

DOCKET NO. FST-CV-155014808-S)	SUPERIOR COURT
)	
WILLIAM A. LOMAS)	J.D. OF STAMFORD/NORWALK
)	
v.)	AT STAMFORD
)	
PARTNER WEALTH MANAGEMENT, LLC,)	
KEVIN G. BURNS, JAMES PRATT-HEANEY,)	
And WILLIAM P. LOFTUS,)	JANUARY 29, 2016

DEFENDANTS' MOTION TO STRIKE PLAINTIFF'S AMENDED COMPLAINT

Pursuant to §10-39 of the Connecticut Rules of Practice, Defendants Partner Wealth Management, LLC (“PWM”), Kevin G. Burns (“Burns”), James Pratt-Heaney (“Pratt-Heaney”) and William P. Loftus (“Loftus”) (together with PWM, the “Defendants”), by and through their undersigned counsel, Berchem, Moses & Devlin, P.C. and Mintz, Levin, Cohn, Ferris, Glovsky & Popeo, P.C., move to strike the Second (Breach of Fiduciary Duty), Third (Willful and Wanton Misconduct), Fourth (Oppression), Fifth (Common Law Action for Accounting) and Sixth (Statutory Action for Accounting) Counts of the Amended Complaint of Plaintiff William A. Lomas (“Lomas”). The aforementioned counts are legally insufficient for the following reasons:

- *Second Count:* The Second Count fails to state a claim for breach of fiduciary duty for two reasons. First, our courts have held as a matter of law that a member of a Connecticut Limited Liability Company does not owe a fiduciary duty to its other members. In addition, the Second Count fails to set forth a legally sufficient cause of action in that Lomas does not allege facts that would establish that a fiduciary duty was owed by Burns, Pratt-Heaney and Loftus to Lomas because

Burns, Pratt-Heaney and Loftus had superior knowledge, skill or expertise as compared to Lomas, that Lomas was unable to protect his interests or that he placed his trust and confidence in Burns, Pratt-Heaney or Loftus.

- *Third Count:* The Third Count fails to set forth a legally sufficient cause of action for willful and wanton misconduct in that Lomas fails to allege that any of the Defendants acted with the intent to harm Lomas. Instead, Lomas admits that the Defendants acted in their own economic self-interest.
- *Fourth Count:* The Fourth Count of Oppression is legally insufficient because the single act of breach of contract alleged by Lomas does not rise to illegal or fraudulent conduct or a continuous course of conduct in which Burns, Pratt-Heaney and Loftus subjected Lomas to wrongful conduct or prejudicial treatment.
- *Fifth Count:* The Fifth Count for a common law accounting is legally insufficient because an accounting is a remedy and not a cause of action.
- *Sixth Count:* The Sixth Count for a statutory accounting under Connecticut General Statute §52-402 is legally insufficient because an accounting is a remedy and not a cause of action.

The Defendants submit the attached Memorandum of Law in further support of this Motion, which Memorandum is incorporated by reference.

THE DEFENDANTS

Richard J. Buturla, Esq.
Berchem, Moses & Devlin, P.C.
75 Broad Street
Milford, CT 06460
Tel. (203) 783-1200
Juris # 022801

David R. Lagasse
MINTZ LEVIN COHN FERRIS GLOVSKY &
POPEO P.C.
666 Third Avenue
New York, NY 10017

Attorneys for Defendants,
Partner Wealth Management, LLC
Kevin G. Burns
James Pratt-Heaney
William P. Loftus

**BERCHEM, MOSES
& DEVLIN, P.C.**
COUNSELORS AT LAW
75 BROAD STREET
MILFORD, CONNECTICUT
06460
—
JURIS NUMBER
22801
—
(203) 783-1200

CERTIFICATE OF SERVICE

I hereby certify that on this 29th day of January 2016, I caused the foregoing Motion to Strike Plaintiff's Amended Complaint to be served via electronic mail on counsel as follows:

Thomas J. Rechen
McCarter & English, LLP
City Place I, 185 Asylum Street
Hartford, CT 06103
trechen@mccarter.com



Richard J. Buturla

DOCKET NO. FST-CV-155014808-S)	SUPERIOR COURT
)	
WILLIAM A. LOMAS)	J.D. OF STAMFORD/NORWALK
)	
v.)	AT STAMFORD
)	
PARTNER WEALTH MANAGEMENT, LLC,)	
KEVIN G. BURNS, JAMES PRATT-HEANEY,)	
And WILLIAM P. LOFTUS,)	JANUARY 29, 2016

**MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS'
MOTION TO STRIKE PLAINTIFF'S AMENDED COMPLAINT**

Pursuant to §10-39 of the Connecticut Rules of Practice, Defendants Partner Wealth Management, LLC (“PWM”), Kevin G. Burns (“Burns”), James Pratt-Heaney (“Pratt-Heaney”) and William P. Loftus (“Loftus”) (together with PWM, the “Defendants”), by and through their undersigned counsel, Berchem, Moses & Devlin, P.C. and Mintz, Levin, Cohn, Ferris, Glovsky & Popeo, P.C., move to strike the Second (Breach of Fiduciary Duty), Third (Willful and Wanton Misconduct), Fourth (Oppression), Fifth (Common Law Action for Accounting) and Sixth (Statutory Action for Accounting) Counts of the Amended Complaint of Plaintiff William A. Lomas (“Lomas”). In support of this Motion, Defendants submit that each of the above-referenced counts is legally insufficient as set forth herein.

PRELIMINARY STATEMENT

Lomas brings a straightforward contract action against the Defendants alleging that the individual Defendants breached the Agreement of Limited Liability Company entered into

among Lomas, Burns, Pratt-Heaney and Loftus on or about November 30, 2009 (the “Operating Agreement”) when the individual Defendants amended the Operating Agreement to reduce the price payable under the Operating Agreement to purchase Lomas’ 25% membership interest following his withdrawal from PWM.

In his Amended Complaint, Lomas lays on a number of counts sounding in tort and cites verbatim a number of e-mails among the individual Defendants in an attempt to transform his contract claim to tort claims. When the Court assesses Lomas’ actual, non-conclusory allegations, however, the allegations fail to support any count other than a breach of contract. Accordingly, the Court should strike Lomas’ Second, Third, Fourth, Fifth and Sixth Counts of his Amended Complaint.

LOMAS’ FACTUAL ALLEGATIONS

The core of Lomas’ factual allegations is very simple:

- Lomas, Burns, Pratt-Heaney and Loftus were each 25% owners of PWM from November 24, 2009 through January 14, 2015. (AC ¶¶1-4).
- Lomas, Burns, Pratt-Heaney and Loftus entered into the Operating Agreement, attached as Exhibit A to the Amended Complaint, on or about November 30, 2009. (AC ¶5).
- Under the Operating Agreement, each of Lomas, Burns, Pratt-Heaney and Loftus had equal votes as members. (AC ¶5, Ex. A at §3.7).

- Under the Operating Agreement, each of Lomas, Burns, Pratt-Heaney and Loftus sat on PWM's Management Committee and each had one vote of the four votes on the committee. (AC ¶5, Ex. A at §3.2, 3.4, Schedule B)
- Each of Lomas, Burns, Pratt-Heaney and Loftus served as an officer of PWM: Lomas was treasurer; Burns was co-president; Pratt-Heaney was co-president; and Loftus was secretary. (AC ¶¶1-4).
- On October 13, 2014, Lomas gave Burns, Pratt-Heaney and Loftus three months' prior notice of his intent to withdraw from PWM. (AC ¶17).
- On January 14, 2015, Lomas formally withdrew as a member of PWM. (AC ¶17).
- Section 8.5 of the Operating Agreement required PWM or the remaining members of PWM to repurchase Lomas' 25% membership interest in PWM following his departure. (AC ¶18, Ex. A at §8.5).
- The price of Lomas' 25% membership interest calculated under the Operating Agreement was \$4,159,791.25. (AC ¶28).
- Burns, Pratt-Heaney and Loftus relied on the amendment provisions set forth in Article VII of the Operating Agreement to amend the Operating Agreement to reduce this price. (AC ¶¶42, 44, Ex. A at Article VII).

