DOCKET NO. CV-20-5047976-S	:	STATE OF CONNECTICUT
AVIONICS TECHNOLOGIES, INC.	:	SUPERIOR COURT
V.	:	JUDICIAL DISTRICT OF NEW HAVEN
	:	AT NEW HAVEN
PETER FAKHRY	:	MAY 23, 2024

CORRECTED MEMORANDUM OF DECISION

(Correction to MEMORANDUM OF DECISION dated May 22, 2024 Correction made re: p. 39 right above "CONCLUSION" should read "Accordingly, the court denies the defendant's request to make a special finding of bad faith pursuant to § 52-226a")

MEMORANDUM OF DECISION

STATEMENT OF CASE AND PROCEDURAL HISTORY

Before the court is a breach of contract action brought by the plaintiff, Avionics Technologies, Inc., against the defendant, Peter Fakhry. Trial was held on October 4, 2023, through October 5, 2023. Pursuant to an order of the court, *Wilson, J.*, the parties submitted post trial memoranda of law on November 6, 2023, and on December 14, 2023, the parties filed reply memoranda. The parties agreed to waive the 120 day time requirement for the court's decision to May 22, 2024.

The plaintiff claims that the defendant: (1) breached the non-solicitation obligations set forth in a written Stipulation Agreement (Stipulation); (2) breached the covenant of good faith and fair dealing owed to the plaintiff; (3) tortiously interfered with the plaintiff's business relations; (4) was unjustly enriched by his conduct; and (5) violated the Connecticut Unfair Trade Practices Act (CUTPA), General Statutes § 42-110a et seq. In response, the defendant asserts that: (1) the plaintiff has failed to prove that he breached the Stipulation, and, notwithstanding the plaintiff's failure to prove a breach, the plaintiff also failed to prove causation for any

damages; (2) the plaintiff has failed to prove that he breached the covenant of good faith and fair dealing; (3) the plaintiff has failed to prove that he tortiously interfered with the plaintiff's business relations in that the plaintiff failed to prove that the defendant made statements that constitute fraud, misrepresentation, or involve improper motive or malice; (4) the plaintiff has failed to prove any actual loss in connection with its claim for tortious interference; (5) the plaintiff has failed to prove its claim for unjust enrichment because it failed to provide evidence that the defendant's actions were to the plaintiff's detriment; and (6) the plaintiff failed to prove that the defendant violated CUTPA because it failed to prove a single breach of contract or sufficient aggravating factors to bring a breach of contract claim within the realm of a CUTPA violation.

The defendant brought a single counterclaim for breach of contract asserting that the plaintiff has unjustifiably withheld $26,296 from the defendant in violation of the stipulation because of the plaintiff's claims in this action that the defendant breached the agreement. The defendant also requests attorney's fees as provided by the stipulation, and seeks a special finding of bad faith under General Statutes § 52-226a. In response, the plaintiff contends that because the defendant materially breached the stipulation, the defendant is not entitled to any of the monies held by the plaintiff. The plaintiff further contends that the defendant's request for a special finding of bad faith is both substantively and procedurally deficient. Lastly, the plaintiff asserts that the defendant cannot prove that the plaintiff's claims are not colorable or that the plaintiff's action was undertaken in bad faith.

FINDINGS OF FACT

"The [fact-finding] function is vested in the trial court with its unique opportunity to view the evidence presented in a totality of circumstances, i.e., including its observations of the demeanor and conduct of the witnesses and parties . . . ." (Internal quotation marks omitted.) *Cavolick* v. *DeSimone*, 88 Conn. App. 638, 646, 870 A.2d 1147, cert. denied, 274 Conn. 906, 876 A.2d 1198 (2005). "It is the sole province of the trial court to weigh and interpret the evidence before it and to pass on the credibility of the witnesses." (Emphasis omitted; internal quotation marks omitted.) *Zahringer* v. *Zahringer*, 124 Conn. App. 672, 679-80, 6 A.3d 141 (2010).

The court makes the following findings of fact by a fair preponderance of the evidence.[1]

ATI is a services company that represents manufacturers of a hired sales team to sell to customers in the highly competitive military, aerospace and defense markets. ATI is a privately, closely-held Connecticut company where Jonathan "Jamie" Lecker was the majority shareholder during the relevant time period. Mr. Fakhry was a former employee, officer, Treasurer and shareholder of ATI. He was hired in approximately 2009 to sell to customers, products

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[1]See *American Diamond Exchange, Inc.* v. *Alpert*, 101 Conn. App. 83, 104-05, 920 A.2d 357, cert. denied, 284 Conn. 901, 931 A.2d 261 (2007) (preponderance of evidence where underlying tort of tortious interference was premised on non-fraudulent actions). See also *Master-Halco, Inc.* v. *Seillia, Dowling & Natarelli, LLC*, 739 F. Supp. 2d 109, 119 (D. Conn. 2010). "Although misrepresentation and fraudulent acts were some of the behaviors that comprised the tortious interference claim, they were not an essential part thereof . . . . [N]one of the counts against the defendant in the complaint required the court to find that she committed any fraudulent acts herself. The tortuous interference claim was satisfied simply by the plaintiffs having demonstrated that the defendant intentionally interfered with its business relations without justification." Here, none of the acts complained of by the plaintiff against the defendant are premised upon fraud. Therefore the appropriate standard of proof is the preponderance of the evidence standard.

manufactured by ATI clients. The defendant worked as a manager worked as a manager in sales for the northeast region, among other duties and responsibilities.

In approximately the fall of 2018, ATI's shareholders learned that the defendant was working with an Italian Distributor to form a new business and that he also wanted to start a company called Waveform Technologies. The defendant was developing a company that did not want to include one of ATI's shareholders in the initiative. The ATI shareholders were disturbed by both initiatives and decided to terminate the defendant's employment in January, 2019. The plaintiff claims that his actions at the time, however, were either for ATI's benefit, or not detrimental to ATI's business. Notwithstanding, the circumstances surrounding the defendant's separation from ATI are not relevant to the issues presently before the court. Related to his separation from the plaintiff, the defendant and ATI entered into a Separation Agreement and a Repurchase Agreement related to severance and repurchase of shares respectively. Those agreements provided for severance payments and payments negotiated for the repurchase of shares in exchange for the defendant's compliance with post-employment obligations, namely the non-solicitation obligation later incorporated into the Stipulation.

Shortly after his termination, ATI learned that Mr. Fakhry was in violation of his obligations and filed a lawsuit in May 2019, to enforce his obligations.[2] To resolve that lawsuit, the parties agreed to a Stipulation on August 22, 2019. (Def. Ex. C). The Stipulation provides in relevant part that through January 14, 2021, in exchange for resuming payments pursuant to the Repurchase Agreement and severance payments pursuant to the Separation Agreement:

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[2]See Avionics Technologies, Inc. v. Fakhry, Superior Court, judicial district of New Haven, Docket No. CV-19-6092291-S (November 22, 2019, *Young, J.*).

> 1. ii. Mr. Fakhry will not directly or indirectly transact any business or seek to transact any business, whether individually, through any entity, or on behalf of any third party in his capacity as its agent and/or representative, with any entities as specified in the attached Schedule A without the prior written consent of the shareholders of Avionics.
>
> iii. Mr. Fakhry will not directly or indirectly solicit, interfere with, or endeavor to entice away, whether individually, through any entity, or on behalf of any third party in his capacity as its agent and/or representative, any entity specified in Schedule A for the purpose of providing services of any kind during the applicable time period without prior written consent of the shareholders of Avionics.

(Def. Ex. C)

As previously noted, the relevant time period was between August 22, 2019, when the parties entered the agreement, and January 14, 2021. See Def. Trial Ex. C, ¶ 1.

