PRETRIAL MOTION AND LITIGATION PRACTICE

MASSACHUSETTS SCHOOL OF LAW
PROF. STEVEN C. SHARAF, ESQ.
Week One

COURSE INTRODUCTION

- Description of course as a practical civil procedure class
- My background as a civil litigator and sole practitioner
- The class: Who you are and why are you here
- The Syllabus: Outline of topics to be covered, assignments and class requirements
Week One

COURSE INTRODUCTION

- Required texts and use of form books
- Grading and final examination
- Case study
  - Group selection as plaintiffs and defendants
  - Basic interviewing/questioning techniques
  - The client-focused practice
  - Issues and concerns
- Assignment
- Questions/discussion
Week One

The Client Focused Practice

- Listening, questioning and the art of information gathering
- Common sense and common business sense
- The decision making process
- The attorney as true counselor
- Alternative dispute resolution and conflict resolution
Week One

The Client-Focused Practice

The Top 10 Steps

- Listen to your client
- Focus on a client’s problem from their perspective
- Be creative in your counseling of a client
- Keep your client continuously informed
- Train your support staff to know your clients
- Acknowledge and respond appropriately to a client’s emotions
The Client-Focused Practice

The Top 10 Steps

- Ensure that your website and other marketing materials are also client-focused
- Review all bills carefully for accuracy and reasonableness prior to sending to a client
- Be flexible and responsive to client needs and requests
- Allow the client to be the primary decision maker
- Learn from your clients
Week Two
Initial Pleadings – The Complaint

- Initial questions
- Before drafting
- Purposes of a Complaint
- Elements
- Filing and service
- Counterclaims, cross-claims and third-party claims
- Additional considerations
Week Two
Initial Pleadings – The Answer

- Preliminary considerations
- Drafting an Answer
- How to Answer
- Affirmative Defenses
- Assignment
Week Three

Written Discovery - Interrogatories

- Introductory comments
- Drafting interrogatories
- Serving interrogatories
- Interrogatory types
- Responding to interrogatories
- Use of written discovery in damage development
- Miscellaneous final comments
Week Three
Written Discovery - Interrogatories

- Written questions seeking discoverable information
- May be served on any party to an action
- In state court, answers due within 45 days; in federal court, answers due within 30 days
- May serve no more than 30 questions; In MA all subparts are counted
- Need not serve entire set of 30 interrogatories at one time
Week Three
Written Discovery - Interrogatories

- Use of form interrogatories a great time saver; but tailor questions to your set of facts
- Draft clear questions
- Draft ambiguity-proof questions
- Be specific and comprehensive
- Factual rather than opinionated wording
- Source interrogatory – obtaining information in regard to the existence of documents or witnesses
Week Three
Written Discovery - Interrogatories

- Substantive interrogatory – obtaining information in regard to the merits of the case
- Contention interrogatory – identify arguments
- Responding: Must have your client’s involvement
- Drafting interrogatory answers – include the entire question, then provide the answer
- Objections (see handout): “irrelevant,” “vague and ambiguous,” “unduly burdensome”
Week Four

Written Discovery - RFPD

- M.R.C.P. Rule 34
- Primary source for discovery
- Planning the production request
- Site and time for production
- Drafting the requests – clear, specific and comprehensive/reasonable particularity
- Review documents produced
- Responding to a RFPD
- Objections
Week Four
Written Discovery - Admissions

- M.R.C.P. Rule 36
- The least used discovery device
- Advantages and disadvantages
- Drafting: Brief, simple and organized/use a declarative statement, not a question
- "Evidence deemed admitted at trial" – See Reynolds Aluminum, 480 N.E. 2nd 1(1985)
- Responding to a Request for Admissions
Week Five
Deposition Practice

- M.R.C.P. Rule 30: sworn testimony of a party, witness or expert witness
- Most Critical and the most flexible
- Provides the opportunity to ask any question and seek information which is relevant or which may lead to admissible evidence
- Provides the opportunity to assess a witness' strengths and weaknesses
- The deposition perpetuates a witness' testimony
Week Five
Deposition Practice
Preparing a Witness

- Explain the process/practice giving testimony
- The witness should tell the truth/answer briefly/never volunteer a response
- The witness should not argue and should think prior to responding
- If the witness does not understand a question, they should say so. If they do not know, they should say so.
- Explain your role
Week Five
Deposition Practice
Taking a Deposition

- When questioning, be yourself
- Listen to the answers being given and follow up if necessary
- Ask open ended questions
- "Close the door" on the witness' testimony
- Keep questions simple/avoid legalese
- Observe body language of the witness
- Organize your questioning
- Don't become side-tracked
Week Five

Deposition Practice

Dealing with Difficult Counsel

- Determine why the opposing attorney is being difficult – to intimidate or to impress
- Don’t become side-tracked and don’t allow difficult attorneys to interfere with your deposition
- Be thoroughly prepared
- Know the rules and the permissible objections
- Stay on the record
Week Five
Deposition Practice

The Deposition Process

- Notice of taking deposition – time and place
- The court reporter
- Stipulations: “All objections except as to form are waived, motions to strike are reserved until time of trial.”
- The deposition transcript
Week Seven
Motion Practice

- Mass/Fed R.C.P. 7(b)(1)
- A written request to the Court to issue an order
- Requirements: In writing and must state the specific grounds and the relief sought
- Memorandum of Law: Brief statement of the issue presented along with supporting argument with relevant cases cited
- Superior Court Rule 9
- District Court motion practice
Week Seven
Motion Practice

The Oral Argument

- Always stand when addressing the Court
- Inform the Court who you represent
- Summarize the Motion before the Court and what relief you are seeking and why
- Listen carefully to the Judge and respond to all questions
- Focus your argument on any concerns raised by the Judge
- Do not interrupt opposing counsel
- *Quit when you are ahead
Week Seven
Motion Practice
Various Motions

- M.R.C.P. Rule 12 – Motions to Dismiss
- Discovery Motions/Superior Court Rule 9C
- M.R.C.P. Rule 56 – Motion for Summary Judgment
- M.R.C.P. Rule 65 – TROs and Injunctions
- M.R.C.P. Rule 4.1 and 4.2 – Attachments and Trustee Process
- M.R.C.P. Rule 26 - Motion for a protective order
Motions to Dismiss

- M.R.C.P. Rule 12

Motion to dismiss tests the sufficiency of the Complaint

- M.R.C.P. Rules 12(b)(1) – 12(b)(9)

- M.R.C.P. Rule 12(b)(6) – The Complaint fails to state a claim upon which relief can be granted

Motion to dismiss tolls the 20 day period to file an Answer. Answer to be filed 10 days after the motion to dismiss is denied
Summary Judgment Motions

- M.R.C.P. Rule 56 – Judgment to be entered if there is no genuine issue of material fact in dispute
- Evidence is viewed in the light most favorable to the nonmoving party
- Effective use of discovery is critical
- Superior Court Rule 9A
- The summary judgment written argument
- The summary judgment oral argument
- Summary judgment oppositions
Week Nine
Motion Practice

TRO’s and Prel. Injunctions

- Purpose – Preserves the status quo
- Advantages and disadvantages
- TRO’s v. Preliminary injunctions
  - Immediate and irreparable harm
- Procedural issues
Week Nine
Motion Practice

TRO’s and Prel. Injunctions

  - Irreparable harm
  - Likelihood of success
  - Balance of harms
  - Risk of harm to the public

  - Irreparable harm
  - Balance of harms
  - Likelihood of success
  - Public interest
Week Ten
Motion Practice
Attachments

- M.R.C.P. Rule 4.1 and M.G.L. ch 223 s.42
- Available in any action where money damages are sought
- Must establish a "reasonable likelihood" that you will recover a judgment in an amount equal to or greater than the amount of the requested attachment
- No insurance available
- Ex parte
Week Ten
Motion Practice

Trustee Process

- M.R.C.P. Rule 4.2 and M.G.L. ch. 246
- Must establish a likelihood of success
- Procedural issues
- The trustee summons
- Ex parte
Week Eleven
Civil Trial Preparation

- Final discovery issues
- Pretrial conferences and memorandum
- Organizing/readying your case for trial
- Trial Briefs, Motions in Limine and Motions for Directed Verdict
- Post trial motions
Week Twelve
Negotiation and Settlement Considerations

- Case valuation and evaluation
- Settlement considerations
- Basic negotiation techniques
- Alternative dispute resolution options
Motions and Pretrial Litigation Practice

Steven C. Sharaf, Esq. steve@betterlawpractice.com
# Attorney New Matter Checklist

<table>
<thead>
<tr>
<th>DO</th>
<th>DONE</th>
</tr>
</thead>
<tbody>
<tr>
<td>1.</td>
<td>Prepare new matter report</td>
</tr>
<tr>
<td>2.</td>
<td>Give attorney checklist for following area of law:</td>
</tr>
<tr>
<td>3.</td>
<td>Assign file number (consult file number notebook)</td>
</tr>
<tr>
<td>4.</td>
<td>List file number in file number notebook and on new matter report</td>
</tr>
<tr>
<td>5.</td>
<td>Place white copy of new matter report in new matter notebook</td>
</tr>
<tr>
<td>6.</td>
<td>Prepare index cards</td>
</tr>
<tr>
<td>7.</td>
<td>Place index cards in files at secretary's desk and near photocopier</td>
</tr>
<tr>
<td>8.</td>
<td>Tape yellow copy of index card to client file envelope</td>
</tr>
<tr>
<td>9.</td>
<td>Stamp file number on client file envelope and put year and code labels on envelope</td>
</tr>
<tr>
<td>10.</td>
<td>Prepare client-attorney agreement form re: fee/costs</td>
</tr>
<tr>
<td>11.</td>
<td>Prepare letter to client re: retainer fee and agreement form</td>
</tr>
<tr>
<td>12.</td>
<td>Include pamphlet <em>How a Lawyer Computes Fees</em> with letter and agreement form</td>
</tr>
<tr>
<td>13.</td>
<td>Note client information on list of clients with open contracts and/or retainers at secretary's desk to keep track of incoming contracts and retainer fees</td>
</tr>
<tr>
<td>14.</td>
<td>Give attorney memo when client has paid retainer fee</td>
</tr>
<tr>
<td>15.</td>
<td>Stamp file when retainer is paid and signed agreement form is returned</td>
</tr>
<tr>
<td>16.</td>
<td>Prepare reminder/assignment cards for following items and place cards in reminder/assignment card file:</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th></th>
<th>Actual Date</th>
<th>Advance Reminder Date(s)</th>
</tr>
</thead>
<tbody>
<tr>
<td>17.</td>
<td>Statute of limitations</td>
<td></td>
</tr>
<tr>
<td>18.</td>
<td>Court date</td>
<td></td>
</tr>
<tr>
<td>19.</td>
<td>Other (namely)</td>
<td></td>
</tr>
<tr>
<td>20.</td>
<td>Prepare client account sheet (ledger sheet) and place in its file</td>
<td></td>
</tr>
<tr>
<td>21.</td>
<td>Prepare client time and expense record sheet and place in its file</td>
<td></td>
</tr>
<tr>
<td>22.</td>
<td>Prepare subfile manila folders entitled as follows and place in client's file:</td>
<td></td>
</tr>
<tr>
<td>23.</td>
<td>Correspondence and pleadings</td>
<td></td>
</tr>
<tr>
<td>24.</td>
<td>Research</td>
<td></td>
</tr>
<tr>
<td>25.</td>
<td>Investigation and exhibits</td>
<td></td>
</tr>
<tr>
<td>26.</td>
<td>Costs and expenses</td>
<td></td>
</tr>
<tr>
<td>27.</td>
<td>Closing documents</td>
<td></td>
</tr>
<tr>
<td>28.</td>
<td>Enter later date one week from date of opening file and list on back of client's file envelope and on desk calendar</td>
<td></td>
</tr>
<tr>
<td>29.</td>
<td>Place yellow copy of new matter report in the correspondence file</td>
<td></td>
</tr>
<tr>
<td>30.</td>
<td>Place photocopy of this checklist in follow-up folder for one week as reminder of work left to be done on file</td>
<td></td>
</tr>
<tr>
<td>31.</td>
<td>Place this checklist in correspondence file</td>
<td></td>
</tr>
</tbody>
</table>
Client Questionnaire

For Office Use Only: Do Not Give to Client!

Fees
Retainer: ________________________________
Payable: ________________________________

Hourly rate for services:
  Attorney: ________________________________
  Paralegal: ________________________________
  Assistant: ________________________________
Source of payment: ________________________________

Security for payment:

☐ Promissory note
☐ Escrow agreement
☐ Chattels deposited
☐ Mortgage
☐ Lien agreement on chose in action

Other comments: __________________________________________________________
_____________________________________________________________
_____________________________________________________________
_____________________________________________________________
Referrer by:
Court no.:

Client
Name: ..........................................................
Age: ..........................................................
Address: ....................................................... ..........................................................
County: ..........................................................
Home phone: ........................................ Length of residence: ..................................
Employer: ..........................................................
Address: ..........................................................
Length of employment: ..........................................................
Social Security #: ..........................................................

Checklist of Discussions
☐ Assignment to client:
  ☐ Books and financial records
  ☐ Deeds, title reports, title documents
  ☐ Papers and contracts
  ☐ Budget for current income and expenses
  ☐ Income tax returns
  ☐ List of debts
  ☐ List of personal property in adverse party's control
  ☐ Other items (please list):
  ..........................................................
  ..........................................................
  ..........................................................

☐ Court procedures explained
☐ Office procedures explained
☐ Fees agreed to
☐ Summary of facts completed
<table>
<thead>
<tr>
<th>Do</th>
<th>Required</th>
<th>Received</th>
<th>Item of Work</th>
</tr>
</thead>
<tbody>
<tr>
<td>☐</td>
<td></td>
<td></td>
<td>1. Client executed retainer agreement</td>
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<td>2. Client executed authorization forms</td>
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<td></td>
<td>3. Police/fire report</td>
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<td>4. Photographs</td>
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<td>5. Police interview</td>
</tr>
<tr>
<td>☐</td>
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<td></td>
<td>6. Dispose of traffic citation against client</td>
</tr>
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<td>7. Motor vehicle report</td>
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<td></td>
<td>8. Letters to witnesses</td>
</tr>
<tr>
<td>☐</td>
<td></td>
<td></td>
<td>9. Witness statements</td>
</tr>
<tr>
<td>☐</td>
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<td></td>
<td>10. Damage estimate of personal property</td>
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<tr>
<td>☐</td>
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<td>11. Wage verification</td>
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<td>☐</td>
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<td></td>
<td>12. Medical reports and bills</td>
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<td>13. Autopsy reports</td>
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<td></td>
<td>14. Death certificate</td>
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<tr>
<td>☐</td>
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<td>15. Hospital bill</td>
</tr>
<tr>
<td>☐</td>
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<td></td>
<td>16. Hospital report/nurse's minutes</td>
</tr>
<tr>
<td>☐</td>
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<td></td>
<td>17. Other proofs of loss (list item below)</td>
</tr>
<tr>
<td>☐</td>
<td></td>
<td></td>
<td>18. Demand for appraisals</td>
</tr>
<tr>
<td>☐</td>
<td></td>
<td></td>
<td>19. Letter to insurance company with documentation of injuries</td>
</tr>
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<td>☐</td>
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<td></td>
<td>20. Demand letter for settlement</td>
</tr>
<tr>
<td>☐</td>
<td></td>
<td></td>
<td>21. Complaint and summons</td>
</tr>
<tr>
<td>☐</td>
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<td></td>
<td>22. Answer</td>
</tr>
<tr>
<td>☐</td>
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<td></td>
<td>23. Interrogatories</td>
</tr>
<tr>
<td>☐</td>
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<td></td>
<td>24. Request to produce documents, etc.</td>
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<tr>
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<td></td>
<td>25. Answers to interrogatories</td>
</tr>
<tr>
<td>☐</td>
<td></td>
<td></td>
<td>26. Request to disclose expert</td>
</tr>
<tr>
<td>☐</td>
<td></td>
<td></td>
<td>27. Depositions (list names of subjects):</td>
</tr>
</tbody>
</table>
Personal Injury Interview Sheet

Referred by: ________________________________ Date: ________________________________

Clients:
(1) Name: ________________________________ Age: ________________________________
Date of birth ________________________________
(if a minor): ________________________________
Address: __________________________________
__________________________________________

Home phone: ________________________________
Business phone: ________________________________
Marital status: ________________________________
Name of spouse ________________________________
(name of spouse if minor): ________________________________
Employer: __________________________________
Job description: ________________________________
Address: __________________________________
__________________________________________

Weekly or yearly gross income: ________________________________
Wage loss verification forms given to client: ________________________________
Passenger: ________________________________
Driver: ________________________________

(2) Name: ________________________________ Age: ________________________________
Date of birth ________________________________
(if a minor): ________________________________
Address: __________________________________
__________________________________________

Home phone: ________________________________
Business phone: ________________________________
Marital status: ________________________________
Name of spouse ________________________________
(name of spouse if minor): ________________________________
Employer: __________________________________
Job description: ________________________________
Address: __________________________________
__________________________________________
Weekly or yearly gross income: ________________________________
Wage loss verification forms given to client: __________________________________________
Passenger: __________
Driver: __________

Previous injury history:
(1) ________________________________________________________________

(2) ________________________________________________________________

Did client make a statement to anyone other than this office? Details:
(1) ________________________________________________________________

(2) ________________________________________________________________

Does client carry medical coverage insurance?
(1) Amount: __________________ Company: ____________________________
(2) Amount: __________________ Company: ____________________________

Automobile insurance:
(1) Amount: __________________ Company: ____________________________
(2) Amount: __________________ Company: ____________________________

Uninsured motorists' insurance:
(1) Amount: __________________ Company: ____________________________
(2) Amount: __________________ Company: ____________________________

Approximate damage to vehicle: ____________________________________________

Client advised to obtain two estimates? _______________________________________
Client advised to photograph damage? _______________________________________

Occurrence:
Date ordered: ____________________________
Was there any drinking involved? ____________________________
Were police notified? ____________________________
Was police report made? ____________________________
City: ____________________________
County: ____________________________
State Highway: ____________________________
Other: ____________________________
Were any arrests made? ____________________________
Disposition of hearing, if known: ____________________________

Defendants:
(1) Name: ____________________________
Address: ____________________________
State license: ____________________________
Name of defendant's insurance carrier or broker: ____________________________
(2) Name: ____________________________
Address: ____________________________
State license: ____________________________
Name of defendant's insurance carrier or broker: ____________________________

Medical:
Attending doctor: ____________________________
Address: ____________________________
Other doctors (first aid, consultants, etc.):
(1) ____________________________
(2) ____________________________
Address: ____________________________
(1) ____________________________
(2) ____________________________
Nature of injuries: ____________________________________________

Hospital: ____________________________________________________
X rays taken? ________________________________________________
Where? ______________________________________________________
By whom? ____________________________________________________

Damages:
Property damage repair bill (estimate): $ ________________________
Property damage repair bill (actual): $ __________________________
X ray bill: ________________________________________________
Ambulance: $ _____________________________________________
Hospital bill: $ _____________________________________________
Orthopedic appointment: $ _________________________________
Nursing care: $ ____________________________________________
Household help: $ _________________________________________
Other: $ _________________________________________________
M.D. bills: $ ______________________________________________
Lost time: $ ______________________________________________

Has client been instructed
☐ To give no information to anyone other than representative of our office?
☐ To be patient?
   (Case may take three to six months before settlement, if any can be effected.
   If lawsuit, then longer.)
☐ To forward to this office all bills or receipts for hospital, X ray, property damage,
   loss of earnings and medical reports?
Name of client:
File no.:
Current date:
Date of accident:
1. Name:
2. Date of birth:
3. Marital status:
4. Home address/phone number:
5. Business address/phone number:
6. Occupation:
7. Name/address/phone of person who will always know how to contact you:
8. What, if any, is your relationship to the parties to this accident?
9. Recollection of accident:
   a. Do you recall the accident?
   b. When did it happen—time and date?
   c. Where did it occur?
   d. Please describe the motor vehicles involved in the accident (make/model/year/operating condition/appearance):
10. How could this accident have been prevented?
11. Did you feel that drugs, including alcohol, played a part in this accident? If so, explain.
12. Did you feel there was any hostility between the parties to the accident or that unusual conduct of any sort was involved? If so, explain.
13. Other impressions:
14. Was notice given to your employer/immediate supervisor?  
(When? By whom?)

Method of notice (verbal or written):

15. Since the accident, have you been contacted by anyone to discuss your knowledge of it? If so, please give details.

16. Have you given any statements or signed any reports regarding the accident? If so, please give details.

17. Have you ever testified in court before? If so, please give details.

Acknowledgment
I have read the above statement, and it is true and accurate to the best of my knowledge, recollection and belief.

Witness

Subscribed and sworn to before me on this _____ day of ________________________, 19____.

Notary Public
Commonwealth of Massachusetts

SUFFOLK, ss.                                          SUPERIOR COURT DEPARTMENT
                                                        OF THE TRIAL COURT
                                                        CIVIL ACTION

No. SJC 09-64483

Wendy Rinkle, Plaintiff(s)                              J-13-10

v.                                                        A True Copy; Attested:

C. Thomas Cutter, Defendant(s)                           Tomasz Kruszewski

SUMMONS

To the above-named Defendant:

You are hereby summoned and required to serve upon

Heinstein & Weinstein, 10 Mechanic Street, Suite 201, Boston, MA 02111,
plaintiff’s attorney, whose address is _______________________, an answer to
the complaint which is herewith served upon you, within 20 days after service of this summons upon you,
exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the
relief demanded in the complaint. You are also required to file your answer to the complaint, the office
of the Clerk of this court at Boston either before service upon plaintiff’s attorney or within a reasonable
time thereafter.

Unless otherwise provided by Rule 13(a), your answer must state as a counterclaim any claim which
you may have against the plaintiff which arises out of the transaction or occurrence that is the subject
matter of the plaintiff’s claim or you will thereafter be barred from making such claim in any other action.

Suzanne V. DelVecchio
Witness, at Boston, the 12th day of January, in the year of our Lord 2010.

Michael Joseph Donovan
Clerk/Magistrate

NOTES.
1. This summons is issued pursuant to Rule 4 of the Massachusetts Rules of Civil Procedure.
2. When more than one defendant is involved, the names of all defendants should appear in the caption. If a separate summons is used for each defendant,
each should be addressed to the particular defendant.
3. TO PLAINTIFF'S ATTORNEY: PLEASE CIRCLE TYPE OF ACTION INVOLVED
   (1) TORT — (2) MOTOR VEHICLE TORT — (3) CONTRACT — (4) EQUITABLE RELIEF — (5) OTHER

Form CIV. P. 13TH Rev. 20M 9/98
PROOF OF SERVICE OF PROCESS

I hereby certify and return that on ____________, 2000, I served a copy of the within summons, together with a copy of the complaint in this action, upon the within-named defendant, in the following manner (See Mass. R. Civ. P. 4 (d) (1-5):


N.B. TO PROCESS SERVER:--
PLEASE PLACE DATE YOU MAKE SERVICE ON DEFENDANT IN THIS BOX ON THE ORIGINAL AND ON COPY SERVED ON DEFENDANT.


Commonwealth of Massachusetts

Superior Court Department

Civil Action

No. 04-83-1

Plaintiff(s).

Defendant(s).

SUMMONS

(Mass. R. Civ. P. 4)

(AFFIX FILING STAMP HERE)
RE: rickles v Cutter

TO:
Seymour Weinstein, Esquire
Weinstein & Weinstein
10 Mechanic Street
Suite 300
Worcester, MA 01608

SCHEDULING ORDER FOR X TRACK

You are hereby notified that this case is on the track referenced above as per Superior Court Standing Order 1-88. The order requires that the various stages of litigation described below must be completed not later than the deadlines indicated.

<table>
<thead>
<tr>
<th>STAGES OF LITIGATION</th>
<th>DEADLINES</th>
</tr>
</thead>
<tbody>
<tr>
<td>Service of process made and return filed with the Court by</td>
<td>01/19/2010</td>
</tr>
<tr>
<td>case shall be resolved and judgment shall issue by</td>
<td>10/16/2010</td>
</tr>
<tr>
<td>10/16/2010.</td>
<td></td>
</tr>
</tbody>
</table>

- The final pre-trial deadline is not the scheduled date of the conference.
- You will be notified of that date at a later time.
- Counsel for plaintiff must serve this tracking order on defendant before the deadline for filing return of service.

Dated: 10/28/2009

Michael Joseph Donovan
Clerk of the Court

Location: CtRm 1015, 3 Pemberton Square, Boston
Telephone: 617-788-8147

abed individuals who need handicap accommodations should contact the Administrative Office of the Superior Court at (617) 8130 - Check website as to status of case: http://ma-trialcourts.org/tcic 3632211 intro001 randie
**CIVIL ACTION COVER SHEET**

**DOCKET NO.(S)** This is the Docket NO.

**County:**

**PLAINTIFF(S)**

This is the place for the Plaintiff's Name

**DEFENDANT(S)**

This is the place for the Defendant's Name

**ATTORNEY, FIRM NAME, ADDRESS AND TELEPHONE**

Attorney, Firm Name, Address, and Telephone Number Here

Board of Bar Overseers number:

**ATTORNEY (if Known)**

The following is a full, itemized and detailed statement of the facts on which plaintiff relies to determine money damages. For this form, disregard double or treble damage claims; indicate single damages only.

### TORT CLAIMS

(Attach additional sheets as necessary)

<table>
<thead>
<tr>
<th>Description</th>
<th>Amount</th>
</tr>
</thead>
<tbody>
<tr>
<td>Documented medical expenses to date:</td>
<td></td>
</tr>
<tr>
<td>1. Total hospital expenses</td>
<td></td>
</tr>
<tr>
<td>2. Total Doctor expenses</td>
<td></td>
</tr>
<tr>
<td>3. Total chiropractic expenses</td>
<td></td>
</tr>
<tr>
<td>4. Total physical therapy expenses</td>
<td></td>
</tr>
<tr>
<td>5. Total other expenses (describe)</td>
<td></td>
</tr>
<tr>
<td><strong>Subtotal</strong></td>
<td></td>
</tr>
<tr>
<td>Documented lost wages and compensation to date</td>
<td></td>
</tr>
<tr>
<td>Documented property damages to date</td>
<td></td>
</tr>
<tr>
<td>Reasonably anticipated future medical and hospital expenses</td>
<td></td>
</tr>
<tr>
<td>Reasonably anticipated lost wages</td>
<td></td>
</tr>
<tr>
<td>Other documented items of damages (describe)</td>
<td></td>
</tr>
<tr>
<td><strong>G. Brief description of plaintiff's injury, including nature and extent of injury (describe)</strong></td>
<td></td>
</tr>
<tr>
<td><strong>TOTAL</strong></td>
<td></td>
</tr>
</tbody>
</table>

### CONTRACT CLAIMS

(Attach additional sheets as necessary)

Provide a detailed description of claim(s):

**TOTAL** $ 

**PLEASE IDENTIFY, BY CASE NUMBER, NAME AND COUNTY, ANY RELATED ACTION PENDING IN THE SUPERIOR COURT DEPARTMENT**

"I hereby certify that I have complied with the requirements of Rule 5 of the Supreme Judicial Court Uniform Rules on Dispute Resolution (SJC Rule 1:18) requiring that I provide my clients with information about court-connected dispute resolution services and discuss with them the advantages and disadvantages of the various methods."

**Signature of Attorney of Record**

**DATE:**
## CIVIL ACTION COVER SHEET
### INSTRUCTIONS

SELECT CATEGORY THAT BEST DESCRIBES YOUR CASE

<table>
<thead>
<tr>
<th>CONTRACT</th>
<th>REAL PROPERTY</th>
<th>MISCELLANEOUS</th>
</tr>
</thead>
<tbody>
<tr>
<td>A01 Services, labor and materials</td>
<td>C01 Land taking (eminent domain)</td>
<td>E02 Appeal from administrative Agency G.L. c.30A</td>
</tr>
<tr>
<td>A02 Goods sold and delivered</td>
<td>C02 Zoning Appeal, G.L. c 40A</td>
<td>E03 Action against Commonwealth Municipality, G.L. c. 258</td>
</tr>
<tr>
<td>A03 Commercial Paper</td>
<td>C03 Dispute concerning title</td>
<td>E05 All Arbitration</td>
</tr>
<tr>
<td>A08 Sale or lease of real estate</td>
<td>C04 Foreclosure of mortgage</td>
<td>E07 c. 112, s. 12S (Mary Moe)</td>
</tr>
<tr>
<td>A12 Construction Dispute</td>
<td>C05 Condominium lien and charges</td>
<td>E08 Appointment of Receiver</td>
</tr>
<tr>
<td>A99 Other (Specify)</td>
<td>C99 Other (Specify)</td>
<td>E09 General contractor bond, G.L. c. 149, s. 29,29a</td>
</tr>
</tbody>
</table>

**MOTOR VEHICLE NEGLIGENCE-PERSONAL INJURY/PROPERTY DAMAGE**

<table>
<thead>
<tr>
<th>TORT</th>
<th>EQUITABLE REMEDIES</th>
<th>TRANSFER YOUR SELECTION TO THE FACE SHEET</th>
</tr>
</thead>
<tbody>
<tr>
<td>B03 Motor Vehicle negligence personal injury/property damage</td>
<td>D01 Specific performance of contract</td>
<td>EXAMPLE:</td>
</tr>
<tr>
<td>B04 Other negligence personal injury/property damage Products Liability</td>
<td>D02 Contribution or Indemnification</td>
<td>CODE NO. TYPE OF ACTION (SPECIFY) TRACK IS THIS A JURY CASE?</td>
</tr>
<tr>
<td>B05 Malpractice-medical</td>
<td>D06 Contribution or Indemnification</td>
<td>B03 Motor Vehicle Negligence-Personal Injury (F) F Yes □ No</td>
</tr>
<tr>
<td>B07 Malpractice-other (Specify)</td>
<td>D07 Imposition of Trust</td>
<td></td>
</tr>
<tr>
<td>B08 Wrongful death, G.L.c.229,s2A</td>
<td>D08 Minority Stockholder's Suit</td>
<td></td>
</tr>
<tr>
<td>B15 Defamation (libel-Slander)</td>
<td>D10 Accounting</td>
<td></td>
</tr>
<tr>
<td>B19 Asbestos</td>
<td>D12 Dissolution of Partnership</td>
<td></td>
</tr>
<tr>
<td>B20 Personal Injury-Slip &amp; Fall</td>
<td>D13 Declaratory Judgment G.L.c.231A</td>
<td></td>
</tr>
<tr>
<td>B21 Environmental</td>
<td>D99 Other (Specify)</td>
<td></td>
</tr>
<tr>
<td>B22 Employment Discrimination</td>
<td></td>
<td></td>
</tr>
<tr>
<td>B99 Other (Specify)</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

### TRANSFER YOUR SELECTION TO THE FACE SHEET

**EXAMPLE:**

- **CODE NO.**
- **TYPE OF ACTION (SPECIFY)**
- **TRACK**
- **IS THIS A JURY CASE?**

### SUPERIOR COURT RULE 29

**DUTY OF THE PLAINTIFF:** The plaintiff or his/her counsel shall set forth, on the face sheet (or attach additional sheets as necessary), a statement specifying in full and itemized detail the facts upon which the plaintiff then relies as constituting money damages. A copy of such civil action cover sheet, including the statement as to the damages, shall be served on the defendant together with the complaint. If a statement of money damages, where appropriate is not filed, the Clerk-Magistrate shall transfer the action as provided in rule 29(5)(C).

**DUTY OF THE DEFENDANT.** Should the defendant believe the statement of damages filed by the plaintiff in any respect inadequate, he or his counsel may file with the answer a statement specifying in reasonably detail the potential damages which may result should the plaintiff prevail. Such statement, if any, shall be served with the answer.

