11/21/13 cc: Rpts Judges, J. Hartley, Lcar, Walsh Sklarek, Donahue Durham & Noonan, G. Ginsberg, Nu330 Roberts LLC. SP Pizzano

NO. HHD CV 12-5036307-S	:	SUPERIOR COURT
STANLEY VALENCIS, ACSYS, INC. AND MIG VENTURES LLC	:	J.D. OF HARTFORD
VS.	:	AT HARTFORD
DAVID NYBERG AND CSM NORTH, LLC	:	NOVEMBER 21, 2013

MEMORANDUM OF DECISION
APPLICATION FOR PREJUDGMENT REMEDY

On July 3, 2012, the plaintiffs, Stanley Valencis, ACSYS, Inc. (ACSYS), and MIG Ventures, LLC (MIG), filed an application for prejudgment remedy (PJR) against the defendants, CSM North, LLC (CSM) and David Nyberg.[1] Therein, the plaintiffs seek to attach and/or garnish the defendants' assets so as to secure a potential judgment in their favor in connection with the present lawsuit. The original proposed complaint, which alleges *inter alia* the existence of a construction contract gone awry, is set forth in twenty-one counts as follows: count one, breach of express contract as to Nyberg and CSM; count two, breach of implied contract as to Nyberg and CSM; count three, breach of the covenant of good faith and fair dealing as to Nyberg and CSM; count four, promissory estoppel as to Nyberg and CSM; count five, unjust enrichment as to Nyberg and CSM; count six, breach of fiduciary duty as to Nyberg; count seven,

[1] The application was originally filed to include other defendants, namely, Gerald Ginsberg, JG Electric LLC (JG Electric), and Level Design Group, LLC (Level Design); however, during the hearing, the plaintiffs informed the court that the PJR application is directed to Nyberg and CSM only. Further, on October 15, 2013, the plaintiffs filed an amended complaint which deleted Ginsberg as a defendant following his testimony that he has filed personal bankruptcy. Accordingly, the defendants referred to herein are Nyberg and CSM.

fraud/intentional misrepresentation as to Nyberg; count eight, negligent misrepresentation as to Nyberg; count nine, negligence as to Nyberg and CSM; count ten, civil conspiracy as to Nyberg, CSM, Ginsberg,[2] and JG Electric; count eleven, conversion as to Nyberg and CSM; count twelve, statutory theft as to Nyberg and CSM; count thirteen, slander of title as to Nyberg and CSM; count fourteen, abuse of process as to Nyberg and CSM;[3] and count fifteen, violation of the Connecticut Unfair Trade Practices Act (CUTPA) as to Nyberg and CSM. The remaining courts are directed at Ginsberg, JG Electric and Level Design and need not be further described for purposes of this memorandum.

In their underlying complaint, the plaintiffs allege the following facts as to the relationships of the parties. Valencis is the founder and president of ACSYS, a corporation in the business of developing web-based software and providing web-based services. MIG is a limited liability company and the current owner of the property located at 1577 New Britain Avenue, Farmington, Connecticut (the property). ACSYS is the sole member of MIG. Nyberg is the manager of Acton, LLC. Acton, LLC is the sole member of CSM, a limited liability company. Gerald Ginsberg is the owner of JG Electric. Ginsberg, at certain points in time, served as the project manager of the construction project on the property. Level Design is a limited liability company that was retained by CSM to provide civil engineering services in

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[2] As noted previously, Ginsberg is no longer a party defendant.

[3] In its post-trial brief, the defendants represent that the plaintiffs have withdrawn counts thirteen and fourteen.

connection with the project. The plaintiffs allege to have entered into a contract with Nyberg and his company, CSM, whereby Nyberg and CSM agreed to manage and oversee the construction of a building on the property, which was planned to be the corporate headquarters of ACSYS.

Although not included in the complaint, counsel reported to the court, and Valencis testified, that around Memorial Day 2012, Valencis called the Farmington Police and thereafter filed a criminal complaint against Nyberg. Because that complaint is still pending, when called to testify by the plaintiffs, Nyberg refused to answer most of the questions posed to him pursuant to his state and federal constitutional privileges against self-incrimination.

The PJR hearing was held over the course of nine hearing days, November 28–30, 2012, December 18–19, 2012, January 2 and 25, 2013, and March 22, 26, and 28, 2013.[4] Briefs were filed by the parties in May 2013. Oral argument on the briefs was heard on July 15, 2013. Because the plaintiffs' application for PJR is directed only to Nyberg and CSM, the court does not address whether there is probable cause to sustain counts sixteen, seventeen, eighteen,

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[4] The following witnesses were called to testify by the plaintiffs: Stanley Valencis, the plaintiff and principal of ACSYS; Frank Cotrona, owner of FJC Construction, project manager for the project; Vincent Lambert, financial consultant to ACSYS and MIG; and David Nyberg, the defendant and principal of CSM North LLC. The following witnesses were called by the defendants: Gerald Ginsberg, CSM's project manager for the project manager and owner of JG Electric; John Querker, Fire Tech Engineering Systems, a witness. Because of the anticipated length of the PJR hearing and related scheduling issues, on November 28, 2012, the parties stipulated without prejudice to a $1 million attachment of Nyberg's personal residence at 5 Prospect Court, Hamden, Connecticut, pending a decision by the court on the PJR.

nineteen, twenty, and twenty-one, all of which are directed against other defendants.

I

PJR STANDARD - GENERAL STATUES § 52–278D

"[P]rejudgment remedy proceedings pursuant to the provisions of [§ 52–278d] are not involved with the adjudication of the merits of the action brought by [a] plaintiff *or with the progress or result of that adjudication.* They are only concerned with whether and to what extent [that] plaintiff is entitled to have property of the defendant held in the custody of the law pending adjudication of the merits of that action." (Emphasis in original; internal quotation marks omitted.) *Hartford Accident & Indemnity Co.* v. *Ace American Reinsurance Co.*, 279 Conn. 220, 230, 901 A.2d 1164 (2006). "The purpose of the prejudgment remedy of attachment is security for the satisfaction of the plaintiff's judgment, *should* he obtain one. . . . It is primarily designed to forestall any dissipation of assets by the defendant and to bring [those assets] into the custody of the law to be held as security for the satisfaction of such judgment as the plaintiff *may recover*. . . . The adjudication made by the court on [an] application for a prejudgment remedy is not part of the proceedings ultimately to decide the validity and merits of the plaintiff's cause of action. It is independent of and collateral thereto. . . ." (Emphasis in original; internal quotation marks omitted.) *Morris* v. *Cee Dee, LLC*, 90 Conn. App. 403, 412, 877 A.2d 899, cert. granted, 275 Conn. 929, 883 A.2d 1245 (2005).

"A prejudgment remedy is available upon a finding by the court that there is probable cause that a judgment in the amount of the prejudgment remedy sought, or in an amount greater

than the amount of the prejudgment remedy sought, taking into account any defenses, counterclaims or set-offs, will be rendered in the matter in favor of the plaintiff. . . . Proof of probable cause as a condition of obtaining a prejudgment remedy is not as demanding as proof by a fair preponderance of the evidence. . . . The legal idea of probable cause is a bona fide belief in the existence of the facts essential under the law for the action and such as would warrant a man of ordinary caution, prudence and judgment, under the circumstances, in entertaining it. . . . Probable cause is a flexible common sense standard. It does not demand that a belief be correct or more likely true than false. . . . Under this standard, the trial court's function is to determine whether there is probable cause to believe that a judgment will be rendered in favor of the plaintiff in a trial on the merits." (Citations omitted; internal quotation marks omitted.) *TES Franchising, LLC* v. *Feldman*, 286 Conn. 132, 137, 943 A.2d 406 (2008).

In addition to proving probable cause as to the merits of the claims, the applicant must also demonstrate probable cause as to the amount of the damages claimed. "In other words, to justify issuance of a prejudgment remedy, probable cause must be established both as to the merits of the cause of action and as to the amount of the requested attachment. That dual requirement ensures that a person is not deprived of the use of property without due process of law." Id., 146. "Facts enabling the court to establish the amount of damages involved must be alleged in . . . an affidavit. . . . [T]he amount of damages in an application for a prejudgment remedy need not be determined with mathematical precision. . . . A fair and reasonable estimate of the likely potential damages is sufficient to support the entry of a prejudgment attachment. . . .

Nevertheless, the plaintiff bears the burden of presenting evidence which affords a reasonable basis for measuring [its] loss." (Citations omitted; internal quotation marks omitted.) *Kendall* v. *Amster*, 108 Conn. App. 319, 331, 948 A.2d 1041 (2008).

II

ADVERSE INFERENCE IN CIVIL CASES/PRIVILEGE AGAINST SELF-INCRIMINATION

"The fifth amendment privilege against self-incrimination not only protects the individual against being involuntarily called as a witness against himself in a criminal prosecution but also privileges him not to answer official questions put to him in any other proceeding, civil or criminal, formal or informal, where the answers might incriminate him in future criminal proceedings. . . . The privilege does not, however, forbid the drawing of adverse inferences against parties to civil actions when they refuse to testify in response to probative evidence offered against them. The prevailing rule is that the fifth amendment does not preclude the inference where the privilege is claimed by a *party to a civil cause*." (Citation omitted; emphasis in original; internal quotation marks omitted.) *Olin Corp.* v. *Castells*, 180 Conn. 49, 53–54, 428 A.2d 319 (1980).

"In the absence of an express statutory provision to the contrary . . . logic suggests that an adverse inference is warranted when a witness invokes a nonconstitutional privilege. . . . Thus, aside from the privilege against compelled self-incrimination . . . silence in the face of accusation is [in proper circumstances] a relevant fact not barred from evidence. . . . These remarks reflect the long-standing principle that the trier of fact is entitled to draw all fair and reasonable

inferences from the facts and circumstances [that] it finds established by the evidence, which consist both of what was said, and what naturally would have been. . . . This is perhaps best expressed in Justice Brandeis' pithy observation that [s]ilence is often evidence of the most persuasive character." (Citations omitted; footnotes omitted; internal quotation marks omitted.) *In re Samantha C.*, 268 Conn. 614, 635–3, 847 A.2d 883 (2004). Nevertheless, "[i]n some situations . . . the inference may be a negative one. For example, the failure to produce evidence that would naturally be favorable creates an inference that such evidence would, in fact, have been unfavorable to the party's cause. . . .

