LLC agreement in a manager-managed LLC explicitly expands, restricts, or eliminates traditional fiduciary duties, managers owe those duties to the LLC and its members and controlling members owe those duties to minority members.” (Footnote omitted; internal quotation marks omitted.) *Id.*<sup>7</sup> “Until the Delaware Supreme Court speaks, the long line of Court of Chancery precedents ... provide persuasive reasons to apply fiduciary duties by default to the manager of a Delaware LLC.” *Feeley v. NHAOCG, LLC*, *supra*, at 62 A.3d 663.

\*6 In the present case, the plaintiff alleges that the defendants owed fiduciary duties to the plaintiff under

[General Statutes § 34–141](#) and Connecticut common law, and that they breached these fiduciary duties by maintaining a \$3,000,000 capital reserve as of the date of the plaintiff’s Repurchase Event, when they knew that such a reserve was unreasonably large and unnecessary. The defendants argue in the present motion that CCP is organized under Delaware law and, therefore, the alleged existence of the defendants’ fiduciary duties must be governed by Delaware law rather than Connecticut statutory or common law. Although the defendants argue that the analysis of the plaintiff’s claim must be limited to Connecticut law, the court cannot ignore Delaware law entirely because, as noted by the defendants, “CCP’s Delaware Operating Agreement” is appended to the complaint as Exhibit A, and specifically requires that it be interpreted according to Delaware law.<sup>8</sup> In ruling on a motion to strike, the role of the trial court is to view the complaint, construed in a light most favorable to the plaintiff, to determine whether it states a legally sufficient cause of action. See *Coe v. Board of Education*, *supra*, 301 Conn. at 117. “A complaint includes all exhibits attached thereto.” (Internal quotation marks omitted.) *Tracy v. New Milford Public Schools*, 101 Conn.App. 560, 566, 922 A.2d 280, cert. denied, 284 Conn. 910, 931 A.2d 935 (2007). As stated above, both Connecticut and Delaware recognize a fiduciary duty between members and managers of a limited liability company. The plaintiff alleges in his complaint that the defendants are members of the limited liability company and also served as managers pursuant to the LLC Agreement. The plaintiff further alleges that the defendants breached the fiduciary duties they owed to the plaintiff and that this breach caused the plaintiff to suffer damages. Under either Connecticut or Delaware law, the plaintiff has alleged sufficient facts to state a cause of action for breach of fiduciary duty. Therefore, the defendants’ motion to strike count one of the second amended complaint must be denied.

## II

### IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING

In support of their motion to strike the second count of the complaint, the defendants argue that the plaintiff’s claim for breach of the implied covenant of good faith and fair dealing must fail because it seeks to impose obligations on the defendants that contradict the express terms of the LLC agreement. The defendants maintain that due to the freedom

of contract that lies at the heart of the Delaware LLC, a court cannot make “value judgments about whether a contractual provision in an LLC Operating Agreement is reasonable, wise, or just.” The plaintiff counters that, notwithstanding freedom of contract, Delaware law makes it clear that the implied covenant of good faith and fair dealing cannot be eliminated in an LLC’s operating agreement. Furthermore, the plaintiff argues that its claim for breach of the implied covenant is a means of filling a gap in the LLC Agreement rather than an express contradiction. In their reply, the defendants assert that the plaintiff’s claim for breach of the implied covenant of good faith and fair dealing must fail because it does not plead facts required under Delaware law; specifically, that no party to the contract anticipated the development or contractual gap that the implied covenant seeks to fill.