During the relevant time period, Lecker was the Chief Executive Officer of the plaintiff, David Tessier was the President of Mason Controls and Ryan Carley was Director of Sales for Mason Controls. Lecker testified that throughout the end of 2019, he was in negotiations with one of ATI's largest clients, Mason Controls, mainly through its Director of Sales at that time, Ryan Carley. Lecker had a 25 year business relationship with Mason Controls. Lecker testified that he was aware that Mason Controls wished to renegotiate the contract with ATI on more favorable terms due to the legacy commissions it was paying. Id. Lecker testified that the reason he flew to California on December 2, 2019, was to meet personally with Carley to discuss the contract. He claimed he traveled to California to meet with representatives of Mason because Mason told him they were interested in "finding a path forward." The credible evidence demonstrates, however, and the court finds that ATI was in fear of losing its contract with Mason, and that is why Lecker flew to California in December 2019, to discuss ATI's contract

with Mason. Lecker portrayed his trip to California as not that serious and that he expected to take a "haircut" on the deal and was willing to do so due to the long and significant relationship that he had with Mason. He claimed that he would have been willing to take $5,000 per month – amount of the contract eventually awarded to Fakhry nearly two years later to sell to a single account – to maintain ATI's relationship with Mason when ATI had been generating $1 million or more per year from Mason. The court simply does not find Lecker's testimony as to why he flew to California credible and rejects it out of hand. Lecker knew that ATI's contract with Mason was coming to an end and he flew to California to try to prevent that from happening.

Moreover, there is credible evidence, that in 2018, when the defendant was still an employee and shareholder of the plaintiff, the plaintiff had knowledge that its contract with Mason Controls was at risk. In the fall of 2018, ATI engaged its certified public accounts to determine the fair market value of a 10% interest in ATI as of September 30, 2018. The valuation was for the sole purpose of repurchasing an ATI employee's 10 percent ownership upon his separation from ATI. The first page of the report notes, and Lecker confirmed, that ATI had already lost a major client listed as "AI2" or otherwise referred to as "AI Squared," which was a subsidiary of a larger conglomerate known as Transdigm. Further, the 2018 Valuation Report notes on page five that "[i]n addition the 30% discount includes the undetermined risk that the business will realize in the future. Transdigm has announced the purchase of Easterline, ATI's largest client. There is significant risk that the company will either terminate or modify their agreements with ATI." Def. Ex. A. Thus, ATI knew in 2018, that there was "significant risk", following Transdigm's purchase of Esterline, that it would "either terminate or modify their

agreements with ATI." Lecker confirmed that Transdigm purchased Esterline, and Mason Controls was a division of Esterline.

Mason Controls terminated its contract with the plaintiff on or about January 2020. Mason's current president, Ryan Carley, and former President, David Tessier, both denied that Peter Fakhry had anything to do with Mason's decision to terminate the plaintiff or that Fakhry had ever disparaged the plaintiff. Tessier testified credibly, and the court so finds, that Mason's termination of ATI was part of a larger business plan to terminate all of it sales representatives, unrelated to Fakhry, and that Mason Controls also paid ATI a termination fee at the time for the sole purpose of being able to end its relationship with ATI. Mr. Tessier testified that he terminated ATI's contract because he was implementing a different business model that relied upon internal salespeople.

> "Q: Okay. And your strategy that you developed at some point during that time frame was to essentially, terminate all sales representatives worldwide for Mason Controls; is that right?
>
> Tessier: Correct."

Pl. Exhibit 11, Tessier Depo Tr., at p. 57 line 23 through p. 58, line 2. Earlier in his testimony he gave reasons for terminating all sales representatives for Mason Controls:

> "….And so at the time, I had decided to terminate every rep at Mason, which again, nothing to do with Jamie [Lecker] or what -- the work that we're doing or -- or Pete[Fakhry]. It was to do with another strategy that I had for the company. We had a dozen different rep companies around the world, and I terminated all of them. ATI was just one of them. Again, it had -- it had to do with my belief in how sales should be done in aerospace at the time. And I believe that having dozens and dozens of sales reps everywhere wasn't really helping us. That was my belief. That's why I made that decision at the time.
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> Q: And when you say 'at the time,' what time was that?

> Tessier: Well, I'd have to – I'd have to think. So I took over 2016 – probably between 2017, '18, '19 is when I wanted to do that. Then we got purchased [by] TransDigm…."

Pl. Ex. 11, Tessier Depo Tr., at p. 14, line 20 to page 15, line 13. Tessier then confirmed that Transdigm's acquisition of Esterline – as was already feared by Lecker, and ATI, and predicted in the 2018 business valuation report – gave Tessier the "green light" to terminate its sales representatives, including ATI:

> Q: Okay.· Now, once Transdigm purchased Esterline and you had the authority to terminate all the sales representatives, you did so. Correct?
>
> Tessier: Correct.

Pl. 11, Tessier Depo Tr., at p. 62, line 23 to page 63, line 2. Finally, the termination of Mason's sales representatives, including ATI, all occurred around the same time. Carley, who was Vice President of Operations at the time, terminated the sales representatives all around the same time:

> Q: …Were all of the sales representatives of Mason terminated at or around the same time frame that ATI was terminated as a sales representative?
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> Tessier: It started with ATI, if I remember right, because they were the biggest. But, yes, it was – the plan was, you know, you go one after the next, and Ryan did all of them within, I think, a six- to eight-months' period.

Pl. Exhibit 11, Tessier Depo Tr., p. 64, lines 12-19.

ATI was paid a "Termination Fee" which was actually an advanced payment on future commissions expected to be received over the following 12 months. Indeed, Mason was willing to advance a full $1 million under the contract just to end its relationship with ATI and fulfill Tessier's broader plan.

Carley testified credibly and corroborated Tessier's testimony that its termination of ATI had nothing to do with Fakhry, and that Fakhry made no attempt to solicit Mason or otherwise

suggest that Mason request he be released from his Non-Compete and Non-Solicitation obligations:

> Q: Did he ever encourage you, in connection with your position at Mason, that you terminate ATI?
>
> Carley: No.
>
> Q: He never suggested that you do that?
>
> Carley: No.
>
> Q: Did Mr. Fakhry have anything to do with [Mason Control]'s decision to terminate ATI, to your knowledge?
>
> Carley: No.

Trial Exhibit 10, Carley Depo. Tr., at pp. 72, lines 19-23 and p. 73, lines 14-16. On one prior occasion, Carley called Fakhry after Fakhry left ATI, asking him what his plans were, and whether he was interested in doing business together. Consistent with Fakhry's testimony at trial, Fakhry told Carley he would be unable to do so:

> Q: How did you know Peter had an agreement?
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> Carley: Because he told me.
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> Q: When did he tell you?
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> Carley: In the couple months prior to early 2020 after he was terminated.
>
> Q: What did he say?
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> Carley: He said he had an agreement that said he couldn't work
> for former principals for a period of time.
>
> Q: And what was your response to that?
>
> Carley: I said okay.

Q: Did you share that with Mr. Tessier?

Carley. Yes.

Trial Exhibit 10, Carley Depo. Tr., at p. 37, lines 1-13. Although Tessier and Carley later asked Lecker if he would be willing to release Fakhry from his restrictive covenants, Fakhry had no idea that the request was being made, and had nothing to do with Tessier's and Carley's decision to make that request:

Q: Okay. Did [Mr. Fakhry] ever direct you to ask Mr. Lecker or anyone else at ATI to –for permission that he be released from his noncompete agreement with ATI?

Carley: No.

Trial Exhibit 10, Carley Depo. Tr., at p. 37, lines 1-13.

Q: Were you the one who wanted Mr. Fakhry released from his postemployment contractual obligations, or was that Mr. Tessier's idea?

Carley: I don't remember which one of us had it. It –

Q: Did you agree with it?

Carley: I did.

Q: And why?

Carley: Because I wanted to get Pete to come work for us as a sales rep.

Trial Exhibit 10, Carley Depo. Tr., at p. 39, lines 7-16. In addition, Fakhry testified credibly, and the court finds, that he had nothing to do with Mason's termination of ATI, and both Tessier and Carley corroborated that testimony.