"Such negative inferences cannot supply proof of any particular fact. Accordingly, negative inferences do not help a party satisfy the burden of production as to a prima facie case. Adverse inferences can be used by the trier only in weighing the evidence and determining whether the ultimate burden of persuasion has been met." (Emphasis omitted.) C. Tait & E. Prescott, Connecticut Evidence (4th Ed. 2008) § 4.3.2, p. 140.

Nyberg invoked his fifth amendment privilege against self-incrimination upon inquiry by the plaintiffs as to the following relevant topics: the amount of money actually paid to subcontractors or used to purchase materials; whether subcontractors were paid on a weekly basis; whether Nyberg actually ordered any materials up front in order to save costs; what was done with the plaintiffs' payments to CSM; billing as it related to spray foam insulation, HVAC materials, plumbing materials, plumbing services, sprinkler work, architectural services, engineering services, and framing services; whether stairs and countertops were ever provided at

the site; whether there was double billing as to garbage removal, dumpster services, and temporary heat; whether the charges to the plaintiffs were inflated; Nyberg's knowledge of the status and progress of the project; Nyberg's participation in invoicing; whether Nyberg invoiced for materials and services that were never provided; whether CSM was a party to the agreement for the design and build-out of the property at cost plus five percent; whether CSM, as a party to the agreement, was supposed to obtain lien waivers, pay for materials, obtain permits, and provide a project manager; whether Nyberg knew CSM was not fulfilling its duties under the agreement; the extent of Nyberg's communication with Ginsberg when Ginsberg served as project manager; whether it was necessary to obtain permits before commencing electrical, heating, plumbing, or sprinkler work at the property; whether such permits were obtained; and whether delay resulted due to the failure to obtain the necessary permits and due to the poor management by CSM.

The court draws an adverse inference from Nyberg's failure to answer the questions posed as to the aforementioned topics and accordingly, considers it in weighing the other evidence presented by the plaintiffs, both testimonial and documentary, in determining whether the defendants have met their burden of persuasion as to the PJR.

III

FINDINGS OF FACT

The court finds that the plaintiffs have presented evidence establishing probable cause as to the following facts. Stanley Valencis is the president of ACSYS. ACSYS is a developer of

web-based software and provides web-based design services to clients. In 2011, in an effort to accommodate the rapid growth of ACSYS, Valencis sought to purchase a commercial property where he could design and build new offices. He located a property for potential purchase at 1577 New Britain Avenue, Farmington, Connecticut. Vincent Lambert is an independent contractor and financial advisor to ACSYS. Lambert introduced Valencis to his friend of several years, David Nyberg. Lambert had known Nyberg as a real estate developer. At the time, the plaintiffs' offices were located at 6 Executive Drive, Farmington, Connecticut.

Nyberg represented to Valencis that he had been in the construction business for over twenty years. Valencis came to rely on Nyberg in connection with the purchase of the property at 1577 New Britain Avenue. Nyberg negotiated and purchased the property in the name of CSM. Thereafter, the property was acquired by MIG Ventures. ACSYS is the sole member of MIG, a limited liability company that was formed for the sole purpose of acquiring the new property. Nyberg not only assisted Valencis with the purchase of the property, he also referred Valencis to a lawyer and to Citizens Bank for a construction loan. The plan from the beginning was to gut and totally renovate the building. The building was to be ninety (90) percent new construction. Early on in the project, the budget, including the purchase price and the design and build out of the building, was approximately $2 million; $1.5 million to purchase the property and $647,000 for the anticipated design and build out.

Valencis and Nyberg entered into an oral agreement whereby Nyberg was to act as general contractor for the project. Nyberg told Valencis that if Valencis were to pay cash up

front for labor and materials, there would be a thirty to forty percent savings. A cost-plus contract was drafted with a budget appended between "David W. Nyberg of CSM North, LLC, referred to as contractor and Stanley Valencis of Acsys Systems referred to as owner." The draft contract reflected an initial total construction cost of approximately $600,000.[5] See Exhibit 1. The original plan was that the project would be completed in December 2011 or January 2012 as Valencis had three years remaining on his lease and had a tenant to take over the ACSYS space.

Demolition at the property began in late June 2011. At some point in September 2011, Ginsberg, an independent contractor and owner of JG Electric, was hired by CSM to be the project manager. He was paid at the rate of $1800 per week. Nyberg was his supervisor. Ginsberg "created invoices" for "work that was done or was forecasted." He sometimes talked to Nyberg about the invoices. When he received checks in payment for the invoices, he left them on Nyberg's desk. Ginsberg also reported to Nyberg on the status of the project and Nyberg participated in meetings on the project. Nyberg was often copied on email communications between Valencis and Ginsberg. Ginsberg echoed Nyberg's representations that upfront cash payments to vendors and subcontractors would result in substantial savings to the plaintiffs.

During the fall of 2011, Valencis' concerns elevated regarding the lack of progress at the construction site. Despite these concerns, he continued to make payments as requested. A particular focus of concern was with the HVAC system. On November 29, 2011, in anticipation

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[5] This contract, however, was never signed by the parties.

of a meeting the next day, Ginsberg emailed Valencis to inform him that the project would need $500,000 to make deposits, "in the next 5 weeks," for materials and labor such as "insulation, MEP engineering, doors, windows, MEP contracting, tile and carpet ordering, paving, exterior, site utilities, etc, etc." Ginsberg assured Valencis that "the money would put the project in full swing" with these things and asked Valencis to "trust in [his] judgment." Exhibit 28. Ginsberg, Nyberg, and Valencis met on November 30, 2011. At the meeting, Ginsberg and Nyberg informed Valencis that the completion date would be pushed to March 2012.[6] By the end of November 2011, Ginsberg wrote to Valencis informing him that the "all in construction number" was $3.5 million. Exhibit 28. Thereafter, Valencis received an invoice dated December 2, 2011 in the amount of $224,700 for "insulation spray foam, electrical materials, plumbing materials, HVAC materials, framing and beam relocations, framing stair relocation, custom countertops, tier walls and underground utility." Exhibit 8. The plaintiffs remitted payment. Exhibit 18. The invoicing reflects that at times plaintiffs were charged a project management fee and five percent cost plus as a general contractor fee.[7] All payments were made payable to CSM North, LLC. Valencis had seventy employees during the time of construction.

In early January 2012, Valencis again voiced concern to Nyberg about the apparent lack

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[6] As a result of this push back, Valencis testified that he lost a sublease tenant that he had lined up for the property then occupied by ACSYS at 6 Executive Drive.

[7] See invoices in Exhibits 2–10. In at least one invoice the cost plus percentage was ten percent then changed to five percent.

of progress on the project despite Ginsberg's and Nyberg's representations that there would be results. On January 12, 2012, Valencis received and paid another invoice in the amount of $102,281 for additional sidewalks, framing and flooring, dumpster services, installing a sprinkler system, project management and supervision, sitework, and excavation. See Exhibits 9, 19. On January 17, 2012, Valencis emailed Ginsberg and Nyberg seeking further detail in the invoicing. See Exhibit 29. In late January 2012, Ginsberg apparently resigned from his position as project manager and subsequently had a conversation with Valencis wherein he expressed his frustration and apparent disappointment with Nyberg's style of overseeing the project.

In late January or early February of 2012, Nyberg asked Frank Cotrona, owner of FJC Construction (FJC), to mange the project two days a week. Eventually, Cotrona entered into an agreement with Nyberg that FJC would take over CSM's role as project manager for five percent of the overall project. Nyberg was to make his own payment arrangements for CSM with MIG. Thereafter, FJC was to accept the subcontractor's invoices, ensure the work had been done, sign off on the invoices, and send them to CSM. Once received, Derek Gothie, a CSM staff person, would review the invoices and forward them to MIG for payment to the subcontractors.

After FJC became project manager, Cotrona began investigating the status of the project and various charges paid by ACSYS and MIG. When he visited the site in late January or early February 2012, Cotrona observed that there was limited progress, to wit: there was some rough plumbing in the walls, there was some framing, and there was little to no electrical work. Upon investigation of the status of permits for the construction, FJC discovered that there was no

general building permit nor were there permits for any specialty subcontractors. Rather, only one permit had been obtained throughout the course of construction, namely, a building permit application for repairs, office framing, and sheetrock. Cotrona testified that the general building permit was a necessary component of the project because the building required extensive remodeling. There was no permit for the scope of work to be done. Permits for subcontractor work were also required before work could be performed.

In the course of his investigation of the invoicing, Cotrona created a spreadsheet reflecting what had been charged to the plaintiffs, whether the fees had been paid out to subcontractors, and whether, more likely than not, the fees charged were justified. See Exhibit 37. The plaintiffs' lender was also concerned with the legitimacy of many charges. See Exhibit 36. Cotrona found that there was essentially nothing to show for much of the materials and labor that had been billed to MIG. MIG paid $25,000 for HVAC materials but no HVAC work had been done and no contractor had been billed out for HVAC work. Cotrona questioned Gothie regarding payments that had been made for insulation, stairs, custom countertops and doors, none of which he could locate at the site. See Exhibit 35. Cotrona emailed Valencis on March 14, 2012, stating that his audit of invoices revealed that there was $249,540 unaccounted for and that CSM had been paid a total of $603,007.34. See Exhibit 37.

Cotrona also questioned Gothie regarding invoices and payments for electrical materials including a December 2011 payment for $35,000 and a February 2012 payment for $25,000. See Exhibits 8, 10, 20. When CSM submitted another invoice for $25,000 in March 2012 for more

electrical materials,[8] Cotrona questioned Gothie about the apparent duplication. Gothie informed Cotrona that the invoice was for electrical materials left on site but Cotrona was not able to confirm this with anyone at CSM; nor was Cotrona able to locate anything on site other than "rough electrical in the walls . . . [and] some electrical left over down in the basement, a spool of wire. . . ." See Exhibits 10, 20.

