EXHIBIT 1

HEARING EXHIBIT
23
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D'Attilo

RETAINER AGREEMENT

I. **PARTIES** - We, Domenic D'Attilo and Cathy D'Attilo, parents and natural guardians of Daniel D'Attilo; Cathy D'Attilo, individually, and Domenic D'Attilo, individually, (hereafter "the Client") retain the law firm of **KOSKOFF, KOSKOFF & BIEDER** (hereafter "K K & B") to investigate, and, if warranted, to represent the Client in a claim or claims against any party or parties arising out of the following:

II. **FEES** - Pursuant to statute, K K & B shall receive fees of 33 1/3% of the first $300,000.00, 25% of the next $300,000.00, 20% of the next $300,000.00, 15% of the next $300,000.00, and 10% of any amount in excess of $1,200,000.00 of the total recovered, whether by way of settlement or award, before deduction of liens, costs and expenses. If that statute is not in effect at the time money is to be distributed to the Client, K K & B shall receive fees of twenty-eight percent (28%) of the total recovered. The Client authorizes K K & B to deduct said fees, liens, costs and expenses out of monies received from said party or parties. If all or any part of the settlement or award is to be paid in installments (a "structured settlement") the fee shall be based upon the present cost of such settlement or award; all fees, liens, costs and expenses shall be paid from the first monies received.

It is agreed that this employment is on a contingent fee basis. If no recovery is made, the Client shall not owe K K & B any sum as attorneys' fees or repayment of costs.

III. **COSTS AND EXPENSES** - Costs and expenses include court fees, computer search/ research fees, investigation expenses, expert fees, and all other disbursements incurred in the prosecution or settlement of this action. K K & B agrees to advance all out of pocket costs and expenses in connection with this litigation. Upon settlement of the case, K K & B is authorized to deduct these costs and expenses from any settlement or award after the legal fee has been deducted.

IV. **SERVICES** - This fee agreement applies to all services rendered up to, and including, the award of damages by the trier of fact, but not to matters ancillary to the above claims, such as probate court proceedings, guardianships, post trial hearings, and appeals.

At the conclusion of the case all documents relating to the case will be electronically stored for six years. Documents conferring or imposing legal rights upon you will be provided to you at the conclusion of the case.

DEPOSITION EXHIBIT
KKB1007
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V. **DISPUTES** - Any disagreements that arise between K K & B and the Client, with respect to fees, costs, expenses, and/or interest due, shall be settled by binding arbitration.

Dated at Bridgton this 21st day of March, 2003.

KOSKOFF, KOSKOFF & BIEDER

THE CLIENT

Domenic D'Attilo, Individually and
As Parent and natural guardian of
Daniel D'Attilo, a minor

Cathy D'Attilo, Individually and as
Parent and natural guardian of
Daniel D'Attilo, a minor

EXHIBIT 2

DOCKET NO X06- UWY-CV14-6051174-S DOMENIC D'ATTILO INDIVIDUALLY, CATHY CULLEN, INDIVIDUALLY, *and* DANIEL JACOB D'ATTILO PPA by his parents Domenic D'Attilo and Cathy M. Cullen, and as guardians and trustees, *Plaintiffs* -against- KOSKOFF, KOSKOFF & BIEDER, P.C. *and* DAY PITNEY, LLP *and* KATHLEEN L. NASTRI, ESQ. and JAMES D. HORWITZ, ESQ *and* JOSHUA D. KOSKOFF EXECUTOR OF ESTATE OF MICHAEL P. KOSKOFF. and WILLIAM M. BLOSS, ESQ. *and* JOEL H. LICHTENSTEIN, ESQ., *and* KEITH BRADOC GALLANT, ESQ. *and* REBECCA A. IANNANTUONI, ESQ., *Defendants*	SUPERIOR COURT COMPLEX LITIGATION DOCKET AT WATERBURY

DOMENIC D'ATTILO, ET AL. V. KOSKOFF, KOSKOFF & BIEDER, P.C., DAY PITNEY, ET AL.

AAA Case No. Case 01-19-0003-2033

ARBITRATION STIPULATION

1. The Parties to this Arbitration Stipulation ("Stipulation") are as follows:

The Plaintiffs: Domenic D'Attilo, Cathy Cullen (formerly Cathy D'Attilo), and Daniel Jacob D'Attilo ("Plaintiffs");

The "Koskoff Defendants": Koskoff, Koskoff & Bieder, P.C., Kathleen L. Nastri, Esq., James D. Horwitz, Esq., Estate of Michael P. Koskoff, Esq., William M. Bloss, Esq., Joel H. Lichtenstein, Esq.; and

The "Day Pitney Defendants": Day Pitney LLP, Keith Bradoc Gallant, and Rebecca Iannantuoni.