Moreover, Lecker's suggestion that Mason's termination of ATI's contract is somehow connected to Mason's request to release Fakhry from his contract is not supported by credible

evidence. Carley, Tessier, and Lecker had numerous conversations discussing the termination of ATI, and the request for Fakhry to be released from his contract happened in only one of those conversations, and was not a factor in Mason's intent to terminate ATI. Again, this is consistent with Tessier's and Carly's testimony on this issue.

The plaintiff claims that Fakhry's phone logs suggest that hew was engaged in conversation with Mason's representatives to solicit and or entice Mason or otherwise caused Mason to end its contract with ATI. Fakhry pointed to two phone calls, one by Fakhry on February 29, 2020 to Carley, and a return call by Carley to Fakhry on March 3, 2020, both which occurred after the present litigation had already commenced. Fakhry called Carley because he had just received ATI's PJR Application seeking a $1.5 million attachment, the basis of which were allegations that he solicited Mason or otherwise caused ATI to lose Mason as a client. Fakhry had a few additional phone calls with Carley in September 2020 which were in connection with the upcoming PJR Application hearing that was still pending. ATI was still asserting a PJR against Fakhry for $1.5 million at that time.

Fakhry eventually did transact business with Mason when he signed his first agreement with Mason starting in October 2021, nine months after the expiration of his restrictive covenants. Further, and as noted above, his contract with Mason was for a flat fee of $5,000 per month, which is in stark contrast to Mason's contract with ATI that had paid ATI over $1 million annually.

In addition, to the above findings, the court makes the following findings of fact based upon the parties stipulation of facts. The defendant was paid and received all monies owed under the Confidential Separation Agreement and General Release executed by the defendant and the

plaintiff on March 8, 2019. The defendant was paid and received four out of five payments of $26,296 for a total of $105,184 under the Repurchase Agreement executed by the defendant and the plaintiff, which is dated March 8, 2019. The plaintiff has not paid the defendant the fifth and final payment of $26,296. The court will make additional findings as necessary.

LEGAL ANALYSIS

A.

Plaintiff's Claims

The burden of proof is on the plaintiff to prove the essential elements of its claims by a preponderance of the evidence. See *Freeman* v. *Alamo Management Co.*, 221 Conn. 674, 678, 607 A.2d 370 (1992). The plaintiff's burden of persuasion is sustained "if the evidence induces in the mind of the trier a reasonable belief that the facts asserted are highly probably true, that the probability that they are true or exist is substantially greater than the probability that they are false or do not exist." (Internal quotation marks omitted.) Id., 679.

I.
Count One – Breach of Contract

"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.) *Sullivan* v. *Thorndike*, 104 Conn. App. 297, 303, 934 A.2d 827 (2007), cert. denied, 285 Conn. 907, 942 A.2d 415 (2008).

The first two elements of a breach of contract claim are not in dispute in the present case. The parties are in agreement that the Stipulation constituted the formation of an agreement. The parties also agree that the defendant was paid and received four out of five payments of $26,296 for a total of $105,184 under the Repurchase Agreement executed by the parties, and that the

plaintiff has not paid the defendant the fifth and final payment of $26,296. The remaining issues are whether the defendant breached the Stipulation and whether the plaintiff suffered damages as a result of that breach.

The plaintiff argues that the defendant engaged in solicitation and enticed away clients in violation of the stipulation. As a basis for its breach of contract claim, the plaintiff specifically alleges that "17. [U]pon information and belief, Mr. Fakhry has solicited, interfered with, and/or enticed away Mason, one of the entities specified in Schedule A of the Stipulation, for the purpose of providing services to Mason without ATI's prior written consent. 26. Mr. Fakhry breached the Stipulation by, upon information and belief, soliciting ATI's client, Mason, interfering with the relationship between ATI and Mason, and endeavoring to entice away Mason." Pl. Compl. ¶¶ 17, 26, Docket Entry No. 119).

Solicitation is defined as "[a]n attempt or effort to gain business." Black's Law Dictionary (11th Ed. 2019). "To establish solicitation, the evidence must show that [the defendant] sought to persuade the clients to do business with him personally, offered incentives to them if they did so (such as a lower price), or disparaged the plaintiff's services in an effort to obtain the business." *ATI Engineering Services, LLC* v. *Millard*, Superior Court, Complex Litigation Docket, judicial district of Hartford, Docket No. X03-CV-18-6118978-S (May 16, 2022, *Farley, J.*). "Enticement is conduct that does not involve outright petitioning or approaching–as is the case with solicitation–but rather, the more understated behavior of luring or inducing." *ATI Engineering Services, LLC* v. *Millard*, Superior Court, judicial district of New Haven, Docket No. CV-18-6079777-S (August 7, 2018, *Pierson, J.*).

Importantly, the plaintiff does not claim in this action that the defendant solicited, interfered with, or enticed away any of the other eighteen clients specified in Schedule A of the parties' stipulation. Instead, the present action focuses only on the defendant's alleged solicitation of, interference with, and/or enticing away of Mason Controls. The plaintiff has furnished no direct credible evidence to prove that the defendant engaged in solicitation or enticed Mason Controls away from the plaintiff.

Rather, much of the plaintiff's case is based on circumstantial evidence which the court finds speculative at best, and which is undermined by the credible direct evidence from Tessier, Carley, Fakhry, and, indeed the business valuation which is exactly what happened when Transdigm purchased Easterline, namely, the termination of ATI's contract with Mason. "The inferences drawn from circumstantial evidence are distinct from conjecture and surmise. Circumstantial evidence requires that the trier [find] that the facts from which the trier is asked to draw the inference are proven and that the inference is not only logical and reasonable but strong enough so that it can be found that it is more probable than otherwise that the fact to be inferred is true." (Internal quotation marks omitted.) *Rawls* v. *Progressive Northern Ins. Co.*, 310 Conn. 768, 777 n.5, 83 A.3d 576 (2014). An example of the circumstantial evidence from which the plaintiff wants the court to leap to the conclusion that Fakhry breached the agreement are the phone records and nonexistent emails. The phone records tell the court nothing. The phone records do not provide what was discussed. The phone calls pointed out by the defendant that took place in February 2020, when he called Carley occurred after the present litigation had commenced. Moreover, the plaintiff testified credibly his reasons for contacting Carley at that time. There are additional calls in September 2020, between the defendant and Carley all of

which were made after the commencement of the present litigation and were regarding the PJR. Carley testified that he and the defendant communicated via emails, however the emails were not retained. The fact that the email communications were not retained, does not lead to an inference that the defendant breached the agreement by soliciting, interfering with, or endeavoring to entice away Mason Controls. Nor does the defendant's subsequent production of phone records he initially stated he did not have lead to the conclusion that he breached the agreement. Without knowing the contents of the phone records or email communications, any inference that the defendant was communicating with Mason to solicit, interfere with, or endeavor to entice away Mason Controls from its contract with ATI, based on the fact that the emails were not retained, or that the phone records were subsequently produced by the defendant, would be drawn from pure speculation.

"Although [t]here is no distinction between direct and circumstantial evidence as far as probative force is concerned . . . [b]ecause [t]he only kind of an inference recognized by the law is a reasonable one . . . any such inference cannot be based on possibilities, surmise or conjecture. . . . It is axiomatic, therefore, that [a]ny [inference] drawn must be rational and founded upon the evidence. . . . However, [t]he line between permissible inference and impermissible speculation is not always easy to discern. When we infer, we derive a conclusion from proven facts because such considerations as experience, or history, or science have demonstrated that there is a likely correlation between those facts and the conclusion. If that correlation is sufficiently compelling, the inference is reasonable. But if the correlation between the facts and the conclusion is slight, or if a different conclusion is more closely correlated with the facts than the chosen conclusion, the inference is less reasonable. At some point, the link

between the facts and the conclusion becomes so tenuous that we call it speculation. When that point is reached is, frankly, a matter of judgment." (Citation omitted; internal quotation marks omitted.) *State* v. *Bemer*, 340 Conn. 804, 812, 266 A.3d 116 (2021).