- Burns, Pratt-Heaney and Loftus were motivated by their personal self-interest in amending the Operating Agreement to reduce the price. (AC ¶¶39-42, 48).
- The amended Operating Agreement was effective and enforceable for and against all of the Members upon its adoption and ratification, superseding the Operating Agreement. (AC ¶¶44(c), (d)).
- The changes to the amended Operating Agreement affected each of the PWM members equally. (AC ¶¶44(a), (c)).

STANDARD OF REVIEW

The purpose of a motion to strike is to contest the legal sufficiency of the allegations of a complaint to state a claim upon which relief may be granted. Practice Book §10-39; *Ameriquest Morg. Co. v. Lax.*, 113 Conn. App. 646, 650 (2009). In ruling on a motion to strike, the court is limited to the facts alleged in the complaint, which it must construe in the manner most favorable to the plaintiff. *See, e.g., Fort Trumbull Conservancy, LLC v. Alves*, 262 Conn. 480, 498 (2003). While a motion to strike admits all facts well-pleaded, however, it does *not* admit legal conclusions or the truth or accuracy of opinions stated in the complaint. *Minachos v. CBS, Inc.*, 196 Conn. 901, 108 (1985); *O&G Insturies, Inc. v. Travelers Prop. Cas. Corp.*, 2001 WL 1178709, at *3 (Conn. Super. Ct. Sept. 7, 2001). Conclusory statements absent supportive facts are insufficient to survive a motion to strike. *Heinrichs v. Danbury Ins. Co.*, 2008 WL 4210587, at *3 (Conn. Super. Ct. Aug. 25, 2008); *Melfi v. Danbury*, 70 Conn. App. 679, 686, *cert. denied*,

261 Conn. 922 (2002). A motion to strike is properly granted when a complaint fails to plead all of the facts essential to proving a cause of action. *See Robert S. Weiss Assoc. v. Wiederlight*, 208 Conn. 525, 536-37 (1988).

ARGUMENT

I. STRIKING LOMAS' NON-CONTRACT COUNTS IN THE AMENDED COMPLAINT IS WARRANTED

Lomas tries to complicate a simple breach of contract action by piling on claims for breach of fiduciary duty, willful and wanton misconduct, oppression and common and statutory accounting. Defendants challenge the legal sufficiency of the allegations set forth in each of these add-on counts. *See Practice Book §10-39(a)*. Even construing the allegations supporting each count in “the manner most favorable to sustaining its legal sufficiency,” the allegations Lomas musters either do not support, or actively undercut, each of the add-on counts. *See American Progressive Life & Health Co. of New York v. Better Benefits, LLC*, 292 Conn. 111, 120 (2009). Accordingly, this Court should grant Defendants motion to strike the Second, Third, Fourth, Fifth and Sixth counts of the Amended Complaint.

II. LOMAS' FAILS TO PLEAD FACTS FROM WHICH THIS COURT CAN INFER THE INDIVIDUAL DEFENDANTS' OWED LOMAS A FIDUCIARY DUTY

Lomas makes two conclusory statements to allege Burns, Pratt-Heaney and Loftus owed him a fiduciary duty: “[a]s members and officers of PWM, Burns Pratt-Heaney and Loftus were

in positions of superiority and influence relative to Lomas” (AC ¶46) and “Defendants Burns, Pratt-Heaney and Loftus owed fiduciary duties to Lomas.” (AC ¶47). These allegations are insufficient to plead that the individual defendants owed Lomas a fiduciary duty.

First, our courts have concluded that as a matter of law, the members of a limited liability company do not owe a fiduciary duty of loyalty or care to the other members. *See Kasper v. Valluzzo*, 2011 Conn. Super. LEXIS 3245 (Dec. 23, 2011)^{1/} (“[t]he court rejects the plaintiff’s claim that a member of a LLC owes a fiduciary duty to another member”). In *Kasper*, the Court reviewed the requirements that General Statute §34-141 imposes on a member of a Connecticut limited liability company. The statute requires that “[a] member or manager shall discharge his duties under section 34-140 and the operating agreement, in good faith, with the care an ordinary prudent person in a like position would exercise under similar circumstances, and in the manner he reasonably believes to be in the best interests of the limited liability company.” The *Kasper* Court concluded that the plain reading of §34-141 is that a member owes a duty of good faith to a limited liability company’s other members, and not a fiduciary duty. *Kasper*, 2011 Conn. Super. LEXIS 3245 at *13 (“On its face, Gen. State §34-141 imposes a duty of good faith, not a fiduciary duty”); *see also Calpitano v. Rotundo*, 2011 Conn. Super. LEXIS 1894, at *19 (Aug. 3, 2011) (“Reading §34-141, it is clear that the intention was that a limited liability corporation more closely resembles a business corporation than a partnership, and the members’ relationship

^{1/} Copies of each unreported decision cited in this memorandum are attached hereto.

to each other is more akin to shareholders than partners, where shareholders owe no particular duty to each other because of their status as fellow shareholders”). A member of a limited liability company cannot breach a fiduciary duty to the other members if no fiduciary relationship exists between them. *See Sherwood v. Danbury Hospital*, 278 Conn. 163, 195 (2006) (“It is axiomatic that a party cannot breach a fiduciary duty to another party unless a fiduciary relationship exists between them.”).

Neither the Connecticut Supreme Court nor any of its Appellate Courts have ruled on this point. Absent such authority, this Court should follow the precedent and sound reasoning set forth in *Kasper*.

Second, even if this Court concluded a fiduciary duty might exist among the members of a limited liability company, Lomas alleges facts that demonstrate none of the members of PWM could owe the other members a fiduciary duty. Whether a party owes another a fiduciary duty is a question of law. *See Iacurci v. Sax*, 313 Conn. 786, 796 (2014). A fiduciary relationship only arises at law when there exists 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.” *See Dunham v. Dunham*, 204 Conn. 303, 322 (1987) *overruled in part by Santopietro v. New Haven*, 239 Conn. 207 (1996). In *High-Ho Tower, Inc. v. Com-Tronics, Inc.*, 255 Conn. 20, 38 (2000), the Connecticut Supreme Court added that “[t]he law will imply

[fiduciary responsibilities] only where one party to a relationship is unable to fully protect its interest . . . and the unprotected party has placed its trust and confidence in the other.”

Lomas does not allege facts in the Amended Complaint from which this Court can infer that he was unable to protect his interests or that he placed his trust and confidence in the other members of PWM. He admits he was one of four members, each of whom held an equal ownership interest, held equal member and management voting rights and served as an officer of PWM. (AC ¶¶1-5, Ex. A at §§3.2, 3.4, 3.7(a) and Schedule B). Thus, no single member had the ability to exercise control over the direction of PWM in any matter. In fact, because the Operating Agreement required at least a majority of the votes of the members as members of PWM or members of its Management Committee, any decision concerning PWM required the vote of at least three of the four members. (AC ¶5, Ex. A at §§3.4, 3.7(a)). If no single member controls, then Lomas’ fiduciary claim hinges on a legal finding that when voting, the other members of PWM were required to represent Lomas’ interests. Finding a requirement that each of the other members was required to vote in Lomas’ interest would turn the democratic principle of one member, one vote set forth in the Operating Agreement on its head.

III. AMENDING THE OPERATING AGREEMENT IN ACCORDANCE WITH ITS TERMS IS NOT WILLFUL OR WANTON CONDUCT

The gravamen of Lomas’ claim for punitive damages is that Burns, Pratt-Heaney and Loftus amended and restated the Operating Agreement over Lomas objection and to his

detriment. Amending an operating agreement does not rise to the level of willful or wanton conduct.