\*7 Unlike the choice of law issue in the claim for breach of fiduciary duty, there is no dispute that the plaintiff’s claim of breach of the implied covenant of good faith and fair dealing is brought under Delaware Law. Under Delaware law, “[t]he implied covenant [of good faith and fair dealing] attaches to every contract by operation of law, ... and it cannot be eliminated from an LLC agreement”<sup>9</sup> (Footnote omitted.) *Dawson v. Pittco Capital Partners, L.P.*, 2012 WL 1564805, at \*24 (Del.Ch. April 30, 2012). “[T]he implied covenant requires a party in a contractual relationship to refrain from arbitrary or unreasonable conduct which has the effect of preventing the other party to the contract from receiving the fruits of the bargain.” (Internal quotation marks omitted.) *Dunlap v. State Farm Fire & Cas. Co.*, 878 A.2d 434, 442 (Del.2005) “Even where a contract creates completely discretionary rights, such rights must still be exercised in good faith.” *Dawson v. Pittco Capital Partners, L.P.*, *supra*, at 2012 WL 1564805, \*24. “The implied covenant of good faith and fair dealing involves a cautious enterprise, inferring contractual terms to handle developments or contractual gaps that the asserting party pleads neither party anticipated ... [O]ne generally cannot base a claim for breach of the implied covenant on conduct authorized by the agreement ... We will only imply contract terms when the party asserting the implied covenant proves that the other party has acted arbitrarily or unreasonably, thereby frustrating the fruits of the bargain that the asserting party reasonably expected ... When conducting this analysis, we must assess the parties’ reasonable expectations at the time of contracting ... and not rewrite the contract to appease a party who later wishes to rewrite a contract he now believes to have been a bad deal. Parties have a right to enter into good and bad contracts,

the law enforces both.” (Footnotes omitted, internal quotation marks omitted.) *Nemec v. Shrader*, 991 A.2d 1120, 1125–26 (Del.2010). “In order to plead successfully a breach of an implied covenant of good faith and fair dealing, the plaintiff must allege a specific implied contractual obligation, a breach of that obligation by the defendant, and resulting damage to the plaintiff ... Since a court can only imply a contractual obligation when the express terms of the contract indicate that the parties would have agreed to the obligation had they negotiated the issue, ... the plaintiff must advance provisions of the agreement that support this finding in order to allege sufficiently a specific implied contractual obligation.” (Footnotes omitted.) *Fitzgerald v. Cantor*, 1998 WL 842316, at \*1 (Del.Ch. November 10, 1998). Furthermore, “[b]ecause one is holding someone responsible for an *implied* duty, it is critical that the standard [for breach of the implied covenant of good faith and fair dealing] be rigorous, that the obligation breached be clearly implied, and that the party act with an improper state of mind, that is, bad faith.” (Emphasis in original) *Liberty Property L.P. v. 25 Massachusetts Ave. Property, LLC*, 2009 WL 224904, at \*5 (Del.Ch. January 22, 2009), *aff’d*, 970 A.2d 258 (Del.2009) “A party does not act in bad faith by relying on contract provisions for which that party bargained where doing so simply limits advantages to another party.” *Nemec v. Shrader*, *supra*, at 991 A.2d 1128.

\*8 In the present case, the plaintiff argues that “Section 10.3(b) of the LLC agreement includes an implied contractual obligation on the part of each member of CCP not to maintain an unreasonably large company capital reserve at the time of a member’s Repurchase Event.” The plaintiff alleges that the defendants breached this obligation by maintaining a \$3,000,000 capital reserve at the time of the plaintiff’s Repurchase Event and that as a result, the plaintiff suffered damages. As stated above, it is critical that the contractual obligation that was allegedly breached be clearly implied. *Liberty Property L.P. v. 25 Massachusetts Ave. Property LLC*, *supra*, at 2009 WL 224904, \*5. In his complaint, the plaintiff has not alleged sufficient facts to demonstrate that the obligation “not to maintain an unreasonably large company capital reserve” was clearly implied in Section 10.3(b) of the LLC Agreement. The previous section, Section 10.3(a), explains that “upon a Repurchase Event with respect to any Member, the Company shall be obligated to repurchase ... all of the Interests held by the Repurchase Member as of the date of the Repurchase Event.” The section at issue, Section 10.3(b), contains the necessary details regarding calculating the specific amount that such Repurchase Member

will receive when CCP repurchases his or her interests. The capital reserve is mentioned in this section as part of such calculation and is referred to as “the then-current capital reserve for future expenses established by the Board of Managers.” This specific language comes from Section 3.2(a) (xiii) of the LLC Agreement, which establishes the powers of CCP’s managers. Because Section 10.3(b) is quoting from the powers established in Section 3.2(a)(xiii) and makes a mere reference to the capital reserve, it cannot be clearly implied from this language that there was a contractual obligation not to maintain an unreasonably large capital reserve at the time of a Repurchase Event. Accordingly, the defendants’ motion to strike count two of the second amended complaint must be granted.