The inferences which the plaintiff wishes this court to draw are not founded upon credible evidence; see *State* v. *Bemer*, supra, 340 Conn. 812; nor is it "strong enough so that it can be found that it is more probable than otherwise that the fact to be inferred is true." (Internal quotation marks omitted.) *Rawls* v. *Progressive Northern Ins. Co.*, supra, 310 Conn. 777 n.5. Although the plaintiff points to email and telephone communications between the defendant and Mason Controls, the plaintiff has not produced evidence of the content of those communications, and the court cannot speculate as to the content, context or subject of those emails and telephone calls. See *State* v. *Bemer*, supra, 340 Conn. 812. Plaintiff testified credibly regarding the two telephone calls in February 2020 and the calls in September 2020, all of which were after the commencement of the present litigation.

The plaintiff has therefore failed to present sufficient credible evidence to substantiate its claim that the defendant breached the Stipulation by soliciting, interfering with, or enticing away the plaintiff's clients, specifically Mason Controls. Accordingly, the plaintiff has not met its burden of proof and therefore the court enters judgment in favor of the defendant on count one, breach of contract.

B.

Damages

"The assessment of damages is . . . within the province of the trier . . . ." *Chila* v. *Stuart*, 81 Conn. App. 458, 466, 840 A.2d 1176, cert. denied, 268 Conn. 917, 847 A.2d 311 (2004).

"The general rule in breach of contract cases is that the award of damages is designed to place the injured party, so far as can be done by money, in the same position as that which he would have been in had the contract been performed. . . . It has traditionally been held that a party may recover general contract damages for any loss that may fairly and reasonably be considered [as] arising naturally, i.e., according to the usual course of things, from such breach of contract itself."[3] (Internal quotation marks omitted.) Id., 467.

The plaintiff seeks damages for the defendant's breach of contract in the form of: (1) damages paid to the defendant pursuant to the Stipulation in the amount of $137,184; and (2) monies the defendant has been awarded as a result of his improper solicitation of Mason Controls, which the plaintiff argues amounts to $130,000, plus interest, for the $5,000 per month retainer fee Mason Controls has paid the defendant for a period of twenty-six months. It is axiomatic that there must be a breach of the parties' contract in order for the court to award damages for breach of contract. Because the court has found that the defendant did not breach the Stipulation, the plaintiff is not entitled to an award of damages on its claim for breach of contract.

II.

Count Two – Breach of the Covenant of Good Faith and Fair Dealing

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[3]"The Restatement (Second) of Contracts divides a defendant's recovery into two components: (1) direct damages, composed of the loss in value to him of the other party's performance caused by its failure or deficiency; 3 Restatement (Second), Contracts § 347 (a) (1981); plus, (2) any other loss, including incidental or consequential loss, caused by the breach. . . . Id., § 347 (b). Traditionally, consequential damages include any loss that may fairly and reasonably be considered [as] arising naturally, i.e., according to the usual course of things, from such breach of contract itself." (Internal quotation marks omitted.) *Ambrogio* v. *Beaver Road Associates*, 267 Conn. 148, 155, 836 A.2d 1183 (2003).

"[E]very 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." (Internal quotation marks omitted.) *Ramirez* v. *Health Net of the Northeast, Inc.*, 285 Conn. 1, 16 n.18, 938 A.2d 576 (2008). "[A]n action for breach of the covenant of good faith and fair dealing requires proof of three essential elements . . . first, that the plaintiff and the defendant were parties to a contract under which the plaintiff reasonably expected to receive certain benefits; second, that the defendant engaged in conduct that injured the plaintiff's right to receive some or all of those benefits; and third, that when committing the acts by which it injured the plaintiff's right to receive benefits it reasonably expected to receive under the contract, the defendant was acting in bad faith." (Internal quotation marks omitted.) *Austrian* v. *United Health Group, Inc.*, Superior Court, Complex Litigation Docket, judicial district of Waterbury, Docket No. X06-CV-05-4010357-S (July 17, 2007, *Stevens, J.*) (43 Conn. L. Rptr. 852, 862).

Again, the parties do not dispute that the Stipulation constituted an agreement; therefore, the court need only consider whether the plaintiff has met its burden to prove that the defendant engaged in conduct that injured the plaintiff's right to receive certain benefits under the agreement and whether the defendant was acting in bad faith when it committed the acts alleged to have injured the plaintiff's right to receive benefits under the agreement.

The plaintiff reasserts the arguments raised in support of its claim for breach of contract and argues that the defendant engaged in bad faith conduct "by purposely violating his restrictions multiple times that ultimately led to the [s]tipulation."[4] See Docket Entry No. 203,

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[4]Importantly, the plaintiff's argument with respect to bad faith conduct refers in part to conduct that occurred before the Stipulation–which is the basis of the plaintiff's claims in the present action–was entered. Because it is raised, the court will address the plaintiff's argument

Pl. Post-Trial Br., p. 10. The plaintiff further argues that the defendant's communications constituted bad faith efforts to injure his former employer, relying on the defendant's admission to redacting phone calls from his phone records and its position that the stipulation was its third attempt to compel the defendant to honor his post-employment obligations.

Because the court has found that the plaintiff failed to meet its burden to prove that the defendant breached the Stipulation by engaging in solicitation or enticing away Mason Controls, the court cannot find that the defendant injured the plaintiff's rights under the Stipulation to receive the benefits it bargained for therein–namely, freedom from direct or indirect solicitation or enticement of its clients. The plaintiff has failed to put forth any credible evidence that Fakhry engaged in conduct that injured ATI's rights to receive some or all of the benefits to which ATI was entitled pursuant to the Stipulation. Moreover, the plaintiff has failed to prove that the defendant acted in bad faith.[5]

"Bad faith in general implies both actual or constructive fraud, or a design to mislead or deceive another, or a neglect or refusal to fulfill some duty or some contractual obligation, not prompted by an honest mistake as to one's rights or duties, but by some interested or sinister motive." (Internal quotation marks omitted.) *Keller* v. *Beckenstein*, 117 Conn. App. 550, 563-64, 979 A.2d 1055, cert. denied, 294 Conn. 913, 983 A.2 274 (2009). The plaintiff has not

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that the defendant acted in bad faith but will limit its consideration to activity related to the defendant's alleged breach of the Stipulation.

[5]"It is the burden of the party asserting the lack of good faith to establish its existence and whether that burden has been satisfied in a particular case is a question of fact." *Kronberg Bros., Inc.* v. *Steele*, 72 Conn. App. 53, 63, 804 A.2d 239, cert. denied, 262 Conn. 912, 810 A.2d 277 (2002).

proffered any credible evidence of sinister motive, neglect or refusal to fulfill a contractual obligation, or fraud on the part of the defendant.

Accordingly, the court enters judgment in favor of the defendant on count two, breach of the covenant of good faith and fair dealing.

III.

Count Three – Tortious Interference

The elements of tortious interference with contract are: "(1) the existence of a contractual or beneficial relationship; (2) the defendant's knowledge of that relationship; (3) the defendant's intent to interfere with the relationship; (4) that the interference was tortious; and (5) a loss suffered by the plaintiff that was caused by the defendant's tortious conduct." *Rioux* v. *Barry*, 283 Conn. 338, 351, 927 A.2d 304 (2007).