2. As a result of the Court's Ruling on Motions to Stay ("Stay Ruling") reported at 2015 Conn. Super LEXIS 658; 2015 WL 1867335 (Conn. Super. Court, March 26, 2015), the Parties must arbitrate certain claims. Other claims have been reserved by the Court for determination through the regular civil trial process.

3. In furtherance of the Stay Ruling, the Parties have agreed to use the American Arbitration Association's ("AAA") List and Appointment Process to choose an arbitrator subject to the AAA's List and Appointment rules, with the following exceptions and additions:

(a) The Parties have agreed through Court mediation that in case of a dispute regarding a claimed conflict of interest of a potential arbitrator, any Party has the option of appealing AAA's initial ruling(s) of either sustaining an objection to an arbitrator or reaffirming the AAA's initial appointment of that arbitrator, to the Honorable Mark Taylor of the Connecticut Superior Court (or as otherwise directed by the Honorable Barbara Bellis or other judge presiding over the case).

(b) The Parties have further agreed that, when facilitating the conflicts check of the highest-ranked mutually agreeable candidate, the AAA will provide the candidate with the attached list of potential witnesses or individuals who may be referenced during testimony, as well as a list of other entities for which disclosures should be made. (See Exhibit A.) The Plaintiffs agree to file a revised application to the AAA reflecting this agreed-upon list found in Exhibit A. This provision does not limit the AAA in what it can provide to a candidate pursuant to the AAA's standard List and Appointment process.

(c) The Parties have further agreed that AAA should not include any arbitrators listed on Exhibit B, each of whom has been rejected during prior discussions among the Parties.

(d) The AAA will send all communications and notices to the Parties via email at their designated email addresses.

(e) The Parties have further agreed that they will have fourteen (14) business days to review the AAA's list of 15 names the AAA provides pursuant to the standard List and Appointment procedures, informing the AAA of the results of that review no later than 5:00 p.m. of the fourteenth business day.

(f) After the initial list and review, and pursuant to the AAA rules except as expressly modified herein, the Parties have eight business days after receipt of the AAA email notifying the Parties of an arbitrator's name, to accept or object to the preliminarily appointed arbitrator.

(g) The Parties agree that during those eight business days ("Confer Process"), the following will apply:

(i) Unless otherwise noted below, deadlines to submit will be 5:00 p.m. of the due date.

(ii) The Parties will confer to determine if there is an objection thereto as follows: for each proposed arbitrator that the AAA provides, each side (that is, the Plaintiffs, and, separately, KKB and Day Pitney) will state for the record via email to each other on or before the third business day at 5:00 p.m. whether that side supports or will file an objection to a proposed arbitrator.

(iii) If none of the Parties plan to object to the appointed arbitrator, the AAA will be notified and the arbitrator will be seated.

(iv) If all Parties object, the AAA will make an alternative appointment and the Confer Process will be repeated.

(v) If a Party intends to object to the appointed arbitrator, that Party will inform the opposing Party(ies) within four (4) business days after AAA notifies the Parties of the name of the appointed arbitrator, including providing specific reasons for the objection. Said objection will also be filed with the AAA as set forth in Section 3(g)(ix) below.

(vi) The objecting Party will simultaneously inform the AAA that an objection to the appointment will be filed, and inform the AAA of the date and time by which it will receive all submissions based upon the date calculations of Section 3.

(vii) The non-objecting Party or Parties may similarly respond within two (2) business days of receiving the objection (no later than 5:00 p.m. of the second business day), with reasons why the selected candidate should be appointed.

(viii) The objecting Party will have up to two business days (no later than 5:00 p.m.) after receiving the non-objecting Parties' response, to file an additional response.

(ix) The Parties will file all documents required under Sections 3(g)(v-viii) with the AAA at any time during the Confer Process, but no later than 5:00 p.m. of the due date for the objecting Party's response.

(x) The Party objecting in accordance with Section 3(g)(v) will forward to the Court, via e-mail to its clerk, by 5:00 p.m. on the next business day after all submissions are due to be filed with the AAA, all of the documents set forth in Section 3(g)(v)-(viii). The objecting Party will ask the Court to schedule a tentative date for a phone conference no sooner than eight days later in the event there is a challenge to AAA's decision on the objection.

(xi) After the AAA determines whether to reaffirm or disqualify the selected arbitrator, if any of the Parties continues to object, within two business days and no later than 5:00 p.m. of the second business day, that Party will either inform the Court it is withdrawing the objection, or else asks the Court to consider the previous submissions or, if the Court desires, hear the Parties at the scheduled phone conference.

(xii) The Court has the option of requesting oral argument or deciding the objection on the submitted papers. If the Court decides not to have

oral arguments, the tentative phone conference will be canceled and the Court will then either sustain or overrule the objection based on the written record.