The rule is that “[p]unitive damages are not ordinarily recoverable for breach of contract. . . . The few classes of cases in which such damages have been allowed contain elements which bring them within the field of tort.” *Triangle Sheet Metal Works, Inc. v. Silver*, 154 Conn. 116, 127 (1966). *Corbett v. Hartford Financial Services Group*, 2012 Conn. Super. LEXIS 1878 (July 26, 2012), is instructive on this point. Corbett participated in a long term incentive plan sponsored by Hartford Financial Services Group (“Hartford”). Corbett alleged that after he terminated his employment, Hartford amended the plan, causing him to lose compensation due to him. Similar to Lomas’ allegations against the Defendants, Corbett pled that Hartford’s “revising the plan and depriving him of certain benefits was done ‘to subjugate Mr. Corbett’s interest in service of their own financial objectives.’” *Corbett*, 2012 Conn. Super. LEXIS 1878 at *6 (*citing* to Corbett’s complaint). The Court granted Hartford’s motion to strike Corbett’s punitive damages claim. Relying on *Enviro Express v. Bridgeport Resco Co.*, 2001 Conn. Super. LEXIS 407, at *7-8 (Feb. 15, 2001), the Court concluded that “[a]llegations such as those made by the plaintiff in this case, that show the defendant was motivated to help itself; but do not include facts that indicate that the defendant intended to harm the plaintiff are not sufficient to support an award of punitive damages.” *Corbett*, 2012 Conn. Super. LEXIS 1878 at *7.

Lomas’ allegations are on all fours with the allegations in Corbett. Lomas pleads that “Defendants Burns and Loftus revealed their unwillingness to pay Lomas was motivated by their own financial self-interest.” (AC ¶39). Further, Lomas admits that the means that Burns, Pratt-Heaney and Loftus used to serve their own self-interest was to amend PWM’s Operating Agreement in accordance with the terms of the Operating Agreement. (AC ¶¶42, 48). Article VII of the operating agreement includes a provision authorizing 65% of the members to amend the agreement at any time. (AC Ex. A at Article VII). Lomas pleads “rather than repurchase Lomas’ interest in PWM in accordance with the [operating agreement], Defendants attempted to circumvent it, using the amendment provision in the Agreement as a pretext in order to justify putting their individual interests ahead of their contractual and fiduciary obligations to Lomas.” (AC ¶42). Lomas admits, however, that the amended Operating Agreement was “effective and enforceable for and against all of the Members upon its adoption and ratification.” (AC ¶44(c), (d)).

In short, Lomas’ allegations come down to the following: he exercised a right under the operating agreement, the remaining three members exercised the right to amend the Operating Agreement set forth in Article VII of the Operating Agreement, the amendment bound all of the members equally and all of the members were motivated to serve their respective financial self-interests. (AC ¶¶39, 42, 44(c), (d), 48). These allegations cannot support a claim for punitive damages under Connecticut law. *See, e.g., Welzenbach v. The Hartford Financial Services*

Group, Inc., 2007 Conn. Super. LEXIS 256, at *7 (Jan. 25, 2007) (“The factual allegations of the complaint here that the Defendant terminated the Plaintiff when he was on the verge of being vested in certain benefits and that Defendant did not keep its promise to make him head of the claims department do not meet the [willful, wanton or reckless] standard”).

IV. OPPRESSION

Lomas recasts his allegations asserted in support of his breach of fiduciary duty claim in his Second Count to support his Fourth Count of “Oppression.” Again, his allegations are insufficient to establish the claim.

Oppression either is conduct by a majority member that is either illegal or fraudulent or a continuous course of “harsh and wrongful conduct, a lack of probity and fair dealing in the affairs of a company to the prejudice of some of its members, or a visible departure from the standards of fair dealing, and a violation of fair play on which every shareholder . . . , is entitled to rely.’” *Stone v. R.E.A.L. Health, P.C.*, 2000 Conn. Super. LEXIS 2987 at *31 (Nov. 15, 2000) citing *Churchman v. Kehr*, 836 S.W.2d 473, 482 (Mo.Ct.App. 1992). Lomas does not allege either illegal or fraudulent conduct; he alleges a breach of the Operating Agreement and bases all of his claims on that alleged breach. (See AC, First Count). Nor does he allege a continuous course of wrongful conduct. He alleges a single instance in which Burns, Pratt-Heaney and Loftus amended the Operating Agreement under Article VII of the Operating Agreement. (AC ¶¶42, 44). Finally, Lomas admits that the amendment bound all four members equally. (AC

¶¶44 (a), (b), (c), (d)). The majority members did not use the amendment to single out Lomas for prejudicial treatment. Rather, all that Lomas alleges is that he was outvoted one time by the other members on whether or not to amend the Operating Agreement, the consequence of which affected all of the Members equally. This act, standing alone, does not support a claim that he was an oppressed minority.

V. COMMON LAW AND STATUTORY ACCOUNTING ARE REMEDIES, NOT CLAIMS

The Connecticut Supreme Court holds that an accounting at common law is a remedy, and not a claim. *See Macomber v. Travelers Property & Casualty Corp.*, 261 Conn. 620, 623, n.3 (2002). The Court stated “[a]lthough the plaintiffs framed [claims for an accounting and constructive trust] as counts eleven and twelve of their complaint, these are issues to be addressed by the trial court upon remand because, rather than being substantive causes of action upon which the complaint are predicated, these counts request remedies, the appropriateness of which would be left to the discretion of the trial court if the plaintiffs, or either of them, were to prevail at trial.” *Id.* Following *Macomber*, our courts have similarly characterized the accounting set forth in General Statutes §52-402 as a remedy and not as a claim. *See AW Power Holdings, LLC v. Firstlight Waterbury Holdings, LLC*, 2015 Conn. Super. LEXIS 300, at *26-27 (Feb. 17, 2015) (“in accordance with *Macomber* an accounting is a remedy and not a substantive

cause of action”) (collecting cases). Accordingly, the Fifth and Sixth must be stricken as a matter of law because they seek a remedy rather than set forth a substantive claim.

CONCLUSION

For all of the foregoing reasons, Defendants respectfully request that this Court strike the Second, Third, Fourth, Fifth and Sixth Counts of Plaintiff’s Amended Complaint.

Dated: January 29, 2016

Respectfully submitted,

THE DEFENDANTS



Richard J. Buturla, Esq.
BERCHEM, MOSES & DEVLIN, P.C.
75 Broad Street
Milford, CT 06460

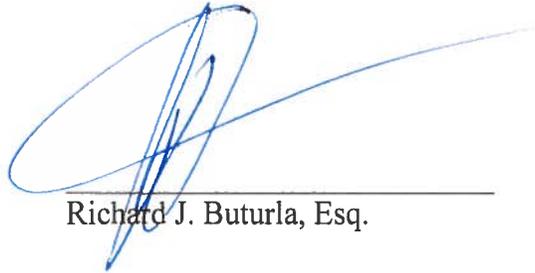
David R. Lagasse
MINTZ LEVIN COHN FERRIS GLOVSKY &
POPEO P.C.
666 Third Avenue
New York, NY 10017

Attorneys for Defendants,
Partner Wealth Management, LLC
Kevin G. Burns
James Pratt-Heaney
William P. Loftus

CERTIFICATE OF SERVICE

I hereby certify that on this 29th day of January 2016, I caused the foregoing Brief in Support of Defendants' Motion to Strike Plaintiff's Amended Complaint to be served via electronic mail on counsel as follows:

Thomas J. Rechen
McCarter & English, LLP
City Place I, 185 Asylum Street
Hartford, CT 06103
trechen@mccarter.com



Richard J. Buturla, Esq.

UNREPORTED CASE



Cited

As of: Jan 28, 2016

AW Power Holdings, LLC et al. v. Firstlight Waterbury Holdings, LLC et al.

CV146047836S

SUPERIOR COURT OF CONNECTICUT, JUDICIAL DISTRICT OF HARTFORD AT HARTFORD

2015 Conn. Super. LEXIS 300

February 17, 2015, Decided

February 17, 2015, Filed

NOTICE: THIS DECISION IS UNREPORTED AND MAY BE SUBJECT TO FURTHER APPELLATE REVIEW. COUNSEL IS CAUTIONED TO MAKE AN INDEPENDENT DETERMINATION OF THE STATUS OF THIS CASE.

JUDGES: [*1] A. Susan Peck, J.