**A CIVIL ACTION COVER SHEET MUST BE FILED WITH EACH COMPLAINT, BUFF COLOR PAPER.**

**FAILURE TO COMPLETE THIS COVER SHEET THOROUGHLY AND ACCURATELY MAY RESULT IN DISMISSAL OF THIS ACTION.**
COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS.                      SUPERIOR COURT
                                      C.A. No.: __________

WENDY RICKLES,                              )
                                )
                                )
                                )
                                )
                                )
                                )
                                )
                                )
                                )
                                )
                                )

v.

C. THOMAS CUTTER,                             )
                                )
                                )
                                )
                                )
                                )

G.L. c. 251 APPLICATION

COMPLAINT TO VACATE ARBITRATION AWARD UNDER G.L.c. 251
Section 15 and Section 12

APPLICATION PURSUANT TO G. L. c. 251 Section 15 FOR AN ORDER TO
VACATE AN ARBITRATION AWARD – G.L. c. 251 Section 12

INTRODUCTION

Now comes the applicant, Wendy Rickles, and pursuant to G.L. c. 251
section 15 and section 12, hereby moves that the Court vacate the arbitration
award delivered to the applicant on September 21, 2009. As grounds therefore
the applicant states that the arbitrator’s finding against Wendy Rickles is
incorrect. (See Exhibit A, Award of the Arbitrators) Specifically, the award was
procured by fraud, there was no arbitration agreement, and the arbitrators
exceeded their powers.

PARTIES

1. Plaintiff Wendy Rickles is an attorney who has a usual place of
   business at Suite 1000, 255 Park Avenue, Worcester, Massachusetts. Wendy
   Rickles lives in Worcester, MA, Worcester County.

2. Defendant C. Thomas Cutter is an individual who lives at 48
   Shipway Place, Charleston, MA, Suffolk County.
ARGUMENT


5. C. Thomas Cutter filed a Petition for Arbitration of a Fee Dispute at the Legal Fee Arbitration Board of the Massachusetts Bar Association. (“the Board”)

6. Wendy Rickles never agreed to arbitrate at the Legal Fee Arbitration Board of the Massachusetts Bar Association.

7. Wendy Rickles told Marc D’Antonio (“D’Antonio”) of the Massachusetts Bar Association several times that she was not going to arbitrate at The Massachusetts Bar Association.

8. Despite this, a hearing was held on September 9, 2009 at the Massachusetts Bar Association by a panel of arbitrators from the Legal Fee Arbitration Board of the Massachusetts Bar Association. On September 9, 2009 the arbitrators made an “award”. (“the Award”) A copy of this award is attached and marked Exhibit A.

9. The award was procured by fraud or other undue means, there was no signed arbitration agreement, the arbitrators exceeded their powers, and the issue was not adversely determined in proceedings. The arbitrators did not hear evidence material to the controversy. All of this was contrary to the provisions of section five of Chapter 251, section 12 of Chapter 251, and other provisions of Chapter 251. This all prejudiced substantially the rights of Wendy Rickles. All of this is set forth in this complaint and accompanying affidavit and Exhibit A, Exhibit B, and Exhibit C.

   Wherefore in accordance with M.G.L.A. c 251, section 12, the moving party Wendy Rickles moves that the court vacate the award.

NO ARBITRATION AGREEMENT AND NO JURISDICTION

10. Wendy Rickles never submitted to arbitration at the Massachusetts Bar Association. Wendy Rickles never signed an arbitration agreement at the Massachusetts Bar Association as she was not going to arbitrate at the Massachusetts Bar Association.
11. Wendy Rickles specifically told Marc D’Antonio that she was not going to arbitrate at the Massachusetts Bar Association and was going to arbitrate with another arbitration group. Wendy Rickles told this to Marc D’Antonio several times. Marc D’Antonio of the Massachusetts Bar Association knew Wendy Rickles had not signed the Agreement as Wendy Rickles was not submitting to arbitration at the Massachusetts Bar Association.

12. C. Thomas Cutter submitted a petition to the Massachusetts Bar Association Legal Fee Arbitration Board.

13. The Rules of the Legal Fee Arbitration Board of the Massachusetts Bar Association ("The Rules") (Exhibit B) specifically state in their Introduction:

> "Once the Board has received the petition, it will ask for the agreement of the other party to participate... The Board does not have the authority to compel anyone; attorney or client, to submit to its jurisdiction..."

14. The Board cannot compel anyone to submit to its jurisdiction. Wendy Rickles did not submit to its jurisdiction. Wendy Rickles told This to Marc D’Antonio of the Massachusetts Bar Association several times.

15. Wendy Rickles did not agree to participate to the arbitration process at the Massachusetts Bar Association, did not sign and return the paperwork to participate. Wendy Rickles specifically told Marc D’Antonio of the Massachusetts Bar Association several times that she was not participating at the Massachusetts Bar Association Legal Fee Arbitration.

16. "The Rules" specifically state: "Please carefully read the rules prior to submitting to the jurisdiction of the Board."

17. Attorney Rickles read "The Rules" and told Marc D’Antonio of the Massachusetts Bar Association that she was not going to submit to the jurisdiction of the Board.

18. "The Rules" specifically state in: II Jurisdiction of the Board A) Role of the Board 4) The arbitration process shall be conducted according to the Board's rules and subject to the requirements of Massachusetts General Laws, Chapter 251, "Commercial Arbitration."

19. Chapter 251 Section 12 states:
   (a) Upon application of a party, the court shall vacate an award if:
   (5) there was no arbitration agreement and the issue was not adversely determined in proceedings under section two ...

20. There was no arbitration agreement here and the issue was not adversely determined in proceedings under Section Two of G.L. c 251.

21. Massachusetts General Laws, Chapter 251 Section 2 states a party may apply to the Superior Court for an order directing parties to arbitrate.
This was not done here. No one applied to Superior Court under Section 2 of Massachusetts General Laws Chapter 251.

22. The Board did not follow its own rules. Wendy Rickles specifically never signed and sent back the Fee Petition as she was not submitting to the Board's jurisdiction. Marc D'Antonio of the Massachusetts Bar Association knew this.

23. The Board did not follow its own rules nor did it follow Massachusetts law in rendering an opinion when Wendy Rickles had not signed nor sent back the fee petition.

24. The Board's own rules state in III Obligations of the Parties. A) Definitions 1) A "party" to the arbitration is the Petitioner, the Respondent, and ... 4) A "Respondent" is a person who agrees to the arbitration process by filing a Respondent's Agreement with the Board.

Wendy Rickles did not agree to this arbitration, so the board had no jurisdiction. Wendy Rickles did not sign the arbitration petition nor did she file a Respondent's Agreement with the Board as she was not submitting to arbitration at the Massachusetts Bar Association Legal Fee Arbitration Board.

25. The Board's own rules state in III Obligations of the Parties B) "Arbitration is a contract. Once the Petition for Arbitration of a Fee Dispute and the Respondent's Agreement to Arbitration of a Fee Dispute are filed..." That was never done in this case. Wendy Rickles never signed the Respondent's Agreement and told Marc D'Antonio of the Massachusetts Bar that she was not doing so.

26. "The Rules" go on to state in III B) "If any party determined to be necessary by the Chief Arbitrator refuses to arbitrate, the arbitration will be dismissed without prejudice to any of the parties unless the party determined to be necessary has previously signed an arbitration agreement, in which case the matter will be stayed and the parties will be given a period of sixty (60) days to file an action to compel arbitration by the refusing necessary party." If no action is filed within said sixty (60) days, the arbitration will be dismissed without prejudice to any of the parties." The Board did not follow its own rules.

27. "The Rules" state in III C) The Petitioner shall initiate the arbitration process by filing a Petition for Arbitration of a Fee Dispute with the Board,... The responding party must file a Respondent's Agreement to Arbitration of a Fee Dispute with the Board within a reasonable time, together with the required filing fee... By so filing his or her Petition or Respondent's Agreement, the parties agree to submit to the jurisdiction and Rules of the Board and to be bound by its decision." Wendy Rickles never did any of this as she did not want to arbitrate at the Massachusetts Bar Association.

28. Wendy Rickles was not told that a hearing was taking place at the Massachusetts Bar Association on this matter.
29. Wendy Rickles' attorney was never notified that a hearing was taking place at the Massachusetts Bar Association on this matter.

30. Wendy Rickles was stunned when a decision of the Arbitrators was sent to her. (See Exhibit C Affidavit of Wendy Jane Rickles) There was no arbitration agreement and the issue was not adversely determined in proceedings. Wendy Rickles had not been told the Board was meeting to hear this case.

31. Nothing was ever sent to Wendy Rickles' attorney at any time from the Legal Fee Arbitration Board of the Massachusetts Bar Association. No notice of a hearing nor any decision of the Arbitrators was ever sent to Attorney Seymour Weinstein.

**CONTINUANCE**

32. A hearing was scheduled for July 28, 2009 at 10am even though Wendy Rickles had not agreed to arbitrate at the Mass Bar. Wendy Rickles brought up this fact to Marc D'Antonio of the Mass Bar. Marc D'Antonio told Wendy Rickles that she had to file a Motion for a Continuance. Wendy Rickles discussed this at length with Marc D'Antonio. Marc D'Antonio assured Wendy Rickles that filing a Motion for Continuance would not submit her to the jurisdiction of the Board.

33. Wendy Rickles did file for a continuance of a hearing that was scheduled without her having submitted to the jurisdiction of the Board. Wendy Rickles was assured by Marc D'Antonio that she had to file for this continuance and that doing so would not submit her to the jurisdiction of the Board.

**DISCOVERY**

34. Attorney Russell Schwartz who represents C. Thomas Cutter sent out a Deposition Notice to the wife of C. Thomas Cutter without permission of the Board. This was against the rules of the Legal Fee Arbitration Board of the Massachusetts Bar Association. Wendy Rickles called Marc D'Antonio about this. Wendy Rickles told Marc D'Antonio that it would look to Mrs. Cutter as if the Deposition Notice was a legal document. Marc D'Antonio told Wendy Rickles he could not do anything about this, but he would refer the matter to the Chair of the panel. Wendy Rickles discussed this matter with Marc D'Antonio many times. Nothing was ever done to stop the Deposition Notice sent by Attorney Schwartz. Wendy Rickles discussed with Marc D'Antonio several times that she felt she had to protect herself and arbitrate somewhere that rules would be enforced. Wendy Rickles discussed with Marc D'Antonio that this was one of the reasons Wendy Rickles was hiring an attorney and not submitting to arbitration at the Massachusetts Bar Association. Marc D'Antonio knew Wendy Rickles was not submitting to arbitration at the Massachusetts Bar Association.
35. It seems as if this Deposition Notice was sent outside of the Rules of the Legal Fee Arbitration Board. Marc D'Antonio never communicated to Wendy Rickles that he did anything about this despite Wendy Rickles' repeated requests to him.

36. The Board's Rules state in VI The Hearing and Award A) Discovery 2) "...Failure to send copies of documentary evidence to all other parties may result in exclusion of those documents at the hearing." Nothing was ever sent to Wendy Rickles after this Deposition Notice and notice to bring documents was sent.

FRAUD

37. Chapter 251, Section 12 Vacation of award... states:

"Section 12 (a) Upon application of a party, the court shall vacate an award if:--
(1) The award was procured by corruption, fraud, or other undue means;"

C. Thomas Cutter gave Wendy Rickles many checks that bounced and were not honored at the bank. This happened several times over the course of Wendy Rickles' representation of Mr. Cutter. Mr. Cutter included the amounts of these bounced checks in the amounts he presented to the Arbitration Board as amounts he had "paid" to Wendy Rickles. Mr. Cutter knew these checks had bounced. He included them in the amounts he had "paid" to Wendy Rickles in his submission to the Board. Including these amounts as "amounts paid" to Wendy Rickles when Mr. Cutter knew these checks had not been successfully cashed was a fraud. These checks were returned to Mr. Cutter as the bank would not honor them. C. Thomas Cutter obtained this award by fraud or other undue means- he included amounts that he said he had paid to Wendy Rickles in his materials to the Board when he knew that he had in fact not paid these amounts.

38. C. Thomas Cutter suggested to Wendy Rickles that she open an account at his bank- which was Citizens Bank. There is not a Citizens Bank in Worcester, MA. Wendy Rickles did open an account at Citizen's Bank. Wendy Rickles made many trips to Citizens Bank with Mr. Cutter's checks. Many of his checks were not honored at that bank as there were not sufficient funds to cover the checks. Several of his checks were honored and Wendy Rickles had to give her MA license to the teller each time she brought a check of Mr. Cutter's to Citizens bank. Wendy Rickles MA license number at the time was her social security number. The social security number was returned to Mr. Cutter when the checks were returned to him.

39. Wendy Rickles has had identity theft problems since this time.

40. This fraud was materially related to the issue in the arbitration- the amount Mr. Cutter said he had paid to Wendy Rickles. C. Thomas Cutter procured the award by the use of fraud.
Chapter 251, Section 12 Vacation of award... states:
"Section 12 (a) Upon application of a party, the court shall vacate an award if:--
(1) The award was procured by corruption, fraud, or other undue means;"

Mr. Cutter presented Wendy Rickles with a list of checks he said he had paid to Wendy Rickles. Many of the checks were checks Wendy Rickles had never seen. Wendy Rickles asked Mr. Cutter over twenty-eight (28) times for copies of the backs of these checks. Wendy Rickles told Mr. Cutter and his attorney Russell Schwartz that Wendy Rickles had never seen these checks. Mr. Cutter never produced these checks. Mr. Cutter never produced copies of the backs of these checks he claimed to have paid to Wendy Rickles.

Wendy Rickles told Mr. Cutter several times that she was fearful that someone else had cashed these checks if indeed they had been cashed or written. Mr. Cutter would not produce the checks or copies of the backs of these checks. If these checks had been written and cashed, it is a criminal matter to be referred to the appropriate District Attorney’s office. Mr. Cutter asked Wendy Rickles which District Attorney’s office would handle this matter, but he still never produced the checks or copies of them.

It was a fraud for Mr. Cutter to submit the amounts of these checks to the Board as amounts he had “paid” to Wendy Rickles. This fraud was materially related to the issue in the arbitration- how much C. Thomas Cutter had paid to Wendy Rickles. Mr. Cutter knew these amounts were not received by Wendy Rickles, but he submitted them to the Board anyway. C. Thomas Cutter procured the award by the use of fraud.

Wendy Rickles has had identity theft problems since this time.

Chapter 251, Section 12 Vacation of award... states:
"Section 12 (a) Upon application of a party, the court shall vacate an award if:--
(1) The award was procured by corruption, fraud, or other undue means;"

Mr. Cutter’s attorney submitted time sheets to the Arbitration Board as time sheets of Wendy Rickles for Mr. Cutter’s case. A significant amount of time and many of the pages of Wendy Rickles’ time sheets were not included with the submission to the Board.

Mr. Cutter knew that only a portion of the time sheets were submitted to the Board instead of all of Wendy Rickles time. This was a fraud. This fraud was materially related to the issue in the arbitration- the amount of time Wendy Rickles had spent on his file and the amount of money Wendy
Rickles was owed by Mr. Cutter. By submitting only a portion of the time sheets of Wendy Rickles, Mr. Cutter perpetrated a fraud on the Board during the arbitration. C. Thomas Cutter procured the award by the use of fraud and undue means.

49. Mr. Cutter submitted the Fee Agreement to the Board which was not as it was when it was signed in the beginning of the case.

ATTORNEY REPRESENTING WENDY RICKLES

50. Attorney Schwartz who represented C. Thomas Cutter called Attorney Weinstein’s office and spoke with Mr. Weinstein’s secretary. Attorney Schwartz told Mr. Weinstein’s secretary that Mr. Weinstein had to submit an appearance to the Massachusetts Bar Association Legal Fee Arbitration Board. On July 30, 2009 Attorney Seymour Weinstein wrote a letter to the Massachusetts Bar Association Legal Fee Arbitration Board stating he was representing Wendy Rickles. The Board presented this letter with its “Award” as an exhibit. Russell P. Schwartz, Esq. was cc on the bottom of this letter.

51. Nothing was ever sent to Mr. Weinstein regarding this case from the Legal Fee Arbitration Board of the Massachusetts Bar Association.

52. The “Rules” state in IV. Notice to the Parties F) “When a party is represented by counsel in an arbitration proceeding, counsel shall file written notice of such appearance with the Board, together with proof of service on the other parties. The Notice of Appearance shall state the name, address, and telephone number of the attorney, and the name of the party he or she represents. Thereafter, any notice or other written communication required to be served on or furnished to a party shall be sent to the attorney of record for such party. (emphasis added)

53. The Legal Fee Arbitration Board never sent anything to Attorney Weinstein. The notice of hearing was never sent to Attorney Weinstein. The Award of the Arbitrators was never sent to Attorney Weinstein. Nothing was sent to Attorney Weinstein about this matter.

54. The Board included a letter from Mr. Weinstein of September 8, 2009 in its Award of the Arbitrators. Marc D’Antonio admitted to having received Mr. Weinstein’s appearance. Wendy Rickles discussed with Marc D’Antonio that Attorney Russell Schwartz had called Mr. Weinstein’s secretary and told her that Attorney Weinstein had to send in his appearance to the Board. Marc D’Antonio did nothing about this.

55. In spite of this, nothing was ever sent to Attorney Weinstein. A notice of the September 9, 2009 hearing was not sent to him. The Award of the Arbitrators was not sent to him. To date, he has not received anything from the Legal Fee Arbitration Board of Massachusetts Bar Association about this matter.
56. Marc D'Antonio represented to Wendy Rickles that he had never sent anything to Attorney Seymour Weinstein. The Board did not follow its own rules.

EXCEEDED THEIR POWERS

57. Chapter 251, Section 12 Vacation of award; grounds; states "Section 12. (a) Upon application of a party, the court shall vacate an award if:-- (3) the arbitrators exceeded their powers;"

58. The arbitrators exceeded their powers in this case and that is another reason for canceling an arbitration award. They held a hearing in circumstances against their own rules. There was no signed arbitration agreement in this case. Marc D'Antonio of their own organization knew well in advance of the hearing date that Wendy Rickles was not submitting to the jurisdiction of the Arbitration Board. They held a hearing without notifying the attorney for Wendy Rickles that they were holding a hearing. They held a hearing without telling Wendy Rickles they were holding a hearing. The Award of the Arbitrators misrepresents many facts. It states many facts that are untrue.

59. Wendy Rickles specifically told Marc D'Antonio several times that she was not participating in the Arbitration. For some unknown reason, Marc D'Antonio did not notify the Board of this fact until the day before the hearing. Wendy Rickles filed a Motion for Continuance at the urging of Marc D'Antonio. He represented to Wendy Rickles that this was necessary even though Wendy Rickles had not Agreed to arbitrate at the Massachusetts Bar Association. Wendy Rickles specifically told Marc D'Antonio that she was not going to arbitrate at the Massachusetts Bar Association and discussed the reasons why with him. Marc D'Antonio assured Wendy Rickles that submitting the Motion for Continuance would not subject her to the jurisdiction of the Board.

60. Wendy Rickles specifically did not sign and send in anything to the Massachusetts Bar Association as she was not going to arbitration there. Marc D'Antonio knew this.

61. There is a Booklet that is entitled "AFTER THE AWARD" A Publication of the Legal Fee Arbitration Board of the of the Massachusetts Bar Association by Paul Peter Nicolai, Esq. Copyright 2008. This is published by the Legal Fee Arbitration Board. In a section entitled "Post Award Proceedings... No Agreement", the book of the Legal Fee Arbitration Board states on page 5: "The final reason for canceling an arbitration award is there is no agreement to arbitrate and the party requesting the arbitration award be canceled did not participate in the hearing without raising the objection. Since the Legal Fee Arbitration Board will only schedule a hearing on a case after all the parties have physically signed an arbitration agreement or the case has been assigned to the Board by a Court, this is also not likely to be a ground for canceling an award issued by the Legal Fee Arbitration Board." Neither of these things happened here.
62. In a booklet published by the very Board that heard this case, it states that they cannot hear a case unless all parties sign the agreement or the case is assigned to them by a Court. Neither was the case here. The Board went against its own rules and the laws of the Commonwealth of Massachusetts.

63. The Board stated in its “Award” that the fee agreement between the Petitioner and the Respondent “unambiguously contemplated that fee disputes of the sort involved in the present matter would be submitted to binding arbitration with the Board.” The Fee Agreement states “or some other fee dispute resolution body.”

64. The Award states that the” Motion for Continuance raised no objections to participating in the arbitration, implicitly or otherwise.” Wendy Rickles specifically discussed this with Marc D’Antonio before filing the Motion for Continuance. Wendy Rickles told Marc D’Antonio of the Mass Bar that she was hiring an attorney and the attorney would decide the place for the arbitration. Marc D’Antonio specifically told Wendy Rickles that filing the Motion for Continuance would not subject her to the jurisdiction of the Board. Wendy Rickles discussed this with Marc D’Antonio again after the continuance.

65. “The Award” states: “Nor was any objection raised by her, or on her behalf, to the matter proceeding to arbitration at any time prior to September 8, the date before the scheduled hearing, when her attorney advised the Board..” By this point Wendy Rickles had discussed this fact several times with Marc D’Antonio. Marc D’Antonio knew before this that Wendy Rickles was not proceeding to arbitration at the Massachusetts Bar Association. For some unknown reason, Marc D’Antonio never told the Board about this. Marc D’Antonio also never told Wendy Rickles that the Board was meeting to hear this case. Wendy Rickles was stunned when an “Award of the Arbitrators” was sent to her. Attorney Schwartz saw Attorney Weinstein after the “hearing” and never mentioned that there had been a hearing. Perhaps an investigation should be done as to how this could have happened. Wendy Rickles was not told a hearing was taking place. Attorney Seymour Weinstein for Wendy Rickles was never sent notice that a hearing was taking place. Marc D’Antonio never told Wendy Rickles that Attorney Schwartz and his client were going to be present at the Massachusetts Bar Association for anything.

66. “The Award” states “only to be advised on the eve of the hearing, for the very first time, that the Respondent did not consider herself to be a party to the proceeding and did not intend to appear.” Wendy Rickles had discussed this very fact several times prior to this time with Marc D’Antonio of the Massachusetts Bar. At one point, when Wendy Rickles wanted to send something to the Board, Marc D’Antonio told Wendy Rickles that everything had to be sent to him. It is not know at this point in time why Marc D’Antonio did not communicate to the board that Wendy Rickles was not a participant and why he did not inform Wendy Rickles or her attorney that a hearing was taking place on this matter. He did not inform Wendy Rickles that Attorney Schwartz and C. Thomas Cutter were appearing at anything.
67. The Award states that "she has effectively waived whatever requirement there may have been that she execute and submit to the Board a formal, written agreement to arbitrate as a precondition to proceeding with the arbitration."

68. Wendy Rickles never signed any agreement to arbitrate at the Massachusetts bar association. The rules of the Board state in II Jurisdiction of the Board A)... 4) The arbitration process shall be conducted according to the Board's rules and subject to the requirements of Massachusetts General Laws, Chapter 251, "Commercial Arbitration."

69. The rules also states in III Obligations of the Parties B) "Arbitration is a contract. Once the Petition for Arbitration of a Fee Dispute and the Respondent's Agreement to Arbitration of a Fee Dispute are filed..." No Agreement to Arbitrate at the Massachusetts Bar was ever signed by Wendy Rickles.

70. The rules states III. Obligations of the Parties. A) Definitions 1) "A party to the arbitration is the Petitioner, the Respondent..."

The Rules go on to state in III. Obligations of the Parties B) "If any party determined to be necessary by the Chief Arbitrator refuses to arbitrate, the arbitration will be dismissed without prejudice to any of the parties unless ...."in which case the matter will be stayed and the parties will be given a period of sixty (60) days to file an action to compel arbitration by the refusing necessary party. If no action is filed within said sixty (60) days, the arbitration will be dismissed without prejudice to any of the parties."

This was not done in this case. The Rules of the Legal Fee Arbitration Board of the Massachusetts Bar Association and the General laws of Massachusetts were not followed. The arbitrators exceeded their powers. The arbitrators granted relief beyond the scope of the arbitration agreement as there was no agreement to arbitrate at the Massachusetts Bar Association. They had no power to grant this award.

71. The arbitrators did not hear evidence that was material to the controversy The conducted the hearing contrary to the provisions of section 5 of chapter 251 and they substantially prejudiced Wendy Rickles by doing so.

CONCLUSION

WHEREFORE, based on the forgoing, the applicant moves as follows:

That the arbitration award be vacated pursuant to G.L. c. 251 section 12 (1) that the award was "procured by corruption, fraud or other undue means;" and pursuant to G.L. C. 12 (3) "the arbitrators exceeded their powers" and pursuant to G.L. c. 251 section 12 (5) "there was no arbitration agreement and the issue was not adversely determined in proceedings under two..."
Wendy Rickles stands ready and willing to proceed to arbitration with an arbitration group agreeable to the parties.

Respectfully submitted,
Applicant Wendy Rickles
By her attorney

Seymour Weinstein
B.B.O. 520660
Weinstein and Weinstein, PC
Suite 300
10 Mechanic Street
Worcester, MA 010608
(508) 757-7000

Dated: October 20, 2009

CERTIFICATE OF SERVICE

I, Seymour Weinstein, attorney for the Applicant, Wendy Rickles, in the above-entitled action, certify that the above COMPLAINT TO VACATE ARBITRATION AWARD UNDER G.L.c. 251 Section 12 APPLICATION will be served upon C. Thomas Cutter.

Seymour Weinstein
Weinstein and Weinstein, PC
Suite 300
10 Mechanic Street
Worcester, MA 010608
BBO 520660
COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

WENDY RICKLES, Plaintiff,

v.

C. THOMAS CUTTER, Defendant.

SUPERIOR COURT
C.A. NO.: SUCV2009-04483

ANSWER and COUNTERCLAIM

Defendant, C. Thomas Cutter's Answer to Plaintiff's Complaint To Vacate Arbitration Award Under G.L. c. 251, Section 15 and Section 12

And

Defendant, C. Thomas Cutter's Counterclaim to Confirm the Arbitration Award Pursuant to G.L. c. 251, Section 11

FIRST DEFENSE

The Plaintiff's Complaint fails to state a claim upon which relief can be granted.

PARTIES

1. The Defendant is without knowledge or information to form a belief as to the allegations contained in paragraph I of the Plaintiff's Application.

2. Admit.

ARGUMENT

3. Admit.

4. Denied.

5. Admit.

6. Denied. Page two, Paragraph 11 of the Model Fee Agreement provided to the Defendant by the Plaintiff states as follows:

   If the Client and Attorney are unable to resolve their differences on the question of any fee, and or expenses, they hereby agree to make a good faith effort at resolving their disputes. If the dispute
cannot be resolved, the Client and Attorney agree to place the matter before the Legal Fee Arbitration Board of the Massachusetts Bar Association, or some other fee dispute resolution body, and agree to be bound by the decision of the arbitrator(s). See attached Model Fee Agreement—Domestic Relations—Hourly Fee as Exhibit A.

7. Denied. See Affidavit of Marc D’Antonio attached as Exhibit B.

8. Admit, that the Arbitration proceeding took place and an award was made in favor of C. Thomas Cutter in the amount of $79,860.00.


WHEREFORE, the Defendant respectfully requests that the Court find as follows:

a. The Plaintiff agreed to arbitrate the fee dispute at the Legal Fee Arbitration Board of the Massachusetts Bar Association;
b. That the Legal Fee Arbitration Board of the Massachusetts Bar Association’s decision be accepted and confirmed; and
c. Any and all further relief that the Court deems just including but not limited to the award of attorney’s fees and costs.

NO ARBITRATION AGREEMENT AND NO JURISDICTION

10. Denied. Page two, Paragraph 11 of the Model Fee Agreement provided to the Defendant by the Plaintiff states as follows:

If the Client and Attorney are unable to resolve their differences on the question of any fee, and or expenses, they hereby agree to make a good faith effort at resolving their disputes. If the dispute cannot be resolved, the Client and Attorney agree to place the matter before the Legal Fee Arbitration Board of the Massachusetts Bar Association, or some other fee dispute resolution body, and agree to be bound by the decision of the arbitrator(s). See attached Model Fee Agreement—Domestic Relations—Hourly Fee as Exhibit A.

11. Denied. See Affidavit of Marc D’Antonio attached as Exhibit B.


13. Defendant neither admits nor denies the allegations contained in this paragraph and further states that the Rules of the Legal Fee Arbitration Board of the Massachusetts Bar Association speak for themselves.
14. Denied. See Affidavit of Marc D'Antonio attached as Exhibit B.

15. Denied. See Affidavit of Marc D'Antonio attached as Exhibit B.

16. Defendant neither admits nor denies and further states that the Rules of the Legal Fee Arbitration Board of the Massachusetts Bar Association speak for themselves.

17. Defendant is without knowledge or information to form a belief as to whether the Plaintiff “read ‘The Rules”’. Defendant denies the remaining allegations contained in Paragraph 17 of the Plaintiff’s Application. See Affidavit of Marc D’Antonio attached as Exhibit B.

18. Defendant neither admits nor denies the allegations contained in this paragraph and further states that the Rules of the Legal Fee Arbitration Board of the Massachusetts Bar Association speak for themselves.

19. Defendant neither admits nor denies the allegations contained in this paragraph and further states that the Massachusetts General Laws speak for themselves.

20. Denied.

21. Defendant neither admits nor denies the allegations contained in this paragraph and further states that the Massachusetts General Laws speak for themselves.

22. Denied. See Affidavit of Marc D’Antonio attached as Exhibit B.

23. Denied.

24. The Rules of the Legal Fee Arbitration Board of the Massachusetts Bar Association speak for themselves. Defendant denies the remaining allegations contained in this paragraph.

25. The Rules of the Legal Fee Arbitration Board of the Massachusetts Bar Association speak for themselves. Defendant denies the remaining allegations contained in this paragraph.

26. The Rules of the Legal Fee Arbitration Board of the Massachusetts Bar Association speak for themselves. Defendant denies the remaining allegations contained in this paragraph.

27. The Rules of the Legal Fee Arbitration Board of the Massachusetts Bar Association speak for themselves. Defendant denies the remaining allegations contained in this paragraph.

29. Denied.

30. Defendant is without knowledge or information to form a belief as to whether the Plaintiff "was stunned." Defendant denies the remaining allegations contained in this paragraph.

31. Defendant is without knowledge or information to form a belief as to the allegations contained in paragraph 31.

**CONTINUANCE**

32. Denied. See Affidavit of Marc D'Antonio attached as Exhibit B.

33. Defendant admits that a continuance of the Arbitration proceeding was allowed. Defendant denies the remaining allegations contained in this paragraph. See Affidavit of Marc D'Antonio attached as Exhibit B.

**DISCOVERY**

34. Denied. See Affidavit of Marc D'Antonio attached as Exhibit B.

35. Denied. See Affidavit of Marc D'Antonio attached as Exhibit B.

36. The Rules of the Legal Fee Arbitration Board of the Massachusetts Bar Association speak for themselves. Defendant denies the remaining allegations contained in this paragraph.

**FRAUD**

37. The Massachusetts General Laws speak for themselves. Defendant denies the remaining allegations contained in this paragraph.

38. Denied.

39. Defendant is without knowledge or information to form a belief as to the allegations contained in paragraph 39.

40. Denied.

**FRAUD**

41. Defendant states that the Massachusetts General Laws speak for themselves.
42. Denied.
43. Denied.
44. Denied.
45. Defendant is without knowledge or information to form a belief as to the allegations contained in paragraph 45.

**FRAUD**

46. Defendant states that the Massachusetts General Laws speak for themselves.
47. Denied.
48. Denied.
49. Denied.

**ATTORNEY REPRESENTING WENDY RICKLES**

50. Admit.
51. Defendant is without knowledge or information to form a belief as to the allegations contained in paragraph 51.
52. The Rules of the Legal Fee Arbitration Board of the Massachusetts Bar Association speak for themselves.
53. Defendant is without knowledge or information to form a belief as to the allegations contained in paragraph 53.
54. Defendant is without knowledge or information to form a belief as to the allegations contained in paragraph 54.
55. Defendant is without knowledge or information to form a belief as to the allegations contained in paragraph 55.
56. Defendant is without knowledge or information to form a belief as to the allegations contained in paragraph 56.