(xiii) The Court's decision to sustain or overrule the objection will be communicated to the Parties via email.

(xiv) The Court's decision will be final, non-appealable and not a ground to vacate any eventual arbitration award.

(xv) Time is of the essence for all of the above filing dates, and late submissions may not be considered by the AAA or the Court unless the party failing to file on time provides good cause and does so prior to any decision rendered by the AAA or the Court.

(h) During any appeals to the Court on AAA's ruling on a disqualification claim, the AAA will put the Parties' List and Appointment Process on hold until it receives written notification from the Parties as to the outcome.

(i) Within two business days (and no later than 5:00 p.m. of the second day) of reaching a mediated agreement on the dispute over the arbitrator or having a Court determined resolution of the disqualification objection, the Parties will inform the AAA whether the arbitrator is reaffirmed or disqualified. If the AAA designated arbitrator is disqualified by the Court, the AAA will continue with the selection process and designate another arbitrator pursuant to its regular selection process.

(j) Should the initial list of fifteen arbitrators be exhausted, the Parties will secure a second list of fifteen arbitrators and repeat the process. The process will be repeated until an arbitrator is seated. If the Parties are unsuccessful in selecting an arbitrator using the second list of fifteen arbitrators, the AAA will then appoint an arbitrator pursuant to its List and Appointment rules.

(k) For purposes of this Section only, the Court shall be deemed to be the Honorable Mark Taylor, or, if he is not available, such other Judge as may be assigned to the Court's Mediation Program.

4. The Parties agree that once selected, the Arbitrator, the Parties, and the Court, will meet to devise a schedule for the completion of the arbitration.

5. The Parties agree that once seated, the arbitrator will conduct the arbitration in accordance with Connecticut General Statute § 52-408, et seq., with the exception that the arbitrator will have sole and full authority to determine what, if any, discovery may take place in this case without regard to any limits on discovery during arbitration otherwise imposed by Connecticut law related to discovery during arbitrations. The Parties reserve all rights to make any and all arguments under Connecticut law or otherwise regarding the appropriate scope of discovery,

if any, in this matter. Discovery approved by the Arbitrator is referred to as "Arbitrator Approved Discovery." The Arbitrator will resolve any disputed discovery requests within ten (10) business days of the issue being fully joined, the timing of which shall be determined by the Superior Court and the Arbitrator at the initial conference. Notwithstanding the Stay, if not resolved by then ("Unresolved Dispute"), the Party requesting the discovery shall file a Request For Adjudication with the Superior Court Complex Litigation Docket via online filing (DOCKET NO X06- UWY-CV14-6051174-S). The Parties agree the Court will have the authority to decide the Unresolved Dispute in the event the Arbitrator does not decide the Unresolved Dispute within ten business (10) days.

6. The Arbitrator and/or the Parties' counsel shall have the power to issue subpoenas directly without applying to Superior Court for any discovery approved by the arbitrator, notwithstanding Conn. Gen. Stat. § 52-412. The Parties agree that the approved subpoenas will be issued using the case caption at the beginning of this Stipulation, or as otherwise modified by the Superior Court. Notwithstanding the Stay, the Parties also agree that the subpoenas approved by the Arbitrator will be issued pursuant to the relevant sections of the Connecticut Practice Book and Connecticut General Statutes for regular discovery.

   (a) Notwithstanding the Stay, the Parties further agree that they consent to the Superior Court Complex Litigation Docket enforcing Arbitrator Approved Discovery, and said Court will not be subject to the limitations of § 52-412.

7. The Parties agree that the Arbitrator shall be bound by the Stay Ruling as to what claims are and are not arbitrable.

8. Unless otherwise agreed to in this Stipulation or as agreed to by the Parties in writing during the course of the arbitration, the arbitrator shall have the sole authority to determine the procedures by which the arbitration will be conducted

9. The Parties will work with the Arbitrator to reach a mutual agreement as to the deadline after the close of the record for the Arbitrator to render a decision. If the Parties disagree, the Arbitrator will decide, but in no event taking more than 120 days to issue a decision.

10. As per an agreement of the Parties as overseen by the Connecticut Superior Court, the Plaintiffs and all the Defendants from Koskoff, Koskoff & Bieder and all Defendants from Day Pitney, have agreed to payment arrangements between the Parties with no disclosures of the arrangements with the AAA and the arbitrator.

11. For convenience, the Parties agree that payment of the arbitrator's fee shall be made by Carmody Torrance Sandak & Hennessey on behalf of all Parties to the arbitration.