### III

#### CUTPA

*General Statutes § 42–110b(a)* provides: “No person shall engage in unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce.” “The purpose of CUTPA is to protect the public from unfair practices in the conduct of any trade or commerce.” (Internal quotation marks omitted.) *Sovereign Bank v. Licata*, 116 Conn.App. 483, 493, 977 A.2d 228, cert. granted, 293 Conn. 935, 981 A.2d 1080 (2009). “In determining whether certain acts constitute a violation of this act, [the Supreme Court has] 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 businessmen) ].” (Internal quotation marks omitted.) *Williams Ford, Inc. v. Hartford Courant Co.*, 232 Conn. 559, 591, 657 A.2d 212 (1995). “[A]ll 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 ... Furthermore, a party need not prove an intent to deceive to prevail under CUTPA.” (Internal quotation

marks omitted.) *Associated Investment Co. Ltd. Partnership v. Williams Associates IV*, 230 Conn. 148, 156, 645 A.2d 505 (1994).

\*9 The plaintiff alleges in the third count of his complaint that the defendants are persons who engaged in trade and commerce in Connecticut and that their conduct was unfair within the meaning of CUTPA. The plaintiff argues that the defendants’ conduct was unfair because it (a) offends public policy, (b) was immoral, unethical, oppressive, and unscrupulous, and (c) caused substantial injury. Furthermore, the plaintiff alleges that he suffered damages as a result of the defendants’ violations of CUTPA. As stated above, “[a] motion to strike is properly granted if the complaint alleges mere conclusions of law that are unsupported by the facts alleged.” (Internal quotation marks omitted.) *Santorso v. Bristol Hospital, supra*, 308 Conn. at 349. In the third count, the plaintiff has alleged the elements of a CUTPA claim without providing a factual basis to support these contentions. Because the plaintiff has alleged mere conclusions of law, the motion to strike the CUTPA claim must be granted.

### IV

#### ATTORNEYS FEES AND PUNITIVE DAMAGES

Finally, the defendants move to strike the plaintiff’s demand for punitive damages and attorneys fees as to counts one and two.<sup>10</sup> “[T]he common law rule in Connecticut, also known as the American Rule, is that attorneys fees and ordinary expenses and burdens of litigation are not allowed to the successful party absent a contractual or statutory exception.” (Internal quotation marks omitted.) *Berzins v. Berzins*, 306 Conn. 651, 657, 51 A.3d 941 (2012). “Where a contract provides for the payment of attorneys fees by a defaulting party, those fees are recoverable solely as a contract right.” (Internal quotation marks omitted.) *N.E. Leasing, LLC v. Paoletta*, 89 Conn.App. 766, 778, 877 A.2d 840, cert. denied, 275 Conn. 921, 883 A.2d 1245 (2005). “Under the American Rule and Delaware law, litigants are normally responsible for paying their own litigation costs ... An exception to this rule is found in contract litigation that invokes a fee shifting provision.” (Footnote omitted.) *Mahani v. Edix Media Group, Inc.*, 935 A.2d 242, 245 (Del.2007).

Section 15.7 of the LLC Agreement provides: “In the event of a breach by any party to this Agreement of its obligations

under this Agreement, any party injured by such breach, in addition to being entitled to exercise all rights granted by law, including recovery of damages and costs (*including reasonable attorneys fees* ) ...” (Emphasis added.) In count one of his complaint, the plaintiff alleges that the fiduciary duty breached by the defendants is explicitly in the LLC by referring to Section 3.4, entitled “Duty of Care.” Because the plaintiff alleges a violation of Section 3.4 and, therefore, an entitlement to attorneys fees under Section 15.7, he has sufficiently alleged facts to establish a contractual exception to the American Rule under either Connecticut or Delaware law.