OPINION BY: A. Susan Peck

OPINION

CORRECTED MEMORANDUM OF DECISION RE DEFENDANTS' MOTION TO STRIKE (Correction to Memorandum of Decision filed February 10, 2015, Correction restates the conclusion)

On April 15, 2014, the plaintiffs, AW Power Holdings, LLC and Sasco River Advisors, LLC,¹ filed an eleven-count operative complaint against the defendants, FirstLight Waterbury Holdings, LLC (FirstLight Waterbury); FirstLight Power Enterprises, LLC (FirstLight Power);² and Waterbury Generation, LLC (WatGen). The plaintiffs allege the following relevant facts.

¹ The plaintiffs bring this action individually and derivatively on behalf of Waterbury Generation, LLC.

² By order of the court, Robaina, J., FirstLight Power Enterprises, LLC was substituted for FirstLight Power, Inc., on April 16, 2014.

In 2006, the Connecticut Department of Public Utility Control (CDPUC) requested proposals to construct power plants and earn the right to enter into a ten-year power purchase contract. The plaintiffs formed the limited liability company (LLC) WatGen for the purpose of submitting a proposal to the CDPUC. In April 2007, the plaintiffs learned that WatGen's proposal was one of four winning bids.

In June 2007, the defendants, [*2]³ through an agreement with the plaintiffs, acquired the option to complete development, construct the power plant, and obtain 98 percent of WatGen. In October 2007, the defendants exercised their option for FirstLight Waterbury to acquire 98 percent of WatGen leaving the plaintiffs with a 2 percent interest. FirstLight Waterbury gained a super majority interest in WatGen. FirstLight Power owns 100 percent of FirstLight Waterbury. Prior to December 26, 2008, FirstLight Power was owned by Energy Capital Partners (ECP).

³ For the purpose of this motion to strike, "the defendants" will refer only to the moving defendants, FirstLight Power and FirstLight Waterbury.

On December 26, 2008, FirstLight Power, and thus FirstLight Waterbury and control over WatGen, was sold to GDF Suez Energy NA, Inc. (GDF Suez), a non-affiliated third party. Pursuant to the operating agreement between the plaintiffs and the defendants, the

plaintiffs had the right to receive an opportunity to sell its shares of WatGen under the same terms and conditions as the defendants when control of WatGen was sold to a non-affiliated third party. The plaintiffs were never given the opportunity to sell their shares of WatGen. [*3] The plaintiffs have suffered, and continue to suffer, losses and damages as a result of the defendants' actions. On May 28, 2014, the defendants filed a motion to strike multiple counts and paragraphs of the plaintiffs' operative complaint and a memorandum of law in support of the motion. On July 28, 2014, the plaintiffs filed a memorandum in opposition to the motion. The matter was heard at short calendar on October 14, 2014. Also, on October 14, 2014, the defendants filed a reply to the plaintiffs' memorandum. On October 17, 2014, the plaintiffs filed a surreply.

MOTION TO STRIKE

"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 [*4] 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).

BREACH OF CONTRACT--COUNT ONE

The defendants move to strike count one of the plaintiffs' operative complaint for breach of contract against FirstLight Waterbury. The defendants argue that count one is legally insufficient because the alleged facts do not support a claim that FirstLight Waterbury breached the operating agreement by not purchasing the plaintiffs' membership interests in WatGen. Specifically, the defendants argue that the plaintiffs failed to allege that FirstLight Waterbury transferred any of its membership interests to a third party, thus triggering the plaintiffs' rights under the operating agreement to have their membership interests purchased.

The plaintiffs counter that the allegations are legally sufficient to state a claim for breach of contract. The plaintiffs argue that the defendants ignore the intent of the parties and the defendants' actions in avoiding that intent, which illustrate a bad faith motive. Specifically, [*5] the plaintiffs argue that "the sale of [FirstLight] Power was a subterfuge designed by [the] defendants to evade [the] plaintiffs' . . . rights by indirectly transferring a membership interest in WatGen from ECP to GDF [Suez]."

"The elements of a breach of contract action are the formation of an agreement, performance by one party, breach of the agreement by the other party and damages." (Internal quotation marks omitted.) *Keller v. Beckenstein*, 117 Conn.App. 550, 558, 979 A.2d 1055, cert. denied, 294 Conn. 913, 983 A.2d 274 (2009).

In the present case, the plaintiffs have sufficiently alleged facts to support a claim for breach of contract. The plaintiffs allege in paragraph 11 that the parties entered into a series of agreements on June 15, 2007. The plaintiffs allege that FirstLight Waterbury breached section 24 of the operating agreement by denying the plaintiffs any opportunity to sell their shares when the control of WatGen was sold to GDF Suez, an unaffiliated third party. The plaintiffs allege that section 24 provides: "[n]o Member or members holding, individually or in the aggregate, more than 5% of the Membership Interest . . . may transfer all or any part of their Membership Interest to a third party who is not an Affiliate of such Selling Member(s), unless the transferee also offers to purchase, [*6] at the same time, all the Membership Interest held by all other Members for a pro-rata share of the consideration for such Member's Membership Interest and otherwise on the same terms and conditions applicable to the same by the Selling Member(s)." The plaintiffs further allege that the section 24 "tag-along" provision was "intended to prevent FirstLight [Waterbury] from depriving [the plaintiffs] of any economic value from a sale of WatGen to a third party." Finally, the plaintiffs allege that FirstLight Waterbury "engaged in negotiations with GDF Suez to acquire WatGen and "[u]ltimately, control of WatGen was sold to GDF Suez . . ." Viewing the allegations of the operative complaint broadly in favor of the plaintiffs, the facts provable under the express and implied allegations support a cause of action for breach of contract. The plaintiffs may prove that FirstLight Waterbury was involved in the sale of FirstLight Power, and control of WatGen, to GDF Suez and that the term "interest" within section 24 includes "control" which would trigger the "tag-along" provisions. Finally, the plaintiffs have alleged in paragraph 20 that as a result of the defendants' breach of the agreement, the plaintiffs have suffered damages [*7] as follows: "The book income allocated to AW Power's interest was \$55,101 in 2009;

\$643,905 in 2010; and \$250,821 in 2011. Similarly, the book income allocated to Sasco's interest was \$29,670 in 2009; \$346,720 in 2010; and \$250,821 in 2011 . . ." In paragraph 21, the plaintiffs also allege that since the control of WatGen had been sold to a non-affiliated third party the value of their membership interest has been diminished by the actions of the defendants. Therefore, the plaintiffs have sufficiently pleaded a claim for breach of contract against FirstLight Waterbury.

BREACH OF IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING--COUNT TWO

The defendants move to strike count two of the plaintiffs' operative complaint for breach of implied covenant of good faith and fair dealing against FirstLight Waterbury. The defendants argue that the plaintiffs improperly attempt to apply the implied covenant of good faith and fair dealing to alter express terms of the operating agreement. Specifically, the defendants argue, similarly to count one, that the plaintiffs have failed to allege facts that would have triggered rights under the operating agreement to have their membership interests purchased, [*8] and cannot invoke the implied covenant of good faith and fair dealing to "invent an obligation" under the operating agreement.

The plaintiffs counter that the allegations are legally sufficient to state a claim for breach of implied covenant of good faith and fair dealing. In addition to the applicable arguments to contractual claims expressed in count one, the plaintiffs argue that the allegations do not contradict the terms of the operating agreement. Specifically, the plaintiffs argue that the purpose of the covenant of good faith and fair dealing is to "fill a gap in the [operating agreement] created by the bad faith conduct" of FirstLight Waterbury, and "protect the parties' original intentions."

"[I]t is axiomatic that the . . . duty of good faith and fair dealing is a covenant implied into a contract or a contractual relationship . . . In other words, every contract carries an implied duty requiring that neither party do anything that will injure the right of the other to receive the benefits of the agreement . . . The covenant of good faith and fair dealing presupposes that the terms and purpose of the contract are agreed upon by the parties and that what is in dispute is a party's [*9] discretionary application or interpretation of a contract term . . .

"To constitute a breach of [the implied covenant of good faith and fair dealing], the acts by which a defendant allegedly impedes the plaintiff's right to receive benefits that he or she reasonably expected to receive under the contract must have been taken in bad faith . . . Bad faith in general implies both actual or constructive fraud,

or a design to mislead or deceive another, or a neglect or refusal to fulfill some duty or some contractual obligation, not prompted by an honest mistake as to one's rights or duties, but by some interested or sinister motive . . . Bad faith means more than mere negligence; it involves a dishonest purpose." (Internal quotation marks omitted.) *Capstone Building Corp. v. American Motorist Ins. Co.*, 308 Conn. 760, 794-95, 67 A.3d 961 (2013).