   (a) Bills from the AAA, if any, or from the arbitrator ultimately appointed, should be made out to and sent to Carmody Torrance Sandak & Hennessey LLP,

attention James K. Robertson, Jr. and Brian T. Henebry, 50 Leavenworth Street, Waterbury, CT 06702 (jrobertson@carmodylaw.com AND bhenebry@carmodylaw.com) with a CC via email to the other counsel:

Anthony Nuzzo, Jr., Esq.
Nuzzo & Roberts LLC
One Town Center
Cheshire, CT 06410
anuzzo@nuzzo-roberts.com
Attorney for Koskoff, Koskoff & Bieder Defendants

James T. Shearin, Esq.
Pullman & Comley, LLC
850 Main St.
Bridgeport CT 06601
jtshearin@pullcom.com
Attorney for Day Pitney Defendants

Howard Altschuler, Esq.
23 Main Street
"The Old Mill" at JCT RT 1/Main St.
East Haven, CT 06512-2507
lawofficesofhowardaltschuler@gmail.com
Attorney for the Plaintiffs

12. The following provisions of Section 11 are the agreed upon additional payment arrangements. Subsections 11(a) through 11(e) shall be redacted when distributed to any third party, arbitrator, or Court, unless there is a dispute under this section:

(f) If there is a dispute under this section, the redacted portion above will only be disclosed to the AAA and/or the arbitrator by order of the Court.

13. Any failure or delay by either Party to exercise any right, power or privilege hereunder or to insist upon observance or performance by the other of the provisions of this Stipulation shall not operate or be construed as a waiver thereof.

14. The Parties enter into this Stipulation without prejudice to their rights to raise any issues available under Connecticut law should the outcome of the arbitration be appealed. Should the arbitration result be appealed, this agreement is not to be deemed a waiver of any right, unless specifically enumerated in this agreement.

15. This Stipulation constitutes the entire agreement between the Parties.

16. This Stipulation may be executed in counterparts, and each counterpart shall have the same force and effect as an original and shall constitute an effective, binding agreement on the part of each of the undersigned Parties. Execution of a facsimile or PDF copy shall have the same force and effect as execution of an original.

DEFENDANTS,
Day Pitney LLP,
Keith Bradoc Gallant, and
Rebecca Iannantuoni

By: _____ 11/20/19
James T. Shearin, Esq.
Marcy Tench Stovall, Esq.
Pullman & Comley LLC
850 Main Street
Bridgeport, CT 06604
Their attorneys

DEFENDANTS,
Koskoff, Koskoff & Bieder,
Kathleen L. Nastri, Esq.,
James D. Horwitz, Esq,.
Estate of Michael P. Koskoff, Esq.,
William M. Bloss, Esq.,
Joel H. Lichtenstein, Esq.,

By: _____ 11/20/19
Anthony Nuzzo, Jr., Esq.
Nadine Pare, Esq.
Nuzzo & Roberts, LLC
One Town Center
Cheshire, CT 06410

And

James K. Robertson, Jr., Esq.
Brian T. Henebry, Esq.
Carmody Torrance Sandak & Hennessey LLP
50 Leavenworth Street
Waterbury, CT 06702

PLAINTIFFS,
Domenic D'Attilo
Cathy Cullen,
and
Daniel Jacob D'Attilo

By: _____ 11/20/19

Howard Altschuler, Esq.
Law Offices of Howard Altschuler
23 Main Street
East Haven, CT 06512-2507

EXHIBIT A

The Parties agree that the arbitrator selected by AAA will be requested to review the list below of potential witnesses or individuals who may be referenced during testimony for purposes of making disclosures to the Parties.

In addition, the arbitrator selected will be asked to disclose if he/she is or ever has been a member or employee of the Connecticut Statewide Grievance Committee, the Connecticut Office of Chief Disciplinary Counsel, the Connecticut Trial Lawyers Association, or any attorney grievance committee or local ethics panel.

Potential Witnesses or Individuals Who May Be Referenced During Testimony:

(a) **PARTIES:**

(i) ***Plaintiffs*:**

- Domenic D'Attilo of Norwalk CT
- Cathy Cullen (formerly Cathy D'Attilo) of Wilton CT
- and their minor son Daniel Jacob D'Attilo of Wilton and Norwalk CT

Please note: the suit was filed when the Plaintiffs were still married, and all the pleadings and subsequent appellate cases refer to Plaintiffs as the "D'Attilos". Therefore, to avoid confusion, I will generally refer to the Plaintiffs, including Cathy Cullen, as the D'Attilos, or Cathy as Cathy D'Attilo.

(ii) ***Defendants (two law firms and seven attorneys)*:**

- **KOSKOFF, KOSKOFF & BIEDER, P.C. (offices in Connecticut)**
- Kathleen L. Nastri, Esq.
- James D. Horwitz, Esq.
- Michael P. Koskoff, Esq. (deceased) (Motion to Substitute Estate of Michael P. Koskoff and Executor Joshua Koskoff is pending)
- William M. Bloss, Esq.
- Joel H. Lichtenstein, Esq.