**EXCEEDED THEIR POWERS**

57. Defendant states that the Massachusetts General Laws speak for themselves.
58. Denied.
59. Denied. See Affidavit of Marc D’Antonio attached as Exhibit B.

60. Denied. See Affidavit of Marc D’Antonio attached as Exhibit B.

61. Defendant states that the Booklet referred to in this paragraph speaks for itself. Defendant denies the remaining allegations contained in this paragraph.

62. Defendant states that the Booklet referred to in this paragraph speaks for itself. Defendant denies the remaining allegations contained in this paragraph.

63. Admit.

64. Denied. See Affidavit of Marc D’Antonio attached as Exhibit B.

65. Denied. See Affidavit of Marc D’Antonio attached as Exhibit B.

66. Denied. See Affidavit of Marc D’Antonio attached as Exhibit B.

67. Admit.

68. The Rules of the Legal Fee Arbitration Board of the Massachusetts Bar Association speak for themselves.

69. The Rules of the Legal Fee Arbitration Board of the Massachusetts Bar Association speak for themselves. Defendant denies the remaining allegations contained in this paragraph.

70. The Rules of the Legal Fee Arbitration Board of the Massachusetts Bar Association speak for themselves. Defendant denies the remaining allegations contained in this paragraph.

71. Denied.

CONCLUSION

WHEREFORE, the Defendant respectfully requests that the Court find as follows:

a. The Plaintiff agreed to arbitrate the fee dispute at the Legal Fee Arbitration Board of the Massachusetts Bar Association;

b. That the Legal Fee Arbitration Board of the Massachusetts Bar Association’s decision be accepted and confirmed; and

c. Any and all further relief that the Court deems just including but not limited to the award of attorney’s fees and costs.
PARTIES

72. Defendant/Plaintiff-In-Counterclaim is an individual who lives at 48 Shipway Place, Charleston, Suffolk County, Massachusetts.

73. Plaintiff/Defendant-In-Counterclaim is an attorney who has a usual place of business at 255 Park Avenue, Suite 1000, Worcester, Worcester County, Massachusetts.

FACTUAL ALLEGATIONS

74. On or about July 7, 2004, parties entered into a Model Fee Agreement Domestic Relations - Hourly Fee. See attached Model Fee Agreement - Domestic Relations - Hourly Fee as Exhibit A.

75. The Model Fee Agreement was prepared by Plaintiff/Defendant-In-Counterclaim with her name clearly identified and set forth in the first sentence of the Agreement. See attached Model Fee Agreement - Domestic Relations - Hourly Fee as Exhibit A.

76. Page two, Paragraph 11 of the Model Fee Agreement provided to the Defendant/Plaintiff-In-Counterclaim by the Plaintiff/Defendant-In-Counterclaim states as follows:

If the Client and Attorney are unable to resolve their differences on the question of any fee, and or expenses, they hereby agree to make a good faith effort at resolving their disputes. If the dispute cannot be resolved, the Client and Attorney agree to place the matter before the Legal Fee Arbitration Board of the Massachusetts Bar Association, or some other fee dispute resolution body, and agree to be bound by the decision of the arbitrator(s). See attached Model Fee Agreement - Domestic Relations - Hourly Fee as Exhibit A.

77. On or about March 27, 2009, Defendant/Plaintiff-In-Counterclaim filed a Petition for Arbitration of a Fee Dispute with the Legal Fee Arbitration Board of the Massachusetts Bar Association pursuant to the Model Fee Agreement prepared by the Plaintiff/Defendant-In-Counterclaim.

78. The Petition for Arbitration of a Fee Dispute was filed based upon the fact that the Plaintiff/Defendant-In-Counterclaim received certain settlement proceeds during the course of her representation of the Defendant/Plaintiff-
In-Counterclaim. The settlement proceeds exceeded the amount of the Plaintiff/Defendant-In-Counterclaim’s fee. The Plaintiff/Defendant-In-Counterclaim refused to remit the settlement proceeds to the Defendant/Plaintiff-In-Counterclaim.

79. On or about July 16, 2009, Plaintiff/Defendant-In-Counterclaim filed a Motion for Continuance of the Arbitration. In neither the Motion nor the Affidavit signed by the Plaintiff/Defendant-In-Counterclaim in support of the Motion is there reference to any lack of jurisdiction by the Legal Fee Arbitration Board of the Massachusetts Bar Association. In fact, Plaintiff/Defendant-In-Counterclaim states that she has “retained counsel and counsel has requested this time to prepare for the hearing.” See Motion and Affidavit of Counsel attached as Exhibit C.

80. On or about September 9, 2009, the Arbitration took place and the Plaintiff/Defendant-In-Counterclaim failed to appear.

81. On or about September 9, 2009, the Legal Fee Arbitration Board of the Massachusetts Bar Association made an award to the Defendant/Plaintiff-In-Counterclaim in the amount of $79,860.00. See Award of the Arbitrators along with the written decision attached as Exhibit D.

82. The crux of the Plaintiff/Defendant-In-Counterclaim’s claim is that she did not submit to the jurisdiction of the Legal Fee Arbitration Board of the Massachusetts Bar Association. See underlying Complaint.

83. The Plaintiff/Defendant-In-Counterclaim’s claim is that the Arbitration Award was obtained through fraud, that there was no arbitration agreement and the arbitrators exceeded their powers. See underlying Complaint.

COUNT I – PLAINTIFF/DEFENDANT-IN-COUNTERCLAIM ACCEPTED THE LEGAL FEE ARBITRATION BOARD'S JURISDICTION

84. Defendant/Plaintiff-In-Counterclaim reaffirms and realleges the allegations contained in paragraphs 1 through 81 of this Complaint/Counterclaim as set forth herein.

85. The Model Fee Agreement was prepared by Plaintiff/Defendant-In-Counterclaim with her name clearly identified and set forth in the first sentence of the Agreement. See attached Model Fee Agreement – Domestic Relations – Hourly Fee as Exhibit A.
Page two, Paragraph 11 of the Model Fee Agreement provided to the Defendant/Plaintiff-In-Counterclaim by the Plaintiff/Defendant-In-Counterclaim states as follows:

If the Client and Attorney are unable to resolve their differences on the question of any fee, and or expenses, they hereby agree to make a good faith effort at resolving their disputes. If the dispute cannot be resolved, the Client and Attorney agree to place the matter before the Legal Fee Arbitration Board of the Massachusetts Bar Association, or some other fee dispute resolution body, and agree to be bound by the decision of the arbitrator(s). See attached Model Fee Agreement – Domestic Relations – Hourly Fee as Exhibit A.

On or about July 16, 2009, Plaintiff/Defendant-In-Counterclaim filed a Motion for Continuance of the Arbitration. In neither the Motion nor the Affidavit signed by the Plaintiff/Defendant-In-Counterclaim in support of the Motion is there reference to any lack of jurisdiction by the Legal Fee Arbitration Board of the Massachusetts Bar Association. In fact, Plaintiff/Defendant-In-Counterclaim states that she has "retained counsel and counsel has requested this time to prepare for the hearing." See Motion and Affidavit of Counsel attached as Exhibit C.

WHEREFORE, the Defendant/Plaintiff-In-Counterclaim respectfully requests that the Court find as follows:

a. The Plaintiff/Defendant-In-Counterclaim agreed to arbitrate the fee dispute at the Legal Fee Arbitration Board of the Massachusetts Bar Association;
b. That the Legal Fee Arbitration Board of the Massachusetts Bar Association’s decision be accepted and confirmed; and
c. Any and all further relief that the Court deems just including but not limited to the award of attorney’s fees and costs.

COUNT II – THE AWARD TO THE DEFENDANT/PLAINTIFF-IN-COUNTERCLAIM WAS NOT OBTAINED BY FRAUD

Defendant/Plaintiff-In-Counterclaim reaffirms and realleges the allegations contained in paragraphs 1 through 87 of this Complaint/Counterclaim as set forth herein.

Plaintiff/Defendant-In-Counterclaim has failed to establish any evidence that the Arbitration Award was obtained through fraud.

WHEREFORE, the Defendant/Plaintiff-In-Counterclaim respectfully requests that the Court find as follows:
a. The Plaintiff/Defendant-In-Counterclaim agreed to arbitrate the fee dispute at the Legal Fee Arbitration Board of the Massachusetts Bar Association;
b. That the Legal Fee Arbitration Board of the Massachusetts Bar Association decision was not obtained by fraud.
c. That the Legal Fee Arbitration Board of the Massachusetts Bar Association’s decision be accepted and confirmed; and
d. Any and all further relief that the Court deems just including but not limited to the award of attorney’s fees and costs.

**COUNT III - THERE WAS AN ARBITRATION AGREEMENT AND THE ARBITRATORS DID NOT EXCEED THEIR POWERS**

90. Defendant/Plaintiff-In-Counterclaim reaffirms and realleges the allegations contained in paragraphs 1 through 89 of this Complaint/Counterclaim as set forth herein.

91. The Plaintiff/Defendant-In-Counterclaim’s Model Fee Agreement, signed Affidavit and actions leading up to the Arbitration hearing clearly evidence an agreement to Arbitrate and that the Arbitrators did not exceed their powers.

WHEREFORE, the Defendant/Plaintiff-In-Counterclaim respectfully requests that the Court find as follows:

a. The Plaintiff/Defendant-In-Counterclaim agreed to arbitrate the fee dispute at the Legal Fee Arbitration Board of the Massachusetts Bar Association;
b. That the Legal Fee Arbitration Board of the Massachusetts Bar Association decision did not exceed their powers.
c. That the Legal Fee Arbitration Board of the Massachusetts Bar Association’s decision be accepted and confirmed; and
d. Any and all further relief that the Court deems just including but not limited to the award of attorney’s fees and costs.

Defendant/Plaintiff-In-Counterclaim,
C. Thomas Cutter,
By his Attorney,

Steven C. Sharaf, BBO#552524
109 Highland Avenue
Needham, MA 02494
Tel: (781)455-0300
DEFENDANT/PLAINTIFF-IN-COUNTERCLAIM'S ATTESTATION

Under pains and penalties of perjury the Defendant/Plaintiff-In-Counterclaim, C. Thomas Cutter, attests to the truth and accuracy of the responses contained within this Answer and Counterclaim this ___ day of January, 2010.

C. Thomas Cutter

CERTIFICATE OF SERVICE

I, Steven C. Sharaf, Attorney for the Defendant/Plaintiff-In-Counterclaim, hereby certify that on this date, ____________ , 2010, I have served a true copy of the foregoing pleading by mailing a copy of same first class mail, postage prepaid, to all counsel of record:

Steven C. Sharaf, BBO #552524
109 Highland Avenue
Needham, Massachusetts 02494
Telephone: (781) 455-0300
Facsimile: (781) 453-0606
**STATEMENT OF DAMAGES**  
St. 1996, c. 358, s.5

**DATE FILED**  (To be added by clerk)  
**DOCKET NUMBER**  (To be added by clerk)

**Trial Court of Massachusetts**

**PLAINTIFF(S)**  
**DEFENDANT(S)**

**INSTRUCTIONS:** This form must be completed and filed with the complaint or other initial pleading in all District Court civil actions seeking money damages.

Based on the facts set forth above (and attached) Plaintiff avers as follows:

X Damages are not likely to exceed $25,000 

The following is a full, itemized and detailed statement of the facts on which the plaintiff relies to determine money damages: (Attach additional sheets as necessary.)

<table>
<thead>
<tr>
<th>CLAIMS</th>
<th>AMOUNT</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>A.</strong> Documented medical expenses to date:</td>
<td>$</td>
</tr>
<tr>
<td>a. Total hospital expenses:</td>
<td>$</td>
</tr>
<tr>
<td>b. Total doctor expenses:</td>
<td>$</td>
</tr>
<tr>
<td>c. Total chiropractic expenses:</td>
<td>$</td>
</tr>
<tr>
<td>d. Total physical therapy expenses:</td>
<td>$</td>
</tr>
<tr>
<td>e. Total other expenses (Describe):</td>
<td>$</td>
</tr>
<tr>
<td><strong>SUBTOTAL:</strong></td>
<td>$</td>
</tr>
<tr>
<td><strong>B.</strong> Documented lost wages and compensation to date:</td>
<td>$</td>
</tr>
<tr>
<td><strong>C.</strong> Documented property damages to date:</td>
<td>$</td>
</tr>
<tr>
<td><strong>D.</strong> Other documented items of damage (Describe):</td>
<td>$</td>
</tr>
<tr>
<td><strong>E.</strong> Reasonably anticipated future medical and hospital expenses:</td>
<td>$</td>
</tr>
<tr>
<td><strong>F.</strong> Reasonably anticipated lost wages:</td>
<td>$</td>
</tr>
<tr>
<td><strong>G.</strong> Extent of injury (check all that apply):</td>
<td>$</td>
</tr>
<tr>
<td>1: Total disability 2: Partial disability 3: Permanent injury 4: Temporary injury ___ months (Describe):</td>
<td>$</td>
</tr>
<tr>
<td><strong>TOTAL:</strong></td>
<td>$</td>
</tr>
</tbody>
</table>

**CONTRACT CLAIMS**

**AMOUNT**

**TOTAL:** $  

**ATTORNEY FOR PLAINTIFF (OR PRO SE PLAINTIFF):**  
**DEFENDANT'S NAME AND ADDRESS:**

Signature  Date  
STEVEN C. SHARAF  552524  
Print or Type Name  B.B.O.#  
75 SECOND AVE. SUITE 430, NEEDHAM, MA 02494  
Address
AMENDED COMPLAINT

PRELIMINARY STATEMENT

This is an action for damages brought by a realtor against her client and against another broker and real estate company for violation of M.G.L. c. 93A, §11.

The client, a buyer of real estate, signed a "Buyer Representation Agreement" with her realtor. The realtor performed under the terms of the Agreement. The buyer has failed to pay the realtor under the terms of the Agreement,
and has thereby breached the Agreement. The realtor seeks appropriate damages.

The other broker and her real estate company intentionally acted to exclude the realtor from the sale of the subject property so as to garner the whole brokers’ commission for themselves. The brokers did this despite being aware of the commission due the realtor and while engaged in a commercial relationship with the realtor. The realtor seeks appropriate damages under M.G.L. c. 93A, §11.

PARTIES

1. The Plaintiff, Margarita Aronova (hereinafter referred to as "Aronova") is a natural person who, at all relevant times hereto, resided at, 90 Mt. Pleasant Avenue, Boston, Suffolk County, Massachusetts. Ms. Aronova, at all times relevant hereto, was a licensed realtor.

2. The Defendant, Olena Krylova (hereinafter referred to as "Krylova") is a natural person who, at all relevant times hereto, resided at 5 Norembega Terrace #5, Waltham, and 8 Cross Street East, Somerville, Middlesex County, Massachusetts.

3. The Third-party Defendant and Defendant Carpenito Real Estate, Inc. (hereinafter referred to as "Carpenito") is an entity engaged in the business of real estate
brokerage with a principle office located at 335 Central Street, Saugus, Essex County, Massachusetts.

4. The Third-party Defendant and Defendant Kristine Valente (hereinafter referred to as "Valente") is a natural person who, at all times relevant hereto, resided at 5 Laura Lee Circle, Saugus, Essex County, Massachusetts. Ms. Valente, at all times relevant hereto, was a duly licensed realtor.

FACTS

3. On November 27, 2006, Ms. Krylova and Ms. Aronova signed a Buyer Representation Agreement ("Agreement"). See Attachment A.


5. During the term of the Agreement, Ms. Krylova granted Ms. Aronova the sole and exclusive right to arrange for the acquisition by Ms. Krylova of a multi-family property.

6. The agreement specified Ms. Krylova would pay a fee equal to 2.5% of the purchase price of the property when any one of the below enumerated conditions were met:

a. Buyer took title to the property;

b. Buyer signed a contract to purchase and assigned it to another buyer;
c. Buyer signed a contract to purchase which consisted of an option, and the Buyer allowed the option to lapse;

d. During the term of the Agreement the Buyer or any person acting for the Buyer on the Buyer’s behalf (“Buyer’s Nominee”) entered into the contract or otherwise acquired the property, whether through the services of Ms. Aronova or otherwise; or

e. Within three (3) months following the term of the Agreement, the Buyer or Buyer’s Nominee entered into a contract or otherwise acquired the property after receiving information about the property from Ms. Aronova during said term.

7. On November 30, 2006, Ms. Krylova responded to Ms. Aronova’s email of a real estate listing for 8 Cross Street East, Somerville, Massachusetts. In the email, Ms. Krylova confirmed she would speak with Ms. Aronova about the property at 8 Cross Street East (“8 Cross Street East”) on either December 1 or 2, 2006. See Attachment B.

8. On December 1 through December 3, 2006, Ms. Krylova and Ms. Aronova held a number of phone conversations about 8 Cross Street East and other listings. During this time, Ms. Aronova also had a number of phone
conversations with Ms. Valente and Carpenito Real Estate, the broker for the sellers of 8 Cross Street East. See Attachment C and Attachment D.

9. Ms. Aronova introduced in person Ms. Valente, the broker for the Sellers only, to Ms. Krylova when Ms. Aronova showed 8 Cross Street East to Ms. Krylova.

10. Ms. Valente and Carpenito Real Estate were informed and knew as of at least November 2006 that Ms. Aronova was the buyer’s broker.¹

11. On January 15, 2007, Ms. Krylova signed a Notice of Dual Agency wherein she agreed broker Kristine Valente could represent both the sellers DiPrizio and Ventola ("Sellers") and the buyer Ms. Krylova in the sale of 8 Cross Street East. See Attachment E. Ms. Aronova was not informed.

12. On January 15, 2007, Ms. Krylova and the Sellers entered into a contract to purchase 8 Cross Street East. Kristine Valente and Carpenito Real Estate acted as the broker for both parties. Ms. Aronova was not informed.

13. On January 23, 2007, prior to entering into a Purchase and Sale Agreement, Ms. Valente was sent a facsimile titled "Buyer Agent Compensation," which stated

¹ In fact, in Ms. Valente's motion to dismiss herself from the instant case, Ms. Valente refers to Ms. Aronova as the "Buyer's Broker." See Valente's Memorandum of Law in Support of Motion to Dismiss, dated October 6, 2009.
the forthcoming Purchase and Sale Agreement should include a buyer agent commission of "two percent of sale price to Aronova Realty." See Attachment F. Ms. Aronova did not generate this facsimile and had no knowledge of it.

14. On February 5, 2007, Ms. Krylova and the Sellers entered into a Purchase and Sale Agreement. Ms. Aronova was not informed.

15. On February 28, 2007, the Sellers delivered the deed for 8 Cross Street East to Ms. Krylova, and on March 1, 2007, Ms. Krylova recorded the deed. Ms. Aronova was not informed. See Attachment G.

16. At the time of the sale of 8 Cross Street East, Kristine Valente and Carpenito Real Estate were paid a total of $18,400.00 as a brokerage commission. See Attachment H at Lines 506 and 703.

17. Despite knowing Ms. Aronova was the buyer’s broker, and being advised prior to the sale that Ms. Valente and Carpenito Real Estate needed to include payment to Ms. Aronova as an element of the transaction, Ms. Valente and Carpenito Real Estate never informed Ms. Aronova of the negotiations regarding 8 Cross Street East, never informed Ms. Aronova of the sale of said property, and Ms. Valente and Carpenito Real Estate never paid any of the commission to Ms. Aronova.
18. Ms. Valente and Carpenito Real Estate's deliberate and deceptive actions clearly constitute interference with trade or commerce, which resulted in economic harm to Ms. Aronova.

19. Ms. Krylova, as the buyer, has taken title to the property, 8 Cross Street East, which was introduced to her by Ms. Aronova. Thus, Ms. Aronova is entitled under the November 27, 2006 Buyer Representation Agreement to 2.5% of the purchase price Ms. Krylova paid for 8 Cross Street East.

20. Ms. Krylova paid $460,000.00 for 8 Cross Street East.

21. 2.5% of $460,000.00 equals $11,500.00.

22. Thus, pursuant to the November 27, 2006 Buyer Representation Agreement, Ms. Krylova owes Ms. Aronova $11,500.00.

23. To date, Ms. Krylova has not paid Ms. Aronova the $11,500.00.

COUNTER I
(Breach of Contract)

24. Ms. Aronova reasserts and realleges the allegations contained in paragraphs 1-23 above.

25. In carrying out the above-described actions, Ms. Krylova breached the contract she made with Ms. Aronova.
26. Ms. Aronova relied to her detriment on the contract with Ms. Krylova and as a result of Ms. Krylova’s breach of this contract, Ms. Aronova suffered economic harm.

27. WHEREFORE, Ms. Aronova demands judgment against Ms. Krylova and seeks damages resulting from this breach as well as interest at 12% pursuant to M.G.L. c. 231, §6C, costs, attorney’s fees and further relief as this court finds appropriate and just.

COUNT II
(Quantum Meruit)

28. Ms. Aronova reasserts and realleges the allegations contained in paragraphs 1-27 above.

29. Ms. Krylova has failed and refused to pay Ms. Aronova the monies owed pursuant to the Buyer Representation Agreement.

30. Wherefore, Ms. Aronova demands judgment against Ms. Krylova for her damages, plus interest at 12% pursuant to M.G.L. c. 231, §6C, costs, attorney’s fees and such other relief as this Court may deem appropriate.

COUNT III
(M.G.L. c. 93A, §11)

31. Ms. Aronova reasserts and realleges the allegations contained in paragraphs 1-30 above.
32. Ms. Valente knew Ms. Aronova was the exclusive buyer's broker, and knew that Ms. Aronova had a contract with Ms. Krylova for payment of a commission.

33. Ms. Valente intentionally cut Ms. Aronova out of the sale of 8 Cross Street East so that she and Carpenito Real Estate could collect the full brokerage commission.

34. The brokerage commission collected by Ms. Valente and Carpenito Real Estate for the sale of 8 Cross Street East totaled $18,400.00.

35. Ms. Valente and Carpenito Real Estate never paid Ms. Aronova the commission she is due.

36. Ms. Valente's deliberate and deceptive actions clearly constitute interference with trade or commerce, which resulted in economic harm to Ms. Aronova.

37. Wherefore, pursuant to M.G.L. c. 93A, §11, Ms. Aronova demands judgment against Ms. Valente for her damages, in the form of treble damages, interest at 12%, costs, attorney's fees and such other relief as this Court may deem appropriate.

COUNT IV
(M.G.L. c. 93A, §11)

38. Ms. Aronova reasserts and realleges the allegations contained in paragraphs 1-37 above.
39. Carpenito Real Estate knew Ms. Aronova was the exclusive buyer's broker, and knew that Ms. Aronova had a contract with Ms. Krylova for payment of a commission.

40. Carpenito Real Estate intentionally cut Ms. Aronova out of the sale of 8 Cross Street East so that it and Ms. Valente could collect the full brokerage commission.

41. The brokerage commission collected by Ms. Valente and Carpenito Real Estate for the sale of 8 Cross Street East totaled $18,400.00.

42. Ms. Valente and Carpenito Real Estate never paid Ms. Aronova the commission she is due.

43. Carpenito Real Estate's deliberate and deceptive actions clearly constitute interference with trade or commerce, which resulted in economic harm to Ms. Aronova.

44. Wherefore, pursuant to M.G.L. c. 93A, §11, Ms. Aronova demands judgment against Carpenito Real Estate for her damages, in the form of treble damages, interest at 12%, costs, attorney's fees and such other relief as this Court may deem appropriate.

THE PLAINTIFF HEREIN DEMANDS TRIAL BY JURY ON ALL ISSUES.

[SIGNATURE BLOCK ON FOLLOWING PAGE]
MARGARITA ARONOVA
By their Attorneys:

Mark S. Bourbeau, BBO#050715
Franziskus Lepionka, BBO#664049
Bourbeau & Associates P.C.
266 Beacon Street
Boston, MA 02116
(617) 536 9695

Dated: December 4th, 2009

CERTIFICATE OF SERVICE

I hereby certify that I have this date served a copy of the foregoing
by first class mail on all counsel of record and all parties appearing
pro se.

Dated: December 4th, 2009

Franziskus Lepionka, Esq.
MARGARITA ARONOVA
Plaintiff,
v.
OLENA KRYLOVA
Defendant and
Third-party plaintiff,
v.

CARPENITO REAL ESTATE, INC. and
KRISTINE VALENTE,
Third-party defendant.

OLENA KRYLOVA ANSWER TO PLAINTIFF’S COMPLAINT AND THIRD PARTY CLAIM

Now comes the Defendant, Olena Krylova, in the above-captioned matter and responds to the Plaintiff’s Complaint as follows:

FIRST DEFENSE

The Complaint fails to state a claim upon which relief can be granted.

SECOND DEFENSE

1. The Defendant is without knowledge or sufficient information to respond to the allegations set forth in paragraph 1.

2. The Defendant admits the allegations set forth in paragraph 2.

3. The Defendant states that the Agreement referenced in paragraph 3 speaks for itself.

4. The Defendant states that the Agreement referenced in paragraph 4 speaks for itself.
5. The Defendant states that the Agreement referenced in paragraph 5 speaks for itself.

6. The Defendant states that the Agreement referenced in paragraph 6 speaks for itself.

7. The Defendant denies the allegations set forth in paragraph 7.

8. The Defendant denies the allegations set forth in paragraph 8.


10. The Defendant states that the Notice of Dual Agency referenced in paragraph 10 speaks for itself.

11. The Defendant states that the contract referenced in paragraph 11 speaks for itself and is without knowledge sufficient to form a belief as to the remaining allegation set forth in paragraph 11.

12. The Defendant states that the agreement referenced in paragraph 12 speaks for itself and is without knowledge sufficient to form a belief as to the remaining allegation set forth in paragraph 12.

13. The Defendant states that the Deed referenced in paragraph 13 speaks for itself and is without knowledge sufficient to form a belief as to the remaining allegations set forth in paragraph 13.

14. The Defendant admits that she has taken title to 8 Cross Street East, but denies the remaining allegations set forth in paragraph 14.

15. The Defendant admits the allegations set forth in paragraph 15.

16. The Defendant states that the math calculation referenced in paragraph 16 speaks for itself.
17. The Defendant denies the allegations set forth in paragraph 17.

18. The Defendant admits the allegations set forth in paragraph 18 and further states that she is not required to do so.

COUNT I
(Breach of Contract)

19. The Defendant repeats and realleges her responses to the allegations contained in paragraphs 1-18 above.

20. The Defendant denies the allegations set forth in paragraph 20.

21. The Defendant denies the allegations set forth in paragraph 21.

22. WHEREFORE, the Defendant respectfully requests that this Honorable Court dismiss the Complaint and award the Defendant her costs in defending this action.

COUNT II
(Quantum Meruit)

23. The Defendant repeats and realleges her responses to the allegations contained in paragraphs 1-22 above.

24. The Defendant denies the allegations set forth in paragraph 24.

25. WHEREFORE, the Defendant respectfully requests that this Honorable Court dismiss the Complaint and award the Defendant her costs in defending this action.

THIRD AFFIRMATIVE DEFENSE

The Plaintiff has failed to mitigate her damages, if any, in a timely manner.

FOURTH AFFIRMATIVE DEFENSE

The Defendant denies that any action or inaction on her behalf proximately
caused damage to the Plaintiff.

FIFTH AFFIRMATIVE DEFENSE

The Plaintiff is barred, in whole or in part, by the doctrines of laches, waiver, and/or estoppel.

SIXTH AFFIRMATIVE DEFENSE

Any damages alleged in the Complaint are the result of the actions of third parties and not the Defendant, and, therefore, the Plaintiff cannot recover.

SEVENTH AFFIRMATIVE DEFENSE

The Defendant hereby gives notice that she intends to rely upon such other defenses as may become available or apparent during discovery and hereby reserves the right to assert any such additional defenses.

THIRD PARTY COMPLAINT

THE PARTIES

1. The Third Party Plaintiff, Olena Krylova, is an individual residing at 8 Cross Street East, Somerville, Middlesex County, Massachusetts.

2. The Third Party Defendant, Carpenito Real Estate, Inc., is an entity engaged in the business of real estate brokerage with a principal office located at 335 Central Street, Saugus, Essex County, Massachusetts.

3. The Third Party Defendant, Kristine Valente, is an individual upon information and belief employed by Carpenito Real Estate, Inc. as a real estate broker.

FACTUAL ALLEGATIONS

4. On or about November 27, 2006 the Third Party Plaintiff, Olena Krylova, signed a Buyer Representation Agreement with the Plaintiff Margarita Aronova.
5. At the time the Third Party Plaintiff signed the Buyer Representation Agreement she did not speak, read or understand English very well.

6. Pursuant to the Buyer Representation Agreement, the Plaintiff agreed to “use reasonably diligent efforts to locate” a residential real estate property for the Third Party Plaintiff.

7. Throughout the time period in which the Buyer Representation Agreement was alleged to be in effect, the Plaintiff did not introduce nor locate any properties for the Third Party Plaintiff to consider.

8. On or about November 30, 2008, the Third Party Plaintiff found a property that she was interested in and emailed the Plaintiff to let her know that she was interested in seeing the property. This property is identified as 8 Cross Street East, Somerville, Massachusetts.

9. In or around early December, 2006, the Third Party Plaintiff informed the Plaintiff that she was not satisfied with her services and considered her actions in breach of the Buyer Representation Agreement.

10. In or around early January, 2007, without help from the Plaintiff, the Third Party Plaintiff returned to see the house that she had located on Cross Street as the price had been reduced.

11. The Third Party Plaintiff contacted the Third Party Defendant, Kristine Valente of Carpenito Real Estate, Inc. directly and made an offer to purchase 8 Cross Street, East Somerville, Massachusetts. At that time the parties entered into a Dual Agency Agreement.
12. At the time of the signing of the Purchase and Sale Agreement, the Third Party Plaintiff informed the Third Party Defendant, Carpenito Real Estate that she had worked with a buyer broker and identified the Plaintiff.

13. The Third Party Defendant told the Third Party Plaintiff not to worry about the buyer broker and that they would take care of her. The Third Party Plaintiff was then instructed to sign the Purchase and Sale Agreement. As the Third Party Plaintiff understood very little English she did so without consulting an attorney nor did the Third Party Defendant ever advise her that she should consult with an attorney.

14. At the sale of 8 Cross Street, East Somerville, Massachusetts, the full commission of 5% was paid to the Third Party Defendant.

COUNT I – M.G.L. c. 93A

15. The Third Party Plaintiff reaffirms and realleges the allegations contained in paragraphs 1 through 15 of this Third Party Complaint as set forth herein.

16. The Third Party Defendants are and were at all times engaged in trade or commerce as defined by M.G.L. c. 93A, Section 1.

17. The Third Party Defendants actions, including, but not limited to, advising the Third Party Plaintiff to sign a Purchase and Sale Agreement without the advice of counsel and informing the Third Party Plaintiff that they would take care of the Plaintiff constitute unfair or deceptive acts or practices in violation of M.G.L. c. 93A, section 2. Further, these actions were willful and in bad faith with reason to know that the acts complained of violated M.G.L. c. 93A, section 2.
18. As a result of the actions of the Third Party Defendants, the Third Party Plaintiff suffered financial damages, including paying attorneys fees to defend against the Plaintiff’s claim and the potential damages to be paid to the Plaintiff as a result of her claim.

WHEREFORE, the Third Party Plaintiff requests that this Honorable Court enter a judgment against the Third Party Defendants in the amount of three times the actual damages because the Third Party Defendants failure to grant appropriate relief upon demand was in bad faith with reason to know that the acts complained of violated M.G.L. c. 93A, section 2, and also requests that his Honorable Court award her reasonable attorneys fees costs, interest and any additional relief which this Honorable Court deems just and reasonable, provided that the Third Party Defendant may employ the provisions of M.G.L. c. 93A, section9(3) by making a written offer of relief and paying the rejected tender into court as soon as practicable after receiving notice of an action commenced under this section.