In the context of a tortious interference with contractual relations claim—as opposed to a tortious interference with business expectancies claim—the first element that the plaintiff must plead and prove is that he had an existing contract with another party. As our Supreme Court has noted, "it is not necessary for a plaintiff to prove that a contract was in fact breached in order to recover on a claim of tortious interference." *Landmark Investment Group, LLC* v. *CALCO Construction & Development Co.*, 318 Conn. 847, 866, 124 A.3d 847 (2015). "A plaintiff may recover damages for tortious interference with a contract not only where the contract is thereby not performed . . . but also where the interference causes the performance to be more expensive or burdensome . . ." (Citation omitted; emphasis added; footnote omitted; internal quotation marks omitted.) *Herman* v. *Endriss*, 187 Conn. 374, 376-77, 446 A.2d 9 (1982). Furthermore, "it is well-settled that the tort of interference with contractual relations only lies when a third party

adversely affects the contractual relations of two other parties . . . [T]here can be no intentional interference with contractual relations by someone who is directly or indirectly a party to the contract." (Citation omitted; emphasis in original; internal quotation marks omitted.) *Metcoff* v. *Lebovics*, 123 Conn.App. 512, 520, 2 A.3d 942 (2010).

The second element that the plaintiff must plead and prove is that the defendant knew of the plaintiff's contract. Although there is no Connecticut appellate authority that directly addresses this element, Superior Court decisions recognize that "the actor must have knowledge of the contract with which he is interfering and of the fact that he is interfering with the performance of the contract . . . Intentional interference of course presupposes knowledge of the plaintiff's contract or interest, or at least of facts which would lead a reasonable person to believe that such interest exists. Without such knowledge there can be no intent and no liability . . ." (Citation omitted; internal quotation marks omitted.) *Tassmer* v. *McManus*, Superior Court, judicial district of New Haven, Docket No. CV-08-5018961-S (April 9, 2009, *Robinson, J.*); see also *Diary Fresh, Inc.* v. *Coca Cola Bottling Co. of New York, Inc.*, Superior Court, judicial district of Hartford-New Britain at Hartford, Docket No. 386770 (February 18, 1992, *Walsh, J.*) (6 Conn. L. Rptr. 628, 629). Put differently, "[t]o be actionable an interference must be a knowing and not an inadvertent or incidental invasion of plaintiff's contractual interests . . . To protect a contractual interest from negligent interference would place an undue burden on freedom of action and could impose a severe penalty on one guilty of mere negligence." (Internal quotation marks omitted.) *Steele* v. *J&S Metals, Inc.*, 32 Conn.Sup. 17, 19, 335 A.2d 629 (1974).

The third element that the plaintiff must plead and prove is that the defendant intended to interfere with the plaintiff's contract. Although there is no Connecticut appellate authority that

directly addresses this element, the Appellate Court's decision in *United Services Automobile Assn.* v. *Marburg*, 46 Conn.App. 99, 105-06, 698 A.2d 914 (1997), is instructive. There, the court explained as follows: "It is axiomatic, in the tort lexicon, that intentional conduct and negligent conduct, although differing only by a matter of degree . . . are separate and mutually exclusive. The distinction between intentional and unintentional invasions draws a bright line of separation among shadings of almost infinitely varied human experiences . . . Although in a given case there may be doubt about whether one acted intentionally or negligently, the difference in meaning is clear. As Holmes observed, even a dog knows the difference between being tripped over and being kicked." (Citations omitted; internal quotation marks omitted.) Id., 105.

The court further explained that "[i]n its most common usage, intent involves (1) . . . a state of mind (2) about consequences of an act (or omission) and not about the act itself, and (3) it extends not only to having in the mind a purpose (or desire) to bring about given consequences but also to having in mind a belief (or knowledge) that given consequences are substantially certain to result from the act . . . Also, the intentional state of mind must exist when the act occurs . . . Thus, intentional conduct extends not only to those consequences which are desired, but also to those which the actor believes are substantially certain to follow from what the actor does . . . Furthermore, [i]t is not essential that the precise injury which was done be the one intended . . . Rather, it is an intent to bring about a result which will invade the interests of another in a way that the law forbids . . . Our case law accords with these principles." (Citations omitted; emphasis omitted; internal quotation marks omitted.) Id., 105-06.

The fourth element that the plaintiff must plead and prove is that the defendant interfered with the plaintiff's contract and that such interference was tortious. It is fundamental that "[o]ur relations and expectancies in life are constantly interfered with by others. That is an inevitable consequence of living in a competitive world, among people whose ambitions, hopes or purposes may match or conflict with our own. If we could file a civil action against anyone who interfered with our contractual relations or business expectancies, the courts would have no time to do anything else. The saving limitation, embedded in the common law, is found in the rule that only a tortious interference is actionable." (Emphasis added; internal quotation marks omitted.) *Brown* v. *Otake*, 164 Conn.App. 686, 710 n.16, 138 A.3d 951 (2016).

Accordingly, our Supreme Court has held that "in an action for tortious interference, not every act that disturbs a contract or business expectancy is actionable. . . . [F]or a plaintiff successfully to prosecute [an action for tortious interference] it must prove that the defendant's conduct was in fact tortious. This element may be satisfied by proof that the defendant was guilty of fraud, misrepresentation, intimidation or molestation . . . or that the defendant acted maliciously. . . . A claim is made out [only] when interference resulting in injury to another is wrongful by some measure beyond the fact of the interference itself. . . . The plaintiff in a tortious interference claim must demonstrate malice on the part of the defendant, not in the sense of ill will, but intentional interference without justification." (Citations omitted; internal quotation marks omitted.) *Landmark Inv. Group, LLC* v. *CALCO Const. and Development Co.*, supra, 318 Conn. 868-69.

The determination of whether the defendant tortiously interfered with the plaintiff's contract without justification "is aided by 4 Restatement (Second), Torts § 767 (1979), which

delineates certain factors relevant thereto, namely: (a) the nature of the actor's conduct, (b) the actor's motive, (c) the interests of the other with which the actor's conduct interferes, (d) the interests sought to be advanced by the actor, (e) the social interests in protecting the freedom of action of the actor and the contractual interests of the other, (f) the proximity or remoteness of the actor's conduct to the interference and (g) the relations between the parties . . . Certain factors are closely interwoven with other enumerated factors, and thus cannot be easily separated." (Internal quotation marks omitted.) *Varley* v. *First Student, Inc.*, 158 Conn.App. 482, 503-04, 119 A.3d 643 (2015). Ultimately, "[w]hether a defendant's interference is tortious is a question of fact for the [trier]." *Landmark Investment Group, LLC* v. *CALCO Construction & Development Co.*, supra, 318 Conn. 869.

The fifth and final element that the plaintiff must plead and prove is that it suffered actual loss as a result of the defendant's tortious interference. As our Supreme Court has explained, "[u]nlike other torts in which liability gives rise to nominal damages even in the absence of proof of actual loss . . . it is an essential element of the tort of unlawful interference with business relations that the plaintiff suffers actual loss." (Internal quotation marks omitted.) *Appleton* v. *Board of Education*, supra, 254 Conn. 213 (discussing actual loss element in context of a tortious interference with contractual relations claim). Put simply, "[p]roof that some damage has been sustained is necessary to [support a cause of action for tortious interference]." (Internal quotation marks omitted.) *Landmark Investment Group, LLC* v. *CALCO Construction & Development Co.*, supra, 318 Conn. 874.

To establish the element of actual loss, it must "appear that, except for the tortious interference of the defendant, there was a reasonable probability that the plaintiff would have

entered into a contract or made a profit." *Kent Literary Club of Wesleyan University* v. *Wesleyan University*, 338 Conn. 189, 222, 257 A.3d 874 (2021). "Such a determination is a question for the trier of fact, as is the question of whether the plaintiff has suffered an actual loss." (Internal quotation marks omitted.) *Coppola Construction Co.* v. *Hoffman Enterprises Ltd. Partnership*, 157 Conn.App. 139, 188, 117 A.3d 876, cert. denied, 318 Conn. 902, 122 A.3d 631 (2015).

The plaintiff argues that the defendant tortiously interfered with ATI's contract with Mason Controls because the defendant knew of ATI's long-standing business relationship with Mason, and that the defendant used the relationship he built with Mason Controls through his employment with ATI to circumvent his obligations under the Stipulation. The plaintiff further argues that, as a result of such conduct, Mason Controls terminated its relationship with the plaintiff, and the plaintiff suffered the loss of its twenty-five year business relationship.