In the present case, the plaintiffs have sufficiently alleged facts to support a claim for breach of implied covenant of good faith and fair dealing. As previously discussed, the plaintiffs have alleged facts that if proven would trigger the "tag-along" provision of section 24 of the operating agreement. Additionally, the plaintiffs have alleged that their reasonable expectation pursuant to the operating agreement was "to receive the opportunity to sell [*10] its shares under the same terms and conditions as [the defendants] when the control of WatGen was sold to a non-affiliated third party." (Emphasis added.) The plaintiffs have alleged that through the sale of FirstLight Power to GDF Suez, the defendants "attempted to accomplish indirectly what they could not do directly--sell control of WatGen to a third party without offering the sale deal terms to [the plaintiffs]." The plaintiffs do not attempt to "achieve a result contrary to the clearly expressed terms" of the operating agreement. (Internal quotation marks omitted; emphasis in original.) See *Eis v. Meyer*, 213 Conn. 29, 37, 566 A.2d 422 (1989). Therefore, the plaintiffs have sufficiently pleaded a claim for breach of implied covenant of good faith and fair dealing against FirstLight Waterbury.

BREACH OF FIDUCIARY DUTY

The defendants move to strike multiple paragraphs of count three, and counts four and seven of the plaintiffs' operative complaint for breach of fiduciary duty. The plaintiffs counter that the allegations are legally sufficient.

"The essential elements to pleading a cause of action for breach of fiduciary duty under Connecticut case law are: (1) That a fiduciary relationship existed which gave rise to (a) a duty of loyalty [*11] on the part of the defendant to the plaintiff, (b) an obligation on the part of the defendant to act in the best interests of the plaintiff, and (c) an obligation on the part of the defendant to act in good faith in any matter relating to the plaintiff; (2) [T]hat the defendant advances his own interests to the detriment of the plaintiff; (3) That the plaintiff sustained damages; (4) That the damages were proximately caused by the fiduciary's breach of his or her fiduciary duty." (Internal quotation marks omitted.) *Ochieke v. Turbine Controls, Inc.*, Superior Court, judicial district of Hartford, Docket No. CV-10-5035041-S, 2014 Conn. Super. LEXIS 2485 (October 8, 2014, Elgo, J.).

A

COUNT THREE

The defendants move to strike paragraphs 30(b), 30(c)(2), and 30(c)(3) of count three of the plaintiffs' operative complaint for breach of fiduciary duty against FirstLight Waterbury.⁴ The defendants argue that the plaintiffs improperly included derivative claims in a cause of action for direct claims. Specifically, the defendants argue that paragraphs 30(b), 30(c)(2), and 30(c)(3) allege a harm to WatGen that can only be asserted by the plaintiffs in a derivative claim.

4 The plaintiffs concede to striking paragraph 30(b) from count [*12] three.

The plaintiffs counter that the allegations contained within paragraph 30(c) are legally sufficient to state a direct claim against FirstLight Waterbury for breach of fiduciary duty. The plaintiffs argue that the defendants' attempt to divide one claim into several is improper because the segregation of these clauses "ignores the cumulative import of the allegation." Specifically, the plaintiffs argue that "[w]hile self-dealing and breach of contract can be distinct claims, the same facts underlying those claims can form the basis of a single claim of shareholder oppression."

"Minority shareholder oppression . . . is not synonymous with the statutory terms 'illegal' or 'fraudulent.' The term can contemplate a continuous course of conduct and includes a lack of probity in corporate affairs to the prejudice of some of its shareholders . . . Oppression has variously been described as burdensome, harsh and wrongful . . . and harsh and wrongful conduct, a lack of probity and fair dealing in the affairs of a company to the prejudice of some of, its members, or a visible departure from the standards of fair dealing, and a violation of fair play on which every shareholder . . . is entitled to [*13] rely." (Citation omitted; internal quotation marks omitted.) *Stone v. R.E.A.L. Health, P.C.*, Superior Court, judicial district of New Haven, Docket No. CV-98-414972-S (November 15, 2000, Munro, J.) (29 Conn. L. Rptr. 219, 225, 2000 Conn. Super. LEXIS 2987).

In the present case, the plaintiffs have pleaded allegations of oppression to support a direct claim for breach of fiduciary duty against FirstLight Waterbury. Paragraph 30(c) alleges that FirstLight Waterbury "oppressed the [p]laintiffs' reasonable expectations of economic benefits as members in WatGen by (1) intentionally, purposefully, knowingly, or otherwise wrongfully depriving [the plaintiffs] of their contractual 'tag-along' right; (2) exercising its uncontested control over

WatGen to deny any distribution payments; (3) extracting money from WatGen through excessive payments to affiliates of [the defendants]; and (4) ultimately preventing [the plaintiffs] from realizing any economic benefits of their membership interest in WatGen." The plaintiffs aver a continuous course of conduct by FirstLight Waterbury that in the aggregate amounts to "harsh and wrongful conduct, a lack of probity and fair dealing" in the affairs of WatGen that have prejudiced the plaintiffs. See *id.* Therefore, the plaintiffs' paragraph 30(c) oppression [*14] allegations are properly pleaded in support of a direct claim for breach of fiduciary duty against FirstLight Waterbury.

B

COUNTS FOUR AND SEVEN

The defendants move to strike counts four and seven of the plaintiffs' operative complaint for breach of fiduciary duty against FirstLight Power.⁵ The defendants argue that counts four and seven are legally insufficient because the plaintiffs have not alleged that FirstLight Power owed the plaintiffs a fiduciary duty. The defendants assert that "[n]o allegations in the complaint demonstrate any unique degree of trust and confidence between the plaintiffs and FirstLight Power." Additionally, "[n]o allegations establish that FirstLight Power had a duty to represent the plaintiffs' interests." Finally, "no allegations in the complaint demonstrate that the plaintiffs had any relationship whatsoever with FirstLight Power."

5 The plaintiffs concede to striking paragraph 30(b) from count four and paragraphs 30(a), 30(c), 37(a), and 37(c) from count seven.

The plaintiffs counter that the allegations are legally sufficient to state a claim for breach of fiduciary duty. The plaintiffs argue that FirstLight Power owes the plaintiffs and WatGen a duty of loyalty because [*15] it had complete control over FirstLight Waterbury as the sole shareholder and manager. The plaintiffs rely upon the Delaware case *Feeley v. NHAOCG, LLC*, 62 A.3d 649 (Del.Ch. 2012), to argue that a fiduciary duty exists between the plaintiffs and FirstLight Power.

The defendants respond that the plaintiffs' dependence on Delaware case law for the proposition that "a parent corporation owes a fiduciary duty to an entity managed by a subsidiary of the parent" is unsupported and inconsistent with Connecticut corporate law. The defendants claim that the plaintiffs' reliance on *Feeley*, which cites *In re USACafes, L.P. Litigation*, 600 A.2d 43 (Del.Ch. 1991) (*USACafes*), is misplaced because Delaware courts have seriously questioned the latter decision "for its lack of analysis and the difficulty to square the decision with traditional understandings of the corporate

form and corporate veil piercing." (Internal quotation marks omitted.) Additionally, the defendants note that *USACafes* has not been adopted by Connecticut courts in the twenty-three years following its publication.

The plaintiffs respond that the defendants overstate the holdings of *USACafes* and *Feeley*. The plaintiffs assert that *USACafes* stands for the proposition that "directors of a corporate general partner owe the same duty of loyalty [*16] to the limited partners as the general partner does," and *Feeley* stands for the proposition that "an entity that controls a manager of [an LLC] owes a duty of loyalty to the members of the company to the same degree as the manager." The plaintiffs argue that these legal principles have not been seriously questioned and are compatible with Connecticut law.