COUNT II – BREACH OF CONTRACT

19. The Third Party Plaintiff reaffirms and realleges the allegations contained in paragraphs 1 through 18 of this Third Party Complaint as set forth herein.

20. The Third Party Defendants breached the Dual Agency Agreement entered into with the Third Party Plaintiff.

21. As a direct and proximate result of the actions of the Third Party Defendants, the Third Party Plaintiff suffered financial damages.
WHEREFORE, the Third Party Plaintiff requests that this Honorable Court enter a judgment against the Third Party Defendants including costs, interest and attorneys fees, and any additional relief which this Honorable Court deems just and reasonable.

COUNT III – MISREPRESENTATION

22. The Third Party Plaintiff reaffirms and realleges the allegations contained in paragraphs 1 through 21 of this Third Party Complaint as set forth herein.

23. In pressuring the Third Party Plaintiff to enter into the Dual Agency Agreement and to sign the Purchase and Sale Agreement, the Third Party Defendants misrepresented material facts which the Third Party Plaintiff relied upon to her detriment, specifically that the Plaintiff “would be taken care of.”

24. As a direct and proximate result of this misrepresentation, the Third Party Plaintiff suffered financial damages.

WHEREFORE, the Third Party Plaintiff requests that this Honorable Court enter a judgment against the Third Party Defendants including costs, interest and attorneys fees, and any additional relief which this Honorable Court deems just and reasonable.

COUNT IV – FRAUD

25. The Third Party Plaintiff reaffirms and realleges the allegations contained in paragraphs 1 through 24 of this Third Party Complaint as set forth herein.
26. The Third Party Defendants fraudulently induced the Third Party Plaintiff to enter into the Dual Agency Agreement and to sign the Purchase and Sale Agreement.

27. As a direct and proximate result of this fraudulent inducement, the Third Party Plaintiff suffered financial damages.

WHEREFORE, the Third Party Plaintiff requests that this Honorable Court enter a judgment against the Third Party Defendants including costs, interest and attorneys fees, and any additional relief which this Honorable Court deems just and reasonable.

**COUNT V – INTENTIONAL INFILCTION OF EMOTIONAL DISTRESS**

28. The Third Party Plaintiff reaffirms and realleges the allegations contained in paragraphs 1 through 27 of this Third Party Complaint as set forth herein.

29. By its actions, the Third Party Defendants intentionally caused severe emotional distress to the Third Party Plaintiff.

30. As a direct and proximate result of the Third Party Defendants' actions which constitute the intentional infliction of emotional distress against the Third Party Plaintiff, the Third Party Plaintiff was injured and caused physical, emotional and psychological damages.

WHEREFORE, the Third Party Plaintiff requests that this Honorable Court enter a judgment against the Third Party Defendants including costs, interest and attorneys fees, and any additional relief which this Honorable Court deems just and reasonable.
COUNT VI – NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS

31. The Third Party Plaintiff reaffirms and realleges the allegations contained in paragraphs 1 through 30 of this Third Party Complaint as set forth herein.

32. By its actions, the Third Party Defendants negligently caused severe emotional distress to the Third Party Plaintiff.

33. As a direct and proximate result of the Third Party Defendants' actions which constitute the negligent infliction of emotional distress against the Third Party Plaintiff, the Third Party Plaintiff was injured and caused physical, emotional and psychological damages.

WHEREFORE, the Third Party Plaintiff requests that this Honorable Court enter a judgment against the Third Party Defendants including costs, interest and attorneys fees, and any additional relief which this Honorable Court deems just and reasonable.

THE DEFENDANT/THIRD PARTY PLAINTIFF DEMANDS TRIAL BY JURY AS TO ALL COUNTS

The Defendant/Third Party Plaintiff,
By her attorney,

Steven C. Sharaf, Esq. BBO#552524
109 Highland Avenue
Needham, MA 02494
(781)455-0300
ursuant to Mass. R. Civ. P. 16 and G.L. c. 221, § 62C, the parties are ORDERED to appear at a case management conference on the above date and time to report on the status of this action.

**Agenda.** The purpose of the case management conference is to:

* Determine the trial readiness of the case;
* Offer and conduct early-intervention alternative dispute resolution;
* Establish deadlines for discovery, amendment of pleading, addition of parties, dispositive motions, and disclosure of expert witnesses;
* Resolve any discovery dispute and address pending motions;
* Review any proposed case management orders submitted by any party;
* Enter case management orders as appropriate; and
* Assign a firm trial date for cases ready for trial or a firm pretrial conference date for all cases not ready for trial.

**Obligations of Counsel.** Counsel shall be familiar with the facts of the case and shall have authority to settle and to select firm dates for trial or pretrial conference. Clients or persons with settlement authority shall be available for telephone consultation with counsel during the case management conference. Counsel shall serve any proposed case management orders and motions to opposing counsel in advance of the case management conference. Counsel are not required to prepare any memorandum for the case management conference.

**Continuances.** Request for continuances of the case management conference for good cause shall be addressed in writing to the judge named below and shall list all dates in the next thirty days that counsel is available for the case management conference.

**Liaison.** Please call the court contact person listed above with any questions or to report settlement.

**Further Orders of the Court:**

04/04/2012: Without a hearing, CIM Strategies, Inc.. Assented To Motion to Continue date for Case Management Conference (Mass.R.Civ.P.40[b]) is ALLOWED.
INTERROGATORIES

Now comes the Defendant, Olena Krylova, and hereby submits the following Interrogatories to be answered by the Plaintiff, Margarita Aronova.

INTERROGATORY NO. 1

Please state your full name, residence address, business address, date of birth, and occupation.

INTERROGATORY NO. 2

With regard to each person whom you expect to call as an expert witness at the trial of this Action, please state:

(a) The name and address of each expert;
(b) The subject matter on which the expert is expected to testify;
(c) The substance of the facts and opinions to which the expert is expected to testify; and
(d) A summary of the grounds for each opinion.
INTERROGATORY NO. 3

With respect to each witness whom you expect to call to testify at the trial of this Action, please state their full name, address, business address, date of birth, relationship to Plaintiff in this Action, if any, and the subject matter upon which he/she is expected to testify.

INTERROGATORY NO. 4

Please identify all persons known or believed by you to have knowledge of the facts that concern this Action, including the allegations asserted by you in this Action.

INTERROGATORY NO. 5

Please identify all documents, exhibits, and/or tangible evidence that you intend to introduce into evidence at the trial of this Action.

INTERROGATORY NO. 6

Please set forth in complete detail the substance of all communications by, between, and/or among Plaintiff in this Action and the Defendant and/or Third Party Defendants in this Action, which communications concerned the property identified as 8 Cross Street East, Somerville, Massachusetts, including in your Answer:

(a) The name and address of each person present and/or participating in each such conversation and/or communication;
(b) Who said what to whom;
(c) The date of each such conversation and/or communication; and
(d) The location where such conversation and/or communication took place.

INTERROGATORY NO. 7

Please set forth in complete detail the substance of all communications by, between, and/or among Plaintiff in this Action and the Defendant and/or Third Party Defendants in this Action, which communications concerned the Buyer Representation Agreement, including in your Answer:

(a) The name and address of each person present and/or participating in each such conversation and/or communication;
(b) Who said what to whom;
(c) The date of each such conversation and/or communication; and
(d) The location where such conversation and/or communication took place.
INTERROGATORY NO. 8

Please set forth in complete detail the substance of all communications by, between, and/or among Plaintiff in this Action and the Defendant and/or Third Party Defendants in this Action, which communications support the Plaintiff's claim that they were the efficient and procuring cause of the resulting purchase of the property identified as 8 Cross Street East, Somerville, Massachusetts, including in your Answer:

(a) The name and address of each person present and/or participating in each such conversation and/or communication;
(b) Who said what to whom;
(c) The date of each such conversation and/or communication; and (d) The location where such conversation and/or communication took place.

INTERROGATORY NO. 9

If you claim that you were the efficient and procuring cause of the resulting purchase of the property identified as 8 Cross Street East, Somerville, Massachusetts, please:

(a) State, in complete detail, all facts that support and/or contradict said claim;
(b) Identify all documents that support and/or contradict said claim;
(c) Identify all witnesses that have knowledge of said claim; and
(d) State, in complete detail, the substance of knowledge that you believe said witnesses possess.

INTERROGATORY NO. 10

Please state all facts upon which you rely in support of your allegation that a brokerage commission is due and owing to you from the Defendant and/or Third Party Defendants as a result of the purchase of the property identified as 8 Cross Street East, Somerville, Massachusetts, and identify all documents that support and/or contradict said allegation.

INTERROGATORY NO. 11

Please state all facts upon which you rely in support of your allegation that you provided brokerage services that led to the successful purchase of the property identified as 8 Cross Street East, Somerville, Massachusetts and identify all documents that support and/or contradict said allegation.

INTERROGATORY NO. 12

If you claim that you used reasonably diligent efforts to locate a property and to negotiate terms and conditions of a contract acceptable to the Defendant leading to the purchase by the Defendant of a property, please:
INTERROGATORY NO. 13

If you claim that brokerage actions and activities engaged in by you resulted in the Defendant purchasing a property, please:

(a) State, in complete detail, all facts that support and/or contradict said claim;
(b) Identify all documents that support and/or contradict said claim;
(c) Identify all witnesses that have knowledge of said claim; and
(d) State, in complete detail, the substance of knowledge that you believe said witnesses possess.

INTERROGATORY NO. 14

Please describe, in complete detail, all brokerage actions and/or activities engaged in by you with respect to the Defendant.

INTERROGATORY NO. 15

Please state all facts in support of your allegation that you made demand upon the Defendant and/or the Third Party Defendants for a commission due as a result of the Defendant’s purchase of 8 Cross Street East, Somerville, Massachusetts, identify all documents that support and/or contradict said allegation, and identify all witnesses with knowledge of the same.

INTERROGATORY NO. 16

Please describe, in complete detail, the economic injury caused by Defendant and/or by the Third Party Defendants as a result of the Defendant’s purchase of the property identified as 8 Cross Street East, Somerville, Massachusetts.

INTERROGATORY NO. 17

If you claim that you relied, to your detriment, upon misrepresentations made by Defendant and/or the Third Party Defendants, please:

(a) State, in complete detail, all facts that support and/or contradict said claim;
(b) Set forth all such alleged misrepresentations;
(c) Identify all documents that support and/or contradict said claim;
(d) Identify all witnesses that have knowledge of said claim; and
(e) State, in complete detail, the substance of knowledge that you believe said witnesses possess.

The Defendant,
Olena Krylova,
By her attorney,

Steven C. Sharaf, BBO#552524
109 Highland Avenue
Needham, MA 02494
(781)455-0300

Dated: October 2, 2009

CERTIFICATE OF SERVICE

I, Steven C. Sharaf, certify that on October 2, 2009, I served a copy of the foregoing pleading/document by first class mail, postage prepaid, upon all counsel of record.

Steven C. Sharaf, BBO#552524
109 Highland Avenue
Needham, MA 02494
(781)455-0300
NOW COMES the Defendant, Olena Krylova, by counsel, and requires the Plaintiff, Margarita Aronova, pursuant to Rule 34 of the Massachusetts Rules of Civil Procedure, to produce the following documents:

DEFINITION

The term "document" is used in this Request in its broadest sense and means any record of information, of any kind or description, however made, produced, or reproduced, whether by hand or by any electronic, photographic, mechanical, or other process. Documents can take the form of any medium on which information can be stored including, without limitation, computer memory, film, paper, phonograph records, tape recordings, videotapes, and video disks.

DOCUMENTS REQUESTED TO BE PRODUCED

1. All documents, things, or other items identified in Plaintiff's Response to Defendant's First Set of Interrogatories directed to Plaintiff, served contemporaneously herewith.

2. All documents, things, or other items referred to, examined, or analyzed by Plaintiff in formulating its responses to Defendant's First Set of Interrogatories directed to Plaintiff, served contemporaneously herewith.
3. All documents that constitute, identify, refer to, or comment on the negotiation, formation, consummation and termination of the Buyer Representation Agreement entered into between the Plaintiff and Defendant dated on or about November 27, 2006 (the “Agreement,” specifically including any amendments and/or alterations thereto.

4. All documents that identify, refer to, comment on, or constitute listings for the property identified as 8 Cross Street East, Somerville, Massachusetts.

5. All marketing information and/or other marketing, and/or sales paraphernalia for the property identified as 8 Cross Street East, Somerville, Massachusetts, obtained by the Plaintiff.

6. All documents that identify, refer to, comment on, or constitute listings for all properties identified by the Plaintiff and introduced, presented and/or shown to the Defendant.

7. All marketing information and/or other marketing, and/or sales paraphernalia for all properties identified by the Plaintiff and introduced, presented and/or shown to the Defendant.

8. All documents that identify, refer to, comment on, or constitute that Plaintiff was the efficient and procuring cause of the resulting purchase of the property identified as 8 Cross Street East, Somerville, Massachusetts by the Defendant.

9. All documents that identify, refer to, comment on, constitute, support, or form(s) the basis of the Plaintiff’s claim that the Plaintiff first located the property identified as 8 Cross Street East, Somerville, Massachusetts and introduced, presented and/or shown to the Defendant.

10. All documents that identify, refer to, comment on, constitute, support, or form(s) the claim that the Buyer Representation Agreement remained in full force and effect and had not been terminated, entitling Plaintiff to a commission.

11. All documents that identify, refer to, comment on, constitute, support, or form(s) the basis of the claim that Plaintiff was entitled to a brokerage commission.

12. Any and all documents and/or tangible things that identify, refer to, comment on, or constitute the factual basis for and which the Plaintiff contends support the claim that the Defendant breached the Buyer Representation Agreement.

13. Any and all documents and/or tangible things that identify, refer to, comment on, or constitute the factual basis for and which the Plaintiff contends support the claim that she used reasonably diligent efforts to locate a property and to negotiate terms and conditions of a contract acceptable to the Defendant leading to the purchase by the Defendant of a property.

14. All statements regarding the Buyer Representation Agreement, whether signed or unsigned, handwritten, typewritten or recorded by mechanical, or electronic means, made by:
(a) The Plaintiff;
(b) The Defendant(s);
(c) Any person connected with the property identified as 8 Cross Street East, Somerville, Massachusetts.

15. All documents that identify, refer to, comment on, or constitute oral or written communications made to or from the Plaintiff and/or any third parties that refers and/or relates to the Buyer Representation Agreement.

16. All documents that identify, refer to, comment on, or constitute oral or written communications made to or from the Plaintiff and/or any third parties that refers and/or relates to the Plaintiff’s claim that she is entitled to a brokerage commission.

17. Any and all documents and/or reports that identify, refer to, comment on or constitute reports from each expert that Defendant has contacted or consulted with regarding the facts and/or circumstances as alleged in Plaintiff’s Complaint or as related to any claim or defense in this action, regardless of whether you intend to call such expert as a trial witness, indicating which expert(s) you intend to call as a trial witness.

18. Each and every document and tangible thing of whatever kind that you intend to offer as evidence at the trial of this action.

19. All documents upon which the Plaintiff may rely in the preparation of its case or may be offered into evidence at trial or depositions or may be used to refresh the recollection of a witness at depositions or trial, including, but not limited to, all statements of witnesses or potential witnesses or persons interviewed in connection with this case.

20. All other documents in the possession of Plaintiff and/or their agents that pertain to this litigation and that are not described and/or requested above.

The Defendant,
Olena Krylova,
By her attorney,

Steven C. Sharaf, BBO #552524
109 Highland Avenue
Needham, Massachusetts 02494
Telephone: (781) 455-0300
Facsimile: (781) 453-0606

Dated: October 2, 2009
CERTIFICATE OF SERVICE

I, Steven C. Sharaf, Attorney for the Plaintiff, hereby certify that on this date, October 2, 2009, I have served a true copy of the foregoing pleading by mailing a copy of same first class mail, postage prepaid, to all counsel of record.

Steven C. Sharaf, BBO #552524
109 Highland Avenue
Needham, Massachusetts 02494
Telephone: (781) 455-0300
Facsimile: (781) 453-0606
COMMONWEALTH OF MASSACHUSETTS

NORFOLK, ss. DEDHAM DISTRICT COURT
C.A. NO. 1154CV1225

CIM Strategies, Inc.
   Plaintiff and Defendant-in-Counterclaim,
v.
The Regal Press Inc.
   Defendant and Plaintiff-in-Counterclaim.

PLAINTIFF, CIM STRATEGIES',
FIRST REQUEST FOR ADMISSIONS
TO DEFENDANT THE REGAL PRESS INC.

NOW COMES the Plaintiff, CIM Strategies, Inc., by counsel, and requires the Defendant, The Regal Press Inc., pursuant to Rule 36 of the Massachusetts Rules of Civil Procedure, to respond to the following request for admissions:

1. CIM Strategies performed services for The Regal Press on an as needed basis.
2. There existed no formal contract between CIM Strategies and The Regal Press.
3. Services were performed by CIM Strategies for The Regal Press on a "Time and Materials" Basis.
4. Payment terms for services performed by CIM Strategies for The Regal Press were due upon receipt.
5. A separate invoice was generated by CIM Strategies for each service performed by CIM Strategies for The Regal Press.
6. The Regal Press never issued a purchase order for services it requested from CIM Strategies.
7. Prior to June 21, 2011, there were 27 outstanding invoices from CIM Strategies to The Regal Press.
9. On or about May 15, 2011 a meeting was held between The Regal Press President, William Duffy, Vice-President of Operations, David Marquis and Joe Maloney of CIM Strategies.


11. CIM Strategies was asked by The Regal Press to “Program the expansion of the PO Number field to accommodate the JP Morgan UK requirement of a 16 position PO Number” as set forth in CIM Strategies Invoice number 09132040 dated September 28, 2010 and attached to this request.

12. CIM Strategies was asked by The Regal Press to “configure iSeries to send email for all system users, debug printer issue in customer service” and “prepare system for Year End Process” as set forth in CIM Strategies Invoice number 600658 dated December 30, 2010 and attached to this request.

13. CIM Strategies was asked by The Regal Press to “apply Operating System Updates to iSeries and configure system connectivity with network server for email transmissions from the iSeries” as set forth in CIM Strategies Invoice number 600650 dated January 3, 2011 and attached to this request.

14. CIM Strategies was asked by The Regal Press to perform “Windows Server Support: Purge Temporary files from server so server would function proper (prevent server from ‘locking up’)” as set forth in CIM Strategies Invoice number 600652 dated January 3, 2011 and attached to this request.

15. CIM Strategies was asked by The Regal Press to “complete File Server Clean-up. Correct network communication fault and apply Microsoft Patch” as set forth in CIM Strategies Invoice number 600653 dated January 3, 2011 and attached to this request.

16. CIM Strategies was asked by The Regal Press to “investigate JP Morgan EDI transmission issue, generate AECOM file for invoicing, create history files for 2011” as set forth in CIM Strategies Invoice number 600667 dated January 10, 2011 and attached to this request.

17. CIM Strategies was asked by The Regal Press to “scan PC’s and servers for virus, address printer issue, configure server for Pleasant Street and purge temporary files from server and verify nightly save was active” as set forth in CIM Strategies Invoice number 600669 dated January 10, 2011 and attached to this request.

18. CIM Strategies was asked by The Regal Press to “configure network infrastructure as Pleasant Street, correct printer failure, reinstall Fedex PC at Pleasant Street and...
debug operational issue, Printer Support at Guild Street” as set forth in CIM Strategies Invoice number 600676 dated January 24, 2011 and attached to this request.

19. CIM Strategies was asked by The Regal Press to perform “network infrastructure installation Pleasant Street, configure/build of Pleasant Street server” as set forth in CIM Strategies Invoice number 600678 dated January 24, 2011 and attached to this request.

20. CIM Strategies was asked by The Regal Press to “analyze and debug Chase UK EDI, recreate EDI file and retransmit” as set forth in CIM Strategies Invoice number 600681 dated January 24, 2011 and attached to this request.

21. CIM Strategies was asked by The Regal Press to “review issues with Fedex Shipping PC at Pleasant Street and work with Fedex for a resolution” as set forth in CIM Strategies Invoice number 600683 dated January 24, 2011 and attached to this request.

22. CIM Strategies was asked by The Regal Press to “review Invoice File Transfer Process and configure on B, Carter's PC” as set forth in CIM Strategies Invoice number 600683 dated January 24, 2011 and attached to this request.

23. CIM Strategies was asked by The Regal Press to perform “Manulife Marketing Center Backup Processing and to load and apply Microsoft Server Packs to all Servers” as set forth in CIM Strategies Invoice number 600694 dated January 28, 2011 and attached to this request.

24. CIM Strategies was asked by The Regal Press to perform “Chase UK EDI Support and retransmission of file, AECOM invoice processing” as set forth in CIM Strategies Invoice number 600688 dated January 31, 2011 and attached to this request.

25. CIM Strategies was asked by The Regal Press to perform “enhancements for Accounts Receivable Aging” as set forth in CIM Strategies Invoice number 600688 dated January 31, 2011 and attached to this request.

26. CIM Strategies was asked by The Regal Press to “load and apply operating system updates to address printer issues” as set forth in CIM Strategies Invoice number 600702 dated January 25, 2011 and attached to this request.

27. CIM Strategies was asked by The Regal Press to “modify programs for digital routing processing support and analyze JP Morgan RUSH issue in EDI transmissions” as set forth in CIM Strategies Invoice number 600704 dated February 7, 2011 and attached to this request.
28. CIM Strategies was asked by The Regal Press to “analyze and debug iSeries email processing” as set forth in CIM Strategies Invoice number 600704 dated February 7, 2011 and attached to this request.

29. CIM Strategies was asked by The Regal Press to perform “enhancements for accounts receivable aging” as set forth in CIM Strategies Invoice number 600712 dated February 14, 2011 and attached to this request.

30. CIM Strategies was asked by The Regal Press to perform “computer reorganization and cabling” as set forth in CIM Strategies Invoice number 600719 dated February 21, 2011 and attached to this request.

31. CIM Strategies was asked by The Regal Press to “recover JP Morgan Chase Invoices and purge the shipping file” as set forth in CIM Strategies Invoice number 600731 dated February 18, 2011 and attached to this request.

32. CIM Strategies was asked by The Regal Press to “recover JP Morgan Chase Invoices for retransmission, and purge the shipping file” as set forth in CIM Strategies Invoice number 600743 dated March 2, 2011 and attached to this request.

33. CIM Strategies was asked by The Regal Press to “purge WIP files to remove duplicate shipping data, and to perform auto-billing programming” as set forth in CIM Strategies Invoice number 600747 dated March 16, 2011 and attached to this request.

34. CIM Strategies was asked by The Regal Press to perform “auto-billing programming” as set forth in CIM Strategies Invoice number 600758 dated March 21, 2011 and attached to this request.

35. CIM Strategies was asked by The Regal Press to perform “auto-billing testing” and provide “order processing printer support” as set forth in CIM Strategies Invoice number 600512 dated April 6, 2011 and attached to this request.

36. CIM Strategies was asked by The Regal Press to provide “Sherwin-Williams EDI Implementation Support” as set forth in CIM Strategies Invoice number 600512 dated April 6, 2011 and attached to this request.

37. CIM Strategies was asked by The Regal Press to provide “invoice processing support – invoice recovery from an abnormal end of job” as set forth in CIM Strategies Invoice number 600524 dated April 15, 2011 and attached to this request.

38. CIM Strategies was asked by The Regal Press to provide “invoice processing support – invoice recovery from an abnormal end of job” as set forth in CIM
Strategies Invoice number 600529 dated April 25, 2011 and attached to this request.

39. CIM Strategies was asked by The Regal Press to provide “invoice processing support – invoice recovery from an abnormal end of job” as set forth in CIM Strategies Invoice number 600535 dated May 2, 2011 and attached to this request.

40. CIM Strategies was asked by The Regal Press to provide “Sherwin-Williams EDI Implementation Support” as set forth in CIM Strategies Invoice number 600548 dated May 11, 2011 and attached to this request.

41. Admit to the authenticity and accuracy of the attached invoice numbered 600709.

42. Admit to the authenticity and accuracy of the attached invoice numbered 600676.

43. Admit to the authenticity and accuracy of the attached invoice numbered 600512.

44. Admit to the authenticity and accuracy of the attached invoice numbered 600524.

45. Admit to the authenticity and accuracy of the attached invoice numbered 600529.

46. Admit to the authenticity and accuracy of the attached invoice numbered 600535.

47. Admit to the authenticity and accuracy of the attached invoice numbered 600548.

48. Admit to the authenticity and accuracy of the attached invoice numbered 600559.

49. Admit to the authenticity and accuracy of the attached invoice numbered 600678.

50. Admit to the authenticity and accuracy of the attached invoice numbered 600681.

51. Admit to the authenticity and accuracy of the attached invoice numbered 600683.

52. Admit to the authenticity and accuracy of the attached invoice numbered 600688.

53. Admit to the authenticity and accuracy of the attached invoice numbered 600694.

54. Admit to the authenticity and accuracy of the attached invoice numbered 600702.

55. Admit to the authenticity and accuracy of the attached invoice numbered 600704.

56. Admit to the authenticity and accuracy of the attached invoice numbered 600712.

57. Admit to the authenticity and accuracy of the attached invoice numbered 600719.
58. Admit to the authenticity and accuracy of the attached invoice numbered 600725.
59. Admit to the authenticity and accuracy of the attached invoice numbered 600731.
60. Admit to the authenticity and accuracy of the attached invoice numbered 600743.
61. Admit to the authenticity and accuracy of the attached invoice numbered 600758.
62. Admit to the authenticity and accuracy of the attached invoice numbered 09132040.
63. Admit to the authenticity and accuracy of the attached Customer Open Balance sheet for The Regal Press.

64. Admit that The Regal Press is liable for an outstanding balance due to CIM Strategies in the amount of $27,755.00.

The Plaintiff,
CIM Strategies, Inc.,
By its attorney,

Steven C. Sharaf, BBO #552524
109 Highland Avenue
Needham, Massachusetts 02494
Telephone: (781) 455-0300
Facsimile: (781) 453-0606

Dated: February 10, 2012

CERTIFICATE OF SERVICE

I, Steven C. Sharaf, Attorney for the Plaintiff, hereby certify that on this date, I have served a true copy of the foregoing pleading by mailing a copy of same first class mail, postage prepaid, to all counsel of record.

Steven C. Sharaf, BBO #552524
109 Highland Avenue
Needham, Massachusetts 02494
Telephone: (781) 455-0300
Facsimile: (781) 453-0606
DEPOSITION BASICS

1. Basics

Taking depositions is easy, a wizened trial lawyer once told me, "just ask a lot of questions." In a loose sense, he's right. But if you've never taken or attended a deposition there are some things that seem obvious to a veteran lawyer, but which the novice lawyer doesn't necessarily appreciate. Even the process for getting a deposition started can trip up the young lawyer.

The Usual Stipulations
The first thing that comes up right around the time the witness is sworn in is the ceremonial discussion of whether the deposition will be governed by "the usual stipulations." Very few people really discuss what the "usual stipulations" are; sometimes you'll hear someone say that "all objections, except as to the form of the question are reserved until trial." But no one ever bothers to state for the record what constitutes an "objection as to the form." It's assumed that you know. Do you?

Form objections
If an alien from outer space were to come and observe a bunch of depositions and then try to figure out what a "form objection" is he would have to conclude that it's any question the attorney doesn't like. Or it's a question the attorney wants the deponent to be very careful in answering. In short, the "form objection" as it is used in everyday law practice is usually a verbal nudge in the deponent's rib cage.

In reality (and it's good to know what the real rule is sometimes), a form objection is one that challenges the manner in which the question is posed. Examples of proper form objections include: leading question (not applicable to a hostile witness), argumentative questions, compound questions (i.e. asking about two different things in one question), ambiguous questions, assuming facts not yet established (some say "not in evidence" but trials are where 'evidence' is introduced), speculative, improperly characterizing the witness' earlier testimony, and cumulative or repetitive questions. See also Trial Techniques (4th Ed.) by Thomas Mauet, at page 426 (listing the various types of objections).

Form objections do not include hearsay, or objections that go to the admissibility of the testimony or evidence. It's stupid to make objections (without some really good reason) to the admissibility of testimony; it gives your opponent a free peek into your strategy at trial.

The reason that 'the usual stipulations' require that objections to the form of the question to be made at the deposition (lest the objection be forfeited) is that it gives the questioner a chance to rephrase the question to cure the objection. Obviously, that rationale doesn't apply to admissibility objections because there is no cure for most of those; the judge is either going to admit the testimony or document or she isn't.

If your opponent makes a form objection that isn't really a proper form objection the best practice is to simply ignore it and instruct the witness that they are allowed to answer the question (assuming that they understand the question). If, however, the form objection seems proper, but you need clarification from your opponent, it is advisable to ask exactly what the basis for the form objection is. And when you make form objections you should make it your practice to state briefly what the objection is (unless, you are using it to simply 'nudge your own witness,' which of course you aren't really supposed to do).

2. Preparing to take a deposition
Taking a deposition is easy, but taking a good deposition requires methodical preparation. First, figure out what your purposes are in taking the deposition (this is easy to do if you have trial experience and hard if you are inexperienced). Here are some things to consider:

- is the deponent an adverse party, an unfavorable witness or a friendly witness?
- are you taking the deposition to gather information, or to perpetuate trial testimony?
- what information are you looking for?
- what documents do you need the witness to authenticate, or explain?
- can the witness help you obtain or defeat a summary judgment (or other pretrial) motion?

Outline your deposition questions
Notice I said "outline" the questions. If you write out a series of questions you are going to be hampered in pursuing new topics that come up in the examination. If you have an outline you will be more flexible. So make an outline.

Start with a heading for "Background" where you will ask the witness some questions about his personal and educational background. If the witness is an expert witness, and especially if his or her qualifications are an issue, you will want to go into detail about the educational background. Of course, you should have a detailed resume, so you don't want to waste time just having the witness recite every step of his educational history.

Other topics for your deposition outline might include documents to be identified, authenticated, or explained (you should have a chronological stack of all the documents that the witness authored or received), as well as key factual issues. Consider writing out elements of the various claims that are at issue in the lawsuit and see if the witness's testimony bears on any of those elements.

Usually the deposition examination should proceed chronologically, that is, from a point early in time to more recent events. Proceeding in this way makes it easier for the witness to remember things, and cuts down on the number of objections where the opposing counsel asks you to "clarify the time frame of your question."

Sometimes you will want to deviate from a strict chronological progression. For example, you may know that you will have to ask pointed questions that the witness will resent, and you might want to save those questions for the very end. Once you start asking a witness about unpleasant things they tend to become less inclined to volunteer information. So sometimes starting with the least controversial stuff first makes the most sense.

Remember to bring a copy of the deposition subpoena, and any witness fees that you might be obligated to give to the witness. Also, bring a business card to give to the court reporter so that he or she can see how to spell your name, and so that they have contact information for you.

3. Getting the deposition started

If all goes well, the witness will show up and everything will proceed smoothly. Usually, the court reporter will want a caption that describes the name of the case, the docket number and the name of the witness. The subpoena should have all of this information, and often you will want to make the subpoena Exhibit 1 of the deposition (hopefully, you brought exhibit stickers, but if not the court reporter should have them).
Swear the Witness & Get their Contact Information
If the court reporter hasn't sworn the witness, then you should ask them to do so. The swearing of the witness is more or less the official beginning of the deposition. Some lawyers then ask the witness to "give their full name and address for the record." If the court reporter got this information before the deposition began then you don't need to do it again, unless you feel you need to have the witness provide this information under oath.

What's a Deposition all about?
Many lawyers have a whole harangue where they explain to the witness what a deposition is, and how they should tell the attorney if they don't understand a question etc. Very few lawyers reflect on what this preamble is designed to accomplish.

Think impeachment at trial.
If the witness says something in the deposition that doesn't jibe with their testimony at trial you can use the deposition to impeach the witness. Assuming that the questions asked in the deposition and at the trial are sufficiently similar, you will succeed in impeaching the witness who changes their testimony.