The defendant contends that not only has the plaintiff failed to prove that he made any statements that constitute fraud, misrepresentation, or improper motive or malice, but that the plaintiff has also failed to establish any reasonable probability that it would profit or continue to profit from its relationship with Mason Controls because the plaintiff was terminated for reasons unrelated to the defendant.

Here, there is no dispute as to the first two elements, namely that the plaintiff was in a contractual relationship with Mason Controls and the defendant knew of this relationship. However, just as the court previously found with respect to the plaintiff's breach of contract claim, the plaintiff has failed to prove that the defendant interfered, at all, let alone intentionally, with the plaintiff's contractual relationship with Mason Controls. Accordingly, the plaintiff has failed to prove the third element of tortious interference.

The plaintiff has also failed to prove the fourth element, that Fakhry was guilty of fraud, misrepresentation, intimidation or molestation or that [he] acted maliciously or that he acted with improper motive or malice. ATI's contract with Mason was already at substantial risk, and Lecker knew it. The business valuation confirms this and so does the testimony of Carley and Tessier. Mason's termination of its contract with ATI was part of a larger business plan to terminate all of it sales representatives, which had nothing to do with the defendant.

In addition, ATI failed to prove the fifth element, namely, any actual loss in connection with its claim for tortious interference with business relations. Although ATI claims that it suffered actual loss, "it [must] appear that, except for the tortious interference of the defendant, there was a reasonable probability that the plaintiff would have entered into a contract or made a profit." *Goldman* v. *Feinberg*, supra, 130 Conn. 675. ATI did not prove this, indeed, the credible evidence demonstrates that Mason terminated ATI's contract for business reasons unrelated to the defendant.

Accordingly, the court enters judgment in favor of the defendant on count three, tortious interference.

IV.

Unjust Enrichment

The plaintiff has raised, in the alternative, a claim for unjust enrichment. "Unjust enrichment is a legal doctrine to be applied when no remedy is available pursuant to a contract." (Internal quotation marks omitted.) *Burns* v. *Koellmer*, 11 Conn. App. 375, 383, 527 A.2d 1210 (1987). "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." (Internal quotation marks omitted.) *Vertex, Inc.* v. *Waterbury*, 278 Conn. 557, 573, 898 A.2d 178 (2006). "This doctrine is based upon the principle that one should not be permitted unjustly to enrich himself at the expense of another but should be required to make restitution of or for property received, retained or appropriated. . . . The question is: Did [the party liable], to the detriment of someone else, obtain something of value to which [the party liable] was not entitled?" (Internal quotation marks omitted.) *Horner* v. *Bagnell*, 324 Conn. 695, 708, 154 A.3d 975 (2017).

"Unjust enrichment is a 'noncontractual means of recovery in restitution.' (Emphasis added; internal quotation marks omitted.) *Professional Electrical Contractors of Connecticut, Inc.* v. *Stamford Hospital*, 196 Conn. App. 430, 438, 230 A.3d 773 (2020); see also *Hospital of Central Connecticut* v. *Neurosurgical Associates, P.C.*, supra, 139 Conn. App. at 784, 57 A.3d 794 ('[u]njust enrichment applies wherever justice requires compensation to be given for property or services rendered . . . *and no remedy is available by an action on the contract*' (emphasis added)). In other words, unjust enrichment is not available as a remedy when there is a valid contract between the parties and that contract addresses the matter at issue in the unjust enrichment action. See *Connecticut Light & Power Co.* v. *Proctor*, 158 Conn. App. 248, 251 n.7, 118 A.3d 702 (2015) ('[a] court . . . cannot grant relief on a theory of unjust enrichment unless the court first finds that there was no contract between the parties'), aff'd, 324 Conn. 245, 152 A.3d 470 (2016). 'Nevertheless, when an express contract does not fully address a subject, a court of equity may impose a remedy to further the ends of justice.' (Emphasis added; internal

quotation marks omitted.) *New Hartford* v. *Connecticut Resources Recovery Authority*, 291 Conn. 433, 455, 970 A.2d 592 (2009)." *Gleason* v. *Durden*, 211 Conn.App. 416, 428, 272 A.3d 1129 (2022).

The Stipulation provides that Avionics would resume payment of the stock pursuant to the Stock Repurchase Agreement. The Stock Repurchase Agreement provides that ATI can cease payments under the Stipulation if the defendant breaches the Stipulation. In addition, the Repurchase Agreement states that Connecticut law shall govern "any suit, action or other proceeding arising ouot of or otherwise related to this Agreement." Pl. Ex. 3. Thus, the plaintiff would be entitled to sue on the contract for contract damages, which, under Connecticut law would include direct and consequential damages.

To prevail on a claim of unjust enrichment, the plaintiff 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 plaintiff['s] detriment." (Internal quotation marks omitted.) *Hartford Whalers Hockey Club* v. *Uniroyal Goodrich Tire Co.*, 231 Conn. 276, 283, 649 A.2d 518 (1994). "[W]hether a particular failure to pay was unjust and whether the defendant was benefitted are essentially factual findings for the trial court . . . ." Id., 283.

The plaintiff argues that the defendant benefitted from his failure to abide by the stipulation in that he received a $5,000 per month retainer from Mason Controls. The plaintiff further argues that the defendant's communications with Mason Controls were designed to aid him in embarking on business immediately upon expiration of the Stipulation, and that such conduct is improper.

The defendant contends that the parties have a written agreement—the Stipulation—and unjust enrichment is not an available remedy here because the Stipulation provides detailed remedies in the event of a breach and, thus, remedies are available in an action on the contract itself. First, the court agrees with the defendant that the written Stipulation provides for remedies pursuant thereto if breached. The Stipulation provides in relevant part: "Avionics will resume payments of amounts in arrears due to Mr. Fakhry *under the Repurchase Agreement* executed on March 8, 2019, within ten (10) business days of the entry of this Stipulation and will resume scheduled payments thereafter *consistent with the Repurchase Agreement*." Def. Ex. C.

The Repurchase Agreement provides in relevant part: "2.1 The Purchase Price for the Shares shall be payable by the Company in five (5) payments of Twenty Six Thousand Two Hundred Ninety Six Dollars ($26,296) paid quarterly with the first payment due fourteen (14) days after execution of this agreement. The payment of the Purchase Price is contingent on the Stockholder's compliance with the terms of this Agreement and the execution and delivery by the Stockholder of the Confidential Separation Agreement in the form presented by the Company to the Stockholder contemporaneously herewith. The payment of the Purchase Price shall be made by the Company by delivery of immediately available funds by wire transfer to the Stockholder in accordance with the wire instructions provided by the Stockholder to the Company. 2.2 The Company shall have no obligation to pay any further installments of the Purchase Price, and the Purchase Price shall be deemed paid in full, (i) in the event of any breach by the Stockholder of any of the terms of this Agreement." Pl. Ex. 3. The Repurchase Agreement further provides that any claims arising under the Agreement shall be governed by the law of the state of Connecticut. See Def. Ex. Pl. Ex. 3. There is nothing in the Stipulation Agreement or the Repurchase

Agreement that would prohibit either party to the Stipulation from suing under the Stipulation for breach of contract and for contract damages that result from the breach. Such damages would include direct damages and or consequential damages that are a result of the breach.[6] Thus, the plaintiff has remedies under the contract to which it could avail itself.

Even if unjust enrichment were an available remedy, the plaintiff has failed to prove that the defendant was unjustly enriched. The plaintiff argues in its brief that it is entitled to an award of damages based on unjust enrichment because "there is no doubt that Mr. Fakhry benefitted from his failure to abide by the Stipulation, with the $5,000 monthly retainer as an award for his prohibited communications during the Restricted Period. By communicating with Mason Controls during the Restricted Period, the defendant engaged in a campaign to keep his business relations 'hot' during the Restricted Period so that he could embark on the business immediately upon expiration of the Stipulation - which is of course precisely what happened. Accordingly, Mr. Fakhry has been unjustly enriched as a result of his improper conduct." Pl. Posttrial Brief, p.