The issue before the court is whether, as alleged, FirstLight Power as the sole owner and controller of FirstLight Waterbury, the manager of WatGen, owes a fiduciary duty to the plaintiffs, members of WatGen, and WatGen. "[T]he determination of whether a [fiduciary] duty exists between individuals is a question of law." (Internal quotation marks omitted.) *Biller Associates v. Peterken*, 269 Conn. 716, 721, 849 A.2d 847 (2004). "The law does not provide a bright line test for determining whether a fiduciary relationship exists, yet courts look to well established principles that are the hallmark of such relationships. Our Supreme Court has stated that [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 [*17] of the fiduciary or dominant party affords him great opportunity for abuse of the confidence reposed in him We have 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 [U]nder our case law, the fiduciary relationship is not singular. The relationship between sophisticated partners in a business venture may differ from the relationship involving lay people who are wholly dependent upon the expertise of a fiduciary. Fiduciaries appear in a variety of forms, including agents, partners, lawyers, directors, trustees, executors, receivers, bailees and guardians. [E]quity has carefully refrained from defining a fiduciary relationship in precise detail and in such a manner as to exclude new situations." (Internal quotation marks omitted.) *Iacurci v. Sax*, 139 Conn. App. 386, 401, 57 A.3d 736 (2012), aff'd, 313 Conn. 786, 99 A.3d 1145 (2014).

The present case is seemingly a matter of first impression. Connecticut courts have yet to address whether a fiduciary duty exists between an entity in control of the

managing member of an LLC and the other members of that LLC. [*18] In consideration of Connecticut precedent, the court turns to Delaware case law, as many jurisdictions do, for guidance on questions of corporate law. See *Von Seldeneck v. Great Country Bank, Superior Court, judicial district of Ansonia-Milford at Milford*, Docket No. CV 89 029886 (October 5, 1990, Meadow, J.) (2 Conn. L. Rptr. 548, 551, 1990 Conn. Super. LEXIS 1366); see also *People's United Bank v. Wetherill Associates, Superior Court, judicial district of Hartford*, Docket No. CV-09-6005763-S, 2011 Conn. Super. LEXIS 43 (January 4, 2011, Robaina, J.) (51 Conn. L. Rptr. 377, 381).

In *Feeley*, the court addressed whether Christopher Feeley--the controller of the LLC, AK-Feel, which in turn was the managing member of Oculus, another entity--could be sued in his capacity as the individual in control of AK-Feel by the other member of Oculus, the counter plaintiff NAHOGC, LLC (NHA). Feeley argued that "NHA cannot sue him for breach of fiduciary duty as the managing member of AK-Feel, because to do so would disregard the separate existence of AK-Feel" and in essence pierce AK-Feel's corporate veil. *Feeley v. NAHOGC, LLC, supra*, 62 A.3d at 666-67. The court rejected this argument, noting that "Delaware corporate decisions consistently have looked to who wields control in substance and have imposed the risk of fiduciary liability on the actual controllers." *Id.*, 668. Ultimately, the court held that Feeley "can be reached [*19] and potentially held liable for breach of fiduciary duty in his capacity as the controller of AK-Feel." *Id.*, 671. In reaching its decision, the court analyzed *USACafes* for its discussion of "the question of what to do with the human controllers of an entity fiduciary" in relation to the Delaware alternative entity statutes and "the tension between corporate separateness and the outcomes achieved in equity by imposing fiduciary duties on those actually in control." *Id.*, 669-70.

In "[*USACafes*], Chancellor Allen considered whether limited partners of USACafes, L.P., could sue the directors of USACafes General Partner, Inc., its corporate general partner, for breach of fiduciary duty." *Id.*, 670. "Defendants Sam and Charles Wyly comprised two of the six directors on the board of the corporate general partner, owned 100% of the stock of the corporate general partner, and held 47% of the limited partnership units." *Id.* "The defendants conceded that the general partner owed fiduciary duties to the limited partners, but they argued that the members of the board of the corporate general partner only owed fiduciary duties to its stockholders, not to the limited partners." *Id.* "Chancellor Allen rejected the defendants' [*20] argument. Finding no precedent on point, Chancellor Allen started from the general principle that one who controls property of an-

other may not, without express or implied agreement, intentionally use that property in a way that benefits the holder of the control to the detriment of the property or its beneficial owner . . . He then noted the equitable tradition of looking to the substance of where control lay, observing that [w]hen control over corporate property was recognized to be in the hands of the shareholders who controlled the enterprise, the fiduciary duty was found to extend to such persons as well . . . Analogizing the corporate general partner to a corporate trustee, a structure where there was a longer tradition of an entity acting as fiduciary, Chancellor Allen noted that courts held the individuals who controlled or made decisions on behalf of the corporate trustee liable for breaches of trust . . . He concluded that [t]he theory underlying fiduciary duties is consistent with recognition that a director of a corporate general partner bears such a duty towards the limited partnership." *Id.*

The Delaware Court of Chancery has subsequently held that individuals and entities who control [*21] the general partner owe to the limited partners at least the duty of loyalty identified in *USACafes. Id., 670-71* (collecting cases). Additionally, the Delaware court has extended the doctrine to other entities, such as LLCs. *Id., 671* (collecting cases). In the present case, the plaintiffs allege that FirstLight Power owns and controls FirstLight Waterbury. FirstLight Power caused and directed FirstLight Waterbury to breach the fiduciary duty it owed to the plaintiffs by depriving them of contractual rights, engaging in self-dealing, and oppression. As a result of FirstLight Power's conduct, the plaintiffs have incurred and continue to incur substantial harm and damages. This court finds the reasoning of the Delaware court in *USACafes*, and its progeny, including *Feeley*, persuasive and thus in light of the specific facts alleged in this case, FirstLight Power, as the true controller of WatGen, owes a fiduciary duty to the plaintiffs, as members of WatGen and sufficient facts have been alleged to sustain this count for breach of fiduciary duty.

C

COUNT SIX

The defendants move to strike paragraphs 30(a), 30(c)(1), and 30(c)(4) of count six of the plaintiffs' operative complaint for breach of fiduciary duty [*22] against FirstLight Waterbury. The defendants argue that the plaintiffs improperly included direct claims in a cause of action for derivative claims. Specifically, the defendants argue that paragraphs 30(a), 30(c)(1), and 30(c)(4) allege a harm to the plaintiffs that results in no injury to WatGen, and can only be asserted by the plaintiffs as a direct claim. The plaintiffs concede to striking paragraphs 30(a) and (c) from count six. (Plaintiffs' Sur-

reply in Opposition to Defendants' Motion to Strike, p. 7.)

AIDING AND ABETTING A BREACH OF FIDUCIARY DUTY--COUNTS FIVE AND EIGHT

The defendants move to strike counts five and eight of the plaintiffs' operative complaint for aiding and abetting a breach of fiduciary duty against FirstLight Power. As to both counts, the defendants argue that (1) the plaintiffs' claim in paragraphs 33(a) and 37(a) are time barred by the lapse of the statute of limitations; (2) the plaintiffs' claim in paragraph 33(b) can only be pleaded in a derivative claim; and (3) the plaintiffs' claim in paragraphs 33(c) and 37(c) improperly attempt to pierce the corporate veil. The plaintiffs concede that counts five and eight may be stricken because the court has found [*23] that a fiduciary duty exists between FirstLight Power and the plaintiffs in counts four and seven. (Plaintiffs' Opposition to Defendants' Motion to Strike, p. 22.)

ACCOUNTING--COUNTS NINE AND TEN

The defendants move to strike counts nine and ten of the plaintiffs' operative complaint for a statutory and common-law accounting derivatively and on behalf of WatGen against the defendants. The defendants argue that (1) an accounting is not a cause of action, but a remedy; (2) the plaintiffs have failed to allege facts that would grant the plaintiffs an accounting of the defendants; and (3) the plaintiffs have failed to allege a denial for a requested accounting of WatGen.

The plaintiffs counter that the allegations are legally sufficient to state a claim for accounting. The plaintiffs argue that (1) an accounting is a cause of action; (2) the plaintiffs are entitled to an accounting because the defendants owed the plaintiffs a fiduciary duty and the plaintiffs' claims sound in fraud; and (3) the plaintiffs are seeking an accounting of the defendants and a demand for an accounting of WatGen would have been futile.