Sometimes, though, when you confront a trial witness with their deposition testimony they will weasel out of it by saying that they didn't really understand the question. So you need to "seal off that exit" by making sure that the deponent knows what the ground rules are. The ground rules are: (1) they are under oath and have to give accurate answers to questions; (2) if they answer a question they will be assumed to understand it, so (3) if they don't fully understand a question they should say so.

Many attorneys spend so much time explaining how a deposition works, or do it in such a formal way, that the witness is taken aback, or made nervous. Your goal, for most deponents, is to put them at ease in the beginning of the deposition so that they give you information freely, without you having to browbeat them for every answer.

So you need a stock way of starting the deposition that isn't too formal or intimidating, but yet still accomplishes the objective of committing the deponent to his or her answers. Here is a good way of doing it:

- Q. Now, Mr. Hitler have you ever been to a deposition before?
  - A. No.
- Q. Well, do you know how a deposition works?
  - A. Not really.
- Q. Well, Mr. Hitler, I'm going to ask you a bunch of questions about the accident/contract dispute/event and you'll have to answer them under oath. The other lawyers here are allowed to ask you questions too if they so choose. The court reporter is taking everything down and will prepare a written record of everything that is said, which we lawyers refer to as "a transcript." If you want to you can review the transcript to check if it is accurate and make any corrections before signing it. Do you understand?
  - A. Yes.
- Q. It is very important that you understand the questions and give accurate answers. If there is anything that you don't understand, or anything that you don't know or aren't sure of, you let us know, okay?
  - A. Yes.
This simple preamble accomplishes all of the objectives discussed previously, except it does so in plain, unassuming language that isn't likely to make the witness nervous. It can be easily modified, so that even if the witness says they have given a deposition you can say, "well then you know that it works like this..."

### Starting to ask questions

Remember you are more likely to get the witness to give you useful information freely if you ask broad questions in a casual manner. If you start with broad questions, you can then zero in on things that you need to. Use follow up questions to tie down details. Remember it doesn't matter if your questions violate some evidence rule; your goal is to gather information (unless it's a perpetuation deposition).

Remember that you usually have two purposes in a deposition: (1) gathering information and getting the witnesses version of events; and (2) "sealing off the exits," or eliminating possible versions of the story that isn't in the witness's version now, but which might sneak in there later.

### 4. On the record - Off the record

During the deposition you are "on the record" and that means that unless the court reporter transcribes information it might as well not exist. So be sure to speak slowly and methodically. You can ask the court reporter to "strike" a question that you realize doesn't make sense after you utter it. But it's best not to get into the habit of doing this too much.

Remember, also, that if you refer to a document you may need to make that document an exhibit to the deposition. You don't need to make every document a part of the record. If the document has a Bates number then you can use that to pin the document down. Again, simplicity is best. You should only make things part of the record if you need to.

If you need to go off the record for some reason don't hesitate to do so. Remember, the court reporters charge by the page and they are only too happy to let you, and your legal brethren, wax eloquent on the record. More blabbing means more money.

You should try to limit the deposition record to the witness's testimony and the important discussions between counsel. A lot of what gets discussed on the record among attorneys is pure crap. Don't be afraid to suggest that a discussion take place "off of the record." If your informal discussion with the other lawyers leads to some agreement that needs to be memorialized you can always go back on the record and state it concisely.

If you are asking pointed questions about a key issue that is in dispute don't let the opposing counsel suggest that you "go off the record" so she can confer with her client. Insist that pending questions be answered before taking a break.

### 5. Common problems

Inexperienced lawyers often run into problems during a deposition. First, they tend to underestimate the time it will take to conduct the deposition. Even a simple deposition taken by an experienced lawyer will take at least an hour.

A second problem, and much more serious, is that the young lawyer will often not have a clear idea of what they are trying to accomplish in the deposition. It often helps to consider if you are: (1) trying to just gather information; (2) getting specific admissions of key facts; or (3) preserving testimony for later use at trial.
Third, lawyers sometimes use an inadequate method of questioning the witness. How you ask questions depends on what you are trying to accomplish. If you are trying to simply find out things then asking informal, open-ended questions is best. If you are trying to pin the witness down then use leading questions. And if you are trying to preserve testimony then use the exact method that you would use in trial, which is likely a methodical approach that takes into account evidentiary issues.

Fourth, many young lawyers frequently get confused about how to handle documents. As discussed before, if you have documents that the witness prepared or received you should have those documents assembled in chronological order. For the documents that you expect to go over with the witness you should have several sets available at the deposition: one set for you, one set for the witness, and one set for each of the lawyers that will be attending the deposition. If you make a document an exhibit you should immediately mark your copy (which you will be giving to the court reporter), and you should keep a running tab of the exhibit numbers that you have used so that when you introduce the next document you don’t get confused.

Fifth, there is the tendency to get bogged down in minutiae, especially when covering background information. Remember your purpose: what information do you absolutely have to get out of this witness? If the witness says something interesting, but which isn’t helpful, go on to a more productive topic. It’s easy to waste time in depositions. It’s a tendency you have to fight constantly, even as you grow more experienced.

6. Defending depositions

Defending depositions is easier than taking them, but that doesn’t mean it is so simple that you don’t have to prepare. First, if there are documents in the case, gather all of the documents that your deponent wrote or received and assemble them in chronological order. Have the witness come in the day before the deposition if possible, or at least a couple of hours early, and put the witness in a room and ask them to go through the documents. Let them do it alone.

After they have reviewed the documents or other materials that will help them orient their memory you can sit down and ask questions about key documents to help focus their attention.

A question that often comes up is the issue of how you prepare the deponent without suggesting what their testimony should be. Obviously, you aren’t going to be telling the witness what to say. It is unethical, and unlikely to help you (and probably very likely to backfire). But what you can, and should do, is to explain to the witness what the case is about and how their testimony fits into the case. If you have identified the key themes that support your case (and odds are you have, or should have, done so) then you can weave those themes into your explanation of the case. Most witnesses have no trouble understanding your theme. If you find witnesses having trouble grasping your themes then you are probably not using simple themes.

After you have reviewed the key facts of the case and oriented the witness you need to let them know how to conduct themselves in a deposition. If they haven’t given a deposition before (or even if they have), they need some simple guidelines that they can remember easily. If you give them ten things to remember then the odds are that they won’t remember anything. It’s best to give them just one or two things to mull over.

First, tell them that they are simply being asked to give a truthful account of what happened so if they just say what they know they’ll be fine. Then tell them that the only problem is that sometimes people think that they know more than they do and wind up speculating and assuming things that they don’t really know. Tell the witness to listen carefully to the question
and only ask the question that is being asked. Don’t assume things, and be quick to answer questions that have built-in assumptions. The witness should remain calm and not get upset, even if the attorney starts asking questions in a pointed manner.

Lastly, tell them that short answers are best. If the question calls for a yes or no, answer with a yes or no. If you need to explain you can, but keep your answers as short as you can.

Short, truthful answers. That’s the key. And that’s something they can remember.

Usually.
Pointers for the Deposition Witness:

THE CARDINAL RULES

1. Always, always tell the truth.
2. Pause before you answer any question and think very carefully.
3. If you do not understand a question, say so.
4. Answer only the question that you are asked.
5. If the question is inarticulate or the questioner appears confused, do not rephrase the question.

ANSWERING TECHNIQUE

1. Testify only about what you actually remember.
2. Never guess or speculate.
3. Do not explain the logic that you used in formulating your answer.
4. If you are testifying about a conversation, make it clear if you are quoting directly or if you are only giving a summary of what was said.
5. If asked to testify about a lengthy transaction or meeting, do not get bogged down in details—summarize.
6. Do not testify about what others know or thought about a given matter—you are only speculating when you do so.
7. Do not volunteer information about your state of mind.
8. If you cannot recall something, say, “I can’t remember.”
9. When you have answered the question asked, STOP!

DEALING WITH DOCUMENTS

1. If you are asked a question about a document, read the document before answering the question.
2. If information or data required to answer a question is in a document that is already an exhibit, ask to see the exhibit.
3. If the information required to answer a question is in a document that is not an exhibit and you do not recall the answer to the question, do not inform the examiner about the existence of the document. Say that you cannot recall.

DEALING WITH THE OTHER ATTORNEY

1. Avoid developing a conversational relationship with the questioner.
2. Face the stenographer when answering questions to make sure the stenographer properly records your answer and to break eye contact with the questioner.
3. Take your time—give your attorney time to object.
4. Be wary of the introductory clauses that precede the questions.
5. Be suspicious of any question that attempts to summarize your prior testimony.
6. Be wary of attempts by the questioner to lead you or to put your thoughts in his or her words.
7. If the questioner interrupts your answer, indicate that you have not completed answering the question and state that you desire to do so.
8. The questioner will establish facts and bring out matters that may be damaging to your case—don’t let it faze you.
9. Every witness makes mistakes at a deposition. If the questioner raises an inconsistency with you, stay calm and answer the question.

DEPOSITION ETIQUETTE

1. Never use obscenities or make ethnic or gender-based comments. Your deposition may later be read to men and women of various races, religions and ethnic backgrounds.
2. No statement you make at your deposition will be “off the record” unless the attorneys agree to that prior to your testimony.
3. No statement you make at a deposition can be “stricken” from the transcript.
4. Avoid making attempts at humor.
5. Never get angry or argue with the questioner.

INTERACTING WITH YOUR ATTORNEY

1. Follow your counsel to a place where you will be able to confer at each recess.
2. If you need a break, take one. Confer with your counsel whenever you desire to do so.
3. If you remember something suddenly at your deposition that you have not previously discussed with your lawyer, do not volunteer it at the deposition. Hold the matter until you have had an opportunity to speak with your counsel at a recess. Ask for a recess if necessary.
4. Listen to your counsel’s objection to a question—it will often be instructive as to problem areas raised by the question.
5. Never agree to supply documents or information to the examiner. Let your attorney respond to any such request.
DEPOSITION CHECKLIST

CASE:
WITNESS:
DATE:
D/O/A:

INTRODUCTION

NAME:
ADDRESS:
  Who live with
  How long live there
  Rent or Own
  Prior Addresses

DATE OF BIRTH:
  Place of birth

MARITAL STATUS:
  Spouse's name
  Spouse's occupation

CHILDREN:
  Names
  Ages
  Marital Status
  Current Addresses

EDUCATION:
PRESENT EMPLOYMENT:

Title
Duties
Wages
  -salary or hourly
  -average weekly or monthly pay
  -hourly pay
Tell of injury on job application
Ever tell employer of injury
Date begun work
Supervisor
Work hours

PRIOR EMPLOYMENT:

Date begun work
Title
Supervisor
Work hours
Duties
Wages
  -salary or hourly
  -average weekly or monthly pay
  -hourly pay
Tell of injury on job application
Ever tell employer of injury
Why leave

EMPLOYMENT ON DAY OF ACCIDENT:

INCOME - OTHER SOURCES

Parents
Stocks, Bonds or other investments
Property
Social Security Disability
Retirement Funds or other pension benefits.
Alimony or child support

**EMPLOYMENT ON D/O/A:**
Total time out of work

**DATE OF ACCIDENT:**

**TIME OF ACCIDENT:**

**PLACE OF ACCIDENT:**

**WHAT TIME ARRIVE ON THE SCENE OF THE ACCIDENT:**
Ever been to the accident scene before the accident (since the accident) When, Why, With Whom
Who arrive at the accident scene with
What did you initially do at the scene
What did you do next

**DESCRIBE SCENE OF THE ACCIDENT:**

**WEATHER:**

**LIGHTING:**

**WHERE GOING:**

**WHERE COMING:**

**WHO WERE YOU WITH AT THE TIME OF THE ACCIDENT:**

**HOW ACCIDENT HAPPENED:**
Vision/sunglasses
Familiarity with the route
How often do you come that way
Had you ever seen the hole there before
Have you been back to the accident scene
When did you first become aware of the defect

**HOW ACCIDENT HAPPENED:**

Shoes

Precautions taken to avoid

Vision/sunglasses

Familiarity with the premises

- Been there before
- Which was did you walk when you entered the premises
- Did you notice the defect/setup

When did you first become aware of the defect

**HOW ACCIDENT HAPPENED:**

Exact position of everyone on the scene

What was each person doing

What happened immediately before the accident

What did you see

When did you become aware that you were injured

**WITNESSES:**

Name

Address

Occupation

Relationship

Statements/Conversations

- When/where
- Who present
- What said

**CONVERSATIONS WITH THE DEFENDANT:**

**INJURIES SUSTAINED:**

Physical Appearance

- Torn clothing
- Bruises
- Bleeding
POST ACCIDENT:
Where go
How get there
Who with

HOSPITALIZATION:
When
Where
Treatment
-Did you tell doctor what happened?

DOCTOR TREATMENT:
Name
Address
Types of Treatment
Who sent you to the doctor
Who paid bills
Braces/crutches/aids
Did you keep any personal diaries or notes of your medical treatment

MEDICATIONS PRESCRIBED:

PERIOD CONFINED TO HOUSE:

PERIOD CONFINED TO BED:

PRESENT PHYSICAL CONDITION:

PRESENTLY TAKING MEDICATION:
What type of medication
If not, why not

PHYSICAL CONDITION BEFORE ACCIDENT:
TMJ
OTHER ACCIDENTS AFTER THIS ONE:

Describe accident
File any claims with insurance companies/ lawsuits
Hospital/Doctor Treatment

OTHER ACCIDENTS BEFORE THIS ONE:

Describe accident
File any claims with insurance companies/ lawsuits
Hospital/Doctor Treatment

LOSS OF EARNINGS:

MEDICAL BILLS:

OTHER EXPENSES INCURRED:

WHAT ACTIVITIES COULD DO BEFORE THAT CANNOT DO NOW:

How has this accident affected your life
What specific physical limitations do you experience now
Are there any activities that you cannot do now
  -Sports
  -Hobbies
  -Entertainment (movies, theatre, sports)
  -Social life (Going out with friends, Family)
  -Family gatherings
  -Drive a car
  -Go out on dates

Did you have any family obligations with regard to caring for relatives which were affected by this accident

KNOWLEDGE OF RISK:

DRIVER'S LICENCE/RESTRICTIONS/ GLASSES:

PRESENTLY DRIVE AUTO:
ALCOHOL/MEDICATION TAKEN BEFORE ACCIDENT:

OTHER LAWSUITS FOR PERSONAL INJURY:

READ ANYTHING TO PREPARE FOR DEPOSITION:

TALK TO ANYONE TO PREPARE FOR DEPOSITION:

PHOTOGRAPH SCENE:

Yourselves

Someone on your behalf

PHOTOGRAPH INJURIES:
NOTICE OF TAKING DEPOSITION

TO: Scott J. Clifford, Esquire
Epstein, Lipsey & Clifford, P.C.
1165 Washington Street, Suite 2
Hanover, Massachusetts 02339

PLEASE TAKE NOTICE that at 10:00 a.m. on Wednesday, April 20, 2011, at the office of Michael Magerer, Esquire, Michael Magerer & Associates, P.C., 109 Highland Avenue, Needham, Massachusetts 02494-3091, the Plaintiff in this action, Ria K. McNamara, Inc., through its counsel, will take the deposition upon oral examination of Mr. Brandt Sharrock, Trader Joe's East, Inc., 117 Kendrick Street, Suite 700, Needham, MA 02494, pursuant to the applicable provisions of the Massachusetts Rules of Civil Procedure, before a Notary Public in and for the Commonwealth of Massachusetts or before some other officer authorized by law to administer oaths. The deposition upon oral examination will continue from day to day until completed.

You are invited to attend and cross examine.

[Signature appears on the following page]

[Signature appears on the following page]
CERTIFICATE OF SERVICE

I, Michael Magerer, Attorney for the Plaintiff, hereby certify that on this date, March , 2011, I have served a true copy of the foregoing pleading by mailing a copy of same first class mail, postage prepaid, to the following Defendant(s), Pro se, or counsel therefor:

Scott J. Clifford, Esquire
Epstein, Lipsey & Clifford, P.C.
1165 Washington Street, Suite 2
Hanover, Massachusetts 02339
TO:  Mr. Brandt Sharrock  
Trader Joe's East, Inc.  
117 Kendrick Street, Suite 700  
Needham, Massachusetts 02494  

Greetings:  

YOU ARE HEREBY COMMANDED in the name of the Commonwealth of Massachusetts in accordance with the provisions of Rules 30 and 45 of the Massachusetts Rules of Civil Procedure, including, but not limited to, Rule 30(b)(6), to appear and testify on behalf of Plaintiff, Ria K. McNamara, Inc., before a Notary Public of the Commonwealth of Massachusetts or some other officer authorized by law to administer oaths, at the office of Michael Magerer, Esquire, Michael Magerer & Associates, P.C., 109 Highland Avenue, Needham, Massachusetts 02494-3091 (Telephone: (781) 453-0800; Facsimile: (781) 453-0606; e mail: mmagerer@maglaw.us), on Wednesday, the 20th day of April, 2011, at 10:00 a.m., and to testify as to your knowledge, at the taking of deposition in the above entitled action.

And you are further required to bring with you:

SEE ATTACHED SCHEDULE A
Pursuant to Mass.R.Civ.P. Rule 30(b)(6), you are hereby notified of the following:

A party may in his notice and in a subpoena name as the deponent a public or private corporation or a partnership or association or governmental agency and describe with reasonable particularity the matters on which examination is requested. The organization so named shall designate one or more officers, directors, or managing agents, or other persons who consent to testify on its behalf, and may set forth, for each person designated, the matters on which he will testify. A subpoena shall advise a non-party organization of its duty to make such a designation. The persons so designated shall testify as to matters known or reasonably available to the organization.

Hereof fail not as you will answer your default under the pains and penalties in the law in that behalf made and provided.

Michael Magerer, Counsel
For Plaintiff

Dated: March , 2011

, Notary Public
My Commission Expires:_____
SCHEDULE A

Please produce all of the following documents, records, reports, statements, and media (collectively, the "Document(s)")}, with regard to and in connection with your relationship with Defendants, Jefferson Shrewsbury Limited Partnership ("Jefferson"), Forecast Shrewsbury Limited Partnership ("Forecast"), and/or Quinsigamond Plaza (the "Plaza"), and/or your tenancy at the real property known as and located at 77 Boston (Worcester) Turnpike, Shrewsbury, Massachusetts (the "Property") (Jefferson, Forecast, and the Plaza are collectively referred to herein as the "Property," unless identified individually), and with the owner and/or managing agent, in connection with and/or related to the Property, as herein identified and defined. The term "Document(s)" is used in this Subpoena in its broadest sense and means any record of information, of any kind or description, however made, produced, or reproduced, whether by hand or by any electronic, photographic, mechanical, or other process. Documents can take the form of any medium on which information can be stored including, without limitation, computer memory, film, paper, phonograph records, tape recordings, videotapes, and video disks. The term Document(s) includes all drafts, all originals, and all non-identical copies, whether different from the original by reason of any notation made on such copies or otherwise. The term Document(s) also includes, without limitation, the following: accounts, advertising, affidavits, agreements, analyses, appointment books, appraisals, authorizations, bank statements, bills, blueprints, books, books of account, brochures, bulletins, calendars, catalogues, charts, checks, checkbooks, check stubs, circulars, communications, compilations, confirmations, contracts, correspondence, diaries, directives, drawings, drafts, evaluations, files, filings with any governmental agency, film, forms, graphs, hospital records, inspection reports, instructions, insurance policies, interviews, invoices, journals, letters, logs, maintenance records, manuals, maps, medical records, memoranda, minutes, newspapers, notes, notebooks, notecards, office reports, opinions or reports of consultants, orders, paintings, pamphlets, periodicals, photographs and photographic negatives, plans, press releases, promotional literature, prospectuses, purchase orders, receipts and other records of payments, records, reports, reports of X-rays or laboratory tests, research data, schedules, scrapbooks, sketches, speeches, statements, studies, summaries or records of any transaction or occurrence including, without limitation, conversations, interviews, meetings and conferences, summaries of any other document including, without limitation, reports of investigations and reports of negotiations, studies, surveys,
tables, or tabulations of data, tracings, telegrams, videotape, vouchers, workpapers and worksheets.

This Subpoena is intended to apply to Trader Joe’s East, Inc., and all affiliated entities thereunder and/or in connection therewith. Unless stated otherwise, the applicable time period is from Trader Joe’s initial tenancy at the Property to the present. The Document(s) and tangible things that you are requested to produce in connection with this Subpoena, for inspection and copying, testing, or sampling are:

1. All documents that constitute, identify, refer to, or comment on the nature and extent of those persons involved and/or participating in the control, operation, and/or management of the Trader Joe’s retail store located in the property known as and located at Quinsigamond Plaza (the “Plaza”), comprised of 77 Boston Worcester Turnpike, Shrewsbury, Massachusetts (the “Jefferson Property”) and 87-97 Boston Turnpike Road, Shrewsbury, Massachusetts (the “Forecast Property”) (the Plaza, the Jefferson Property, and the Forecast Property are collectively referred to herein as the “Property”).

2. All documents that constitute, identify, refer to, or comment on the negotiation, formation, consummation, and/or content of any agreement(s) by and between Trader Joe’s and Roy Roberts/Milestone Associates, including, but not limited, brokerage agreements, which any such agreement(s) applied to and/or were relevant to the Property or any part of the Property.

3. All documents that identify, refer to, comment on, or constitute a/the lease, as same may have been amended, by and with Trader Joe’s, as the tenant, and Defendant Jefferson, and/or the owner of the Property, whether or not said party is related to or controlled by the Defendant Jefferson, at the Plaza.

4. All documents that identify, refer to, comment on, or constitute a “Right of First Refusal,” with regard to a/the lease by and with Trader Joe’s, as the tenant, and Defendant Jefferson, and/or the owner of the Property, whether or not said party is related to or controlled by the Defendant Jefferson, at the Plaza, whether contained in a lease or in whatever form or circumstances or whenever any such right may exist or existed and held by Trader Joe’s, and specifically including, but not limited to, as same may be related to the space adjacent to Trader Joe’s and formerly...
occupied by the Ski Market. This request is intended to include, but not be limited to, documents related to discussion(s) and/or negotiation(s) of any such Right of First Refusal, the terms, conditions, and content of any such Right of First Refusal, any amendments, changes, revivals, revisions, and/or modifications thereto, and documents offering and/or exercising the Right of First Refusal.

5. All documents that identify, refer to, comment on, or constitute a/the lease by and with Trader Joe's, as the tenant, and Defendant Jefferson, and/or the owner of the Property, whether or not said party is related to or controlled by the Defendant Jefferson, with regard to the space adjacent to Trader Joe’s and formerly occupied by the Ski Market. This request is intended to include, but not be limited to, documents related to discussion(s) and/or negotiation(s) of any such lease, the terms, conditions, and content of any such lease, and any amendments, changes, revivals, revisions, and/or modifications thereto.

6. All documents that identify, refer to, comment on, constitute, support, or form(s) the basis of Jefferson and/or the owner of the Plaza offering the space adjacent to Trader Joe’s and formerly occupied by the Ski Market to Trader Joe’s to allow Trader Joe’s to expand its existing location.

7. All documents that identify, refer to, comment on, constitute, support, or form(s) the basis of Jefferson and/or the owner of the Plaza informing Trader Joe’s of a pending lease with GT&T Associates, Inc., d/b/a New England Dental Group (“New England Dental”), for the space adjacent to Trader Joe’s and formerly occupied by the Ski Market.

8. All statements regarding the space adjacent to Trader Joe’s and formerly occupied by the Ski Market, whether signed or unsigned, handwritten, typewritten or recorded by mechanical, or electronic means, and made by and party.
COMMONWEALTH OF MASSACHUSETTS

ESSEX, ss.

DEPARTMENT OF THE TRIAL COURT
SUPERIOR COURT DIVISION
Docket No. 94-2136-B

SUSAN SHARP,
Plaintiff

vs.

VICTOR BROYAN, STELLWAGEN SEAFOOD
CORPORATION, FOOD EQUIPMENT
ASSOCIATES CORPORATION,
HOWARD MONTE ROME and
DANIEL COHEN,
Defendants

DEPOSITION OF SUSAN SHARP, taken on behalf of the Defendant Victor Broyan, pursuant to the applicable provisions of the Massachusetts Rules of Civil Procedure, before Denise M. Rae, a Notary Public within and for the Commonwealth of Massachusetts, at the Law Offices of Brody, Hardoon, Perkins & Kesten, Marketplace Center, Two Hundred State Street, Boston, Massachusetts, on Friday, November 10, 1995, commencing at 2:25 a.m.

DUNN & GOUDREAU COURT REPORTING SERVICE, INC.
294 Washington Street
Boston, Massachusetts 02108
(617) 482-3039
APPEARANCES:

FRANK J. TEAGUE, ESQ.
MILLS & TEAGUE
One Financial Center, 28th Floor
Boston, Massachusetts 02111
On behalf of the Plaintiff;

STEVEN C. SHARAF, ESQ.
BRODY, HARDOON, PERKINS & KESTEN
Marketplace Center
Two Hundred State Street
Boston, Massachusetts 02109
On behalf of the Defendant Victor Broyan;

PAUL M. LANE, ESQ.
VENA, TRUELOVE & RILEY
253 Summer Street
Boston, Massachusetts 02210-1128
On behalf of the Defendant Daniel Cohen.

ALSO PRESENT: Victor Broyan.
# INDEX

## Witness Direct Cross

**Susan Sharp**

- By Mr. Sharaf 5
- By Mr. Lane 110

## EXHIBITS

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<td>Six pages beginning with letter to Board of Directors, Primary Care Nursing Services.</td>
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<td>17 pages consisting of AT &amp; T phone bills beginning December 11, 1991.</td>
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At the offices of Brody, Hardoon, Perkins & Kesten:

IT IS HEREBY STIPULATED AND AGREED by and between counsel for the respective parties that the Witness will read and sign the deposition transcript under the pains and penalties of perjury; that the reading and signing is deemed waived if not accomplished within 30 days of transcript delivery; and that the sealing, filing, and certification of the deposition transcript are waived.

It is further stipulated and agreed that all objections, except objections to the form of the questions, and motions to strike will be reserved until the time of trial or pretrial hearing.

MR. SHARAF: Perhaps I should state at least for the record as well that the other defendant in this case, Monte Rome, who is pro se, was notified of this deposition and he has informed Attorney Lane --

MR. LANE: He will not be here.

MR. SHARAF: -- that he will not be here this morning.
Susan Sharp, having duly sworn that her testimony would be the truth, the whole truth, and nothing but the truth, testified as follows in answer to direct interrogatories by Mr. Sharaf:

Q Ms. Sharp, my name is Steve Sharaf and I represent Victor Broyan in this matter. Could you state your full name for the record?

A Susan Mary Sharp.

Q Ms. Sharp, I just want to assure you that I understand that you've been deposed before in this consolidated action and I do not intend on dragging you through everything that was already discussed and that you've already been through previous to today; however, there will be certain things that will probably be repetitive in nature and I apologize for that. My primary purpose today is to really get an understanding from you as to your relationship specifically with my client Victor Broyan and of course, there's going to be some overlap here. Do you understand that?

A Yes, I do.

Q Obviously, you've testified at a deposition
before. If you don't understand a question that I ask, would you please let me know that and I'll try to rephrase it for you. All right?

A Yes.

Q Once again, as you see, the stenographer is taking down your testimony; therefore, all your responses have to be verbal.

A Yes.

Q And finally, if you have a desire for a break or to talk with your attorney, please let me know that and we'd be happy to allow you that time. All right?

A Okay.

Q Could you give me your present residential address?

A 13 Anthony Lane, A-n-t-h-o-n-y, Lawrenceville, New Jersey, 08648.

Q How long have you been at that address?

A Since 1984.

Q And your current business address, please?

A 3140 Lilymar Court, L-i-l-y-m-a-r, Court, Dublin, Ohio, 43017.

Q And is that the location of Primary Care

DUNN & GOUDREAU
NOW COMES the plaintiff, Margarita Aronova ("Aronova"), and moves that this honorable court enter an order pursuant to Mass.R.Civ.P. Rule 15(a), permitting her to amend her complaint to add, as additional causes of action, third and fourth counts alleging violation of M.G.L. c. 93A, §11 as against third-party defendants Carpenito Real Estate, Inc. and Kristine Valente.

The grounds for the motion are that the plaintiff has just learned of the existence of additional facts, which are stated in the proposed amended complaint and support the counts for violation of M.G.L. c. 93A, §11; and justice requires the filing
so that all issues between the parties may be fully litigated in this action.

In support of the foregoing, plaintiff states as follows:

1. Ms. Aronova had a contract with the defendant Ms. Krylova, whereby Ms. Aronova was guaranteed a commission of 2.5% of the purchase price of any property, which she introduced Ms. Krylova to and which Ms. Krylova bought.

2. On or about November/December 2006, Ms. Aronova introduced Ms. Krylova to the property at 8 Cross Street East, Somerville, Massachusetts.

3. Ms. Aronova also introduced Ms. Krylova to Ms. Valente and Carpenito Real Estate, the sellers' broker for 8 Cross Street East.


5. Ms. Aronova was never informed by Ms. Krylova, Ms. Valente or Carpenito Real Estate that Ms. Krylova had negotiated to buy and then bought the property at 8 Cross Street East.

6. Prior to the sale, both Ms. Aronova and Ms. Krylova informed Ms. Valente and Carpenito Real Estate that Ms. Aronova was the buyer's broker for the sale of 8 Cross Street East.
7. On January 23, 2007, Ms. Valente and Carpenito Real Estate were told the Purchase and Sale Agreement should include the “Buyer Agent Commission” for Ms. Aronova.

Exhibit A.

8. Ms. Krylova, Ms. Valente and Carpenito Real Estate, despite being aware of the fee due Ms. Aronova, intentionally excluded Ms. Aronova from the sale in order to garner the entire brokers’ fee for Carpenito Real Estate and Ms. Valente.

9. Moreover, under their contract, Ms. Krylova owed Ms. Aronova 2.5% of the purchase price, i.e. $11,500.00. By excluding Ms. Aronova, Ms. Krylova paid only $10,000.00.

Exhibit B at Lines 201 and 506.


In further support of the foregoing, plaintiff refers this honorable court to the proposed amended complaint, a copy of which is attached hereto. Exhibit C.
WHEREFORE, plaintiff Ms. Aronova moves that relief be granted as requested herein.

Respectfully
MARGARITA ARONOVA
By her Attorney,

[Signature]

Franziskus Lepionka, Esquire
BBO# 664049
Bourbeau & Associates, P.C.
266 Beacon Street
Boston, MA 02116
Tel: (617) 536-9695
Fax: (617) 536-9697

Dated: December 4th, 2009

CERTIFICATE OF SERVICE

I hereby certify that I have this date served a copy of the foregoing by first class mail on all counsel of record and all parties appearing pro se.

[Signature]

Dated: December 4th, 2009

Franziskus Lepionka, Esq.
Now comes Kristine Valente, Third Party Defendant in the within matter and respectfully requests that the Complaint against her be dismissed with prejudice.

As reasons therefore Third Party Defendant relies upon her Affidavit and the Memorandum of Law both of which are attached hereto and incorporated herein by reference.

Wherefore, the Third Party Defendant in the within matter respectfully requests that the Complaint against her be dismissed with prejudice.

Respectfully Submitted,
Kristine Valente, Defendant
By her attorney,

Alba Doto Baccari
Azzari Doto Baccari, LLP
316 Central Street
Saugus, MA 01906
(781) 233-0909
BBO # 554604

Dated: 10/06/09
MARGARITA ARONOVA,
Plaintiff

v.

OLENA KRYLOVA,
Defendant
Third Party Plaintiff

v.

CARPENITO REAL ESTATE, INC.,
KRISTINE VALENTE,
Third Party Defendant

*******************************

ISSUE

Should a motion to dismissed be allowed where Defendant was acting as an agent of Defendant Company throughout the transaction.