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[6]"The general rule of damages in a breach of contract action is that the award should place the injured party in the same position as he would have been in had the contract been performed. . . . Damages for breach of contract are to be determined as of the time of the occurrence of the breach. . . . The [injured party] has the burden of proving the extent of the damages suffered. . . . Although the [injured party] need not provide such proof with [m]athematical exactitude . . . the [injured party] must nevertheless provide sufficient evidence for the trier to make a fair and reasonable estimate. . . .

"The Restatement (Second) of Contracts divides [an injured party's] recovery into two components: (1) direct damages, composed of the loss in value to him of the other party's performance caused by its failure or deficiency; 3 Restatement (Second), Contracts § 347 (a) (1981); plus, (2) any other loss, including incidental or consequential loss, caused by the breach . . . . Id., § 347 (b). Traditionally, consequential damages include any loss that may fairly and reasonably be considered [as] arising naturally, i.e., according to the usual course of things, from such breach of contract itself. . . ." *Smernoff* v. *Star Tire*, 204 Conn.App. 577, 581-82, 251 A.3d 632 (2021).

11. As this court previously found, the plaintiff did not prove by a fair preponderance of the evidence that the defendant engaged in improper conduct by "directly or indirectly soliciting, interfering with, or endeavoring to entice away, whether individually, through any entity, or on behalf of any third party in his capacity as its agent and/or representative Mason Controls in violation of the Stipulation. Because the court has found that the defendant did not engage in any improper conduct as alleged by the plaintiff, there is no improper conduct from which the defendant would be unjustly enriched to the plaintiff's detriment. See, e.g., *Gagne* v. *Vaccaro*, 255 Conn. 390, 409, 766 A.2d 416 (2001) ("in the present case, Gagne was required to prove in the trial court that Vaccaro had received a benefit at his expense under circumstances that would otherwise make it unjust for Vaccaro to retain the benefit"). The defendant eventually did transact business with Mason when he signed his first agreement with them starting in October 2021, nine months after the expiration of his restrictive covenants. His contract with Mason was for a flat fee of $5,000 per month which was rightfully his under the terms of the Stipulation as the period of restriction was from August 22, 2019, through January 14, 2021. The plaintiff has therefore failed to prove a claim for unjust enrichment.

Accordingly, the court enters judgment in favor of the defendant on count four of the complaint for unjust enrichment.

V.

Count five CUTPA

General Statutes § 42-110b provides in relevant part: "(a) 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 a practice violates

CUTPA [our courts] have adopted the criteria set out in the cigarette rule by the federal trade commission for determining when a 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 trade practice . . . or a practice amounting to a violation of public policy. . . . Furthermore, a party need not prove an intent to deceive to prevail under CUTPA." (Internal quotation marks omitted.) *Journal Publishing Co.* v. *Hartford Courant, Co.*, 261 Conn. 673, 695-96, 804 A.2d 823 (2002).

"[W]hether a practice is unfair and thus violates CUTPA is an issue of fact." (Internal quotation marks omitted.) *Ramirez* v. *Health Net of the Northeast, Inc.*, supra, 285 Conn. 22. "[N]ot 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). Furthermore, "[n]ot every misrepresentation rises to [the] level of [a] CUTPA violation . . . There must be some nexus with a public interest, some violation of a concept of what is fair, some immoral, unethical, oppressive or unscrupulous business practice or some practice that offends public policy. . . . In the absence of allegations arising to such a level of conduct, the plaintiffs have failed to properly plead a cause of action under CUTPA." *Cap Maintenance Solutions, LLC* v.

Wallingford Autopark, Inc., Superior Court, judicial district of New Haven, Docket No. CV-16-6060392-S (September 6, 2016, *Wilson, J.*).

The plaintiff argues that the defendant embarked on a continued campaign to violate the Stipulation, collect severance and payments pursuant to the Stipulation, and pursued a personally lucrative engagement with one of ATI's largest customers, which also precipitated the demise of the relationship. The plaintiff further argues that the defendant encouraged Mason Controls to seek a release/waiver from his non-solicitation restrictions in the Stipulation and, in doing so, acted in his own self-interest and engaged in a pattern of self-dealing and diversion. The plaintiff argues that, by such conduct, the defendant engaged in unfair methods of competition in the conduct of trade or commerce, and that such conduct offends public policy, is immoral, oppressive, unethical, and unscrupulous. In addition, the plaintiff argues that it has been substantially injured.

The defendant argues that the plaintiff's claim of a CUTPA violation rests on a single alleged breach of the Stipulation, and that a simple breach of contract does not equate to a claim of unfair trade practices. The defendant also argues that the plaintiff failed to prove that there were any sufficient aggravating factors to bring its breach of contract claim into the realm of a CUTPA violation.

As discussed above, the plaintiff has failed to prove by a preponderance of the evidence, that the defendant breached the Stipulation Agreement. Therefore, there is no breach of contract to form the basis of a CUTPA violation.[7] Moreover, the plaintiff has failed to prove by a

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[7]Even if the defendant had breached the Stipulation, there are no substantial aggravating factors that support a finding that the defendant violated CUTPA. See *Lydall, Inc.* v. *Ruschmeyer*, 282 Conn. 209, 248, 919 A.2d 421 (2007) ("absent substantial aggravating

circumstances, [a] simple breach of contract is insufficient to establish [a] claim under CUTPA”). “A simple breach of contract does not offend traditional notions of fairness and, standing alone, does not offend public policy so as to invoke CUTPA. A CUTPA claim lies where the facts alleged support a claim for more than a mere breach of contract. Depending upon the nature of the assertions, however, 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). That generally is so when the aggravating factors present constitute more than a failure to deliver on a promise. *Tienshan, Inc.* v. *George, Superior Court*, complex litigation docket at Waterbury, Docket No. X01 CV–04 4006907,2006 WL 2349157 (July 28, 2006, *Sheedy, J.*).

“Connecticut case law demonstrates that the aggravating factors present must involve bad faith conduct or violation of some concept of fairness in order to sufficiently plead a CUTPA claim by way of breach of contract. Compare *Landmark Investment Group, LLC* v. *Chung Family Realty Partnership*, LLC, 125 Conn.App. 678, 708, 10 A .3d 61 (2010), cert. denied, 300 Conn. 914, 13 A.3d 1100 (2011); (upholding finding of aggravating factors sufficient to prove a violation of CUTPA where, in addition to a breach of an employment contract, the defendant engaged in multiple false misrepresentations and other acts exhibiting ‘a pattern of bad faith conduct, seeking to escape its contractual obligations unfairly while negotiating a more favorable offer with . . . a third party’), with *Naples* v. *Keystone Building & Development Corp.*, supra, 295 Conn. at 227–29 (upholding finding of no aggravating factors where defendant performed unworkmanlike construction per the contract, but its conduct ‘lacked the unethical behavior’ necessary for a CUTPA claim since the defendant attempted to remedy problem and ‘[i]n the absence of aggravating unscrupulous conduct, mere incompetence does not by itself mandate a trial court to find a CUTPA violation’), and *IN Energy Solutions, Inc.* v. *Realgy*, LLC, 114 Conn.App. 262, 274–75, 969 A.2d 807 (2009) (upholding finding that no aggravating factors accompanied breach of contract so as to constitute CUTPA violation where plaintiff failed to show that the defendant’s ‘conduct in failing to pay commissions [pursuant to the contract] was unethical, unscrupulous, wilful or reckless’).” *Metromedia Energy, Inc.* v. *21st Century Management, Inc.*, Superior Court, judicial district of New Haven, Docket No. CV 13–6043097 S (October 2, 2014, *Wilson, J.*).