- **DAY PITNEY, LLP (offices in Connecticut, New Jersey, Massachusetts, New York, Washington D.C., and Florida)**
- Keith Bradoc Gallant, Esq.
- Rebecca A. Iannantuoni, Esq.

(iii) **COUNSEL FOR PARTIES:**

(A) **FOR PLAINTIFFS**:

- Howard Altschuler of the Law Offices of Howard Altschuler, East Haven, CT, 23 Main St., "The Old Mill" JCT RT 1/Main St., East Haven CT 06512-2507

(B) **FOR DEFENDANTS**

(1) **FOR KOSKOFF, KOSKOFF AND BIEDER AND KKB INDIVIDUAL DEFENDANTS**

- **Nuzzo and Roberts**, Cheshire, CT (Anthony Nuzzo, primary counsel).

- **(Non-appearing counsel): Carmody, Torrance Sandak and Hennessey**, Waterbury and New Haven, CT (James Robertson, primary counsel)

(2) **FOR DAY PITNEY**:

- Pullman & Comley, Bridgeport, CT (James (Tim) Shearin and Marcy Stovall, primary counsel) for the Day Pitney Defendants

(C) **OTHER POTENTIAL WITNESSES OR INDIVIDUALS WITH SIGNIFICANT MENTIONS IN THE PLEADINGS IN THIS CASE OR IN RELATED LITIGATION**

Last Name	First Name	Company	Position
Bair	John T.	Forge Consulting	Investment Advisor
Bott, Esq.	Cynthia	Koskoff, Koskoff & Beider	Partner
Bowler, Esq	Michael P	CT Statewide Grievance Committee	Statewide Bar Counsel
Carrasquillla, Esq.	Karyl L	Formerly with CT Statewide Grievance Committee	Formerly Chief Disciplinary Counsel (currently Superior Court judge)
Ciaramella	Lisa M.	Day Pitney	paralegal
Crane, Esq.	Anne	Berkowtiz Trager & Trager	Attorney
DePanfilis	Hon. Anthony	DePanfilis & Vallerie	Retired CT Probate Court judge
Dubois, Esq.	Mark	Geraghty & Bonnano	Attorney and Former Chief Disciplinary Counsel
Egan, Jr.	Joseph	Retired attorney	Retired CT Probate Court judge
Ely	Diane	Norwalk Probate Court	Clerk
Fagan, Sr.	Daniel	TIAA-CREF	Investment Counselor
Foito	Jeff	Coldwell Banker	Real estate agent
Forman, Esq.	Lawrence	Comprehensive Rehabilitation Associates, Inc.	Life Care Planner
Freccia, III Esq.	Vincent J.		Attorney
Fries, Esq.	Colleen D.	Coyne, Von Kühn, Brady & Fries, LLC	Attorney
Ganim, Esq.	Paul	Ganim Legal, P.C.	Attorney
Geronemus, Esq.	David		Attorney

Goldman, Esq.	Stephen E.	Robinson & Cole, LLP	Attorney
Greany, Esq.	Mark		Attorney
Jones, Esq.	Michael J.	Ivey, Barnum & O'Mara	Attorney
Kelly	Scott	Wells Fargo	Senior Vice President – Investment Officer
King, Esq.	Patricia	Geraghty & Bonnano	Attorney and Former Chief Disciplinary Counsel
Koskoff, Esq.	Joshua	Koskoff, Koskoff & Beider	Partner
Kulas, Esq.	Steven P.	Fairfield Judicial District Grievance Panel	Counsel
Larocca	Barbara	Koskoff, Koskoff & Beider	Paralegal
Lasprogato	Debra	Norwalk Probate Court	Clerk
Marra	Jayne A.	Day Pitney	Paralegal
Mercuri	Rosanna		Mr. D'Attilo's sister
Name(s) not currently known	accountant/bookkeeper	Koskoff, Koskoff & Beider	accountant/bookkeeper
Name(s) not currently known	IT technician(s)	Koskoff, Koskoff & Beider	IT technician(s)
Orozco	Diana	Koskoff, Koskoff & Beider	Bookkeeper
Pascucci	Joseph		Juror at first medical malpractice trial
Port, Esq.	Jennifer	Ivey Barnum & O'Mara	Attorney
Riccio, Esq	Eugene J.	Stamford/Norwalk Judicial District Grievance Panel	Counsel
Rosenblum, Esq.	James	Rosenblum Newfield, LLC	Attorney
Rosenblum	Todd	Adaptive Architecture	Architect
Silver, Esq.	Richard	Silver Golub & Teitell	Attorney