FACTS

On or about September, 2006 Ms. Margarita Aronova (hereinafter "Buyer's Broker") contacted Kristine Valente (hereinafter "Realtor") of Carpenito Real Estate, Inc. (hereinafter "Company"). Buyer's Broker wanted to schedule a showing of the property located at 8 Cross Street East, Somerville, Massachusetts (hereinafter "Property") for Olena Krylova (hereinafter "Buyer") (Exhibit 1).
On or about January, 2007 Buyer appeared at a showing of the Property with another real estate broker, an African-American male. That real estate broker then told the Realtor that the Buyer had been to the Property previously with another real estate broker. Realtor then recalled that Buyer had been to the property previously.

On or about January, 2009 Buyer contacted Realtor to make an offer to purchase the property. Realtor asked Buyer to contact the real estate broker with whom the Buyer had last visited the property, the African-American male. Buyer responded that she was not working with that male real estate broker but had only met him at an open house at another property. Realtor then asked the Buyer to contact Buyer's Broker with whom Buyer had originally seen the property. Buyer stated that she had terminated the services of Buyer's Broker was not working with any real estate agent. Buyer did not inform the Realtor that she had a contract with the Buyer's Broker. At that time Buyer signed a Dual Agency Agreement with Realtor (Exhibit 2). At that time Buyer offered to purchase the Property which offer was accepted (Exhibit 3). Buyer retained counsel who reviewed and approved a Purchase and Sale Agreement (Exhibit 4). The parties to the transaction executed a Purchase and Sale Agreement (Exhibit 5).
The Purchase and Sale Agreement contained a clause stating "The buyer & seller represent & warrant to one another that neither has contacted real estate broker(s) in connecting with the transaction & neither was directed to the other as a result of any services or facilities for any real estate broker other than the broker(s) listed in Paragraph #18. Each agrees to indemnify & hold harmless the other from & against all claims for any brokerage commission on account of this transaction by any other broker(s) who has established by Court action a right to such a commission arising out of his dealing with the other. This paragraph shall survive delivery of the deed hereunder." (Exhibit 5, Paragraph 30). On or about January 23, 2009 Realtor was contacted by Buyer's attorney regarding Buyer's Broker's commission. Still neither Buyer nor Buyer's counsel informed Realtor that a contract existed between Buyer and Buyer's Broker. During the same period Buyer's Broker's attorney contacted Realtor and Company about a broker fee, alleging that Buyer's Broker had procured the Buyer to purchase the Property (Exhibit 6). Company contacted its counsel who immediately addressed the situation in writing to Buyer's Broker's counsel (Exhibit 7). No response to the correspondence was received.

On or about June 24, 2009 Buyer's Broker brought an action against Buyer for a commission. On or about July 15, 2009 Buyer impleaded Realtor and Company.
ARGUMENT

A motion to dismiss may be allowed where a plaintiff has failed to state a claim upon which relief may be granted. Mass. R.Civ.P. 12(b)(6). In allowing a motion to dismiss the court must determine whether "the allegations in the pleading attacked disclose with certainty that the plaintiff would not be entitled to relief under any state of facts which could be proved in support of the claim." Berish v. Bornstein, 437 Mass. 252, 267 (2002). The effect, then, of this rule is that the plaintiff has the burden of setting forth sufficient facts, which if proved at trial, will entitle him to relief. Nader v. Citron, 372 Mass. 96, 97-98 (1977) citing Conley v. Gibson, 355 U.S. 41, 45-46 (1957).

Here, Plaintiff has not set forth sufficient facts which if proved at trial would entitle her to relief. If all of the facts in Buyer's Third Party Complaint are true, Buyer would not prevail at trial since Realtor was an agent of Company. Therefore, any and all actions by Realtor throughout the subject transaction and sale of the Property were the actions of Company, also a defendant in the within action.

An employer may be held liable for the actions of its agents acting within the scope of employment. Dias v. Brigham Medical Associates, Inc., 438 Mass. 317 (2002). At the time of the action, the servant's act must have been performed in the
course of doing his master's work, in carrying out his master's directions, or in accomplishing his master's business. Coughlin v. Rosen, 220 Mass. 220, 223 (1915); Khoury v. Edison Electric Illuminating Co., 265 Mass. 236, 238 (1928). It is sufficient that the master has the right to control the servant's general activities and need not control the details of the servant's work for the master. Id.; Levi v. Brooks, 121 Mass. 501, 505 (1877).

In this case, at all relevant time throughout the transaction, Realtor, an independent contractor rendering her services through Company, was working as an agent of Company. Company is a named defendant in the Third Party Complaint. Realtor is not personally liable to a third party for actions she took during her employment and in furtherance of her employer's business. During the entire transaction, Realtor was performing duties as part of her work as a real estate agent with Company, engaging in selling the Property listed for sale by Company, at Company's direction and in an attempt to accomplish a sale on behalf of Company. Therefore, the actions alleged in the Third Party Complaint were the actions of Company and not of Realtor individually. Even if all of the facts alleged in the Third Party Complaint, Company shall be held liable for Realtor's actions. Realtor is not personally liable for actions done within the scope of her employment.
Since Realtor's actions occurred during and within the scope of her employment and since Company is a named defendant, the Third Party Complaint against Realtor should be dismissed.

CONCLUSION

For these reasons, this Court should allow the motion to dismiss.

Respectfully Submitted,
Kristine Valente, Defendant
By her attorney,

Dated: 10/06/09

Alba Doto Baccari
Azzari Doto Baccari, LLP
316 Central Street
Saugus, MA 01906
(781) 233-0909
BBO # 554604
I, Kristine Valente, Third Party Defendant in the above-captioned matter do hereby under oath state that:

1. I am a real estate agent licensed to practice in the Commonwealth of Massachusetts;

2. I am currently an independent contractor selling real estate through Carpenito Real Estate, Inc.;

3. At all relevant times during the course of the events alleged in the within action, I was acting as an agent of Carpenito Real Estate, Inc.

Signed under the pains and penalties of perjury.

Date: 10/06/09

Kristine Valente
October 22, 2009

Civil Clerk
Somerville District Court
175 Fellsway
Somerville, MA 02145-5108

Re: Aronova
Vs. Krylova
Vs. Carpenito Real Estate and Kristine Valente
C.A. No.: 0910CV814

Dear Clerk:

Enclosed please find for docketing:

1. Third Party Plaintiff’s, Olena Krylova Opposition to Third Party Defendant, Kristine Valente Motion To Dismiss; and
2. Supporting Affidavit.

Please note that this matter is scheduled for hearing on November 4, 2009 at 9:00 a.m.

Thank you for your attention to this matter.

Very truly yours,

Steven C. Sharaf

/SCS
Enclosures
cc: Alba Doto Baccari, Esq.
Franziskus Lepionka, Esq.
COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, ss. SOMERVILLE DISTRICT COURT

MARGARITA ARONOVA

C.A. NO. 0910CV814

v.

OLENA KRYLOVA

Plaintiff,

Defendant and Third Party Plaintiff,

v.

CARPENITO REAL ESTATE, INC. and KRISTINE VALENTE,

Third Party Defendants.

THIRD PARTY PLAINTIFF’S, OLENA KRYLOVA OPPOSITION TO THIRD PARTY DEFENDANT, KRISTINE VALENTE MOTION TO DISMISS

Now comes the Third Party Plaintiff, Olena Krylova, and respectfully requests that the Court deny the Third Party Defendant, Kristine Valente’s Motion to Dismiss. In support of this Opposition, the Third Party Plaintiff submits the attached affidavit and states as follows:

Factual Allegations

1. On or about November 27, 2006 the Third Party Plaintiff, Olena Krylova, signed a Buyer Representation Agreement with the Plaintiff Margarita Aronova.

2. At the time the Third Party Plaintiff signed the Buyer Representation Agreement she did not speak, read or understand English very well.

3. Pursuant to the Buyer Representation Agreement, the Plaintiff agreed to “use reasonably diligent efforts to locate” a residential real estate property for the Third Party Plaintiff.

4. Throughout the time period in which the Buyer Representation Agreement was alleged to be in effect, the Plaintiff did not introduce nor locate any properties for the Third Party Plaintiff to consider.
5. On or about November 30, 2008, the Third Party Plaintiff found a property that she was interested in and emailed the Plaintiff to let her know that she was interested in seeing the property. This property is identified as 8 Cross Street East, Somerville, Massachusetts.

6. In or around early December, 2006, the Third Party Plaintiff informed the Plaintiff that she was not satisfied with her services and considered her actions in breach of the Buyer Representation Agreement.

7. In or around early January, 2007, without help from the Plaintiff, the Third Party Plaintiff returned to see the house that she had located on Cross Street as the price had been reduced.

8. The Third Party Plaintiff contacted the seller’s broker, Third Party Defendant, Kristine Valente of Carpenito Real Estate, Inc. directly and made an offer to purchase 8 Cross Street East, Somerville, Massachusetts.

9. At the time of the signing of the Purchase and Sale Agreement, the Third Party Plaintiff informed Third Party Defendant, Kristine Valente as agent for Third Party Defendant, Carpenito Real Estate that she had worked with a buyer broker and identified the Plaintiff.

10. The Third Party Defendant, Kristine Valente, told the Third Party Plaintiff not to worry about the buyer broker and that they would take care of her. The Third Party Plaintiff was then instructed to sign the Purchase and Sale Agreement. As the Third Party Plaintiff understood very little English she did so without consulting an attorney nor did the Third Party Defendant, Kristine Valente, ever advise her that she should consult with an attorney.

11. At the sale of 8 Cross Street East, Somerville, Massachusetts, the full commission of 5% was paid to the Third Party Defendant, Kristine Valente.
Argument

As set forth under Rule 12 of the Massachusetts Rules of Civil Procedure, "[a] motion under Rule 12(b)(6), like the traditional demurrer, tests the legal sufficiency of the complaint, counterclaim, or cross-claim. It should be allowed if and only if 'it appears to a certainty that [the claiming pleader] is entitled to no relief under any state of facts which could be proved in support of the claim.'" Emphasis added. M.R.C.P. Rule 12 citing 2A Moore, Federal Practice 2245. Third Party Plaintiff respectfully suggests that the Third Party Defendant has clearly failed to present even the most minimal support to satisfy this standard.

The Third Party Defendant's Motion to Dismiss lacks factual and legal support. First, the Third Party Defendant's statement of "Facts" is unsupported. A number of statements are made which are not contained in any of the existing pleadings and no affidavits have been submitted to substantiate the facts alleged. The only affidavit submitted by the Third Party Defendant merely states that she is an independent contractor licensed to sell real estate and that she was acting as an agent of Third Party Defendant Carpenito Real Estate, Inc. However, there is unsupported reference to numerous conversations and allegations of events which took place in the Third Party Defendant's Motion to Dismiss. There is no affidavit or other evidence submitted by the Third Party Defendant supporting the allegations made nor is there any evidence to support her summary of conversations held with the Third Party Plaintiff. Specifically, reference is made, but not limited, to the following without support:

a. That the Plaintiff contacted the Third Party Defendant on or about September, 2006 in regard to 8 Cross Street East, Somerville, Massachusetts. "Exhibit 1" submitted by the Third Party Defendant is not evidence as it is merely a printout from July 21, 2009 (nearly three years later) of the listing sheet.
b. That conversations were held on or about January, 2007 with “another real estate broker, an African-American male....”

c. That on or about January, 2009, conversations were held with the Third Party Plaintiff and that the Third Party Plaintiff informed the Third Party Defendant that “she was not working with that male real estate broker...” and that “she was not working with any real estate agent....”

d. That the Third Party Plaintiff “did not inform the Realtor that she had a contract with the Buyer’s Broker.”

There is nothing contained in the Third Party Defendant’s Motion to Dismiss nor in the existing pleadings or documents submitted to date which support any of the factual allegations. To allow a motion to dismiss based upon unsubstantiated claims and without the benefit of cross examination for a fact finder to determine credibility would be patently premature and unjust to the Third Party Plaintiff.

Second, the Third Party Defendant argues that “[i]f all of the facts in Buyer’s Third Party Complaint are true, Buyer would not prevail at trial since Realtor was an agent of Company.” The Third Party Defendant further admits that she is an independent contractor. The Third Party Plaintiff’s Complaint contains claims for violations of M.G.L. c. 93A, Breach of Contract, Misrepresentation, Fraud, Intentional Infliction of Emotional Distress and Negligent Infliction of Emotional Distress. Taking these claims as true leads one to conclude that the Third Party Defendant, an “independent contractor,” was within her “scope of employment” when she violated M.G.L. c. 93A, breached the dual agency agreement, misrepresented material facts, committed fraud and intentionally/negligently inflicted emotional distress upon the Third Party Plaintiff. There is nothing in the Third Party Defendant’s Motion to Dismiss to suggest that the
Third Party Defendant, Carpenito Real Estate, Inc. confirms that such actions were at their
direction and with their approval.

Conclusion

Based upon the foregoing, the Third Party Plaintiff respectfully requests that the Court
deny the Third Party Defendant’s Motion to Dismiss.

Third Party Plaintiff,
Olena Krylova,
By her attorney,

Steven C. Sharaf, BBO#552524
109 Highland Avenue
Needham, MA 02494
(781)455-0300

Dated: October 22, 2009

CERTIFICATE OF SERVICE

I, Steven C. Sharaf, certify that on October 22, 2009, I served a copy of the foregoing
pleading/document by first class mail, postage prepaid, upon all counsel of record.

Steven C. Sharaf, BBO#552524
109 Highland Avenue
Needham, MA 02494
(781)455-0300
COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, ss. SOMERVILLE DISTRICT COURT
C.A. NO. 0910CV814

MARGARITA ARONOVA
Plaintiff,

v.

OLENA KRYLOVA
Defendant and Third
Party Plaintiff,

v.

CARPENITO REAL ESTATE, INC. and
KRISTINE VALENTE,
Third Party Defendants.

AFFIDAVIT OF OLENA KRYLOVA IN OPPOSITION TO THIRD PARTY DEFENDANT’S MOTION TO DISMISS

Now comes the Third Party Plaintiff, Olena Krylova, in the above-captioned matter and under oath depose and says as follows:

1. I am the named third party plaintiff in the above-captioned matter.

2. On or about November 27, 2006 I signed a Buyer Representation Agreement with the Plaintiff Margarita Aronova.

3. At the time I signed the Buyer Representation Agreement I did not speak, read or understand English very well.

4. Pursuant to the Buyer Representation Agreement, the Plaintiff agreed to “use reasonably diligent efforts to locate” a residential real estate property for me.

5. Throughout the time period in which the Buyer Representation Agreement was alleged to be in effect, the Plaintiff did not introduce nor locate any properties for me to consider.

6. On or about November 30, 2008, I found a property that I was interested in and emailed the Plaintiff to let her know that I was interested in seeing the property. This property is identified as 8 Cross Street East, Somerville, Massachusetts.
7. In or around early December, 2006, I informed the Plaintiff that I was not satisfied with her services and considered her actions in breach of the Buyer Representation Agreement.

8. In or around early January, 2007, without help from the Plaintiff, I returned to see the house that I had located on Cross Street as the price had been reduced.

9. I contacted the seller’s broker, Third Party Defendant Kristine Valente of Carpenito Real Estate, Inc. directly and made an offer to purchase 8 Cross Street East, Somerville, Massachusetts.

10. At the time of the signing of the Purchase and Sale Agreement, I informed Third Party Defendant, Kristine Valente as agent for Third Party Defendant Carpenito Real Estate that I had worked with a buyer broker and identified the Plaintiff.

11. The selling broker, Third Party Defendant, Kristine Valente, told me not to worry about the buyer broker and that they would take care of her. I was then instructed to sign the Purchase and Sale Agreement. As I understood very little English I did so without consulting an attorney nor did the selling broker, Third Party Defendant, Kristine Valente, ever advise me that I should consult with an attorney.

12. At the sale of 8 Cross Street East, Somerville, Massachusetts, the full commission of 5% was paid to the selling broker, Third Party Defendant, Kristine Valente.

Signed under the pains and penalties of perjury, this 15th day of October, 2009.

Olena Krylova
MIDDELSEX, ss.

MARGARITA ARONOVA
Plaintiff,

v.

OLENA KRYLOVA
Defendant &
Third Party Plaintiff,

v.

CARPENITO REAL ESTATE, INC.
And KRISTINE VALENTE
Third Party Defendants.

PLAINTIFF ARONOVA’S OPPOSITION TO
THIRD PARTY DEFENDANT VALENTE’S MOTION TO DISMISS

NOW COMES the plaintiff, Margarita Aronova ("Aronova") and respectfully OPPOSES the third party defendant, Kristine Valente’s ("Valente") Motion to Dismiss Subject to Opposition Procedure and the memorandum of law based thereon. As reasons herefor, the plaintiff states the following:
I. PROCEDURAL AND FACTUAL BACKGROUND\(^1\)

This is an action for damages brought by a realtor, Ms. Aronova, against her client, Ms. Olena Krylova ("Krylova"). After Ms. Aronova filed suit against Ms. Krylova for breach of contract, Ms. Krylova impleaded Ms. Valente and Carpenito Real Estate.

Ms. Krylova, a buyer of real estate, signed a binding "Buyer Representation Agreement" with Ms. Aronova, which granted Ms. Aronova the sole and exclusive right to arrange for the acquisition by Ms. Krylova of a multi-family property. The term of the Agreement ran from November 27, 2006 through March 31, 2007.

Ms. Aronova performed under the terms of the Agreement by introducing Ms. Krylova in November-December 2006, to 8 Cross Street East in Somerville, Massachusetts. During this time, Ms. Aronova also introduced Ms. Krylova to the sellers' exclusive real estate agent, Ms. Valente.

Subsequently, on January 15, 2007, Ms. Krylova signed a Notice of Dual Agency wherein she agreed agent Kristine Valente could represent both the sellers DiPrizio and Ventola ("Sellers") and the buyer Ms. Krylova in the sale of 8 Cross

\(^1\) See Affidavit of Margarita Aronova, dated June 17, 2009, attached as Exhibit A, for support of all facts averred herein by the plaintiff.

Ms. Valente, an employee of Carpenito Real Estate, never informed Ms. Aronova of the ongoing negotiation and sale of 8 Cross Street East, and allegedly collected, on behalf of herself and Carpenito Real Estate, the full 5% brokers' commission.

To date, Ms. Krylova has failed to pay Ms. Aronova under the terms of the Agreement, and has breached the Buyer's Representation Agreement. Moreover, even though Ms. Valente and Carpenito Real Estate are aware of Ms. Aronova's role in the sale of 8 Cross Street East, they have not paid over any of the commission owed Ms. Aronova.

II. STANDARD OF REVIEW

Confronted with a Motion to Dismiss pursuant to Mass.R.Civ.P. Rule 12(b)(6), Ms. Krylova is entitled to a deferential standard of review. In considering a motion to dismiss pursuant to Mass.R.Civ.P. Rule 12(b)(6), the Court must "accept the factual allegations in the [third-party plaintiff's] complaint, as well as any favorable inferences reasonably drawn from them, as true." 2 Ginther v. Commissioner of Insurance, 427 Mass. 319, 322 (1998). Furthermore, in considering a 12(b)(6)

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2 Aronova urges this Court, for the limited purpose of ruling on the instant motion to adopt Krylova's factual allegations as true, in so far as those allegations do not contradict factual allegations made by Aronova. Except for where explicitly noted, Aronova does not accept as true any factual allegations made by the other parties.

III. ARGUMENT

Ms. Valente is correct in arguing that Carpenito Real Estate is liable for interfering in the contractual relationship between Ms. Aronova and Ms. Krylova. However, Ms. Valente cannot be dismissed from this action for she too played an integral and liable role in the disruption of the contractual relationship between Ms. Aronova and Ms. Krylova.

It has become clear, through discovery provided to the plaintiff by Ms. Krylova, that Ms. Valente warranted she was the sole representative for the sellers of 8 Cross Street East, even to the exclusion of Carpenito Real Estate. Exhibit B. In her capacity as sole real estate agent, Ms. Valente and Ms. Aronova made personal contact in order to further the sale.

Ms. Valente alleges she had no idea a contract existed between Ms. Krylova and her broker Ms. Aronova, even though such contracts are standard. At the same time, Ms. Valente herself
acknowledges she knew at the time of the sale that Ms. Aronova was entitled to a broker’s fee, which was presumably based on a contract between Ms. Aronova and Ms. Krylova. Exhibit C. Moreover, Ms. Krylova alleges she informed Ms. Valente that Ms. Aronova was her buyer’s broker. In response, Ms. Valente allegedly told her “not to worry about [Aronova] and that [she] would take care of her.” Krylova Affidavit, ¶11 (Oct. 15, 2009).

The court must accept as true the allegations made by Ms. Krylova (and Ms. Aronova), that Ms. Valente intentionally chose to ignore the Buyer’s Representation Agreement, and in so doing interfered in the contractual relationship between Ms. Aronova and Ms. Krylova. Opus Investment Management, Inc. v. John C. Donohue et al., 18 Mass. L. Rep. 51 (2004). “Intentional interference with contractual relations can serve as the basis for unfair or deceptive practices under G.L. 93A §11.” Id. (citing Melo-Tone Vending v. Sherry, Inc., 39 Mass.App.Ct. 315, 320 (1995). Accordingly, Ms. Krylova’s third-party complaint makes a c. 93A claim, and since the third-party complaint states a valid cause of action under c. 93A (and since plaintiff Aronova now also appears to have a 93A claim) against Ms. Valente, she cannot be dismissed from the instant case.
IV. CONCLUSION

WHEREFORE, plaintiff Aronova respectfully requests that this honorable court DENY third-party defendant Ms. Valente's Motion to Dismiss.

Respectfully
MARGARITA ARONOVA
By her Attorney,

[Signature]

Franziskus Lepionka, Esquire
BBO# 664049
Bourbeau & Associates, P.C.
266 Beacon Street
Boston, MA 02116
Tel: (617) 536-9695
Fax: (617) 536-9697

Dated: November 25th, 2009

CERTIFICATE OF SERVICE

I hereby certify that I have this date served a copy of the foregoing by first class mail on all counsel of record and all parties appearing pro se.

[Signature]

Dated: November 25th, 2009

Franziskus Lepionka, Esq.
MRCP RULE 4.1(h) AFFIDAVIT OF MARGARITA ARONOVA

NOW COMES the plaintiff Margarita Aronova, pursuant to Mass. Rule of Civ. Pro. Rule 4.1(h) and in support of her motion for attachment of defendant’s real property, and hereby states the following to be based upon her own knowledge, information or belief; and, so far as upon information and belief, states she believes this information to be true:

1. On November 27, 2006, Ms. Krylova and I signed a binding Buyer Representation Agreement (“Agreement”). See Attachment A.


3. During the term of the Agreement, Ms. Krylova granted me the sole and exclusive right to arrange for the acquisition by Ms. Krylova of a multi-family property.

4. The agreement specified Ms. Krylova would pay a fee equal to 2.5% of the purchase price of the property when any one of the below enumerated conditions were met:
a. Buyer took title to the property;

b. Buyer signed a contract to purchase and assigned it to another buyer;

c. Buyer signed a contract to purchase which consisted of an option, and the Buyer allowed the option to lapse;

d. During the term of the Agreement the Buyer or any person acting for the Buyer on the Buyer's behalf ("Buyer's Nominee") entered into the contract or otherwise acquired the property, whether through the services of Ms. Aronova or otherwise; or

e. Within three (3) months following the term of the Agreement, the Buyer or Buyer's Nominee entered into a contract or otherwise acquired the property after receiving information about the property from Ms. Aronova during said term.

5. On November 30, 2006, Ms. Krylova responded to my email of a real estate listing for 8 Cross Street East. In the email, Ms. Krylova confirmed she would speak with me about the property at 8 Cross Street East ("8 Cross Street East") on either December 1 or 2, 2006. See Attachment B.

6. On December 1 through December 3, 2006, Ms. Krylova and I held a number of phone conversations about 8 Cross Street East and other listings. See Attachment C.

7. I introduced in person Kristine Valento, the broker for the 8 Cross Street East sellers, to Ms. Krylova when I showed 8 Cross Street East to Ms. Krylova.

8. Upon information and belief, on January 15, 2007, Ms. Krylova signed a Notice of Dual Agency wherein she agreed broker Kristine Valento could represent both the sellers DiPrizio and Ventola ("Sellers") and the buyer Ms. Krylova in the sale of 8 Cross Street East. See Attachment D.

9. Upon information and belief, on January 15, 2007, Ms. Krylova and the Sellers entered into a contract
to purchase 8 Cross Street East. Kristine Valento
served as the broker to both parties. I was not
informed.

10. Upon information and belief, on February 5, 2007,
Ms. Krylova and the Sellers entered into a Sales
Agreement. I was not informed.

11. On February 28, 2007, the sellers delivered the deed
to 8 Cross Street East to Ms. Krylova, and on March
1, 2007, Ms. Krylova recorded the deed. I was not
informed. See Attachment E.

12. Ms. Krylova, as the buyer, has taken title to the
property, 8 Cross Street East, which was introduced
to her by me. Thus, I am entitled under the
November 27, 2006 Buyer Representation Agreement to
2.5% of the purchase price Ms. Krylova paid for 8
Cross Street East.

13. Upon information and belief, Ms. Krylova paid
$460,000.00 for 8 Cross Street East. See Attachment
E.

14. 2.5% of $460,000.00 equals $11,500.00.

15. Thus, pursuant to the November 27, 2006 Buyer
Representation Agreement, Ms. Krylova owes me
$11,500.00.

16. To date, Ms. Krylova has not paid me the $11,500.00.

17. I am unaware of Ms. Krylova having any liability
insurance available to satisfy any judgment against
her in the instant action.

18. Given Ms. Krylova's past behavior and willingness to
breach her contract with me so as to avoid paying
the fee I earned, a clear danger exists that Ms.
Krylova if notified in advance of attachment of 8
Cross Street East will convey the property.

[SIGNATURE BLOCK ON NEXT PAGE]
Signed under the pains and penalties of perjury, this 17th day of June, 2009.

Margarita Aronova
THE EMPLOYERS' FIRE INSURANCE CO., as subrogee of Debbie Wong Restaurant, Inc.,
One Beacon Street, Boston, MA 02188
Plaintiff,

VS.

FIRE DEFENSE CENTERS, INC.,
832 Siles Deane Highway
Wethersfield, Connecticut 06109

DEFENDANT, FIRE DEFENSE CENTER'S
MOTION FOR SUMMARY JUDGMENT

Pursuant to Rule 56 of the Federal Rules of Civil Procedure, the defendant,
Fire Defense Center, moves for summary judgment as to the plaintiff's Complaint.

As grounds therefore, the defendant states the following:

1. This is a subrogation action in which the plaintiff alleges that the
defendant was negligent in the servicing of a fire suppression system. The contract
entered into between the plaintiff's insured and the defendant contains a Limitation
of Liability Clause limiting damages to $50.00. The Limitation of Liability Clause
also requires that any alleged negligence by the defendant must by the "sole
proximate cause" of the plaintiff's loss. The defendant seeks, by way of this motion
and accompanying Memorandum of Law, to have summary judgment entered in
its favor or alternatively to limit any damages sought by the plaintiff to $50.00.

2. In support of this Motion, the defendant incorporates as if fully set
forth herein, pursuant to Rule 10(c) of the Federal Rules of Civil Procedure, its
Memorandum in Support of this Motion attached hereto with exhibits.

3. Furthermore, the defendant certifies that the parties have conferred and have attempted in good faith to resolve or narrow this issue pursuant to United States District Court, Local Rule 7.1(A)(2). In fact, at the Scheduling Conference before the Court on October 25, 1996, the defendant informed the Court of this issue in the presence of plaintiff's counsel. Plaintiff's counsel responded by stating that he did not believe that the Limitation of Liability provision was applicable in this case. Therefore, this issue cannot be resolved without the Court's involvement.

WHEREFORE, Fire Defense Center requests that this Court allow their Motion, enter judgment in their favor and grant them such other relief as the Court deems appropriate under the circumstances.

Respectfully submitted,
Fire Defense Center,

By their attorneys,

Richard E. Brody, BBO#058260
Steven C. Sharaf, BBO#552524
BRODY, HARDOON, PERKINS & KESTEN
200 State Street
Boston, MA 02109
(617) 951-3900

Dated: 12/17/96
INTRODUCTION

The defendant, Fire Defense Center, seeks by this Motion to limit the damages of the plaintiff, The Employers' Fire Insurance Co., as subrogee of Debbie Wong Restaurant, Inc., to $50.00 in accordance with the Limitation of Liability Provision in the Extinguishing System Sales Agreement entered into between Fire Defense Center and the Debbie Wong Restaurant in February, 1980. Furthermore, the defendant, Fire Defense Center, also seeks entry of summary judgment in accordance with the Liability Provision in the Extinguishing System Sales Agreement which requires that any alleged negligence by the defendant must be the "sole proximate cause" of the plaintiff's loss.

II. STATEMENT OF REASONS

A. Uncontested Facts.
1. Debbie Wong Restaurant, Inc. and the defendant, Fire Defense Center, entered into an Extinguishing System Sales Agreement dated February 18, 1980 (See the Extinguishing System Sales Agreement attached hereto as Exhibit "A").

2. Pursuant to the Extinguishing System Sales Agreement, Fire Defense Center was to install an automatic and manual dry chemical fire protection system at the Debbie Wong Restaurant located at 1168 Boston Road, Springfield, Massachusetts.

3. On July 19, 1995, a fire occurred at the Debbie Wong Restaurant. See Massachusetts Fire Incident Report attached as Exhibit "C". The plaintiff, as subrogee of Debbie Wong Restaurant alleges that the restaurant sustained damages as a result of the defendant’s failure to properly maintain the fire suppression system.

4. The individual who signed the Extinguishing System Sales Agreement on behalf of Debbie Wong Restaurant, Inc., was duly authorized to sign the Extinguishing System Sales Agreement on behalf of Debbie Wong Restaurant, Inc., as he is an authorized officer of Debbie Wong Restaurant. See Deposition of Kaigee Debbie Liu, pages 8, 39 and 40, attached as Exhibit "D".

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1 Fire Defense Center was purchased by Aloi Electric Service, Inc. in April, 1990. Pursuant to that sale all active contracts entered into by Fire Defense Center, prior to the purchase by Aloi Electric Service, Inc., were acquired by Aloi Electric Service, Inc. pursuant to the asset purchase agreement. See Affidavit of Paul Aloi with accompanying document attached as Exhibit "B".

2 Kaigee Debbie Liu's maiden name is Wong. Hence the name Debbie Wong Restaurant. See Deposition of Kaigee Debbie Liu, page 4, attached as Exhibit "D".
5. The Extinguishing System Sales Agreement, Section 4C(2) states as follows:

In the event the System should malfunction or nonfunction and provable damage or loss to the person or property of Buyer or others be alleged in any legal, equitable, or administrative action, FIRE DEFENSE CENTER shall be liable only if it is proven, that its installation or service was negligently performed and that such negligent performance was the sole proximate cause of the malfunction or nonfunction resulting in the proven damage or loss, and FIRE DEFENSE CENTER’s liability shall be limited to a fixed sum of $50 as liquidated damages, and no more.

6. The Extinguishing System Sales Agreement also provides in pertinent part:

Section 5. Miscellaneous

C. This Agreement constitutes the entire agreement of FIRE DEFENSE CENTER and Buyer and all other statements, representations and agreements, if not set forth herein, have no further force or effect and shall be null and void.

7. The Debbie Wong Restaurant and Fire Defense Center did not modify the terms of the Extinguishing System Sales Agreement in question in writing prior to the time of the purported loss (i.e., July 19, 1995). See Affidavit of Paul A. Aloi attached as Exhibit “B”.

8. The plaintiff seeks damages in the amount of $135,000 as a result of the property loss and damage which it allegedly sustained on July 19, 1995.

B. Standard for a Motion for Summary Judgment

Summary Judgment Should Be Granted Where There Are No Genuine Issue as to Any Material Fact and the Moving Party is Entitled to Judgment as a Matter of Law.