Cotrona also questioned the legitimacy of the framing fees assessed by CSM. Of the $107,604 charged for framing, Cotrona testified that the real value of this labor was no more than $40,000 when evaluated in light of the cost of materials actually used, which was only $12,700. See Exhibit 37. Most of this framing work had to be corrected and redone with new material at an estimated cost of approximately $30,000.

Cotrona reported that between an extra $150,000 and $170,000 was spent on ripping up pavement, changing piping underground, changing the underground electrical conduit, and changing the sprinkler piping, all of which was a result of improper planning and project management by CSM at the beginning of the project.

Cotrona also questioned the legitimacy of the project management fees that had been charged to MIG in addition to the cost plus fees charged to MIG by CSM. In addition to its general contractor fees of cost of materials plus five percent, CSM charged project management

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[8] This bill was not paid.

fees of $38,564 to $50,064.[9] The contract between ACSYS and CSM/Nyberg provided payment terms of cost of materials plus five percent, the customary fee arrangement between a general contractor and an owner. While sometimes a project management fee is charged in addition to a cost plus arrangement, Cotrona found the project management fees charged by CSM to be excessive. When Cotrona took over the project management in January 2012, the total amount paid to CSM was $603,007, which made no sense in light of the amount of work that had been done. Cotrona questioned additional payments of approximately $250,000.

There were other questionable items reflected in the billing by CSM. The plaintiffs were billed by CSM and paid $15,890 in November 2011 for architectural and engineering services, and $2500 in November 2011 for design drawings. See Exhibits 2, 7, 11, 16, 17. Nevertheless, the architects, Zared Architecture, had an unpaid balance of $6600 and would not release the prepared site plan to Cotrona when Cotrona took over as project manager. See Exhibit 37. Level Design, hired by CSM to perform civil engineering services in connection with the project, was also not paid. Exhibit 21 is an invoice to Ginsberg from Level Design, dated January 31, 2012, which reflects an unpaid balance of $12,274.28, paid by MIG on March 8, 2012. See Exhibit 22. Valencis testified that although he requested that Nyberg authorize Level Design to release the site plan to the plaintiffs, that request was denied. Cotrona confirmed that when he took over managing the project, he also was unable to obtain a site plan from the civil engineer. The record

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[9] Although Cotrona testified that the project management fees amounted to $50,064, the exhibits reflect only $38,564.

also reveals that despite the fact that the plaintiffs had prepaid CSM $35,386 for plumbing materials in December 2011 and $25,000 for sprinkler installation in January 2012, the plumber, Michael Sheehy Plumbing and Heating, LLC (Sheehy Plumbing), had not been paid. See Exhibits 8, 9. MIG ultimately paid Sheehy Plumbing directly. Exhibits 35, 51, 53, 54.

The completion of the project, which was originally planned for December 2011 or January 2012, did not occur until a certificate of occupancy was issued in August 2012. The plaintiffs continued operations at 6 Executive Drive, Farmington, due to the delay in completion of the project. Valencis testified that the plaintiffs incurred additional expense in the form of rent for the loss of two prospective subtenants to take over the 6 Executive Drive lease.

At the end of the relationship between the parties, Nyberg told Cotrona that CSM was owed $350,000 and could justify placing a mechanics lien for that amount on the property. Cotrona testified that at the time of completion of the project in August 2012, he had billed the plaintiffs for $1.6 million dollars, which amount included the work of FJC plus materials. The final cost of the project to the plaintiffs was $3.7 or $3.8 million.

IV

PLAINTIFFS' CLAIMS/PROBABLE CAUSE

A

Contract Claims

Counts One and Two
Breach of Express Contract and Breach of Implied Contract as to Nyberg and CSM

"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). "Whether [a] contract is styled express or implied involves no difference in legal effect, but lies merely in the mode of manifesting assent. . . . A true implied [in fact] contract can only exist [however] where there is no express one. It is one which is inferred from the conduct of the parties though not expressed in words. Such a contract arises where a plaintiff, without being requested to do so, renders services under circumstances indicating that he expects to be paid therefor, and the defendant, knowing such circumstances, avails himself of the benefit of those services. In such a case, the law implies from the circumstances, a promise by the defendant to pay the plaintiff what those services are reasonably worth. . . . Although both express contracts and contracts implied in fact depend on actual agreement . . . [i]t is not fatal to a finding of an implied contract that there were no express manifestations of mutual assent if the parties, by their conduct, recognized the existence of contractual obligations." (Citations omitted; internal quotation marks omitted.) *Janusauskas* v. *Fichman*, 264 Conn. 796, 804–05, 826 A.2d 1066 (2003).

Based on the findings of fact detailed in part III of this memorandum, the plaintiffs have established probable cause that there was an oral agreement between the plaintiffs and CSM whereby CSM was to act as general contractor for the build out of 1577 New Britain Avenue, the contract was breached by CSM and the plaintiffs suffered damages. The only remaining question

concerning the contractual relationship between the parties is whether Nyberg is personally liable as to these claims inasmuch as he failed to disclose that he was acting in a representative capacity of his principal, CSM.

"To avoid personal liability, it is the duty of an agent to disclose both the fact that he is acting in a representative capacity and the identity of his principal, since the party with whom he deals is not required to discover or to make inquiries to discover these facts. *Klepp Wood Flooring Corp.* v. *Butterfield*, 176 Conn. 528, 532–33, 409 A.2d 1017 (1979); *Antinozzi Associates* v. *Arch Fracker Plumbing & Heating Contractor, Inc.*, 39 Conn. Supp. 375, 379, 465 A.2d 333 (1983). Therefore, 'where the agent contracts as ostensible principal, regardless of his intention and notwithstanding his lack of personal interest in the consideration, he will be personally liable on the contract as if he were the principal.' 3 C.J.S. Agency § 369.

"The existence of an agency relationship is a question of fact for the trier. *Botticello* v. *Stefanovicz*, 177 Conn. 22, 26, 411 A.2d 16 (1979). The burden of proving agency is on the party asserting its existence." *New England Whalers Hockey Club* v. *Nair*, 1 Conn. App. 680, 683, 474 A.2d 810 (1984).

There is probable cause to believe the following: Lambert referred Valencis to Nyberg personally, as Nyberg and Lambert had been friends for years. Valencis and Nyberg had discussions regarding the purchase of the property at 1577 New Britain Avenue and the plaintiffs' construction plans. Following those discussions, Valencis and Nyberg agreed that Nyberg's company, CSM, would purchase the property, which would subsequently be acquired by MIG, a

limited liability company of which ACSYS is the sole member. Thereafter. the parties negotiated the design and build out of the interior of the property.

Valencis testified that he knew CSM was Nyberg's company but that he did not know of CSM's existence at the very beginning of his dealings with Nyberg. Valencis conceded, however, that "early on" he was aware of CSM and was under the impression, based upon Nyberg's representations, that both Nyberg and his company CSM would serve as the general contractors. While there was no written contract, Valencis testified that Nyberg referred to himself as a "handshake kind of guy" and that Nyberg assured Valencis that he would be overseeing the project and manage the subcontractors on a day to day basis.

While there is a lack of a writing fully memorializing the parties' agreement, there are other documents that speak to the nature of the arrangement. Exhibit 23 is an email exchange dated February 24, 2011. This email was sent to Valencis by Nyberg and reflects that Nyberg "accepts the terms proposed" with regard to acquiring the subject property. Exhibit 1 is an unsigned copy of a cost-plus contract,[10] which refers to "David W. Nyberg of CSM North, LLC" as the contractor. All invoices submitted as evidence appear to be issued by CSM and all payments in evidence were made to CSM, and not to Nyberg personally.

With these considerations in mind, the court must weigh Valencis' testimony as to his perception of his agreement with Nyberg and CSM, Nyberg's denial of being a party to the

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[10] This agreement was discussed by the parties but apparently was never signed.

contract,[11] and the paper trail of invoices and payments. The probable cause standard is not a demanding one. The plaintiffs are merely required to present sufficient evidence to demonstrate a basis for a bona fide belief in the existence of facts that would warrant a person of ordinary caution, prudence and judgment, under the circumstances, in entertaining them. In light of this standard and the fact that it is Nyberg's burden to prove the existence of the agency relationship he apparently claims, the plaintiffs have demonstrated probable cause as to Nyberg's personal liability. See, e.g., *Frederick Raff Co.* v. *Goeben*, 116 Conn. 83, 163 A. 462 (1932) (affirming trial court's finding that a check from the principal company and a letter regarding construction supplies, which was signed by the principal company, was not sufficient to put the plaintiff on notice that the defendant, whom the plaintiff dealt directly with, was merely an agent of the principal company).

Accordingly, the court finds that the plaintiffs have established probable cause as to their contract claims against both CSM and Nyberg.

Count Three
Breach of the Covenant of Good Faith and Fair Dealing

"[E]very contract carries an implied covenant of good faith and fair dealing requiring that neither party do anything that will injure the right of the other to receive the benefits of the agreement." (Internal quotation marks omitted.) *Jones* v. *H.N.S. Management Co.*, 92 Conn.

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[11] Other than asserting his constitutional privilege not to testify, the only substantive answer given by Nyberg during his testimony was to deny that he was personally party to the contract with the plaintiffs.

App. 223, 227, 883 A.2d 831 (2005). "[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 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.*" (Emphasis added; internal quotation marks omitted.) *Renaissance Management Co.* v. *Connecticut Housing Finance Authority*, 281 Conn. 227, 240, 915 A.2d 290 (2007). Bad faith involves "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." (Emphasis added; internal quotation marks omitted.) *New England Custom Concrete, LLC* v. *Carbone*, 102 Conn. App. 652, 661, 927 A.2d 333 (2007).