Totilo	Michael A	Totilo & Company	Accountant
Viscarello, M.D	Richard	Maternal Fetal Care PC	Medical doctor who settled with the D'Attilos in 2012
Walsh	Cindy	Koskoff, Koskoff & Beider	Controller
Waters	Brian	Lawsuit Funding Solutions	
Wood, Esq.	Robert W.	Wood LLP	Attorney

- There may be others not yet known because there has not been any discovery in this case
- Potentially, there may be expert testimony as well; expert names not yet known

(D) **OTHER ENTITIES FOR WHICH DISCLOSURE IS REQUESTED**:

- Connecticut Statewide Grievance Committee or related entities
- Connecticut Office of Chief Disciplinary Counsel
- Connecticut Trial Lawyers Association
- any attorney grievance committee or local ethics panel

EXHIBIT B

The Parties have agreed that the following arbitrators should not be included any any list of arbitrators that the AAA provides to the Parties:

1. Lisa G. Arrowood, Esq.
2. Andrew Lavoott Bluestone, Esq.
3. William Clendenen, Esq.
4. Michael J. DeBlis, Esq.
5. Hon. Elaine Gordon (Ret.)
6. Paul Holtzman, Esq.
7. Joseph Mengacci, Esq.
8. Matthew F. Pawa, Esq.
9. Hon. Joel Pisano (Ret.)
10. Hon Jonathan Silbert (Ret.)
11. Hon. Peter T. Zarella, (Ret.)
12. Hon. James Stapleton (Ret.)
13. Hon. Christopher Droney (Ret.)
14. Hon. Alan Nevas (Ret.)

EXHIBIT 3

AMERICAN ARBITRATION ASSOCIATION® | INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION®

AMERICAN ARBITRATION ASSOCIATION

In the Matter of Arbitration Between:

Case Number: 01-19-0003-2033

Domenic D'Attilo, Cathy Cullen fka
Cathy D'attilo, Daniel Jacob D'Attilo
-and-
Koskoff, Koskoff & Bieder PC; Kathleen L
Nastri Esq.; James D Horwitz, Esq.
Michael P Koskoff, Esq. (deceased) (Motion to
Substitute estate and Executor Joshua Koskoff
is pending); William M Bloss, Esq.
Joel H Lichtenstein, Esq.
-and-
Day Pitney LLP; Keith Bradoc Gallant, Esq.;
Rebecca A Iannantuoni, Esq.

NOTICE OF APPOINTMENT

To: Theodore Cheng Esq.;

It is most important that the parties have complete confidence in the arbitrator's impartiality. Therefore, please disclose any past or present relationship with the parties, their counsel, or potential witnesses, direct or indirect, whether financial, professional, social or of any other kind. This is a continuing obligation throughout your service on the case and should any additional direct or indirect contact arise during the course of the arbitration or if there is any change at any time in the biographical information that you have provided to the AAA, it must also be disclosed. Any doubts should be resolved in favor of disclosure. If you are aware of direct or indirect contact with such individuals, please describe it below. Failure to make timely disclosures may forfeit your ability to collect compensation. The Association will call the disclosure to the attention of the parties.

You will not be able to serve until a duly executed Notice of Appointment is received and on file with the Association. Please review the attached Disclosure Guidelines and, after conducting a conflicts check, answer the following questions and complete the remainder of this Notice of Appointment:

1. Do you or your law firm presently represent any person in a proceeding involving any party to the arbitration?

Yes (No)

2. Have you represented any person against any party to the arbitration?

Yes (No)

3. Have you had any professional or social relationship with counsel for any party in this proceeding or the firms for which they work?

Yes (No)

4. Have you had any professional or social relationship with any parties or witnesses identified to date in this proceeding or the entities for which they work?

Yes No

Please see additional disclosures.

5. Have you had any professional or social relationship of which you are aware with any relative of any of the parties to this proceeding, or any relative of counsel to this proceeding, or any of the witnesses identified to date in the proceeding?

Yes No

6. Have you, any member of your family, or any close social or business associate ever served as an arbitrator in a proceeding in which any of the identified witnesses or named individual parties gave testimony?

Yes No

7. Have you, any member of your family, or any close social or business associate been involved in the last five years in a dispute involving the subject matter contained in the case, which you are assigned?

Yes No

8. Have you ever served as an expert witness or consultant to any party, attorney, witness or other arbitrator identified in this case?

Yes No

9. Have any of the party representatives, law firms or parties appeared before you in past arbitration cases?

Yes No

10. Are you a member of any organization that is not listed on your panel biography that may be relevant to this arbitration?

Yes No

11. Have you ever sued or been sued by either party or its representative?

Yes No

12. Do you or your spouse own stock in any of the companies involved in this arbitration?

Yes No

13. If there is more than one arbitrator appointed to this case, have you had any professional or social relationships with any of the other arbitrators?