Rule 56 of the Federal Rules of Civil Procedure allows for the prompt disposition of controversies on their merits without a trial, if no real dispute as to their salient facts exits. Cassesso v. Commissioner of Correction, 390 Mass. 419, 422
(1983); Community National Bank v. Dawes, 369 Mass. 550, 553 1976). Rule 56(c) provides that summary judgment should enter:

...if the pleading, depositions, answers to Interrogatories, and admissions on file together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.

Opposing parties will not successfully avoid summary judgment when they merely raise "vague and general allegations of expected proof." Dawes, 369 Mass. at 555, 556, quoting Albre Marble & Tile Co. v. John Bowen Co., 338 Mass. 394, 397 (1959). In Anderson v. Liberty Lobby, 106 S.Ct. 2505 (1986), the United States Supreme Court held that the standard for summary judgment "mirrors the standard for directed verdict under Federal Rule of Civil Procedure 50(a)." Id. at 2511; Kaitz v. Foreign Motors, Inc., 25 Mass. App. Ct. 198, 200 (1987). That is, "the inquiry under each is the same; whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." Anderson, 106 S.Ct. at 2515. "Once the movant avers an absence of evidence to support the non-moving party's case, the latter must adduce specific facts establishing the existence of at least one issue that is both 'genuine' and 'material.' " Sheinkopf v. Stone, 927 F.2d 1259, 1261 (1st Cir. 1991) quoting Celotex Corp. v. Nell Catrett, 477 U.S. 317 and Anderson 106 S.Ct. 2510.

In determining whether a genuine issue of fact exists under the rule, the Court held that:

[i]the mere existence of a scintilla of evidence in support of the [non-moving] party's position will be insufficient; there must be evidence on which the jury could reasonably find for the [non-moving party].
"The mere existence of a factual dispute, of course, is not enough to defeat summary judgment." Sheinkopf, 927 F.2d at 1262. "The evidence relied upon [by the non-moving party] must be 'significantly probative' of specific facts which are 'material' in the sense that the dispute over them necessarily 'affect[s] the outcome of the suit.'" Id. quoting Anderson, 106 S.Ct. at 2510-11. "[T]he party opposing summary judgment must demonstrate that there are bona fide factual issues which 'need to be resolved before the related legal issues can be decided.'" Id., quoting Mack v. Great Atlantic and Pacific Tea Co., 871 F.2d 179, 181 (1st Cir. 1989). In deciding upon a dispositive motion, "'[t]he Court] need not give credence to 'mere allegations,' or draw inferences where they are implausible or not supported by 'specific facts.'" Sheinkopf, 927 F.2d at 1262 citing Anderson, 106 S.Ct. at 2510.

Nor can the court accept, in lieu of documented facts, conclusory assertions." Id. "[C]onclusory allegations do not pass muster, and hence, must be disregarded." Id.

In Celotex Corp. v. Nell Catrett, 477 U.S. 317, 323, 324 (1986), the United States Supreme Court held that summary judgment would be granted against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. In Kourouvacilis v. General Motors Corp., 410 Mass. 706, 712-714 (1991), the Massachusetts Supreme Judicial Court embraced the standard articulated in Celotex to the effect that "'where [as here] the non-moving party will bear the burden of proof at trial on a dispositive issue, a summary judgment motion may properly be made in reliance solely on the 'pleading, depositions,
answers to interrogatories, and admissions on file."

C. Limitation of Liability Provisions are Uniformly Upheld in Massachusetts.


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The defendant relies upon Massachusetts law to interpret the limitation of liability provision as the contract between Fire Defense Center and Debbie Wong Restaurant was entered into in Massachusetts, the Debbie Wong Restaurant is located in Massachusetts and the alleged incident occurred in Massachusetts. Furthermore, all servicing of the fire suppression system installed at the Debbie Wong Restaurant by Fire Defense Center was performed in Massachusetts.

The courts virtually always uphold reasonable limitation of liability clauses when the potential damages are extensive especially when compared to the renumeration received by the party potentially exposed to those damages. The present case provides a clear example of the public policy behind this well established law. In the present case, Fire Defense Center received $1,700.00 for the initial installation of the system and another $55.00 semi-annually thereafter for inspections. Yet, the purported property damage allegedly sustained by the Debbie Wong Restaurant was approximately $135,000. A company receiving only $55.00 twice a year has compelling reasons to limit its liability so as to permit it to stay in business. For example, to recoup the sums the plaintiff claims it is owed, the defendant would have to collect inspection fees for more than 1200 years without incurring any costs of running its business merely to break even.

Therefore, as the contract containing the limitation of liability provision was entered into between two commercial business entities and as public policy clearly

4 In fact, Thomas Wong’s restaurant corporation has been represented by an attorney since the establishment of their first restaurant in 1970 (well before this contract was entered into.) See Deposition of Kaigee Debbie Liu, pages 11, 46 and 48 attached as Exhibit “D”. This is not a disadvantaged “consumer.”
dictates a finding that such limitation of liability provisions are acceptable, the plaintiff's claimed damages must be limited, if payable at all, to the liquidated damages sum of $50.00. As set forth below in section D, the defendant would also argue that the plaintiff is not entitled to the liquidated damages sum of $50.00.

It is expected that the plaintiff may argue that because Fire Defense Center was sold to the present owner in April, 1990, the contract dated February, 1980, was no longer valid. However, clearly the facts establish otherwise. The sale of Fire Defense Center was merely an ownership change. As set forth in the Affidavit of Paul Aloi, attached as Exhibit "B", this defendant acquired everything from the previous owner. In fact, for at least a one year period, the defendant also acquired the previous owner. The sale included all assets, inventory, supplies, employees and motor vehicles. Furthermore, the sale included the tradename, goodwill and customer lists from the previous owner. See Asset Purchase Agreement dated April 2, 1990, attached to the Affidavit of Paul Aloi. To suggest that every existing contract expired upon the date of the transfer of ownership is a far leap indeed, and clearly not supported by the evidence. As is also set forth in the Affidavit of Paul Aloi, attached as Exhibit "B", the defendant continued to service the Debbie Wong Restaurant according to the terms and conditions of the original contract. Furthermore, Debbie Wong testified at her deposition that up until the date of loss in July, 1995, it was her expectation that Fire Defense Center was responsible for maintaining and servicing the fire suppression system. See Deposition of Kaigee Debbie Liu, pages 19 and 20 attached as Exhibit "D". Finally, Charles Lowendowski, a
former employee of Fire Defense Center\(^5\) testified at his deposition that when he left
Fire Defense Center to start his own business, he attempted to solicit the Debbie
Wong Restaurant. However, he was told that they would remain with Fire Defense
Center. See Deposition of Charles Lowendowski, pages 11, 12 and 13, attached as
Exhibit “E”. Ironically, if it is the plaintiff’s contention that no contract exists, then
why are they suing this defendant. If the plaintiff is suggesting that certain work
was negligently performed by the defendant, the plaintiff must acknowledge that the
work was performed according to a contract the defendant had with the Debbie
Wong Restaurant. Why else would the defendant have been at the Debbie Wong
Restaurant when the alleged negligent act occurred?\(^6\)

There can be no question, that a valid contract existed between the Debbie
Wong Restaurant and Fire Defense Center. Based upon that valid contract, the
liability of the defendant must be limited to $50.00.

D. The Alleged Negligence By The Defendant Was Not The Sole
Proximate Cause For The Damages Sustained By the Plaintiff.

As set forth above, in order for the plaintiff to recover the liquidated damages
amount as set forth in Section 4C(2) of the Extinguishing System Sales Agreement,
the defendant’s alleged negligence must be the “sole proximate cause of the

\(^5\) In fact, Mr. Lowendowski was one of the employees that was acquired
with the sale of Fire Defense Center. See Deposition of Charles Lowendowski, pages
6 and 7, attached as Exhibit “E”.

\(^6\) Again, it was the expectation of the Debbie Wong Restaurant that Fire
Defense Center services their restaurant. The Debbie Wong Restaurant did not ask
Fire Defense Center to perform their last service call prior to this alleged incident, it
was expected. See Deposition of Kaigee Debbie Liu, page 24 attached as Exhibit “D”.

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malfunction or nonfunction resulting in the proven damage or loss....” See the Extinguishing System Sales Agreement attached as Exhibit “A”.

Pursuant to the Extinguishing System Sales Agreement, the defendant was to perform semi-annual servicing of the fire suppression system located at the Debbie Wong Restaurant. The last service date prior to the incident on July 19, 1995, was in January, 1995. The defendant was required to service the system again by the end of July, 1995. At no time prior to the incident on July 19, 1995, did the Debbie Wong Restaurant contact the defendant to perform any service. See Affidavit of Paul A. Aloi attached as Exhibit “B” and Deposition of Kaigee Debbie Liu, page 24, attached as Exhibit “D”.

Between each service date, the owner of the fire suppression system is required to inspect and maintain the system on a daily and monthly basis. It is the defendant’s contention (supported by Debbie Wong’s deposition testimony) that the Debbie Wong Restaurant’s failure to inspect and maintain the system on a daily and monthly basis contributed to the nonactivation of the fire suppression system. Therefore, the defendant’s alleged negligence cannot be the “sole proximate cause” for the nonactivation of the fire suppression system or for the plaintiff’s alleged loss. The defendant’s contention is supported by reviewing the Owners Manual for the Kidde Automatic Fire Suppression System, the Kidde Industrial Dry Chemical Fire Suppression System Installation, Operation, and Maintenance Manual and also pursuant to NFPA 17 Standard for Dry Chemical Extinguishing Systems, published by the National Fire Protection Association.
1. **Owners Manual**: It is the defendant's understanding and belief that at the time this fire suppression system was installed at the Debbie Wong Restaurant, the owners of the restaurant were provided with and were, in fact, in possession of a copy of the Owners Manual. See Affidavit of Paul A. Alai attached as Exhibit "B" and Deposition of Charles Lewandowski, pages 36 and 37 attached as Exhibit "E". The Owners Manual states that "[y]our system must be inspected and serviced on a regular basis to insure that it is always in a proper 'ready to operate' condition." Furthermore, the manual states that on a daily basis a number of checks of the system must be performed. See Owners Manual page 12 attached as Exhibit "F". It is the defendant's contention that the Debbie Wong Restaurant failed to perform any of these checks. Furthermore, Debbie Wong admits that none of these checks were performed nor has she ever reviewed the Owner's Manual. See Deposition of Kaigee Debbie Liu, pages 19, 20, 21, 34, 36, 37, 38, 40 and 64, attached as Exhibit "D".

Furthermore, on a monthly basis the Debbie Wong Restaurant is required to "[v]isually inspect all the System components as noted in this manual for damage, corrosion or alteration. Check that the fusible links or thermostats are clean and free of grease deposits. See Owners Manual page 12 attached as Exhibit "F". It is the defendant's contention that the Debbie Wong Restaurant failed to perform this inspection. Furthermore, Debbie Wong admits that no inspection was performed. See Deposition of Kaigee Debbie Liu, pages 19, 20, 21, 34 and 36, attached as Exhibit "D".
Finally, the Owners Manual states that in case of fire, "[d]on't wait for the system to discharge automatically. Instead, proceed to discharge it manually by pulling the Ring Pin out of the handle on the Control Head and turning the handle in a downward direction." See Owners Manual page 4 attached as Exhibit "F". It is the defendant's contention that the Debbie Wong Restaurant failed to follow this instruction and their failure contributed to the nonactivation of the fire suppression system. Furthermore, Debbie Wong admits that no one attempted to manually activate the fire suppression system. See Deposition of Kaigee Debbie Liu, pages 60, 61 and 64, attached as Exhibit "D".

2. Industrial Dry Chemical Fire Suppression System Installation, Operation and Maintenance Manual: The Service and Maintenance section states that "[I]n accordance with NFPA 17, make frequent inspections to ascertain that the system is operable. Also, be sure that nothing has occurred which would compromise the effectiveness of the system." See Industrial Dry Chemical Fire Suppression System Installation, Operation and Maintenance Manual page 9-1 attached as Exhibit "G". Furthermore, the owner is required to perform a number of system checks on a daily basis. See Industrial Dry Chemical Fire Suppression System Installation, Operation and Maintenance Manual 9-1 attached as Exhibit "G". It is the defendant's contention that the Debbie Wong Restaurant failed to follow these instructions and their failure contributed to the nonactivation of the fire suppression system. Furthermore, Debbie Wong admits that none of these instructions were followed nor has she ever reviewed the Industrial Dry Chemical
Fire Suppression System Installation, Operation and Maintenance Manual. See Deposition of Kaigee Debbie Liu, pages 40 and 41, attached as Exhibit “D”.

3. **NFPA 17 Standard for Dry Chemical Extinguishing Systems:** Section 9-1.4 states that “[a]ll dry chemical extinguishing systems shall be inspected in accordance with the owner’s manual and maintained and recharged in accordance with the manufacturer’s listed installation and maintenance manual and service bulletins.” See NFPA 17, page 17-13 attached as Exhibit “H”. Furthermore, section 9-2.1 states that “[o]n a monthly basis, inspection shall be conducted in accordance with the manufacturer’s listed installation and maintenance manual or owner’s manual. As a minimum, this ‘quick check’ or inspection shall include verification of the following: ...(b) The manual actuators are unobstructed....(e) No obvious physical damage or condition exists that might prevent operation.” See NFPA 17, page 17-14 attached as Exhibit “H”. It is the defendant’s contention that the Debbie Wong Restaurant failed to follow these instructions and their failure contributed to the nonactivation of the fire suppression system. Furthermore, Debbie Wong admits that she has never reviewed NFPA 17 nor has she ever heard of the National Fire Protection Association. See Deposition of Kaigee Debbie Liu, pages 41 and 42, attached as Exhibit “D”.

As the Debbie Wong Restaurant failed to inspect the fire suppression system as required by the system’s Owners Manual as well as by the National Fire Protection Association, the defendant’s alleged negligence cannot be the “sole proximate cause”
of the fire suppression system's failure to activate. Therefore, based upon the Extinguishing System Sales Agreement, Section 4C(2), the plaintiff cannot recover any amount of liquidated damages.

The plaintiff may argue that an "unsophisticated consumer" would not know how to perform daily and/or monthly inspections on the fire suppression system and shouldn't be expected to do so. First, the defendant suggests that we are not concerned here with an individual homeowner who throws away the warning that accompanied the newly purchased microwave oven. We are concerned with a commercial restaurant establishment that caters to the general public. Such business owners should have at the very least a basic knowledge of the equipment employed in their establishment, especially when safety is at issue. As Debbie Wong admits that she knew nothing about the dry chemical fire suppression system nor had she ever heard of the National Fire Protection Association or of the Occupational Safety and Health Administration (OSHA)(See Deposition of Kaigee Debbie Liu, pages 35, 41 and 42 attached as Exhibit "D"), there is no question that this restaurant owner's knowledge falls well below an acceptable standard. Second, a sophisticated inspection of this system was not required to determine whether a potential problem existed. The packing plate, which is alleged to have been left in the system thereby preventing it from activating, "stands out like a sore thumb." See Deposition of Charles Lewandowski, page 34 attached as Exhibit "E". Third, it is not the defendant's contention that the Debbie Wong Restaurant's failure to perform any inspections was the "sole proximate cause" for the loss sustained. Only that
their failure contributed to the loss sustained. Therefore, the defendant's alleged negligence cannot be the "sole proximate cause."

III. CONCLUSION

For the reasons stated above, the defendant respectfully requests that this court enter summary judgment in favor of Fire Defense Center. Alternatively, the defendant respectfully requests that this court dismiss so much of the plaintiff's Complaint as seeks damages in excess of $50.00 and issue an Order that the liability of Fire Defense Center is limited to $50.00.

REQUEST FOR ORAL ARGUMENT

The defendant respectfully requests that oral argument be allowed as to this motion.

Respectfully submitted,
FIRE DEFENSE CENTER,

By their attorneys,

Richard E. Brody, BBO#058260
Steven C. Sharaf, BBO#552524
BRODY, HARDOON, PERKINS & KESTEN
Marketplace Center
Two Hundred State St.
Boston, MA 02109
(617)951-3900

Dated: 12/17/96

CERTIFICATE OF SERVICE

I, hereby certify that a true copy of the above document was served upon each counsel of record by first class mail on 12/17/96.

Steven C. Sharaf
Affidavit of Paul A. AloI

I, Paul A. AloI, hereby depose and say as follows:

1. I am the President of AloI Electric Service, Inc.


3. Pursuant to the asset purchase agreement, I acquired all employees, including the former principle owner (for at least one year), all assets, including office equipment, inventory, supplies and motor vehicles from Fire Defense Center, as well as the tradename, goodwill and customer lists from Fire Defense Center. See Asset Purchase Agreement, dated April 2, 1990, attached to this Affidavit.

4. Pursuant to the asset purchase agreement, I acquired all existing contracts previously entered into by Fire Defense Center. See Asset Purchase Agreement dated April 2, 1990, attached to this Affidavit.

5. Pursuant to the asset purchase agreement, I acquired the contract entered into by Fire Defense Center and the Debbie Wong Restaurant dated February
Since my acquisition of Fire Defense Center until the plaintiff's alleged loss, the Debbie Wong Restaurant was serviced according to the terms and conditions of the contract entered into by Fire Defense Center and the Debbie Wong Restaurant dated February 18, 1980. See the service card attached to this Affidavit.

Prior to the plaintiff's alleged loss in July, 1995, the contract entered into by Fire Defense Center and the Debbie Wong Restaurant dated February 18, 1980, had not been terminated nor modified in any way.

It is my understanding and belief that at the time the fire suppression system was installed at the Debbie Wong Restaurant the Owners Manual published by Kidde-Fenwal was provided to the Debbie Wong Restaurant.

In fact, following the purchase of Fire Defense Center, I saw the Owner's Manual hanging from the cylinder connected to the fire suppression system at the Debbie Wong Restaurant.

According to the contract between Fire Defense Center and the Debbie Wong Restaurant, Fire Defense Center was responsible to service the fire suppression system at the Debbie Wong Restaurant on a semi-annual basis. The last service performed prior to the alleged loss at the Debbie Wong Restaurant was in January, 1995. The next scheduled service at the Debbie Wong Restaurant was to be performed by the end of July, 1995.

Between the time that the fire suppression system at the Debbie Wong Restaurant was last serviced by the defendant in January, 1995 and the alleged loss at the Debbie Wong Restaurant, the defendant had not been asked to perform any
services by the Debbie Wong Restaurant.

Signed and sworn to under the pains and penalties of perjury this 10th day of

December, 1996.

Paul A. Aloi, President
Aloi Electric Service, Inc.
Q. That's all you know?
A. Right.

Q. Are you aware of any of the procedures that are required to service or maintain the dry chemical fire suppression system, what is involved in inspecting it or servicing it or maintaining the system, do you know anything about that?
A. No.

Q. Are you familiar with any of the responsibilities that the owner of a fire suppression system such as this dry chemical fire suppression system has in maintaining or servicing the system?
A. No.

Q. Did anyone ever tell you or anyone else at the restaurant what your obligations were in regards to this dry chemical fire suppression system, again, prior to July of '95?
A. No.

Q. Are you aware that owners are given certain responsibilities in regard to the servicing or inspecting the dry chemical fire suppression system? Are you aware of anything such as that?
A. No.

Q. Anyone ever review the system with you or anyone else at the restaurant?
A. Not to me.
Q. Not to you. Do you know if anyone from Fire Defense Centers ever did that with someone at the restaurant?
A. I don't think so.
Q. Had you or anyone at the restaurant ever requested information from Fire Defense Centers or anywhere else regarding the inspection or servicing or maintaining the system?
A. To us?
Q. Have you ever had such information?
A. No.
Q. Do you any if anyone else at the restaurant ever did?
A. No.
Q. Do you know if you or anyone else at the restaurant was ever provided any written documentation relating to the fire suppression system prior to July of 1995?
A. No.
Q. You don't have an owner's manual for the system?
A. No.
Q. No owner's manual was ever provided to you or anyone else at the restaurant?
A. I don't think so.

Q. You have never seen the owner's manual at your restaurant?

A. No.

Q. Who might have that, if there was such a document?

A. Probably my father or the manager way back in 1970s.

Q. Before your father took over?

A. Yes.

Q. Do you know when the dry chemical fire suppression system was installed in the restaurant?

A. No.

Q. If I suggested to you it was installed in 1980, would you know if that was true or not?

A. No, because I wasn't here yet.

Q. Was your father?

A. I'll ask him.

Q. If I suggested to you that there is a contract between Fire Defense Centers and --

MR. CLARK: Objection.

MR. SHARAF: I haven't finished the question.

MR. CLARK: Fire Defense Center is the person named on the contract.

MR. SHARAF: Well, whatever.
Q. (By Mr. Sharaf) Let me show you this. Have you ever seen this document before?

A. No.

Q. If I suggested to you that this document that I have just shown you is a contract between Fire Defense Center, even though the little location says Fire Defense Center on it and Debbie Wong Restaurant, would you know anything about this contract?

A. No.

Q. If I suggested to you that it's dated February 18, 1980, would that lead you to believe that your father was the owner of the restaurant back in 1980?

A. The owner?

Q. Or --

A. Yes.

Q. The document refers to Debbie Wong Restaurant No. 3?

A. Yes.

Q. Which restaurant is that?

A. The one in Springfield.

Q. The one where the fire took place?

A. Yes.

Q. Are you familiar with your father's signature?
A. Yes.

Q. If I show you this document, we will mark it as an exhibit, if you like, and show you the end of the document it says "T. Wong" there. Would that be your father?

A. It looks like his handwriting but I'm not sure back to -- because he usually writes the whole word and Thomas Wong instead of just initial T.

Q. Does that look like your father's handwriting?

A. Yes.

Q. And your father's first name is Thomas?

A. Yes.

MR. SHARAF: Do you want to mark this?

MR. CLARK: It's up to you.

MR. SHARAF: Let's mark this as No. 1.

(Defendant's Exhibit 1, Document, marked for identification)

Q. (By Mr. Sharaf) Have you heard of the Kidde HDR-25DC and HDR-50DC automatic fire suppression system owner's manual?

A. No.

Q. Are you familiar or have you ever heard of
COMMONWEALTH OF MASSACHUSETTS

Essex, ss.

LYNN DISTRICT COURT
C.A. NO.:

EASTERN BANK, Plaintiff,

v.

Michael Melito, Defendant.

MOTION FOR EX PARTE REAL ESTATE ATTACHMENT

Now comes the Plaintiff, Eastern Bank, with a place of business at One Eastern Place, Lynn, Massachusetts, and moves this Honorable Court, pursuant to Rule 4.1 of the Massachusetts Rules of Civil Procedure, to enter an Order authorizing the attachment of all the real estate owned by Michael Melito, whether individually or jointly, located in Essex County, in the Commonwealth of Massachusetts including, but not limited to, real estate located at , Saugus, Essex County, MA , in the amount of Eleven Thousand Five Hundred and 00/100 ($11,500.00) Dollars.

In support of this Motion, Eastern Bank, refers this Court to the Complaint and Affidavit filed herewith. In further support, Plaintiff states as follows:

1. This is an action brought to recover monies due and owing by Defendant to Plaintiff arising out of an agreement to provide banking services.

2. There is a reasonable likelihood that the Plaintiff will recover judgment against the Defendant, including interest, costs, and fees in the amount equal to or greater than Eleven Thousand Five Hundred and 00/100 ($11,500.00) Dollars.

3. The Plaintiff believes that the Defendant has no liability insurance, which is available to satisfy the judgment, which shall be entered against the Defendant.

4. Plaintiff is informed and believes that the Defendant owns an interest in real estate situated at , Saugus, Massachusetts. Plaintiff is further informed and believes that the Defendant intends to sell the subject property imminently. In fact, the defendant informed the plaintiff that he intends to sell the property imminently.

Eastern Bank,
By Their Attorney,

Dated:

Steven C. Sharaf, BBO#552524
1172 Beacon Street
Newton, MA 02461
617-558-2707
COMMONWEALTH OF MASSACHUSETTS

Essex, ss.

Eastern Bank,
Plaintiff,

V.

Michael Melito,
Defendant.

LYNN DISTRICT COURT
C.A. NO.:  )

AFFIDAVIT IN SUPPORT OF MOTION FOR EX PARTE REAL ESTATE ATTACHMENT

I, Peter J. Malionek, of Lynn, Essex County, Massachusetts on oath say and depose as follows:

1. I am a Fraud Investigator in the Security Department for Eastern Bank, Plaintiff in the above-entitled matter.

2. I am knowledgeable of the outstanding overdraft accounts and collection matters of Plaintiff. As such, I am personally familiar with the outstanding overdraft accounts, documents, files, and collection matters regarding the Defendant.

3. The plaintiff, Eastern Bank, is a Massachusetts Company, with a principal place of business at One Eastern Place, Lynn, Massachusetts, and is engaged in the business of providing banking services to commercial, institutional and individual consumers.

4. Defendant, Michael Melito owes Plaintiff the sum of Eleven Thousand and 00/100 ($11,000.00) Dollars as a result of an overdrawn bank account by the Defendant in violation of the Personal Deposit Account Agreement.

5. Defendant has breached the terms of said banking agreement by failing to make restitution to the Plaintiff for the overdrawn amount in accordance with the terms and conditions thereof.

6. Plaintiff is informed and believes that the Defendant owns an interest in real estate situated at , Lynn, Massachusetts. Plaintiff is further informed and believes that the Defendant intends to sell the subject property imminently. In fact, the Plaintiff was informed by the defendant that he is placing the property on the market for sale imminently.

7. Plaintiff knows of no other assets which Defendant has available to satisfy the judgment Plaintiff will recover against Defendant.

8. Plaintiff knows of no liability insurance available to satisfy any judgment Plaintiff will recover against Defendant.
WHEREFORE, the Plaintiff seeks the approval for the Motion for Ex Parte Real Estate Attachment and files this affidavit in support thereof.

The information set forth is true, to the best of my knowledge, information and belief.

WITNESS MY HAND AND SEAL THIS ___ DAY OF ________, 2005

______________________________
Peter J. Malioneck
MOTION FOR EX PARTE TRUSTEE PROCESS

COMMONWEALTH OF MASSACHUSETTS

Middlesex, ss. Superior Court Dept.

SUPPLIER, Civil Action No.
Plaintiff,

v.

SUB, GC, PRO, and PRES, Defendants

BANK, Trustee

MOTION FOR EX PARTE TRUSTEE PROCESS

Now comes the plaintiff in the above case and moves this honorable court for an attachment by trustee process on the defendant Sub and/or Press goods, effects and monies held by the Bank, Trustee, in the amount of One Hundred Ten Thousand Dollars ($110,000.00).

SUPPLIER
By its attorney,

Krulwich & Associates
Dana E. Casher
50 Staniford Street
Boston, MA 02114
(617) 367-1200
BBO # 551037

Dated: October 1, 1994
Affidavit in Support of Ex Parte Attachment

COMMONWEALTH OF MASSACHUSETTS

Middlesex, ss.

SUPPLIER, Plaintiff, v. SUB, GC, PRO, and PRES, Defendants

BANK, Trustee

AFFIDAVIT IN SUPPORT OF EX PARTE BANK ATTACHMENT

Now comes Steven Stevenson, who being duly sworn, deposes and states as follows:

1. I am the credit manager for the plaintiff, a corporation duly organized under the laws of the Commonwealth of Massachusetts, and I am duly authorized by Supplier to make this affidavit.

2. At the commencement of this action, the defendant Sub was indebted to the plaintiff over and above any discount and without deduction or setoff, the sum of money stated in the complaint and in the itemized statement of account attached hereto amounting to One Hundred Thousand and 00/100 Dollars ($100,000.00).

3. The said indebtedness represents goods sold and delivered by the plaintiff to or for the defendant Sub.

4. The plaintiff has not, directly or indirectly, received any part of the money or goods charged herein as due or received any security or satisfaction for which credit has not already been given.

5. The plaintiff keeps regular books of account, and the keeping of said books of account is in the charge of or under the supervision of the affiant. The entries in said books of account are made in the ordinary course of business. Said entries show that the defendant Sub is indebted to the plaintiff in the manner and amount herein set forth.
6. I am aware of no meritorious defense to this matter, and there is a likelihood that plaintiff will recover One Hundred Thousand and 00/100 Dollars ($100,000.00) together with interest from the date of demand.

7. I know of no insurance or other liability coverage available to satisfy a judgment which may be rendered on these proceedings.

8. The defendant has been very evasive in its answers as to when payment of this claim can be expected.

9. In response to my many demands, the defendant Sub has claimed that its debtors have not been paying it so that it is unable to pay my bills. I have spoken personally with the contact people at the general contractors offices and they state that all payments have been made to Sub on a timely basis.

10. Further, the people at the general contractors offices have informed me that due to their dissatisfaction with certain aspects of their transactions with Sub, they will not be using Sub for any future projects. Thus, there will be no further income to Sub from GC or Pro after the next month or so.

11. Many demands have been made upon the defendant for payment of this claim which has made no effort to liquidate same.

12. An ex parte bank attachment is necessary as security for the judgment plaintiff expects to recover, and defendant, if given notice, would withdraw the funds from the account.


Steven Stevenson
DEFFENDANT/PLAINTIFF-IN-COUNTERCLAIM’S OPPOSITION TO
PLAINTIFF/DEFENDANT-IN-COUNTERCLAIM’S MOTION TO VACATE THE
JUDGMENT AND FINDINGS

Now comes the Defendant/Plaintiff-In-Counterclaim and opposes the
Plaintiff/Defendant-In-Counterclaim’s Motion to Vacate the Judgment and Findings. In
support of this opposition, the Defendant/Plaintiff-In-Counterclaim states as follows:

1. The Plaintiff/Defendant-In-Counterclaim filed her Complaint to Vacate Arbitration Award on or about October 20, 2009.

2. The Defendant/Plaintiff-In-Counterclaim’s Answer and Counterclaim were filed with the Court and served on Plaintiff/Defendant-In-Counterclaim on February 8, 2010, as set forth in the Court’s docket.

3. The Plaintiff/Defendant-In-Counterclaim failed to answer or otherwise defend as to the Defendant/Plaintiff-In-Counterclaim’s Counterclaim. On or about September 8, 2010, Defendant/Plaintiff-In-Counterclaim filed a Request for Default as a result of the Defendant/Plaintiff-In-Counterclaim’s failure to respond to the Defendant/Plaintiff-In-Counterclaim’s Counterclaim as set forth in the Court’s docket.
4. On or about June 3, 2010, Defendant/Plaintiff-In-Counterclaim served upon Plaintiff/Defendant-In-Counterclaim, his Request for Production of Documents. As a result of the Plaintiff/Defendant-In-Counterclaim’s failure to respond to said discovery, this Court entered Final Judgment by Default against the Plaintiff/Defendant-In-Counterclaim on October 26, 2010 as set forth in the Court’s docket.

5. Based upon the default entry, this Court scheduled this matter for an assessment of damages hearing on November 12, 2010. At the Plaintiff/Defendant-In-Counterclaim’s request the assessment of damages hearing was re-scheduled three times; December 7, 2010, January 31, 2011 and March 9, 2011.

6. Throughout this delay, and although a default has already entered, the Plaintiff/Defendant-In-Counterclaim has made no attempt to either answer the Defendant/Plaintiff-In-Counterclaim’s complaint nor respond to the requested discovery.

7. The Plaintiff/Defendant-In-Counterclaim now requests that the Court’s findings be vacated because a letter was sent requesting yet another date for the assessment hearing. Having not heard from the Court, it apparently did not occur to the Plaintiff/Defendant-In-Counterclaim that further follow up was required.

8. Furthermore, the Plaintiff/Defendant-In-Counterclaim’s Motion to Vacate was not filed according to the Superior Court Rules. In fact, it was sent by facsimile to the Court on March 11, 2011 but only by regular mail to the Defendant/Plaintiff-In-Counterclaim which was received on March 15, 2011.