Valencis testified that the plaintiffs made payments to the defendants for the renovation and construction of new offices for the plaintiffs. See Exhibits 11–20. The referenced exhibits and the testimony of both Valencis and Cotrona reflect that the defendants invoiced the plaintiffs and were paid for labor, materials, and some services that were never rendered. The evidence

further supports an inference that Nyberg had oversight of the invoicing and was aware of the lack of progress on the construction site. The record reflects that Nyberg and others at CSM had knowledge that the plaintiffs were overpaying for services that, at times, were not rendered. The record also reflects that Nyberg and others at CSM represented to the plaintiffs that the requisite construction permits had been obtained when they knew such permits had not been obtained. In addition, Nyberg invoked his fifth amendment privilege against self-incrimination with respect to questions concerning payments to subcontractors, purchase of materials, rendering of services, whether discounts were given for the plaintiffs' prepayments for services and materials as promised, the preparation of fraudulent invoices, the filing of a mechanics lien on the property, the defendants' history of payments to subcontractors involved in other construction projects, CSM's involvement in the contract, whether CSM was authorized to do business in the state of Connecticut during the pendency of the project, whether proper permits were obtained for the project, and overcharges for labor, materials, and services, among other topics. The court draws an inference from Nyberg's refusal to testify as to these issues inasmuch the answers, if given, would support the plaintiffs' allegations and evidence presented in support of the elements of count three, specifically, that Nyberg and CSM acted in bad faith. For reasons further discussed infra, the same inference supports the other evidence offered by the plaintiffs as to counts seven and eight.

Accordingly, the court finds that the plaintiffs have established probable cause as to their claim of breach of the covenant of good faith and fair dealing against both CSM and Nyberg.

Count Four
Promissory Estoppel as to Nyberg and CSM

"Under the law of contract, a promise is generally not enforceable unless it is supported by consideration. . . . This court has recognized, however, the development of liability in contract for action induced by reliance upon a promise, despite the absence of common-law consideration normally required to bind a promisor. . . . Section 90 of the Restatement [(Second) of Contracts] states that under the doctrine of promissory estoppel [a] promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise. . . . A fundamental element of promissory estoppel, therefore, is the existence of a clear and definite promise which a promisor could reasonably have expected to induce reliance. Thus, a promisor is not liable to a promisee who has relied on a promise if, judged by an objective standard, he had no reason to expect any reliance at all. . . .

"Although the promise must be clear and definite, it need not be the equivalent of an offer to enter into a contract because [t]he prerequisite for . . . application [of the doctrine of promissory estoppel] is a *promise* and not a bargain and *not* an offer. . . . This, of course, is consistent with the principle that, although [a]n offer is nearly always a promise . . . all promises are not offers. . . .

"Additionally, the promise must reflect a present intent to commit as distinguished from a mere statement of intent to contract in the future. . . . [A] mere expression of intention, hope,

desire, or opinion, which shows no real commitment, cannot be expected to induce reliance . . . and, therefore, is not sufficiently promissory. The requirements of clarity and definiteness are the determinative factors in deciding whether the statements are indeed expressions of commitment as opposed to expressions of intention, hope, desire or opinion. . . . Finally, whether a representation rises to the level of a promise is generally a question of fact, to be determined in light of the circumstances under which the representation was made." (Citations omitted; emphasis in original; internal quotation marks omitted.) *Stewart* v. *Cendant Mobility Services Corp.*, 267 Conn. 96, 104–06, 837 A.2d 736 (2003).

The plaintiffs have demonstrated probable cause as to the promissory estoppel count inasmuch as there is evidence of a promise upon which the plaintiffs justifiably relied to their detriment. There is evidence that the defendants promised the plaintiffs to act as general contractors in supervising and managing the project on the subject property. There is evidence that the plaintiffs justifiably relied upon this promise and made a myriad of payments and prepayments to the defendants for labor and services to be rendered, which ultimately were not rendered.

Accordingly, the court finds that the plaintiffs have established probable cause as to count four, promissory estoppel, as an alternative claim.

Count Five
Unjust Enrichment as to Nyberg and CSM

"Unjust enrichment applies wherever justice requires compensation to be given for

property or services rendered under a contract, and no remedy is available by an action on the contract. . . . A right of recovery under the doctrine of unjust enrichment is essentially equitable, its basis being that in a given situation it is contrary to equity and good conscience for one to retain a benefit which has come to him at the expense of another. . . . With no other test than what, under a given set of circumstances, is just or unjust, equitable or inequitable, conscionable or unconscionable, it becomes necessary in any case where the benefit of the doctrine is claimed, to examine the circumstances and the conduct of the parties and apply this standard. . . . Unjust enrichment is, consistent with the principles of equity, a broad and flexible remedy. . . . Plaintiffs seeking recovery for unjust enrichment must prove (1) that the defendants were benefitted, (2) that the defendants unjustly did not pay the plaintiffs for the benefits, and (3) that the failure of payment was to the plaintiffs' detriment." (Internal quotation marks omitted.) *Vertex, Inc.* v. *Waterbury*, 278 Conn. 557, 573, 898 A.2d 178 (2006).

Based on the findings of fact made by the court in part III of this memorandum, and for reasons similar to those articulated in connection with counts one through four, the plaintiffs have established probable cause as to count five, unjust enrichment, as an alternative claim.

Count Six
Breach of Fiduciary Duty as to Nyberg

"It is well settled 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. . . . Although this court has

refrained from defining a fiduciary relationship in precise detail and in such a manner as to exclude new situations . . . we have recognized that not all business relationships implicate the duty of a fiduciary. . . . In particular instances, certain relationships, as a matter of law, do not impose upon either party the duty of a fiduciary." (Citations omitted; internal quotation marks omitted.) *Hi-Ho Tower, Inc.* v. *Com-Tronics, Inc.*, 255 Conn. 20, 38, 761 A.2d 1268 (2000). "In the cases in which [the state Supreme Court] has, as a matter of law, refused to recognize a fiduciary relationship, the parties were either dealing at arm's length, thereby lacking a relationship of dominance and dependence, or the parties were not engaged in a relationship of special trust and confidence." Id., 39.

The plaintiffs in the present case have failed to produce evidence of the existence of a unique degree of trust and confidence between the parties. Rather, the evidence before the court suggests the existence of an arm's length agreement. Accordingly, the plaintiffs have failed to establish probable cause as to their claim of breach of fiduciary duty.

B

Tort Claims

A threshold question as to the tort claims is whether there is probable cause to find that Nyberg may be held personally liable for the tort claims against him or whether he may evade personal liability by virtue of his status as an agent of CSM. "It is true that the agent is not liable where, acting within the scope of his authority, he contracts with a third party for a known principal. . . . It is also true that an officer of a corporation does not incur personal liability for its

torts merely because of his official position. Where, however, an agent or officer commits or participates in the commission of a tort, whether or not he acts on behalf of his principal or corporation, he is liable to third persons injured thereby." (Citations omitted.) *Scribner* v. *O'Brien, Inc.*, 169 Conn. 389, 404, 363 A.2d 160 (1975); see also *Joseph General Contracting, Inc.* v. *Couto*, 144 Conn. App. 241, 72 A.3d 413, cert. granted, --- Conn. ---- (2013). Based on findings of fact as set forth in the previous parts of this memorandum of decision, the adverse inferences that may be drawn from Nyberg's invocation of his fifth amendment privilege not to testify concerning his role within CSM as it related to the construction project, and the foregoing legal principles, the plaintiffs have established probable cause to believe that Nyberg may be held to be individually liable for the personal tort claims asserted against him.

Counts Seven and Eight
Fraud/Intentional Misrepresentation and Negligent Misrepresentation as to Nyberg

The tort of fraud, which is also commonly referred to as the tort of intentional misrepresentation; see, e.g., *Williams Ford, Inc.* v. *Hartford Courant Co.*, 232 Conn. 559, 561, 657 A.2d 212 (1995); consists of the following elements: "(1) that a false representation was made as a statement of fact; (2) that it was untrue and known to be untrue by the party making it; (3) that it was made to induce the other party to act on it; and (4) that the latter did so act on it to his injury." (Internal quotation marks omitted.) *Updike, Kelly & Spellacy P.C.* v. *Beckett*, 269 Conn. 613, 643, 850 A.2d 145 (2004). "[A] claim of fraudulent misrepresentation, [is] a separate and distinct tort from the tort of negligent misrepresentation." *Kramer* v. *Petisi*, 285 Conn. 674,

684, 940 A.2d 800 (2008). "In contrast to a negligent representation, [a] fraudulent representation . . . is one that is knowingly untrue, or made without belief in its truth, or recklessly made and for the purpose of inducing action upon it." (Internal quotation marks omitted.) Id., 674 n.9. "Traditionally, an action for negligent misrepresentation requires the plaintiff to establish (1) that the defendant made a misrepresentation of fact (2) that the defendant knew or should have known was false, and (3) that the plaintiff reasonably relied on the misrepresentation, and (4) suffered pecuniary harm as a result." (Internal quotation marks omitted.) *Coppola Construction Co., Inc.* v. *Hoffman Enterprises Ltd. Partnership*, 309 Conn. 342, 351–52, 71 A.3d 480 (2013).

As previously found by the court, there is probable cause to believe the following. A number of weeks into the commencement of demolition at the project site, Ginsberg was hired by Nyberg and CSM to serve as project manager. Nyberg and Ginsberg made representations to the plaintiffs that if they pre-paid for services, the plaintiffs would receive discounts and a better turnaround time from subcontractors. Nyberg knew these representations were false and misleading and the plaintiffs relied to their detriment on these representations. In addition, Nyberg made representations to the plaintiffs that the proper town permits had been obtained when in fact they had not and that he paid subcontractors weekly when in fact this was not true. See Exhibit 30 (email from Nyberg to Valencis stating "The way I can build [sic] 35 [to] 40 percent less is because I pay my subs weekly as well as all materials are ordered up front for savings.")

In addition, Ginsberg testified about the lack of progress on the property despite substantial prepayments made by the plaintiffs. He testified that he would report to Nyberg on the status of the project, that Nyberg would participate in meetings on the project, and that he would discuss with Nyberg his forecast forward on a regular basis as to the status of the project. Ginsberg also testified that he would prepare the invoices, that he would seek Nyberg's approval with respect to an amount billed on some occasions, and that once a payment was received from the owner, he would place the check on Nyberg's desk. Given this and other evidence of Nyberg's oversight of the project, there is probable cause to believe Nyberg had knowledge of the falsity of his representations regarding the permits and invoices and that the plaintiffs relied on these representations to their detriment, which ultimately caused them damages.