Yes No

14. Are there any connections, direct or indirect, with any of the case participants that have not been covered by the above questions?

Yes No

15. Are you aware of any other information that may lead to a justifiable doubt as to your impartiality or independence or create an appearance of partiality?

Yes (No)

Should the answer to any question be "Yes", or if you are aware of any other information that may lead to a justifiable doubt as to your impartiality or independence or create an appearance of partiality, then describe the nature of the potential conflict(s) on an attached page.

Please indicate one of the following:

___ I have conducted a check for conflicts and have **nothing to disclose**.

_X__ I have conducted a check for conflicts and have **made disclosures on an attached sheet**.

THE ARBITRATOR'S OATH

State of New Jersey

SS:

County of Mercer

I attest that I have reviewed my biographical information provided to the parties on this case and confirm it is current, accurate and complete.

I attest that I have diligently conducted a conflicts check, including a thorough review of the information provided to me about this case to date, and that I have performed my obligations and duties to disclose in accordance with the Rules of the American Arbitration Association, Code of Ethics for Arbitrators in Commercial Disputes, the parties' agreement, and applicable law pertaining to arbitrator disclosures.

I further affirm that consistent with the applicable Rules of the American Arbitration Association, the Code of Ethics for Arbitrators in Commercial Disputes, the parties' agreement, and applicable law:

- That I am fit to serve on the above-referenced arbitration and able to fully execute my responsibilities during all phases of the case;
- That I will keep confidential all matters relating to the above-referenced arbitration;
- That I will maintain a professional demeanor and appearance of impartiality during all phases of this case;
- That I will endeavor to effectively manage all phases of this case with a commitment to speed, economy and just resolution in a manner consistent with the parties' expectations;
- That I will bill parties responsibly and ethically and will review my bills for reasonableness relative to the nature and scope of the activity performed prior to submitting them to the AAA.

The arbitrator being duly sworn, hereby accepts this appointment.

Dated: 1/8/2020 Signed: 

Sworn before me this _____ day of _____ , 20__

AMERICAN ARBITRATION ASSOCIATION

In the Matter of Arbitration Between:

Case Number: 01-19-0003-2033

Domenic D'Attilo, Cathy Cullen fka
Cathy D'attilo, Daniel Jacob D'Attilo
Koskoff, Koskoff & Bieder PC; Kathleen L
Nastri Esq.; James D Horwitz, Esq.
Michael P Koskoff, Esq. (deceased) (Motion to
Substitute estate and Executor Joshua Koskoff
is pending); William M Bloss, Esq.
Joel H Lichtenstein, Esq.
Day Pitney LLP; Keith Bradoc Gallant, Esq.;
Rebecca A Iannantuoni, Esq.

NOTICE OF COMPENSATION ARRANGEMENTS

To: Theodore Cheng Esq.

You have been invited to serve as an arbitrator in the above matter. It is important that you understand the terms of your compensation and the role you play in ensuring that you receive payment for fees and expenses that you may incur during your service. This invitation to serve is based on our assumption that unless your panel biography states otherwise, you are willing to comply with the AAA's Billing Guidelines for Commercial Neutrals, which are available in Panelists eCenter at www.adr.org. If you expect to assess charges that fall outside those guidelines and those charges are not detailed on your panel biography, you must notify the AAA prior to accepting your appointment so that the parties can determine whether they still seek your services as an arbitrator.

Your Compensation

This matter is being administered under the Regular procedures of the Arbitrator Selection Service. Please carefully review your Compensation Rates below.

Neutral Name:	Theodore Cheng Esq.
Hearing:	$550/Hr
Study:	$550/Hr
Travel:	$0/Hr
Cancellation:	$0/Hr
Cancellation Period:	30days
Rate Comment:	On Large Complex Commercial, Regular Track, and Employment cases, expenses are generally charged at cost, but there will be no charges for time or disbursements related to travel and lodging. A per diem of four (4) hours will also be charged for the first two days of a scheduled session, if the session is cancelled less than 30 days before the scheduled date; 50% of the hourly rate will be charged for every cancelled or adjourned scheduled date thereafter. On expedited and flat-fee cases, there will be no charges for time related to travel, but travel and lodging-related costs may be charged for any session held more than two (2) hours travel time from Princeton Junction, NJ. No cancellation fees will apply on expedited and flat-fee

cases.

In all cases, any non-refundable travel and lodging-related costs incurred in response to a cancellation within five (5) business days of the commencement of a session will be charged.