9. The Plaintiff/Defendant-In-Counterclaim’s Motion to Vacate is yet another example of a delay tactic implemented by the Plaintiff/Defendant-In-
Counterclaim stemming back to before the Arbitration hearing when she requested a
continuance and then failed to appear for that re-scheduled hearing as well.

10. The Complaint is to vacate an Arbitration Award. The Counterclaim is to
affirm the Arbitration Award. The Plaintiff/Defendant-In-Counterclaim’s default and
failure to respond to the Defendant/Plaintiff-In-Counterclaim’s Counterclaim should
simply require a finding by this Court that the Arbitration Award be affirmed, which was
finally done on March 9, 2011.

11. This process should not be delayed any further. The Defendant/Plaintiff-
In-Counterclaim should not need to incur additional expense as a result of the
Plaintiff/Defendant-In-Counterclaim’s continued attempts at delaying this matter.

WHEREFORE, Defendant/Plaintiff-In-Counterclaim respectfully requests that this
Court deny the Plaintiff/Defendant-In-Counterclaim’s Motion to Vacate the Judgment
and Findings entered by this Court.

C. Thomas Cutter, Defendant/Plaintiff-In-Counterclaim;
By his attorney,

Steven C. Sharaf, BBO #552524
109 Highland Avenue
Needham, Massachusetts 02494
Telephone: (781) 455-0300
Facsimile: (781) 453-0606
E Mail: ssharaf@verizon.net

Dated: March 16, 2011
CERTIFICATE OF SERVICE

I, Steven C. Sharaf, certify that on March 16, 2011, I served a copy of the foregoing pleading/document by facsimile and by regular mail, upon the following counsel of record for the Plaintiff/Defendant-In-Counterclaim or on the Plaintiff/Defendant-In-Counterclaim’s attorney,

Seymour Weinstein, Esq.
Weinstein and Weinstein, P.C.
Suite 300
10 Mechanic Street
Worcester, MA 01608

Steven C. Sharaf, BBO #552524
September 8, 2010

Seymour Weinstein, Esq.
Weinstein and Weinstein, PC
Suite 300
10 Mechanic Street
Worcester, MA 01608

RE: Rickles
Vs. Cutter
C.A. No. SUCV2009-04483

Dear Attorney Weinstein:

Enclosed please find an Application for Final Judgment for failure to respond to Request for Production of Documents and Defendant/Plaintiff-in-Counterclaim’s Final Request for Production of Documents.

Sincerely,

Steven C. Sharaf
Attorney for the Plaintiff
COMMONWEALTH OF MASSACHUSETTS

Suffolk, ss.

Superior Court
Civil Action No. SUCV2009-04483

Wendy Rickles,
Plaintiff/Defendant-in-Counterclaim,

V.

C. Thomas Cutter,
Defendant/Plaintiff-in-Counterclaim.

APPLICATION FOR FINAL JUDGMENT FOR RELIEF FOR FAILURE TO RESPOND TO REQUEST FOR PRODUCTION OF DOCUMENTS

C. Thomas Cutter, Defendant/Plaintiff-in-Counterclaim herein, requests that final judgment be entered on behalf of Defendant/Plaintiff-in-Counterclaim, and against Wendy Rickles, Plaintiff/Defendant-in-Counterclaim herein, for the reason that the last-named party has failed to file timely respond to the request for production of documents which were served upon said party on June 3, 2010. Such responses should have been filed by now.

September 8, 2010

Date

Steven C. Sharaf, Atty for Plaintiff
BBO#552524
109 Highland Avenue
Needham, MA 02494
781-455-0300
COMMONWEALTH OF MASSACHUSETTS

Suffolk, ss. Superior Court
Civil Action No. SUCV2009-04483

Wendy Rickles,
Plaintiff/Defendant-in-Counterclaim,

V.

C. Thomas Cutter,
Defendant/Plaintiff-in-Counterclaim.

FINAL REQUEST FOR ANSWERS
(Rule 33(a)(3))

C. Thomas Cutter, Defendant/Plaintiff-in-Counterclaim herein, makes a final request for production of documents. On June 3, 2010, C. Thomas Cutter, Defendant/Plaintiff-in-Counterclaim served Plaintiff/Defendant-in-Counterclaim with request for production of documents via first class mail. Defendant/Plaintiff-in-Counterclaim has not yet been served with Plaintiff/Defendant-in-Counterclaim’s answers to said discovery. Such answers should have been served on Defendant/Plaintiff-in-Counterclaim by now.

In accordance with Rule 33(a)(3), Plaintiff may apply for Final Judgment for relief or dismissal, pursuant to paragraph 4 in the event that answers or objections are not timely received.

September 8, 2010

Date

Steven C. Sharaf, Atty for Plaintiff
BBO#552524
109 Highland Avenue
Needham, MA 02494
781-455-0300
CERTIFICATE OF SERVICE

I, Steven C. Sharaf, Attorney for Plaintiff, certify that I have mailed a copy of the Application for Final Judgment for failure to respond to Request for Production of Documents and Plaintiff’s Final Request for Production of Documents, by regular U.S. mail, to the Plaintiff/Defendant-in-Counterclaim at the address below:

Seymour Weinstein, Esq.
Weinstein and Weinstein, PC
Suite 300
10 Mechanic Street
Worcester, MA 01608

September 8, 2010  
Date

Steven C. Sharaf  
Attorney for Plaintiff
October 19, 2010

Clerk – Civil Session
Suffolk Superior Court
Three Pemberton Square
Boston, MA 02108

RE: Wendy Rickles, Plaintiff/Defendant-in-Counterclaim
Vs. C. Thomas Cutter, Defendant/Plaintiff-in-Counterclaim
C.A. No. SUCV2009-04483

Dear Sir or Madam:

Enclosed please find a Re-Application for Final Judgment for failure to answer Request for Production of Documents. Please docket and file in your usual manner.

Thank you for your cooperation in this matter.

Sincerely,

Steven C. Sharaf
Attorney for the Defendant/Plaintiff-in-Counterclaim
Suffolk, ss.  

Wendy Rickles,  
Plaintiff/Defendant-in-Counterclaim,  

V.  

C. Thomas Cutter,  
Defendant/Plaintiff-in-Counterclaim,  

RE-APPLICATION FOR FINAL JUDGMENT FOR RELIEF FOR FAILURE TO ANSWER REQUEST FOR PRODUCTION OF DOCUMENTS  

C. Thomas Cutter, Defendant/Plaintiff-in-Counterclaim herein, requests that final judgment be entered on behalf of Defendant/Plaintiff-in-Counterclaim, and against Wendy Rickles, Plaintiff/Defendant-in-Counterclaim herein, for the reason that the last-named party has failed to file timely response to request for production of documents which were served upon said party on June 3, 2010. Such answers should have been filed by now. The Application for Final Judgment for Relief for Failure to Answer Request for Production of Documents was served upon the Plaintiff/Defendant-in-Counterclaim on September 8, 2010. See attached documents.

October 19, 2010  

Date  

Steven C. Sharaf, Atty for Plaintiff  
BBO#552524  
109 Highland Avenue  
Needham, MA 02494  
(781)455-0300
Suffolk, ss.                                            Civil Action No. SUCV2009-04483

Wendy Rickles,
Plaintiff/Defendant-in-Counterclaim,

v.

C. Thomas Cutter,
Defendant/Plaintiff-in-Counterclaim,

DEFENDANT/PLAINTIFF-IN-COUNTERCLAIM'S AFFIDAVIT IN SUPPORT OF DEFENDANT/PLAINTIFF-IN-COUNTERCLAIM'S REQUEST FOR DEFAULT FOR FAILURE TO ANSWER REQUEST FOR PRODUCTION OF DOCUMENTS

I, Steven C. Sharaf, Attorney for the Defendant/Plaintiff-in-Counterclaim, on oath depose and say:

1. Defendant/Plaintiff-in-Counterclaim served the Plaintiff/Defendant-in-Counterclaim, on June 3, 2010, the Defendant/Plaintiff-in-Counterclaim’s Request for Production of Documents via first class mail.

2. The Plaintiff/Defendant-in-Counterclaim failed to serve answers on the Defendant/Plaintiff-in-Counterclaim in the initial period.

3. On September 8, 2010, Defendant/Plaintiff-in-Counterclaim served the Plaintiff/Defendant-in-Counterclaim, via first-class mail, the Defendant/Plaintiff-in-Counterclaim’s Final Request for Answers to Request for Production of Documents. See attached documents.

4. As of today, the Plaintiff/Defendant-in-Counterclaim has not served answers or objections in the final 40 day period.

5. Therefore, I am applying for final judgment in the above referenced case.

Signed under the pains and penalties of perjury.

October 19, 2010

Steven C. Sharaf, BBO#552524
109 Highland Avenue
Needham, MA 02494
(781)455-0300
CERTIFICATE OF SERVICE

I, Steven C. Sharaf, Attorney for Defendant/Plaintiff-in-Counterclaim, certify that I have mailed a copy of the Re-Application for Final Judgment for failure to answer Request for Production of Documents, by regular U.S. mail, to the attorney for Plaintiff/Defendant-in-Counterclaim at the address below:

Seymour Weinstein, Esq.
Weinstein and Weinstein, PC
Suite 300
10 Mechanic Street
Worcester, MA 01608

October 19, 2010

Date

Steven C. Sharaf
Attorney for Plaintiff
COMMONWEALTH OF MASSACHUSETTS

SUPRFOLK, ss.

SUPERIOR COURT
CIVIL ACTION NO. SUCV2009-04483

WENDY RICKLES,
Plaintiff/Defendant-In-Counterclaim,

v.

C. THOMAS CUTTER,
Defendant/Plaintiff-In-Counterclaim.

MOTION FOR ENTRY OF DEFAULT JUDGMENT
AND APPLICATION FOR ASSESSMENT OF DAMAGES
HEARING AGAINST PLAINTIFF/DEFENDANT-IN-COUNTERCLAIM, WENDY RICKLES,
PURSUANT TO MASS.R.CIV.P. 55(b)(4)

Pursuant to Rule 55(b)(4) of the Massachusetts Rules of Civil Procedure, I, Steven C. Sharaf, the undersigned, counsel for the Defendant/Plaintiff-In-Counterclaim in this action, hereby apply for a hearing for a Default Judgment against the above named Plaintiff/Defendant-In-Counterclaim in this action, Wendy Rickles ("Rickles"). In support hereof, the undersigned makes the following affidavit:

1. The Defendant/Plaintiff-In-Counterclaim’s Answer and Counterclaim were filed with the Court and served on Plaintiff/Defendant-In-Counterclaim Rickles on February 8, 2010, as set forth in the Court’s docket;

2. The above named Plaintiff/Defendant-In-Counterclaim Rickles has failed to answer or otherwise defend as to the Defendant/Plaintiff-In-Counterclaim's Counterclaim. On or about
September 8, 2010, Defendant/Plaintiff-In-Counterclaim filed a Request for Default as a result of the Plaintiff/Defendant-In-Counterclaim's failure to respond to the Defendant/Plaintiff-In-Counterclaim's Counterclaim. See attached.

3. On or about June 3, 2010, Defendant/Plaintiff-In-Counterclaim served upon Plaintiff/Defendant-In-Counterclaim Rickles, his Request for Production of Documents. As a result of the Plaintiff/Defendant-In-Counterclaim's failure to respond to said discovery, this Court entered Final Judgment by Default against the Plaintiff/Defendant-In-Counterclaim on October 26, 2010. See attached Re-Application for Final Judgment and Court's decision.

4. The Plaintiff/Defendant-In-Counterclaim Rickles is not a person in the military service of the United States or its Allies, as defined in the Soldiers' and Sailors' Civil Relief Act of 1940, as amended, and/or the Servicemembers Civil Relief Act, 50 U.S.C. App. §§501 et. seq.

5. The Plaintiff/Defendant-In-Counterclaim is not an infant or incompetent person.

WHEREFORE, the Defendant/Plaintiff-In-Counterclaim respectfully requests that this Court find as follows:

1. The Plaintiff/Defendant-In-Counterclaim agreed to arbitrate the fee dispute at the Legal Fee Arbitration Board of the Massachusetts Bar Association;
2. That the Legal Fee Arbitration Board of the Massachusetts Bar Association's decision be accepted and confirmed in the amount of $79,860.00. See attached Award of the Arbitrators; and

3. Any and all further relief that the Court deems just including but not limited to the award of attorney's fees and costs.

4. A proposed Judgment and Finding is attached hereto.

SIGNED UNDER THE PENALTIES OF PERJURY.

C. Thomas Cutter,
Defendant/Plaintiff-In-Counterclaim;
By his attorney,

Steven C. Sharaf, BBO #552524
109 Highland Avenue
Needham, Massachusetts 02494
Telephone: (781) 455-0300
Facsimile: (781) 453-0606
E Mail: ssharaf@verizon.net

Dated: November 12, 2010

EXECUTION REQUESTED
CERTIFICATE OF SERVICE

I, Steven C. Sharaf, certify that on November 12, 2010, I served a copy of the foregoing pleading/document by hand, upon the following counsel of record for the Plaintiff/Defendant-In-Counterclaim or on the Plaintiff/Defendant-In-Counterclaim,

Seymour Weinstein, Esq.
Weinstein and Weinstein, P.C.
Suite 300
10 Mechanic Street
Worcester, MA 01608

Steven C. Sharaf, BBO #552524
COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT

CIVIL ACTION NO. SUCV2009-04483

WENDY RICKLES,
Plaintiff/Defendant-In-Counterclaim,

v.

C. THOMAS CUTTER,
Defendant/Plaintiff-In-Counterclaim.

PROPOSED JUDGMENT AND FINDING

In regard to the above-captioned matter, this Court finds as follows:

1. The Plaintiff/Defendant-In-Counterclaim agreed to arbitrate the fee dispute at the Legal Fee Arbitration Board of the Massachusetts Bar Association;

2. That the Legal Fee Arbitration Board of the Massachusetts Bar Association's decision be accepted and confirmed in the amount of $79,860.00.

3. That an Execution in the amount of $79,860.00 be issued against the Plaintiff/Defendant-In-Counterclaim, Wendy Rickles.

Justice of the Superior Court
Now comes the Defendant/Plaintiff-In-Counterclaim and opposes the Plaintiff/Defendant-In-Counterclaim’s Motion to Vacate the Judgment and Findings. In support of this opposition, the Defendant/Plaintiff-In-Counterclaim states as follows:

1. The Plaintiff/Defendant-In-Counterclaim filed her Complaint to Vacate Arbitration Award on or about October 20, 2009.

2. The Defendant/Plaintiff-In-Counterclaim’s Answer and Counterclaim were filed with the Court and served on Plaintiff/Defendant-In-Counterclaim on February 8, 2010, as set forth in the Court’s docket.

3. The Plaintiff/Defendant-In-Counterclaim failed to answer or otherwise defend as to the Defendant/Plaintiff-In-Counterclaim’s Counterclaim. On or about September 8, 2010, Defendant/Plaintiff-In-Counterclaim filed a Request for Default as a result of the Plaintiff/Defendant-In-Counterclaim’s failure to respond to the Defendant/Plaintiff-In-Counterclaim’s Counterclaim as set forth in the Court’s docket.
4. On or about June 3, 2010, Defendant/Plaintiff-In-Counterclaim served upon Plaintiff/Defendant-In-Counterclaim, his Request for Production of Documents. As a result of the Plaintiff/Defendant-In-Counterclaim’s failure to respond to said discovery, this Court entered Final Judgment by Default against the Plaintiff/Defendant-In-Counterclaim on October 26, 2010 as set forth in the Court’s docket.

5. Based upon the default entry, this Court scheduled this matter for an assessment of damages hearing on November 12, 2010. At the Plaintiff/Defendant-In-Counterclaim’s request the assessment of damages hearing was re-scheduled three times; December 7, 2010, January 31, 2011 and March 9, 2011.

6. Throughout this delay, and although a default has already entered, the Plaintiff/Defendant-In-Counterclaim has made no attempt to either answer the Defendant/Plaintiff-In-Counterclaim’s complaint nor respond to the requested discovery.

7. The Plaintiff/Defendant-In-Counterclaim now requests that the Court’s findings be vacated because a letter was sent requesting yet another date for the assessment hearing. Having not heard from the Court, it apparently did not occur to the Plaintiff/Defendant-In-Counterclaim that further follow up was required.

8. Furthermore, the Plaintiff/Defendant-In-Counterclaim’s Motion to Vacate was not filed according to the Superior Court Rules. In fact, it was sent by facsimile to the Court on March 11, 2011 but only by regular mail to the Defendant/Plaintiff-In-Counterclaim which was received on March 15, 2011.

9. The Plaintiff/Defendant-In-Counterclaim’s Motion to Vacate is yet another example of a delay tactic implemented by the Plaintiff/Defendant-In-
Counterclaim stemming back to before the Arbitration hearing when she requested a continuance and then failed to appear for that re-scheduled hearing as well.

10. The Complaint is to vacate an Arbitration Award. The Counterclaim is to affirm the Arbitration Award. The Plaintiff/Defendant-In-Counterclaim’s default and failure to respond to the Defendant/Plaintiff-In-Counterclaim’s Counterclaim should simply require a finding by this Court that the Arbitration Award be affirmed, which was finally done on March 9, 2011.

11. This process should not be delayed any further. The Defendant/Plaintiff-In-Counterclaim should not need to incur additional expense as a result of the Plaintiff/Defendant-In-Counterclaim’s continued attempts at delaying this matter.

WHEREFORE, Defendant/Plaintiff-In-Counterclaim respectfully requests that this Court deny the Plaintiff/Defendant-In-Counterclaim’s Motion to Vacate the Judgment and Findings entered by this Court.

C. Thomas Cutter, Defendant/Plaintiff-In-Counterclaim;
By his attorney,

Steven C. Sharaf, BBO #552524
109 Highland Avenue
Needham, Massachusetts 02494
Telephone: (781) 455-0300
Facsimile: (781) 453-0606
E Mail: ssharaf@verizon.net

Dated: March 16, 2011
A pretrialconciliation conference will be held at this court on the above date and time. Pursuant to Mass. R. Civ. P. 16, the parties are ORDERED as follows:

1. Settlement. Plaintiff counsel shall contact opposing counsel to discuss settlement in advance of the conference. Defense counsel shall, after conferring with the defendant(s), respond to any settlement demand made by the plaintiff(s). Counsel for each party shall discuss with their client(s) the estimated costs of further litigation through trial, and shall certify in the pretrial memorandum that such discussion has occurred.

2. Memorandum. At least three weeks before the conference, plaintiff counsel shall prepare and serve a draft joint pretrial memorandum to opposing counsel, consisting of no more than 5 pages, setting forth: (A) a concise summary of the claim and defenses; (B) a list of witnesses, including experts, and a concise summary of the testimony anticipated from each witness; (C) facts established by pleadings, stipulation or admission; (D) an itemized list of special damages, if any; (E) the estimated length of trial; (F) certification by each counsel that their clients(s) have been apprised of estimated litigation costs. At least two weeks before the conference, defense counsel shall prepare and serve any revisions to such memorandum. Counsel for all parties shall thereafter confer and, at least one week before the conference, file a joint pretrial memorandum with the court.

3. Authority. Counsel are expected to have full authority to settle and file stipulations of dismissal or agreements for judgment at the pretrial conference. All parties shall be available for telephone consultation by counsel during the pretrial conference.

4. Continuances. Request for continuances of the pretrial conference shall be made in writing and addressed to the attention of the judge named below. Requests shall specify the next pretrial conference dates that all counsel are available.

5. Trial Date. A firm trial date will be set by the Court and counsel if the case does not settle at the pretrial conference.

6. Sanctions. Failure to comply with this order, or failure to appear at the pretrial conference, may result in sanctions including but not limited to assessment of costs, entry of default or dismissal.

7. Liaison. Please call the court contact person listed above with any questions or to report settlement in advance of the pretrial conference.
MARGARITA ARONOVA
Plaintiff,

v.

OLENA KRYLOVA
Defendant &
Third Party Plaintiff,

v.

CARPENITO REAL ESTATE, INC.
And KRISTINE VALENTE
Third Party Defendants.

JOINT PRETRIAL MEMORANDUM

Pursuant to the September 28, 2009 Notice of Pretrial Conference, the parties respectfully submit to this honorable court the following Pretrial Memorandum.

I. SUMMARY OF CLAIM AND DEFENSES

A. The Plaintiff's Claim and Defendant's Defenses

Plaintiff Ms. Aronova relied to her detriment on a contract between herself and defendant Ms. Krylova, and as a result of Ms. Krylova's breach of this contract, Ms. Aronova suffered economic harm. Specifically, Ms. Krylova refuses to pay Ms.
Aronova the monies owed pursuant to a Buyer Representation Agreement signed by the plaintiff and defendant.

Ms. Krylova's defense against Ms. Aronova's claim takes the form of a third-party complaint against Carpenito Real Estate and Realtor Kristine Valente, which is detailed below.

B. The Third-Party Plaintiff's Claim and Third-Party Defendant's Defenses

Third-Party Plaintiff's Claim: The Third-Party Plaintiff entered into a Buyer Representation Agreement with the Plaintiff. However, she terminated the agreement because the Plaintiff failed to "use reasonably diligent efforts to locate" a property for her. Further, it is the Third-Party Plaintiff's position that although terminating the agreement with the Plaintiff she nonetheless identified the Plaintiff to the Third-Party Defendants at the signing of the Purchase and Sale Agreement. The Third-Party Defendants failed and/or refused to pay a commission due to the Plaintiff, if any.

C. The Third-Party Defendant Valente's Claim

Third-Party Defendant Kristine Valente's Claim: Third-Party Defendant was not required to pay a commission to Plaintiff since Plaintiff was not the "procuring cause" to the sale. Third-Party Defendant was not the proximate cause of Defendant/Third-Party Plaintiff's damages. Third-Party Defendant is not personally liable for any actions in this matter since at
all relevant times she acted as an agent of Carpenito Real Estate, Inc.

D. The Third-Party Defendant Carpenito's Claim

Third-Party Defendant Carpenito Real Estate, Inc.'s Claim:

Third-Party Defendant was not required to pay a commission to Plaintiff since Plaintiff was not the "procuring cause" to the sale. Third-Party Defendant was not the proximate cause of Defendant/Third-Party Plaintiff's damages.

II. WITNESSES

A. Plaintiff's Witnesses

Margarita Aronova: Will testify that she and the defendant signed a binding Buyer Representation Agreement, which guaranteed a fee equal to 2.5% of the purchase price Ms. Krylova paid for 8 Cross Street East; and, that Ms. Krylova never paid the fee.

Moreover, Ms. Aronova will testify that Ms. Valente and Carpenito Real Estate were aware that she was the buyer's broker on the 8 Cross Street East sale and was entitled to a commission.

Charles A. Blaisdell, Esq.: Will testify that he instructed Kristine Valente to include a buyer agent commission equal to 2% of the purchase price, in the Purchase and Sale Agreement for 8 Cross Street East.
Further, the Plaintiff reserves the right to call any witness listed and/or identified by the Defendant/Third-Party Plaintiff and/or the Third Party Defendant.

B. Defendant/Third-Party Plaintiff’s Witnesses

In addition to the Plaintiff and the Third Party Defendant, as of the date hereof, the Defendant identifies the following witnesses:

Alex Rapoport, mortgage broker; He will testify as to the facts stated in the Third Party Complaint, including but not limited to conversations with the Plaintiff about the type of property the defendant desired, the mortgage process and what the Defendant can afford, and in regard to the termination of the Buyer Representation Agreement.

Dr. Naum Kitzis; He will testify regarding the Defendant’s displeasure with the Plaintiff’s services and in regard to the termination of the Buyer Representation Agreement. Dr. Kitzis also loaned a portion of the purchase price to the Defendant.

Bill Harrison; He will testify regarding the Defendant’s displeasure with the Plaintiff’s services and in regard to the termination of the Buyer Representation Agreement.

Lavinia Burke; She will testify regarding the fact that the Plaintiff had no transportation and the Defendant’s displeasure with the Plaintiff’s service.
Alba Doto Baccari: She will testify as to a letter she drafted dated March 23, 2007 denying that a commission is due to the Plaintiff and the reasons supporting that opinion.

Olena Krylova: She will testify that she entered into a Buyer Representation Agreement with the Plaintiff but that she terminated the agreement because of the Plaintiff's failure to "use reasonably diligent efforts to locate" a property for her. Nonetheless, at the time the Defendant entered into the Purchase and Sale Agreement for the property she identified to the Third Party Defendants the Plaintiff as a broker she had worked with.

The Defendant/Third-Party Plaintiff reserves the right to amend and/or supplement this list, pursuant to applicable Rules of Civil Procedure. Further, the Defendant/Third-Party Plaintiff reserves the right to call any witness listed and/or identified by the Plaintiff and/or the Third Party Defendant.

C. Third-Party Defendant's Witnesses

The Third-Party Plaintiff Kristine Valente and Caprenito Real Estate, Inc., each reserve the right to amend and/or supplement this list, pursuant to the applicable Rules of Civil Procedure. Further the Third-Party Plaintiffs reserve the right to call any witness listed and/or identified by the Plaintiff and/or the Defendant/Third-Party Plaintiff.
to call any witness listed and/or identified by the Plaintiff and/or the Defendant/Third-Party Plaintiff.

III. AGREED FACTS

1. On November 27, 2006, Ms. Krylova and Ms. Aronova signed a Buyer Representation Agreement.


3. On January 23, 2007, attorney Charles A. Blaisdell, sent a facsimile to Kristine Valente requesting that "the Buyer Agent Commission" to Aronova Realty be included on the purchase and sale agreement in the amount of 2% of the sales price for the property.

4. On February 5, 2007, Ms. Krylova and the Sellers entered into a Purchase and Sales Agreement for the purchase of 8 Cross Street East.

5. On February 28, 2007, the Sellers delivered the deed to 8 Cross Street East to Ms. Krylova.

6. The Purchase price for 8 Cross Street East was $460,000.00.

7. 2.5% of $460,000.00 equals $11,500.00.

8. On or about March 23, 2007, attorney Alba Doto Baccari sent a letter to attorney Peter Bernstein denying any claim for a commission was due to Aronova.

9. To date, Ms. Aronova has not received a commission from either Ms. Krylova, Carpenito Real Estate or Kristine Valente.

IV. SPECIAL DAMAGES

None pleaded.

V. ESTIMATED LENGTH OF TRIAL

Two (2) days.
VI. CERTIFICATION OF LITIGATION COSTS

Counsel for the plaintiff, Margarita Aronova, hereby certifies the client was apprised of estimated costs of further litigation through trial.

Franziskus Lepionka, Esq.

Dated: December 1, 2009

Counsel for the defendant/third-party plaintiff, Olena Krylova, hereby certifies the client was apprised of estimated costs of further litigation through trial.

Steven C. Sharaf, Esq.

Dated: December 1, 2009

Counsel for the third-party defendants, Kristine Valente and Carpenito Real Estate, hereby certifies the clients were apprised of estimated costs of further litigation through trial.

Aiba Doto Baccari, Esq.

Dated: December 1, 2009

Respectfully submitted
MARGARITA ARONOVA
By her Attorney,

Franziskus Lepionka, Esquire
BBO# 664049
Bourbeau & Associates, P.C.
266 Beacon Street
Boston, MA 02116
Tel: (617) 536-9695
Fax: (617) 536-9697
OLENA KRYLOVA
By her attorney,

[Signature]

Steven C. Sharaf, Esq., BBO#552524
109 Highland Avenue
Needham, MA 02494
Tel: (781) 455-0300
Fax: (781) 453-0606

Dated: December 2nd, 2009

Kristine Valente
By her attorney,

[Signature]

Alba Doto Baccari, Esq.
316 Central Street
Saugus, MA 01906
Tel. 781-233-0909
Fax. 781-233-1337
BBO# 554604

Carpentito Real Estate, Inc.
By its attorney,

[Signature]

Alba Doto Baccari, Esq.
316 Central Street
Saugus, MA 01906
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Fax. 781-233-1337
BBO# 554604

Dated: December 2nd, 2009
DEFENDANT'S MOTION IN LIMINE TO PRECLUDE THE PLAINTIFF FROM OFFERING ANY EVIDENCE AS TO A LOST EARNING CLAIM

The defendant moves that the court preclude the plaintiff from offering any evidence as to a lost earning claim. As grounds for this Motion in Limine, the defendant states as follows:

During the plaintiff's deposition conducted on May 22, 1996, the plaintiff was asked a number of questions which his attorney instructed him not to answer. The plaintiff's attorney's instruction not to answer was improper since the questions which were asked were relevant, and sought legitimate, discoverable information. Further, the questions did not seek any information protected by the attorney/client privilege. Based upon the plaintiff's refusal to provide answers to the questions asked regarding the plaintiff's lost earnings claim, the defendant would respectfully ask that the plaintiff's lost earnings claim be dismissed.

The defendant refers to Rule 26 of the Mass.R.Civ.P., which states, in relevant part, that “[p]arties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action....”

The questions sought to be answered by the defendant regarding the plaintiff's
lost earnings claim and the plaintiff's responses are as follows:

1. Page 96, line 13:

Q  My understanding is that you've brought a loss of earnings claim in regard to this particular incident; is that correct?

A  Yes.

Q  And what amount of damages are you suggesting that you lost as a result of this accident?

A  I'm not exactly sure what we figured out. Gerry might have some figures on that.

Q  Do you know what it was based on?

Mr. Noonan: I'm going to object.

Mr. Sharaf: That's part of his claim.

Mr. Noonan: Yes, but it's attorney/client privilege here on this issue in terms of figures that we've put together. Okay? I'm going to object to the question.

Mr. Sharaf: So I can't find out what his lost earnings claim is?

Mr. Noonan: It's in what we've already put in.

Mr. Sharaf: So, why is that attorney/client privilege?

Mr. Noonan: It's conversations that we've had regarding coming up with the figures.

Mr. Sharaf: I don't want the conversation.

Mr. Noonan: I'm going to object.

Mr. Sharaf: He's the one who worked, he's the one who has this lost wage claim. I want to know what it is.

Mr. Noonan: I'm going to object.
Mr. Sharaf: Are you instructing him not to answer?

Mr. Noonan: Yes.

To suggest that the defendant is not entitled to information which supports the plaintiff's loss of earnings claim is absurd. Based upon the plaintiff's blatant and unsupportable refusal to provide this information, his claim for lost earnings should be dismissed and the plaintiff and his attorney should be prevented from offering any evidence as to a lost earnings claim.

WHEREFORE, the defendant, Town of Mansfield requests that this Court enter an order preventing the plaintiff and/or his attorney and/or other plaintiff witness' from offering any evidence as to a lost earning claim.

The defendant,
Town of Mansfield,
By its attorneys,

Richard E. Brody, BBO#058260
Steven C. Sharaf, BBO#552524
Brody, Hardoon, Perkins & Kesten
200 State Street
Boston, MA 02109
(617)951-3900
The defendant moves that the court preclude the plaintiff from referencing the existence of liability insurance, whether in opening statement, presentation of evidence or argument before the jury. The defendant also moves that the court order the plaintiff’s counsel to instruct his witnesses to refrain from referencing liability insurance or the defendant’s liability insurer.

As grounds for this motion, the defendant states the following:

1. In other than exceptional circumstances, plaintiffs may not show that a defendant is insured against liability. Gladny v. Home Furnace Company, 336 Mass. 366, 368 (1957). “Exposing juries to such information is condemned because it is not itself probative of any relevant proposition and is taken to lead to undeserved verdicts for plaintiffs and exaggerated awards which jurors will readily load on faceless insurance companies supposedly paid for taking the risk.” Goldstein v. Gontares, 364 Mass. 800, 808 (1974).

2. No such exceptional circumstances exist in this case. Any mention of liability insurance would merely serve to prejudice the jury against the defendant,
with any possible probative value outweighed by the severe prejudice to the defendant.

3. Referencing insurance would be so devastating to the defendant that a curative instruction is likely to only focus the jury's attention on the matter, rather than curing the error.

The defendant,
Town of Mansfield,
By its attorneys,

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Steven C. Sharaf, BBO#552524
Brody, Hardoon, Perkins & Kesten
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