Count Nine
Negligence as to Nyberg and CSM

"The essential elements of a cause of action in negligence are well established: duty; breach of that duty; causation; and actual injury. . . . Duty is a legal conclusion about relationships between individuals, made after the fact, and [is] imperative to a negligence cause of action. . . . Thus, [t]here can be no actionable negligence . . . unless there exists a cognizable duty of care . . . the scope of which we sometimes refer to as the standard of care. . . . [T]he test for the existence of a legal duty of care entails (1) a determination of whether an ordinary person in the defendant's position, knowing what the defendant knew or should have known, would anticipate that harm of the general nature of that suffered was likely to result, and (2) a determination, on the

basis of a public policy analysis, of whether the defendant's responsibility for its negligent conduct should extend to the particular consequences or particular plaintiff in the case." (Citations omitted; internal quotation marks omitted.) *Doe* v. *Saint Francis Hospital & Medical Center*, 309 Conn. 146, 174–75, 72 A.3d 929 (2013). "[T]he duty to exercise reasonable care arises whenever the activities of two persons come so in conjunction that the failure to exercise that care by one is liable to cause injury to the other." (Internal quotation marks omitted.) *Borsoi* v. *Sparico*, 141 Conn. 366, 370, 106 A.2d 170 (1954).

There is probable cause to believe that Nyberg and CSM owed the plaintiffs a duty of care arising out of the promises made to Valencis by Nyberg to properly complete construction of the project within a reasonable time frame. Nyberg knew, or reasonably should have known, that the failure to obtain the necessary permits, the failure to pay subcontractors, the submission of invoices for services and materials not provided, among other wrongful actions, would result in substantial delays in the project. Based on all the findings of fact previously stated, Nyberg and CSM breached their duty of care owed to the plaintiffs, which was a substantial factor in causing financial injury to the plaintiffs. Accordingly, the plaintiffs have established probable cause as to their claim of negligence.

Count Ten
Civil Conspiracy as to Nyberg and CSM

"The [elements] of a civil action for conspiracy are: (1) a combination between two or more persons, (2) to do a criminal or an unlawful act or a lawful act by criminal or unlawful

means, (3) an act done by one or more of the conspirators pursuant to the scheme and in furtherance of the object, (4) which act results in damage to the plaintiff. . . . There is, however, no independent claim of civil conspiracy. Rather, [t]he action is for damages caused *by acts committed pursuant to a formed conspiracy* rather than by the conspiracy itself. . . . Thus, to state a cause of action, a claim of civil conspiracy must be joined with an allegation of a substantive tort. . . . [T]he essence of a civil conspiracy . . . [is] two or more persons acting together to achieve a shared goal that results in injury to another. . . .

"Thus, the purpose of a civil conspiracy claim is to impose civil liability for damages on those who agree to join in a tortfeasor's conduct and, thereby, become liable for the ensuing damage, simply by virtue of their agreement to engage in the wrongdoing. Implicit in this purpose, and in the principle that there must be an underlying tort for the viability of a civil conspiracy claim, is the notion that the coconspirator be liable for the damages flowing from the underlying tortious conduct to which the coconspirator agreed." (Citations omitted; emphasis in original; internal quotation marks omitted.) *Macomber* v. *Travelers Property & Casualty Corp.*, 277 Conn. 617, 635–36, 894 A.2d 240 (2006).

"Courts in other jurisdictions—both federal and state—that have addressed issues involving civil intracorporate conspiracy allegations have adopted the intracorporate conspiracy immunity doctrine to hold that wholly intracorporate conduct does not satisfy the plurality requirement necessary to establish an actionable conspiracy claim. This single entity view of intracorporate conduct derives from traditional principles of agency law. A basic principle of

agency is that a corporation can act only through the authorized acts of its corporate directors, officers, and other employees and agents. Thus, the acts of the corporation's agents are attributed to the corporation itself." (Internal quotation marks omitted.) *Harp* v. *King*, 266 Conn. 747, 776–77, 835 A.2d 953 (2003).

"[F]or a claim of intracorporate conspiracy to be actionable, the complaint must allege that corporate officials, employees, or other agents acted outside the scope of their employment and engaged in conspiratorial conduct to further their own personal purposes and not those of the corporation. . . . In other words, the employee's allegedly wrongful conduct must be in furtherance of personal considerations unrelated or extraneous to the corporation's interest. In determining whether an employee has acted within the scope of employment, courts look to whether the employee's conduct: (1) occurs primarily within the employer's authorized time and space limits; (2) is of the type that the employee is employed to perform; and (3) is motivated, at least in part, by a purpose to serve the employer. . . .

"Ordinarily, it is a question of fact as to whether a wilful tort of the servant has occurred within the scope of the servant's employment . . . [b]ut there are occasional cases [in which] a servant's digression from [or adherence to] duty is so clear-cut that the disposition of the case becomes a matter of law." (Citations omitted; internal quotation marks omitted.) Id., 782–83.

Based on these legal principles, the court finds that the plaintiffs have failed to establish probable cause as to the requisite elements of civil conspiracy. To prevail in this count, the plaintiffs have the burden of proving that Nyberg and Ginsberg both acted to further their own

purposes and not those of CSM.[12] However, the evidence suggests that the tortious acts alleged in the complaint were committed in furtherance of the interests of CSM and perhaps Nyberg's personal interests as they relate to CSM. This type of intracorporate conduct thus does not satisfy the plurality requirement necessary to establish an actionable conspiracy claim.

Count Eleven
Conversion as to Nyberg and CSM

"The tort of [c]onversion occurs when one, without authorization, assumes and exercises ownership over property belonging to another, to the exclusion of the owner's rights. . . . Thus, [c]onversion is some unauthorized act which deprives another of his property permanently or for an indefinite time; some unauthorized assumption and exercise of the powers of the owner to his harm. The essence of the wrong is that the property rights of the plaintiff have been dealt with in a manner adverse to him, inconsistent with his right of dominion and to his harm. . . . The term owner is one of general application and includes one having an interest other than the full legal and beneficial title. . . . The word owner is one of flexible meaning, and it varies from an absolute proprietary interest to a mere possessory right. . . . It is not a technical term and, thus, is not confined to a person who has the absolute right in a chattel, but also applies to a person who has possession and control thereof." (Citation omitted; internal quotation marks omitted.) *Deming* v. *Nationwide Mutual Ins. Co.*, 279 Conn. 745, 770–71, 905 A.2d 623 (2006). "The

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[12] The court notes that at the time of his testimony, Ginsberg stated that in October 2012, he filed a Chapter 7 bankruptcy petition and, on October 15, 2012, the plaintiffs filed an amended complaint that removed Ginsberg as a defendant.

intent required for a conversion is merely an intent to exercise dominion or control over an item even if one reasonably believes that the item is one's own." *Plikus* v. *Plikus*, 26 Conn. App. 174, 180, 599 A.2d 392 (1991).

"Conversions may be grouped into two general classes: (1) those where the possession is originally wrongful; and (2) those where it is rightful and subsequently becomes wrongful. Under the first class, wrongful use and the unauthorized dominion constitute the conversion; therefore no demand for the return of the personal property is required. Under the second class, since the possession is rightful and there is no act of conversion, there can be no conversion until the possessor refuses to deliver up the property upon demand." *Label Systems Corp.* v. *Aghamohammadi*, 270 Conn. 291, 331 n.30, 852 A.2d 703 (2004). In the present case, the conversion alleged is of the latter type. Initially, the payments were made by the plaintiffs ostensibly to purchase materials from suppliers and pay for services rendered by subcontractors and other third parties.

"[M]oney can clearly be subject to conversion. See *Devitt* v. *Manulik*, 176 Conn. 657, 662–63, 410 A.2d 465 (1979) (recovery of money wrongfully taken from joint survivorship bank account); *Dunham* v. *Cox*, 81 Conn. 268, 270–71, 70 A. 1033 (1908) (recovery of a sum of money entrusted to the defendant for payment to a third person); *Shelby Mutual Ins. Co.* v. *Della Ghelfa*, 3 Conn. App. 432, 445, 489 A.2d 398 (1985), aff'd, 200 Conn. 630, 513 A.2d 52 (1986) (recovery by insurer from insured's attorney pursuant to General Statutes [Rev. to 1979] § 38–325 [b]). . . ." (Internal quotation marks omitted.) *Deming* v. *Nationwide Mutual Ins. Co.*,

supra, 279 Conn. 771.

The court finds that the plaintiffs have established probable cause as to the elements of conversion. As discussed previously in part III of this memorandum, Nyberg and CSM assumed and exercised ownership over the plaintiffs' money paid to them for purchase of materials and rendering of services anticipated for the construction project at 1577 New Britain Avenue. See Exhibits 11–20 (checks written from ACSYS and MIG to CSM). At some point, the plaintiffs came to realize that the monies paid to Nyberg and CSM were not being used in a proper manner or for their intended purposes in accordance with the contract between the parties. Specifically, the plaintiffs came to discover that there were duplicate charges for the same services, charges for services never rendered, and also subcontractors who had not been paid for services that were rendered. Exhibit 39 is an email from Valencis written to Nyberg wherein Valencis expresses concern over charges not accounted for and states that he "expect[s] any unused funds to be immediately returned and appropriate credits issued to questionable charges."[13] Despite this demand, Nyberg and CSM failed to account for or return the monies so demanded. Therefore,

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[13] The email further provides, in relevant part: "The bank's initial observations suggest there is over $200,000 of the over $600,000 of funds paid to CSM not accounted for. Furthermore, I have questions on several charges including but not limited to over $100,000 for framing, $35,000 insulation and especially the more than $50,000 for Project Management which contradicts the 5 percent management fee we originally agreed to. There are several other questionable charges including invoices that are in excess of what the vendor charged.

"I have requested the bank this week to provide a detailed audit so we can clear up any misunderstandings. I expect any unused funds to be immediately returned and appropriate credits issued to questionable charges." Exhibit 39.

there is probable cause that Nyberg and CSM exercised dominion and control over funds that were wrongfully retained, despite their knowledge that the funds in question had not been expended as promised.