"A split of authority exists among the judges of the Superior Court on whether accounting [*24] is a remedy or a cause of action." *David Fuhrer Enterprises, LLC v. Add the Flavor, LLC, Superior Court, judicial district of Stamford-Norwalk at Stamford, Docket No. CV-13-6018002-S, 2013 Conn. Super. LEXIS 2307 (October 9, 2013, Taggart, J.T.R.)* (collecting cases). Connecticut Superior Court decisions that have granted a motion to strike an accounting as a cause of action have relied on the Connecticut Supreme Court case *Macomber v. Travelers Property & Casualty Corp., 261 Conn. 620, 623 n.3, 804 A.2d 180 (2002)*. See *David Fuhrer Enterprises, LLC v. Add the Flavor, LLC, supra, Superior Court, Docket No. CV-13-6018002-S, 2013 Conn. Super. LEXIS 2307* (citing *Macomber* and striking claim for

accounting as cause of action); *Simko Law Firm, LLC v. Yale New Haven Health Services Corp.*, Superior Court, judicial district of Fairfield, Docket No. CV-07-5006228-S, 2008 Conn. Super. LEXIS 742 (March 25, 2008, Frankel, J.) (same); *Priceline.com, Inc. v. Mayes*, Superior Court, judicial district of Stamford-Norwalk, Complex Litigation Docket, Docket No. X08-CV-03-0196820-S (March 16, 2005, Adams, J.) (39 Conn. L. Rptr. 9, 12, 2005 Conn. Super. LEXIS 739) (same). Connecticut Superior Court cases that have denied a motion to strike an accounting as a cause of action have typically cited *Mankert v. Elmatco Products, Inc.*, 84 Conn.App. 456, 460, 854 A.2d 766, cert. denied, 271 Conn. 925, 859 A.2d 580 (2004). See *AHP Holdings, LLC v. New Meadows Realty Co., LLC*, Superior Court, judicial district of New Haven, Docket No. CV-12-6031174-S (April 22, 2013, Zemetis, J.) (56 Conn. L. Rptr. 117, 122, 2013 Conn. Super. LEXIS 899) (citing *Mankert* and sustaining claim for accounting as cause of action); *Shames v. Prottas*, Superior Court, judicial district of New London, Docket No. CV-12-6013378 (December 27, 2012, Cosgrove, J.) (55 Conn. L. Rptr. 310, 313, 2012 Conn. Super. LEXIS 3148) [*25] (same); *William Raveis Real Estate v. Cendant Mobility Corp.*, Superior Court, judicial district of Ansonia-Milford, Docket No. CV-05-4002709-S, 2005 Conn. Super. LEXIS 3510 (December 6, 2005, Stevens, J.) (same).

In the present case, the defendants support their motion to strike by citing to *Macomber* and the plaintiffs support their opposition by citing, *inter alia*, *Mankert* as an example of a court upholding a cause of action for an accounting. In *Mankert*, the court defined an accounting as "an adjustment of the accounts of the parties and a rendering of a judgment for the balance ascertained to be due *An action for an accounting* usually invokes the equity powers of the court, and the remedy that is most frequently resorted to . . . is by way of a suit in equity." (Emphasis added; internal quotation marks omitted.) *Mankert v. Elmatco Products, Inc.*, *supra*, 84 Conn. App. 460. "To support an action of accounting, one of several conditions must exist. There must be a fiduciary relationship, or the existence of a mutual and/or complicated accounts, or a need of discovery, or some other special ground of equitable jurisdiction such as fraud." (Emphasis added; internal quotation marks omitted.) *Id.*⁶ However, [*26] in *Macomber*, our Supreme Court stated that an accounting is a remedy. See *Macomber v. Travelers Property & Casualty Corp.*, *supra*, 261 Conn. at 623 n.3. Our Supreme Court mentioned in a footnote that, "[t]he plaintiffs also requested that the trial court order an accounting of all moneys that allegedly were wrongfully obtained by the defendants in purchasing the structured settlements on the plaintiffs' behalf, and impose a constructive trust over such moneys. Although the

plaintiffs framed these requests as counts eleven and twelve of their complaint, these are issues to be addressed by the trial court upon remand because, rather than being substantive causes of action upon which the complaint is predicated, *these counts request remedies*, the appropriateness of which would be left to the discretion of the trial court if the plaintiffs, or either of them, were to prevail at trial." (Emphasis added.) *Id.*

6 The court notes that in *Mankert* the third amended complaint did not contain a separate count for accounting, and the trial court found that the request for an accounting was contained within the breach of contract count. See *Mankert v. Elmatco Products, Inc.*, *supra*, 84 Conn.App. 459 n.2.

The plaintiffs also argue that an accounting is "identified as a cause of action right in the relevant statutes," citing *General Statutes* §52-402.⁷ The court is not [*27] persuaded by this argument and will not disregard *Macomber*. Further, Superior Court decisions have also characterized an accounting as described in §52-402 as a remedy. "The remedy of an accounting has been traditionally recognized in Connecticut, and is codified in [Connecticut General Statutes] §§52-401 through 52-405." *R.S. Silver Enterprises Co., Inc. v. Pascarella*, Superior Court, judicial district of Stamford-Norwalk at Stamford, Docket No. CV-06-5002499-S, 2012 Conn. Super. LEXIS 1134 (April 25, 2012, Jennings, J.T.R.), remanded on other grounds, 148 Conn.App. 359, 86 A.3d 471 (2014). "These statutes primarily consider the procedures to be followed after a trial court has determined that an accounting is due." *Kasper v. G&J Partnership*, Superior Court, judicial district of Stamford-Norwalk at Stamford, Docket No. CV-07-5004956-S, 2011 Conn. Super. LEXIS 3244 (December 23, 2011, Tierney, J.). Therefore, in accordance with *Macomber* an accounting is a remedy and not a substantive cause of action.

7 *General Statutes* §52-402 provides in relevant part: "(a) When a judgment is rendered against the defendant in an action for an accounting that he account . . ."

DISSOLUTION--COUNT ELEVEN

The defendants move to strike count eleven of the plaintiffs' operative complaint for dissolution of WatGen pursuant to *General Statutes* §34-207.⁸ The defendants argue that this court lacks the authority to [*28] grant dissolution of WatGen because the principal office is located in Houston, Texas and the location of the power generation facility is in Waterbury, Connecticut.

8 *General Statutes* §34-207 provides: "On application by or for a member, the superior court for the judicial district where the principal office of the limited liability company is located may order dissolution of a limited liability company whenever it is not reasonably practicable to carry on the business in conformity with the articles of organization or operating agreement."

The plaintiffs counter that pursuant to §34-207 and the analogous corporate statute, *General Statutes* §33-896, the court has authority to grant the dissolution of WatGen with a registered address in Connecticut.

"*General Statutes* §1-2z instructs us that [o]ur fundamental objective is to ascertain and give effect to the apparent intent of the legislature . . . In other words, [the court] seek[s] to determine, in a reasoned manner, the meaning of the statutory language as applied to the facts of [the] case, including the question of whether the language actually does apply . . . In seeking to determine that meaning . . . §1-2z directs [the court] first to consider the text of the statute itself and its relationship to other statutes. If, after [*29] examining such text and considering such relationship, the meaning of such text is plain and unambiguous and does not yield absurd or unworkable results, extra-textual evidence of the meaning of the statute shall not be considered . . . When a statute is not plain and unambiguous, [the court] also look[s] for interpretive guidance to the legislative history and circumstances surrounding its enactment, to the legislative policy it was designed to implement, and to its relationship to existing legislation and common law principles governing the same general subject matter . . ." (Internal quotation marks omitted.) *Envirotest Systems Corp. v. Commissioner of Motor Vehicles*, 293 Conn. 382, 386-87, 978 A.2d 49 (2009).