“In addition, ‘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.’ (Citations omitted; internal quotation marks omitted.) *Greene* v. *Orsini*, supra, 50 Conn.Sup. at 317.” (Internal quotation marks omitted.). Here, the plaintiff has not demonstrated by any credible evidence aggravating circumstances that would raise its breach of contract claim to the level of a CUTPA violation. There is no evidence that the defendant engaged in a pattern of bad faith, unethical, unscrupulous, willful or reckless conduct. This is mere breach of a noncompete agreement.” *Santa Buckley Energy Ltd.* v. *Tiscia Corp.*, Superior Court, judicial district of New Haven, Docket No. No. CV156052285S (May 16, 2016, *Wilson, J.*).

preponderance of the evidence that the defendant's conduct: (1) offends public policy as it has been established by statutes, the common law, or otherwise; (2) was immoral, unethical, oppressive, or unscrupulous; or (3) causes substantial injury to consumers, competitors or other businessmen.

Accordingly, the court enters judgment in favor of the defendant on count five, violation of CUTPA.

B.

Defendant's Counterclaim

I.

Breach of Contract

The defendant has filed a counterclaim for breach of contract for the plaintiff's failure to pay amounts owed to him pursuant to the stock Repurchase Agreement, Separation Agreement, and Stipulation. The defendant seeks monetary damages, interest, and attorney's fees and costs. "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.) *Sullivan* v. *Thorndike*, supra, 104 Conn. App. 303.

There is no dispute that the Stipulation constituted an agreement. Because the court has found that the defendant was not in breach of his agreement with the plaintiff, the plaintiff was required to perform its obligations pursuant to the parties' contract (s).[8] The court found,

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[8]The Stipulation provided that, so long as the defendant complied with the terms of the contract, the plaintiff would resume payments under both the Repurchase Agreement and the Confidential Separation Agreement and General Release which the parties' executed on March 8,

pursuant to the parties stipulation of facts that the defendant received only four out of five payments of $26,296 for a total of $105,184 under the Repurchase Agreement, and that the plaintiff has not paid the defendant the fifth and final payment of $26,296. Thus, the court finds that the plaintiff has breached the Stipulation and the defendant is owed the amount of $26,296 pursuant to the Stipulation.

Accordingly, the court enters judgment in favor of the defendant on the counterclaim for breach of contract and enters an award of damages for said breach in the amount of $26,296.

II.

Attorney's Fees

"The general rule of law known as the American rule is that attorney's fees and ordinary expenses and burdens of litigation are not allowed to the successful party absent a contractual or statutory exception. . . . Connecticut adheres to the American rule. . . . There are few exceptions. For example, a specific contractual term may provide for the recovery of attorney's fees and costs . . . or a statute may confer such rights. . . . This court also has recognized a bad faith exception to the American rule, which permits a court to award attorney's fees to the prevailing party on the basis of bad faith conduct of the other party or the other party's attorney." *Indoor Billboard Northwest, Inc.* v. *M2 Systems Corporation*, 202 Conn.App. 139, 198, 245 A.3d 426 (2021).

The defendant seeks an award of attorney's fees pursuant to the Stipulation. The defendant urges this court to abide by the spirit of the parties' intent apparent on the face of the Stipulation and award attorney's fees and costs to the defendant as the prevailing party. Specifically, the defendant argues that under the express terms of the Stipulation, the parties

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2019. See Def. Trial Ex. C, ¶ 2.

contemplated that their prior legal action giving rise to the Stipulation would remain in effect through the prohibited period, and that any efforts to enforce the Stipulation would be made through a motion for contempt. The defendant further asserts that although the court, *Young, J.*, required that the case be withdrawn before the end of the prohibited period in January 2021, the parties contemplated that the prevailing party in an action to enforce the Stipulation would be entitled to attorney's fees and costs. In support of his argument, the defendant points to the following language in the parties' stipulation: "Enforcement: Should contempt proceedings be brought to enforce any portion of this Stipulation, reasonable costs and [attorney's] fees shall be awarded to the prevailing party." See Def. Trial Ex. C, ¶ 3.

"Although ordinarily the question of contract interpretation, being a question of the parties' intent, is a question of fact . . . [w]here there is definitive contract language, the determination of what the parties intended by their contractual commitments is a question of law." (Internal quotation marks omitted.) *Tallmadge Bros., Inc.* v. *Iroquois Gas Transmission System, L.P.*, 252 Conn. 479, 495, 746 A.2d 1277 (2000). "A contract must be construed to effectuate the intent of the parties, which is determined from the language used interpreted in the light of the situation of the parties and the circumstances connected with the transaction. . . . [T]he intent of the parties is to be ascertained by a fair and reasonable construction of the written words and . . . the language used must be accorded its common, natural, and ordinary meaning and usage where it can be sensibly applied to the subject matter of the contract. . . . [A]ny ambiguity in a contract must emanate from the language used in the contract rather than from one party's subjective perception of the terms." (Internal quotation marks omitted.) Id., 498.

The parties' agreement clearly and expressly applies to contempt proceedings brought to enforce the stipulation. A contempt proceeding requires a violation of a court order or rule. See, e.g., *O'Keeffe* v. *O'Keeffe*, Superior Court, judicial district of Stamford-Norwalk, Docket No. FA-15-6025075-S (August 6, 2019, *Moore, J.*) ("[a] contempt finding requires three separate elements: a clear court order, a violation of that order, and an unexcused [wilfulness] on the part of the alleged contemnor"). Those circumstances are not present here, and the defendant has acknowledged that the parties contemplated that their prior legal action giving rise to the Stipulation would remain in effect through the prohibited period, and any efforts to enforce the Stipulation would be made through a motion for contempt.[9]

On the basis of the foregoing, the defendant's claim for attorney's fees and costs is denied.

III.

Finding of Bad Faith Under General Statutes § 52-226a

In addition to an award of attorney's fees, the defendant seeks a special finding of bad faith pursuant to § 52-226a. General Statutes § 52-226a provides in relevant part: "In any civil action tried to . . . the court, not more than fourteen days after judgment has been rendered, the prevailing party may file a written motion requesting the court to make a special finding to be incorporated in the judgment or made a part of the record, as the case may be, that the action or a

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[9]In response to the defendant's request for attorney's fees, the plaintiff argues that attorney's fees are not typically awarded to the successful party absent specific exceptions which are not present here. The plaintiff further argues that there is no evidence that would support a claim, pursuant to § 52-226a, that this action was brought or maintained in bad faith. To the extent that the defendant relies on his arguments in support of his request for a special finding of bad faith pursuant to § 52-226a as grounds to award attorney's fees, the defendant's § 52-226a argument is premature, as will be discussed below.

defense to the action was without merit and not brought or asserted in good faith. Any such finding by the court shall be admissible in any subsequent action brought pursuant to section 52-568."

The plaintiff argues that the defendant's request for a special finding of bad faith is premature. The court agrees. The defendant's request for a special finding of bad faith pursuant to § 52-226a must be made fourteen days after judgment has been rendered in his favor, by way of written motion. See *Siddiqui* v. *Randhawa*, Superior Court, judicial district of Hartford, Docket No. CV-17-6073898-S (November 2, 2023, *Rosen, J.*) (rejecting defendant's request for special finding pursuant to § 52-226a because request was premature as no judgment had been rendered); *Fisher* v. *JLG Industries, Inc.*, Superior Court, Complex Litigation Docket, judicial district of Waterbury, Docket No. X02-CV-01-0165100-S (September 18, 2001, *Sheldon, J.*) ("[s]ection 52-226a expressly contemplates that claims thereunder will be raised by post-verdict motion . . .").

Accordingly, the court denies the defendant's request to make a special finding of bad faith pursuant to § 52-226a.

CONCLUSION

On the basis of the foregoing, the court finds in favor of the defendant on the complaint and on his counterclaim for breach of contract. The court awards the defendant damages for said breach in the amount of $26,296. The court denies defendant's request for an award of attorney's fees. In addition, the court denies the defendant's request for a finding of bad faith. It is so ordered.

Juris No. 421279

Wilson, J.