C

Statutory Claims

Count Twelve
Statutory Theft as to Nyberg and CSM

"Statutory theft under § 52–564 is synonymous with larceny under General Statutes § 53a–119. . . . Pursuant to § 53a–119, [a] person commits larceny when, with intent to deprive another of property or to appropriate the same to himself or a third person, he wrongfully takes, obtains or [withholds] such property from an owner. . . . Conversion can be distinguished from statutory theft as established by § 53a–119 in two ways. First, statutory theft requires an intent to deprive another of his property; second, conversion requires the owner to be harmed by a defendant's conduct. Therefore, statutory theft requires a plaintiff to prove the additional element of intent over and above what he or she must demonstrate to prove conversion." (Citations omitted; internal quotation marks omitted.) *Deming* v. *Nationwide Mutual Ins. Co.*, supra, 279 Conn. 771.

"[M]oney can be the subject of statutory theft. See *Howard* v. *MacDonald*, [270 Conn. 111, 111, 851 A.2d 1142 (2004)] (unlawful transfer of funds from elderly woman's bank account to defendant's bank account)." (Internal quotation marks omitted.) *Deming* v. *Nationwide*

Mutual Ins. Co., supra, 279 Conn. 771–72.

Based upon the evidence before the court, the court finds there is probable cause to believe that Nyberg knew that CSM was issuing duplicate billing for materials and/or services already paid for or for materials and/or services not received or never rendered. There is evidence that Valencis confronted Nyberg regarding these discrepancies and that Nyberg and CSM retained funds rightfully belonging to the plaintiffs. The court also considers that Nyberg invoked his fifth amendment privilege against self-incrimination as to questions concerning where payments for the project went after the checks from the plaintiffs were cashed or deposited. Accordingly, the plaintiffs have demonstrated probable cause as to the element of intent as well as to the other elements of statutory theft as to both Nyberg and CSM.

Count Fifteen
Violation of CUTPA as to Nyberg and CSM

General Statutes § 42–110b (a) provides that: "No person shall engage in unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce." "It is well settled that in determining whether [an act or] practice violates CUTPA [the state Supreme Court] [has] adopted the criteria set out in the cigarette rule by the federal trade commission for determining when [an act or] practice is unfair: (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]. . . .

"All three criteria do not need to be satisfied to support a finding of unfairness. A practice may be unfair because of the degree to which it meets one of the criteria or because to a lesser extent it meets all three. . . . Thus a violation of CUTPA may be established by showing either an actual deceptive practice . . . or a practice amounting to a violation of public policy. . . . Furthermore, a party need not prove an intent to deceive to prevail under CUTPA." (Citations omitted; internal quotation marks omitted.) *Jacobs* v. *Healey Ford-Subaru, Inc.*, 231 Conn. 707, 725–26, 652 A.2d 496 (1995).

"The same facts that establish a breach of contract claim may be sufficient to establish a CUTPA violation. *Lester* v. *Resort Camplands International, Inc.*, 27 Conn. App. 59, 71, 605 A.2d 550 (1992). Not every contractual breach rises to the level of a CUTPA violation. *Hudson United Bank* v. *Cinnamon Ridge Corp.*, 81 Conn. App. 557, 571, 845 A.2d 417 (2004). 'There is a split of authority in Superior Court decisions regarding what is necessary to establish a CUTPA claim for breach of contract, the majority of courts holding that a simple breach of contract, even if intentional, does not amount to a violation of CUTPA in the absence of substantial *aggravating circumstances*.'" (Emphasis added.) *Greene* v. *Orsini*, Superior Court, judicial district of New London, Docket No. CV-06-5100265-S (March 15, 2007, *Devine, J.*) (50 Conn. Supp. 312, 315, 926 A.2d 708). "The general rule is that a breach of contract claim will support a CUTPA action when the claim is associated with aggravating, unethical or unscrupulous acts amounting to unfair

or deceptive conduct." *Ulbrich* v. *Groth*, Superior Court, judicial district of Waterbury, Complex Litigation Docket, Docket No. X06-CV-08-4016022-S (October 26, 2010, *Stevens, J.*); see also *Greene* v. *Orsini*, supra, 316 ("[T]he plaintiffs allege that the defendants breached the noncompetition agreement on several occasions despite the plaintiffs' repeated complaints. These multiple breaches, if proven, could satisfy the third prong of the cigarette rule, causing substantial injury to a competing business."); *Ameripride Services, Inc.* v. *U.S. Food Service, Inc.*, Superior Court, judicial district of Hartford, Docket No. CV-04-0835453-S (June 7, 2006, *Tanzer, J.*) ("Multiple breaches of contract may also raise a breach of contract claim to the level of a CUTPA violation"); *Cadle Co.* v. *Multi Unit Services, Inc.*, Superior Court, judicial district of Fairfield at Bridgeport, Docket No. CV-03-393187 (May 12, 2003, *Levin, J.*) (finding that cumulative breaches of a contract may be characterized as an aggravating circumstance).

Furthermore, a number of judges of the Superior Court have found that a claim of misrepresentation coupled with a breach of contract claim is enough to constitute an aggravating circumstance so as to state a claim for a violation of CUTPA. *Wright Brothers Builders, Inc.* v. *Shuldman*, Superior Court, judicial district of Stamford-Norwalk, Docket No. CV-05-4005897-S (October 31, 2006, *Jennings, J.*) ("The court finds in this case, however, that substantial aggravating circumstances have been alleged in the Eighth Count in the form of intentional misrepresentations."); *Friedlander, L.P.* v. *Cohen*, Superior Court, Judicial District of Fairfield at Bridgeport, Docket No. CV-04-0412547 (April 15, 2005, *Skolnick, J.*) ("Where a complainant alleges that a defendant made a misrepresentation during the course of the defendant's business

practice, with or without the intent to deceive [or defraud], and that misrepresentation led a plaintiff to lose money or property, that plaintiff has alleged a cause of action under CUTPA."); *Designs on Stone, Inc.* v. *John Brennan Construction Co.*, Superior Court, judicial district of Ansonia-Milford at Milford, Docket No. CV-97-059997 (April 9, 1998, *Corradino, J.*) (21 Conn. L. Rptr. 659, 660) ("It has been held that a 'misrepresentation' can constitute an aggravating circumstance that would allow a simple breach of contract claim to be treated as a CUTPA violation; it would in effect be a deceptive act. . . .")

The court finds that there is probable cause to believe that Nyberg and CSM committed multiple breaches of contract, misrepresentations, statutory theft, and conversion, which caused substantial injury to the plaintiffs, vendors, and subcontractors on the project. Based on this finding as well as the previous findings of fact made throughout this memorandum, the court finds that there is also probable cause to believe that Nyberg's and CSM's acts were immoral, unethical, oppressive, or unscrupulous. Accordingly, the plaintiffs have established probable cause as to their CUTPA claim.

V

DAMAGES/PROBABLE CAUSE

"[T]he party seeking the prejudgment remedy must present evidence that is sufficient to enable the court to determine the probable amount of the damages involved. . . . Although the likely amount of damages need not be determined with mathematical precision . . . the plaintiff bears the burden of presenting evidence [that] affords a reasonable basis for measuring her loss."

(Citations omitted; internal quotation marks omitted.) *TES Franchising, LLC* v. *Feldman*, supra, 286 Conn. 146.

The plaintiffs seek a prejudgment remedy in the amount of $2,190,603.30. The first category of damages claimed flow from the plaintiffs' statutory theft claim. If probable cause is found as to these damages, they are subject to trebling pursuant to General Statutes § 52–564.[14] As to the statutory theft claim, the plaintiffs ascribe a $422,776.34 loss to overcharges and duplicated charges. The plaintiffs break this amount down as follows: $26,750 for garbage removal, $2200 for temporary power, $4871 for temporary heat, $11,650 for mechanical, electrical, plumbing, and engineering services, $2500 for architectural fees, $2500 for design drawings, $15,890 for architectural and engineering fees, $60,000 for plumbing including a sprinkler, $50,000 for spray foam insulation, $60,000 for electrical materials, $25,000 for HVAC materials, $14,000 for custom cut doors, and $8000 for stairs. In addition, the plaintiffs claim $50,064.39 for project management fees, $21,746.55 for the cost plus fee for labor, materials and/or services that were never provided, and $67,604.40 for excessive charges for framing labor.

The second category of damages claimed by the plaintiff is not the subject of statutory

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[14] General Statutes § 52–564 provides: "Any person who steals any property of another, or knowingly receives and conceals stolen property, shall pay the owner treble his damages." "Under this mandatory language, where liability is found, the damages are to be trebled. See *Stuart* v. *Stuart*, [297 Conn. 26, 53 n.14, 996 A.2d 259 (2010)] (§ 52–564 contains mandatory language)." *Jalbert* v. *Mulligan*, Superior Court, judicial district of Waterbury, Docket No. CV-08-6001044-S (June 11, 2013, *Shapiro, J.*).

theft, and therefore, does not require trebling. The plaintiffs break this amount down as follows: $12,274.28 for a payment to Level Design, $100,000 of rent paid at the 6 Executive Drive property, $110,000 for the buyout of the 6 Executive Drive lease, $170,000 for the cost to redo work other than framing at the site, $30,000 for the cost of materials to correct defective framing, $150,000 in lost profits, $250,000 in lost interest, income, and other opportunity costs, $100,000 in attorney's fees, and $200,000 in punitive damages.