After a review of the plain language of §34-207, the court agrees with the plaintiff that the statute is silent and ambiguous as to what should occur when a Connecticut LLC maintains its principal office outside of Connecticut. The defendants suggest that pursuant to §34-207, the Connecticut Superior Court would not have the authority to dissolve an LLC formed under the laws of Connecticut if the principal office was located outside of the state. The defendants' interpretation of §34-207 would yield absurd and unworkable results where Connecticut courts were powerless to dissolve a Connecticut LLC as [*30] long as the principal office was not located in Connecticut. The court sees no reason, and the defendants have offered none, as to why the language of the analogous corporate statute, §33-896, should not provide guidance in interpreting §34-207. *Section 33-896* provides what should occur when a corporation does not have its principal office in Connecticut by including the phrase "if none in this state, its registered office . . ." Therefore, the

Superior Court for the judicial district where the principal office or, if none in this state, its registered office, of the LLC is located may order dissolution pursuant to §34-207. However, the plaintiffs have not alleged where WatGen's registered office is located and, without this allegation, count eleven must be stricken.

IX

PRAYER FOR RELIEF--COSTS AND ATTORNEYS FEES

The defendants move to strike paragraph 9 of the prayer for relief seeking costs and attorneys fees pursuant to *General Statutes* §52-572j. The defendants argue that §52-572j provides no support for the plaintiffs' claim for costs and attorneys fees because WatGen is an LLC and neither a corporation nor an unincorporated association. The plaintiffs counter that the applicability of §52-572j to derivative actions for LLCs includes the fee shifting provisions [*31] for costs and attorneys fees.

The plaintiffs are not entitled to costs and attorneys fees pursuant to §52-572j for derivative claims on behalf of WatGen, an LLC.⁹ The plaintiffs misconstrue Superior Court case law to support their argument that the defendants are "subject to [§52-572j] authorizing derivative actions in general" including "the portion of [§52-572j] authorizing an award [for] costs and attorneys fees to a derivative plaintiff." Although the plaintiffs correctly cite Superior Court decisions for the proposition that a plaintiff may bring a derivative action on behalf of an LLC; See, e.g., *FCR Realty v. Green*, Superior Court, judicial district of Windham, Docket No. CV-13-5005777-S, 2014 Conn. Super. LEXIS 1430 (April 30, 2014, Boland, J.); *Calpitano v. Rotundo*, Superior Court, judicial district of New Britain, Docket No. CV-11-6008972-S (August 3, 2011, Swinton, J.) (52 Conn. L Rptr. 464, 466, 2011 Conn. Super. LEXIS 1894); see also *Voll v. Dunn*, Superior Court, judicial district of Waterbury, Complex Litigation Docket, Docket No. X10-CV-12-6018520-S, 2014 Conn. Super. LEXIS 2849 (November 10, 2014, Dooley, J.); *Newlands v. NRT Associates, LLC*, Superior Court, judicial district of Fairfield, Docket No. CV-08-4027098-S (March 25, 2010, Tyma, J.) (49 Conn. L Rptr. 557, 559, 2010 Conn. Super. LEXIS 772); the plaintiffs incorrectly attribute the applicability of a derivative action on behalf of an LLC to §52-572j.

9 *Section 52-572j* provides in relevant part: "Derivative [*32] actions by shareholders or members. (a) Whenever any corporation or any unincorporated association fails to enforce a right which may properly be asserted by it, a derivative action may be brought by one or more shareholders or members to enforce the right, provided the

shareholder or member was a shareholder or member at the time of the transaction of which he complained or his membership thereafter devolved on him by operation of law . . .

(b) . . . The costs of the action or part thereof, which shall include but not be limited to witness' fees, court costs and reasonable attorneys fees, may be charged by the court, in its discretion, against the corporation."

The Superior Court decisions that have sustained a derivative cause of action on behalf of an LLC consistently cite *Ward v. Gamble*, Superior Court, judicial district of Hartford, Docket No. CV-08-5017829-S (July 23, 2009, Prescott, J.) (48 Conn. L. Rptr. 286, 2009 Conn. Super. LEXIS 2091). In *Ward*, Judge Prescott "based [his] holding on analysis of statutory law, public policy justifications and case law from [Connecticut] and other states." *Calpitano v. Rotundo*, supra, 52 Conn. L. Rptr. 465, 2011 Conn. Super. LEXIS 1894. Specifically, Judge Prescott looked at New York case law because "[l]ike Connecticut, New York's statutes do not explicitly authorize derivative actions to be brought against [*33] members of an LLC." *Ward v. Gamble*, supra, 48 Conn. L. Rptr. 288, 2009 Conn. Super. LEXIS 2091. He then discussed a New York Court of Appeals case that found "derivative actions to be a fundamental component of corporate law and that to refuse to extend them to LLCs would be unwise." *Id.* Ultimately, he agreed with the New York Court of Appeals that "the absence of a statute authorizing derivative actions with respect to LLCs does not mean that such actions cannot be recognized as a matter of common law" and held that derivative actions are available for members of an LLC. *Id.*, 289, 2009 Conn. Super. LEXIS 2091.

In some instances, however, Superior Court decisions have gone beyond the common law and applied codified corporation laws to LLCs. See *Budney v. Budney Industries, Inc.*, Superior Court, judicial district of New Britain, Docket No. CV-13-602373-S (April 11, 2014, Swinton, J.) (58 Conn. L. Rptr. 22, 23, 2014 Conn. Super. LEXIS 861) (applying requirements for demand to be made on corporation's board of directors before derivative action may be brought as set forth in *General Statutes* §33-722 to LLC); see also *Moore v. Bender*, Superior Court, judicial district of Stamford-Norwalk at Stamford, Docket No. CV-13-6020376-S, 2014 Conn. Super. LEXIS 1692 (July 14, 2014, Karazin, J.) (same). This court is not persuaded by the few Superior Court decisions that have extended the codified requirements pertaining to corporations to LLCs [*34] when the well reasoned *Ward* decision, as well as the New York Court of Appeals decision, only recognized the application of derivative actions to LLCs based on common law. See *Ward v. Gamble*, supra, 48

Conn. L. Rptr. 289, 2009 Conn. Super. LEXIS 2091; *Tzolis v. Wolff*, 10 N.Y.3d 100, 108-09, 884 N.E.2d 1005, 855 N.Y.S.2d 6 (2008); see also *Billings v. Bridgepoint Partners, LLC*, 21 Misc. 3d 535, 863 N.Y.S.2d 591, 595 (2008) (citing *Tzolis* and turning to common-law analysis to determine whether there was contemporaneous ownership requirement and/or requirement for demand in relation to derivative action involving LLC). "[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). In the present case, the plaintiffs have not alleged a contractual exception or cited an applicable statutory exception to allow for the plaintiffs' derivative claims on behalf of an LLC to be awarded costs and attorneys fees.

Finally, the plaintiffs argue that "in a measure of equity, it would be unjust for WatGen to not compensate [the plaintiffs] for the costs of pursuing the rights of WatGen in [the plaintiffs'] derivative claims." Even if logic would suggest that the codification of fee shifting provisions for derivative actions on behalf of [*35] corporations should be mirrored in the analogous common-law derivative actions on behalf of LLCs, the court will not disregard the American Rule. See, e.g., *Doe v. State*, 216 Conn. 85, 109-10, 579 A.2d 37 (1990) ("The plaintiffs next urge this court simply to exercise its equitable powers to award them attorneys fees. Citing the equitable maxims that 'every wrong has its remedy' and 'in an equitable action the court endeavors to do complete justice . . . The plaintiffs, in effect, advocate that we judicially undermine the well established American rule" [citations omitted]).

CONCLUSION

Accordingly, for the foregoing reasons, the defendants' motion to strike counts five, eight, nine, ten, eleven, paragraphs 30(b) from count three, 30(b) from count four, paragraphs 30(a) and 30(c) from count six,¹⁰ paragraphs 30(a), 30(c), 37(a) and 37(c) from count seven, and the prayer for relief seeking costs and attorneys fees, is hereby granted. The motion to strike counts one, two, and paragraphs 30(c)(2), and 30(c)(3) of count three, count four other than paragraph 30(b), and count seven other than paragraphs 30(a), 30(c), 37(a) and 37(c) is hereby denied.

¹⁰ Although the defendants moved to strike only paragraphs 30(c)(1) and 30(c)(4) from count six, in [*36] their surreply, the plaintiffs agreed to strike all of paragraph 30(c).

PECK, J.