In Connecticut, “in order to award punitive damages, evidence must reveal a reckless indifference to the rights of others or an intentional and wanton violation of those rights.” *Franc v. Bethel Holding Co.*, 73 Conn.App. 114, 137, 807 A.2d 519, cert. granted, 262 Conn. 923, 812 A.3d 864 (2002) “Under Delaware law, [p]unitive damages are recoverable where the defendant’s conduct exhibits a wanton or wilful disregard for the rights of [the] plaintiff.” (Internal

quotation marks omitted.) *Porter v. Turner*, 954 A.2d 308, 312 (Del.2008). The plaintiff has not sufficiently alleged that the defendants had a reckless indifference to his rights or that they engaged in wanton or wilful misconduct. Therefore, the motion to strike the plaintiff’s claim for an award of punitive damages as to the first count must be granted.

## CONCLUSION

\*10 Accordingly, for all the foregoing reasons, the motion to strike the first count of the second amended complaint and the claim for an award of attorneys fees in connection with that count is hereby denied and the motion to strike the second and third counts and the claim of punitive damages is hereby granted.

## All Citations

Not Reported in A.3d, 2014 WL 1190079, 57 Conn. L. Rptr. 710

## Footnotes

- 1 On or about June 30, 2004, Vecchio ceased to be a member of CCP.
- 2 The substance of this amendment is not relevant to the present motion. The 2006 amendments altered how distributions would be made to each member.
- 3 The substance of these amendments is also not relevant to the present motion.
- 4 The plaintiff contends, upon information and belief, that the Kavanagh Lawsuit was settled for an undisclosed sum in or around late April 2013 or early May 2013, but before May 6, 2013. On or about May 8, 2013, the Kavanagh Lawsuit was withdrawn.
- 5 In both their memorandum in support of the motion to strike and in their reply to the plaintiff’s opposition memorandum, the defendants seek to reserve their right to challenge the sufficiency of any prospective claim of breach of fiduciary duty that the plaintiff seeks to make under Delaware law. As noted, in the body of this memorandum, although arguably not necessary for the resolution of the pending motion to strike, the court finds that the allegations made by the plaintiff as to the first count would also sufficiently state a claim of breach of fiduciary duty against the defendants under Delaware law.
- 6 Delaware’s LLC Act includes [DEL. CODE ANN. tit. 6, § 18–101](#) through [§ 18–1109](#).
- 7 A Second Circuit District Court case distinguished *Kelly v. Blum* and specifically held that “minority members of an LLC do not owe fiduciary duties to other members.” *Marino v. Grupo Mundial Tenedora, S.A.*, 810 F.Sup.2d 601, 608 (S.D.N.Y.2011). This distinction has no bearing on the present motion, as the defendants served on the “Board of Managers” pursuant to Article III of the LLC Agreement and were, therefore, managers of the LLC rather than minority members.
- 8 See docket entry # 101: “15.5 Governing Law. This Agreement shall be construed in accordance with the laws of the State of Delaware, without giving effect to the principles of conflicts of law thereof that would cause the application of the laws of any jurisdiction other than the State of Delaware.”
- 9 [DEL CODE ANN tit 6, § 18–1101\(c\)](#) (2013) provides: “To the extent that, at law or in equity, a member or manager or other person has duties (including fiduciary duties) to a limited liability company or to another member or manager or to another person that is a party to or is otherwise bound by a limited liability company agreement, the member’s or manager’s or other person’s duties may be expanded or restricted or eliminated by provisions in the limited liability company agreement, *provided, that the limited liability company agreement may not eliminate the implied contractual covenant of good faith and fair dealing.*” (Emphasis added.)

- 10 Because the motion to strike the second count has been granted, the plaintiff's claim for attorneys fees and punitive damages as to that count is also necessarily granted.

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