For the reasons set forth herein, the court finds probable cause in support of the following damages:

Damages Subject to Trebling

Type of Damages	Amount
Garbage Removal	26,750.00
MEP Fees	11,650.00
Design Drawings	2500.00
Architectural and Engineering Fees	15,890.00
Plumbing and Sprinkler	60,000.00
Spray Foam Insulation	50,000.00
Electric Materials	60,000.00
HVAC Materials	25,000.00
Custom Cut Doors and Stairs	22,000.00
Project Management Fee	38,564.39
Cost Plus Fee for Labor	21,746.25
Excessive Charges for Labor for Framing	67,604.40

TOTAL	401,705.04
TOTAL x's 3	**1,205,115.12**

Damages Not Subject to Trebling

Type of Damages	Amount
Payment to Level Design	12,274.28
Redoing Work on Site Other than Framing	170,000.00
Cost of Correcting Defective Framing	30,000.00
Attorney's Fees	100,000.00
TOTAL	**312,274.28**

A

Damages Subject to Trebling

Garbage Removal

As to the garbage removal, the plaintiffs paid an invoice dated November 10, 2011, which included a $26,750 charge for "garbage removal, trailer removal and regrading, block walls, sidewalk demo." The same invoice noted a charge for "dumpster services" in the amount of $2800. See Exhibits 7, 16, 17. The plaintiffs also paid an invoice dated October 14, 2011, which included a $5329.24 charge for "dumpster services." See Exhibits 6, 15. The plaintiffs also paid an invoice dated January 12, 2012, which included a $4000 charge for "dumpster services."

Exhibits 9, 19. The plaintiffs claim that the total of $12,129.24 paid for dumpster services is duplicative of the $26,750 paid for garbage removal. Valencis testified that these services were duplicative and Nyberg invoked the fifth amendment privilege against self-incrimination as to questions related to whether such charges were duplicative. Based on the evidence presented, the court finds that the plaintiffs have demonstrated probable cause as to duplicated charges for garbage removal and dumpster fees in the amount of $26,750.

Temporary Power and Heat

The plaintiffs next claim that they are entitled to $2200 for temporary power and $4871 for temporary heat. On October 14, 2011, the plaintiffs were invoiced $2200 for temporary power. See Exhibits 6, 15. On January 12, 2012, the plaintiffs were invoiced $4871 for temporary heat. See Exhibits 9, 19. On November 10, 2011, the plaintiffs were invoiced $5360 for "temporary conditions (heat, toilets and power)." See Exhibits 7, 16, 17. In addition to this evidence, the plaintiffs point to Valencis' testimony that he believed the charges to be duplicated. However, the plaintiffs also point to Cotrona's testimony, which actually serves to undermine their claim. Cotrona testified that "[t]here was power on site, yes, there was definitely temporary power on the site. And there was still a leftover—or a furnace that was running a single furnace down in the basement." The plaintiffs accordingly have failed to satisfy their burden to demonstrate probable cause as to whether the charges for temporary power were duplicated.

MEP Fees

The plaintiffs next claim that they are entitled to $11,650 for mechanical, electrical and

plumbing engineering fees. The plaintiffs paid an invoice dated November 10, 2011, which included a $11,650 charge for mechanical, electrical and plumbing engineering fees. See Exhibits 7, 16, 17. Valencis testified that these services were never provided and as a result the plaintiffs hired their own MEP engineer, MUSCO. Cotrona's audit spreadsheet also raises questions as to whether a subcontractor had been paid by CSM for providing such mechanical, electrical and plumbing engineering services. See Exhibit 37. Based on this evidence, there is probable cause as to the plaintiffs' claim of damages for mechanical, electrical and plumbing engineering fees in the amount of $11,650.

Design Drawings

The plaintiffs claim that they are entitled to $2500 for design drawings. The plaintiffs paid an invoice dated October 14, 2011, which included a $2500 charge for design drawings. See Exhibits 6, 15. Valencis testified that he never received a site plan from the civil engineer; nor did he receive any certified architectural blueprints. Cotrona's audit spreadsheet also reflects that questions existed as to whether a subcontractor had been paid by CSM for providing design drawings. See Exhibit 37. Nyberg invoked the fifth amendment as to whether he told Level Design not to release the site plan even though the plaintiffs had paid their bill directly. Based on the foregoing evidence, there is probable cause as to the plaintiffs' claim of damages for the design drawings in the amount of $2500.

Architectural and Engineering Fees

The plaintiffs next claim that they are entitled to $15,890 for architectural and engineering fees. The plaintiffs paid an invoice dated November 10, 2011, which included a $15,890 charge for architectural and engineering fees. See Exhibits 7, 16, 17. Exhibit 21 reflects that Level Design invoiced Ginsberg, CSM's then project manager, for $12,274.28 for civil engineering services.[15] Valencis testified that he discovered that CSM never paid this invoice and directed that the invoice be paid directly to Level Design. See Exhibit 22. Based on the foregoing evidence, there is probable cause as to the plaintiffs' claim of damages for the architectural and engineering fees in the amount of $15,890.[16]

Plumbing and Sprinkler

The plaintiffs next claim that they are entitled to $60,000 for plumbing and sprinkler services. The plaintiffs paid an invoice dated December 2, 2011, which included a $35,000 charge for plumbing materials. See Exhibits 8, 18. The plaintiffs also paid an invoice dated January 12, 2012, which included a $25,000 charge for the installation of a sprinkler. See

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[15] For further discussion regarding the $12,274.28 payment, see infra part V (B).

[16] The plaintiffs also make a claim for $2500 in "architectural fees." The plaintiffs have not provided a citation to the record for the payment of this charge, nor does this court see such a charge on the invoices provided. The plaintiffs, therefore, have failed to establish probable cause as to this element of their damages claim.

Exhibits 9, 19. Cotrona testified that when he visited the site in late January or early February, there was some rough plumbing done, which Cotrona described as "some piping for hot and cold water and drainage for some of the interior bathrooms to be installed." Valencis testified that he spoke with the plumbing subcontractor, Sheehy, only to find out that Sheehy had never been paid. The plaintiffs ultimately chose to pay Sheehy directly. See Exhibits 35, 51, 53, 54. Nyberg invoked the fifth amendment as to questions related to the plumbing and sprinkler. Based on this evidence, there is probable cause as to the plaintiffs' claim of damages for the plumbing and sprinkler in the amount of $60,000.

Spray Foam Insulation

The plaintiffs next claim that they are entitled to $50,000 for spray foam insulation. The plaintiffs paid an invoice dated December 2, 2011, which included a $50,000 charge for spray foam insulation. See Exhibits 8, 18. Through his testimony, Cotrona verified that, upon his audit, he discovered there had been no insulation contractor selected; nor was there any insulation on site. Nyberg invoked the fifth amendment with regard to this charge. Based on the foregoing evidence, there is probable cause as to the plaintiffs' claim of damages for the spray foam insulation in the amount of $50,000.

Electrical Materials

The plaintiffs next claim that they are entitled to $60,000 for electrical materials. The plaintiffs paid an invoice dated December 2, 2011, which included a $35,000 charge for electrical materials. See Exhibits 8, 18. Thereafter, the plaintiffs paid an invoice dated February 21, 2012,

which included a $25,000 charge for electrical material on site. See Exhibits 10, 20. In support of their claim for $60,000, the plaintiffs point to Cotrona's testimony that there was essentially nothing at the project site to show for these electrical material charges. Cotrona testified that when he visited the site in late January or early February 2012, "[t]here was no electrical done – rough electrical in the walls. There was some electrical left over down in the basement, a spool of wire or something." Nyberg also invoked the fifth amendment as to all questions related to the legitimacy of the electrical material charges. Based on this evidence, there is probable cause as to the plaintiffs' claim of damages for electrical materials in the amount of $60,000.

HVAC Materials

The plaintiffs next claim that they are entitled to $25,000 for HVAC materials. The plaintiffs paid an invoice dated December 2, 2011, which included a $25,000 charge for HVAC materials. See Exhibits 8, 18. Cotrona verified that "there was a $25,000 invoice that was billed . . for HVAC. . . . [T]here was no [HVAC] contractor hired on site at that point nor was there any HVAC done." Nyberg invoked his fifth amendment privilege against self-incrimination as to the billing for HVAC. Based on this evidence, there is probable cause as to the plaintiffs' claim of damages for HVAC materials in the amount of $25,000.

Custom Cut Doors and Stairs

The plaintiffs next claim that they are entitled to $14,000 for custom counter tops[17] and $8000 for stairs, neither of which were ever provided. The plaintiffs paid an invoice dated December 2, 2011, which included a $14,000 charge for custom counter tops and $8000 for framing stair relocation. See Exhibits 8, 18. As to these costs, Cotrona testified that they were not substantiated inasmuch as there was nothing on site to reflect stairs, doors and/or counter tops. Nyberg invoked the fifth amendment as to questions relating to these charges. Based on this evidence, there is probable cause as to the plaintiffs' claim of damages for the stairs and custom counter tops in the amount of $22,000.

Project Management Fees

The plaintiffs next claim that they are entitled to $50,064.39 for unjustified project management fees. There is evidence that the plaintiffs paid the following project management fees: $7,314.39 reflected in the October 14, 2011 invoice, $7,250 reflected in the November 10, 2011 invoice, $12,000 reflected in the December 2, 2011 invoice, and $12,000 reflected in the January 12, 2012 invoice. See Exhibits 6, 7, 8, 9, 15, 16, 17, 18, 19. These payments come to a total of $38,564.39. In the present case, the parties already had stipulated to a contract arrangement of actual cost of the project plus five5 percent. Moreover, in light of all of the

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[17] It is unclear if this charge was for doors or custom counter tops. The record reflects that the charges could have been for either or both.

evidence strongly suggesting that the defendants failed to provide the labor and services as promised, this court finds that there is probable cause to believe the aforementioned project management fees were not warranted. Accordingly, there is probable cause as to damages for project management fees in the amount of $38,564.39.

Cost Plus Fee for Labor

The plaintiffs next claim that they are entitled to $21,746.55 for cost plus fees because these were charged in connection with labor, materials, and services that were never provided. There is evidence that the plaintiffs paid the following cost plus fees: $3962 reflected in the October 14, 2011 invoice, $7,084.25 reflected in the November 10, 2011 invoice, and $10,700 reflected in the December 2, 2011 invoice. See Exhibits 6, 7, 8, 15, 16, 17, 18. These payments come to a total of $21,746.25. In light of the previously noted evidence that there is probable cause to believe that a significant portion of the labor and services that the plaintiffs contracted for were never rendered, there is also probable cause to believe that a cost plus fee assessed upon these services was not warranted. Accordingly, there is probable cause as to damages for the cost plus fee in the amount of $21,746.25.

Excessive Charges for Labor for Framing

The plaintiffs next claim that they are entitled to $67,604.40 for excessive charges for labor for framing. Cotrona's audit spreadsheet reflects that the plaintiffs paid $107,604.40 for framing labor. Exhibit 37; see also Exhibits 6, 7, 8, 9. Cotrona testified that upon assessing the framing at the site, he concluded that approximately $40,000 would have been a legitimate

amount to charge. Based upon this evidence, there is probable cause as to damages for the framing labor in the amount of $67,604.40.

Accordingly, for the foregoing reasons, plaintiffs have established probable cause that they have suffered damages subject to trebling, pursuant to § 52–564, in the amount of $1,205,115.12 ($401,705.04 x 3).

B

Damages Not Subject to Trebling

Level Design Payment

The plaintiffs claim that they are entitled to their $12,274.28 payment to Level Design, which resulted from the defendants' failure to remit payment to Level Design in connection with architectural and engineering services rendered. As discussed above, the plaintiffs paid an invoice dated November 10, 2011, which included a $15,890 charge for architectural and engineering fees. See Exhibits 7, 16, 17. Exhibit 21 reflects that Level Design invoiced Ginsberg, CSM's agent, for $12,274.28 in connection with civil engineering services. Valencis testified that he discovered that CSM had never paid this invoice, and ultimately, the plaintiffs paid the invoice directly to Level Design. See Exhibit 22. There is probable cause to believe that if the defendants had paid Level Design, the plaintiffs would not have had to pay Level Design $12,274.28 directly. Finally, Cotrona testified that a substantial amount of the engineering work at the site had to be redone. Therefore, the plaintiffs paid twice for essentially the same work. Based on the foregoing evidence, there is probable cause as to damages for the payment to Level

Design in the amount of $12,274.28.

Rent Paid at 6 Executive Drive

The plaintiffs next claim that they are entitled to $100,000 for the rent paid by ACSYS at the same time that they were making mortgage payments on the property, which resulted from the defendants' failure to obtain a certificate of occupancy by the end of December 2011. There is evidence that the defendants represented to the plaintiffs that construction would be completed by December 2011; however, a certificate of occupancy at the property was not obtained until August 10, 2012. See Exhibit R. In addition, there is also evidence that the scope of the project as initially contemplated by the plaintiffs changed over time. Accordingly, not all of the delay in completion was attributable to the actions of the defendants. Moreover, the plaintiffs have failed to provide further evidence to corroborate Valencis' testimony that he had subtenants lined up to assume the remainder of the plaintiffs' lease at 6 Executive Drive. Based upon the foregoing considerations, the plaintiffs have failed to establish probable cause as to their claim of damages for lost rent..

Buyout of 6 Executive Drive Lease

The plaintiffs next claim that they are entitled to $110,000, which is the amount they paid to buy out their lease at 6 Executive Drive. The buyout agreement indeed reflects that the plaintiffs agreed to pay their landlord $110,000 as consideration for the early termination of their lease at 6 Executive Drive. See Exhibit 64. Nevertheless, the plaintiffs have failed to provide evidence to corroborate Valencis' testimony that he had subtenants lined up to assume the

remainder of the plaintiffs' lease at 6 Executive Drive. Based upon the foregoing considerations, the plaintiffs have failed to establish probable cause as to these damages.

Cost of Redoing Work Other than Framing

The plaintiffs next claim that they are entitled to $170,000 for the cost of redoing a substantial amount of work at the site because the defendants did not obtain proper plans or approvals in advance of the commencement of the construction. Cotrona testified that when he took over the construction, he encountered various issues with the work that had been done at the site. He testified as follows: "The issues that were encountered afterwards when we took over were every – most of the subs, except for the HVAC had exterior work to do and it was costly; it was about 150, $170,000 not on our end, from all the subs. Some of the paving had to be ripped up, piping changed underground, electrical conduit changed underground, sprinkler piping had to be changed from the main going in underground. That's the stuff that we needed from—originally from the civil design. The asphalt should have never been laid down; you know, that stuff should have been done beforehand." He testified that "[a]ll the changes from the subs add up to about $170,000" and that this was attributable to the fact that "[t]here was improper planning/project management early on. What needed to be done was to have those drawings—civil engineering drawings done, locations identified underground where they needed to be and ran, what needed to be done for that building, septic system needed to be sized properly, was never sized properly; things of that nature that the civil engineer needed to do. If that was done first, then it would have – he would not have been incurring additional costs to redo." Based

upon this testimony, this court finds that there is probable cause as to damages in the amount of $170,000 for the costs incurred to redo work.

Cost of Correcting Defective Framing

The plaintiffs next claim that they are entitled to $30,000 for the cost paid to correct defective framing. On the subject of framing, Cotrona testified that when he took over, "[m]ost of the basement [had] to be redone by the building inspector in regards to correcting; just a lot of it didn't have pressure-treated wood on the floors. So he made us pull up a good percentage of that and redo. A lot of the upstairs, the interior doorways were not wide enough to accommodate . . . to code door, a 36 [inch] door that was to be in there. Some of the walls were just not straight." Cotrona testified that this cost approximately $30,000 to fix. Based on the foregoing evidence, there is probable cause as to damages in the amount of $30,000 for the cost paid to correct defective framing.

Lost Profits

The plaintiffs next claim that they are entitled to $150,000 for lost profits due to their inability to hire two new employees inasmuch as their expansion was delayed. In response to whether or not the plaintiffs incurred damages as a result of the delay of the construction, Valencis testified that "we were at maximum capacity and we were unable to hire new employees so we had to not hire people and we lost about $150,000 of revenue for that." At the outset, this court notes that Valencis testified as to the loss in revenue and not the loss of profits. Moreover, Valencis' estimate, uncorroborated by other evidence, is not sufficient to demonstrate probable

cause that the plaintiffs suffered lost profits of $150,000, or any other amount, as a consequence of the defendants' actions. "At a minimum, opinions or estimates of lost profits must be based on objective facts, figures, or data from which the amount of lost profits may be ascertained. *Szczepanik* v. *First Southern Trust Co.*, 883 S.W.2d 648, 649 (Tex. 1994); see also *Waterbury Petroleum Products, Inc.* v. *Canaan Oil & Fuel Co.*, [193 Conn. 208, 225–28, 477 A.2d 988 (1984)] (plaintiff's uncorroborated testimony regarding damages insufficient to establish losses with reasonable certainty); *Bianco* v. *Floatex, Inc.*, 145 Conn. 523, 525, 144 A.2d 310 (1958) ('the mere statement of the plaintiff that the reasonable value of his [services] . . . was $2250 was an inadequate basis for the court's finding that the reasonable value was $1450 or, for that matter, any other amount')." *American Diamond Exchange, Inc.* v. *Alpert*, 302 Conn. 494, 511–12, 28 A.3d 976 (2011). Accordingly, the plaintiffs have not established probable cause as to lost profits.

Lost Interest, Income, and Opportunity Cost

The plaintiffs also claim that they are entitled to $250,000 in lost interest, income and other lost opportunity costs because Valencis was forced to fund the entire amount of the construction loan out of his own pocket. Valencis testified that in order to fund the loan, he sold approximately $700,000 worth of stock and, as a result, he suffered a loss between $200,000 and $250,000 in missed investment opportunities. Specifically, Valencis claims he lost income in the stock market from having to sell the stock, having to pay the capital gains on that, and lost investment opportunity. Inasmuch as this testimony is uncorroborated by any other evidence, the

plaintiffs have failed to establish probable cause as to these damages for lost interest, income and other lost opportunity costs.

Attorney's Fees

The plaintiffs claim that they are entitled to $100,000 in attorney's fees, which is recoverable pursuant to their CUTPA claim. General Statutes § 42–110g (d). Our Supreme Court has "repeatedly held that courts have a general knowledge of what would be reasonable compensation for services which are fairly stated and described. Not only is expert testimony not required, but such evidence, if offered, is not binding on the court." (Internal quotation marks omitted.) *Piantedosi* v. *Floridia*, 186 Conn. 275, 279, 440 A.2d 977 (1982). "[N]o one can state the reasonable value of legal services as a fact. . . . The value is based upon many considerations' such as "the time consumed in and of the efforts devoted to the preparation of the case. . . ." (Internal quotation marks omitted.) Id. "[C]ourts may rely on their general knowledge of what has occurred at the proceedings before them to supply evidence in support of an award of attorney's fees. . . . Even though a court may employ its own general knowledge in assessing the reasonableness of a claim for attorney's fees, we also have emphasized that no award for an attorney's fee may be made when the evidence is insufficient." (Citation omitted; internal quotation marks omitted.) *Smith* v. *Snyder*, 267 Conn. 456, 471–72, 839 A.2d 589 (2004). This court presided over a nine day PJR hearing and is familiar with the extent of the preparation and other work performed in connection with this case. At the PJR hearing, Valencis testified that, as of December 18, 2012, he had spent approximately $48,000 in attorney's fees. He further

testified that his attorney's hourly rate was $295 an hour. Upon the conclusion of the evidentiary portion of the PJR hearing, the parties filed extensive post-trial briefs and reply briefs, which were argued at short calendar on July 15, 2013. Continued discovery and trial preparation of this case undoubtedly will require extensive work. Accordingly, the court finds probable cause for an expenditure of $100,000 in attorney's fees by the plaintiffs.

Punitive Damages

Finally, the plaintiffs ask this court to award punitive damages, which are permissible pursuant to the plaintiffs' CUTPA claim should this court find reckless indifference to the plaintiffs' rights. *Gargano* v. *Heyman*, 203 Conn. 616, 622, 525 A.2d 1343 (1987). At this stage of the proceedings and on the present record, the court declines to award such damages given that Nyberg has invoked his fifth amendment privilege against self-incrimination based on a criminal complaint filed against him by Valencis.

Accordingly, for the foregoing reasons, plaintiffs have established probable cause that they have suffered damages not subject to trebling, in the amount of $312,274.28.

VI

CONCLUSION

For all the foregoing reasons, the court hereby orders a PJR in favor of the plaintiffs in the amount of $1,205,115.12 ($401,705.04 x 3) for the first category of damages and $312,274.28 for the second category of damages, for a grand total of $1,517,389.40.

Peck, J.