NOTE: On cases administered under the Expedited and Fast Track procedures, the AAA established fixed rates with the expectation that the case should not require more than one day of hearing. If during the preliminary hearing you determine that this matter requires more than one day of hearing, please consult with your case manager about moving the case to the Regular procedures. Your case manager will discuss and facilitate any necessary changes to your terms of compensation. If the matter concludes after the preliminary hearing and prior to the final hearing, you will be compensated at half of this established rate. Under the Expedited and Fast Tracks, you receive no compensation for study time, travel time, or cancellations.

Your Expenses

On most cases, your expenses should be nominal and will be reimbursed immediately after you submit them. For any single expense over $75.00, please include a receipt with your request for reimbursement.

If you anticipate that you will incur significant expenses, such as airfare or hotel room costs, please advise your Case Manager in advance so that the parties can be asked to make deposits prior to you incurring the expense.

Deposits and Payment

Payment for your compensation is the obligation of the parties and it is understood that the American Arbitration Association has no liability, direct or indirect, for such payment. During the course of the proceeding the Case Manager will ask that you provide an estimate of the amounts needed to cover your fees. Generally this occurs immediately after the preliminary hearing, although on longer or more complex cases it can occur immediately upon appointment or after each series of hearings.

Unless you specify otherwise, the parties are advised that deposits are due 30 days prior to the first hearing. No later than two weeks prior to the hearing, the Case Manager will advise you of the total amount on deposit. Should the parties fail to make deposits in a timely manner, you must determine whether to go forward, suspend or terminate the proceedings until such time as deposits have been made, or per Rule R-57, a party may request that the arbitrator take specific measures relating to a party's non-payment. If you decide to go forward without full deposits, you may not subsequently delay the rendering of the award for lack of payment of your fees. The time to deal with this issue is prior to the commencement of the hearings. Should you decide to suspend the proceedings, your Case Manager can assist you in issuing an appropriate order to the parties.

If you realize that you are spending more time on this matter than you originally estimated, it is your obligation to inform the Case Manager prior to exhausting the current deposit. The Case Manager will then make arrangements with the parties for additional deposits per your instructions.

In order to receive payment, please submit bills promptly. Your bills should be submitted in a format that is presentable to the parties, should detail the dates on which the charges were incurred and must correspond with the terms of compensation outlined herein. Upon receipt, the AAA will release payment from the amounts deposited by the parties. Should there be insufficient funds on deposit, you will not receive payment until the parties have made additional deposits. Further, we will not use one party's deposit to cover another party's obligation without written permission to do so.

In the event your Award is delivered prior to payment by the parties of the agreed upon compensation, the AAA is authorized but not obligated to seek to collect these monies on your behalf by all lawful means to represent you in any action or proceeding for such recovery and to file a claim in any bankruptcy or insolvency proceeding for such

monies. The AAA may prosecute and receive any recovery on behalf of the undersigned and has full authority to compromise or settle such claims as may be, in its discretion, appropriate. However, under no circumstances whatsoever will the AAA be liable for any failure to collect any or all the monies due. The AAA is authorized to subtract a reasonable amount for collection and attorney's fees.

Failure to Disclose and Forfeiting Compensation

As an arbitrator in this matter, you have an ongoing obligation to disclose any direct or indirect relationship with the case participants. Your failure to make disclosures in a timely manner would be a serious transgression and may be grounds for your removal as arbitrator from this case and/or from the AAA's Roster of Neutrals. Should this occur, you may be required to forfeit the compensation for the time you spent on this matter after you should have made such disclosures.

If you are willing to serve on this matter per the compensation terms detailed above, please complete and sign the following section and return it, along with your Notice of Appointment, to your Case Manager.

ARBITRATOR MUST COMPLETE THE FOLLOWING SECTION

Compensation payments, and the corresponding IRS reporting, will be made to either to you individually (attributed to your Social Security Number) or to your employer (attributed to the Employer Identification Number), based on the preference you indicated and as recorded in your panel record. If you are unsure of your current payment preference, you may contact your Case Manager or the AAA Department of Neutrals' Services. Promptly inform the AAA if this information is incorrect or changes during the case, or if an address correction is necessary.

If the AAA does not have the payee's tax information on record, we must withhold 31% of compensation payments, as required by the IRS. Reimbursements of expenses are not subject to withholding and are not reported to the IRS.

I am willing to accept appointment on this matter under the compensation terms detailed above.

Dated: 1/8/2020 Signed: 

EXHIBIT 4

AD HOC ARBITRATION TRIBUNAL

In the Matter of the Arbitration between Domenic D'Attilo, Cathy Cullen (f/k/a Cathy D'Attilo), and Daniel Jacob D'Attilo, Plaintiffs, V. Koskoff, Koskoff & Bieder, P.C., Kathleen L. Nastri, Esq., James D. Horwitz, Esq., Joshua D. Koskoff, Esq. (as Executor of the Estate of Michael P. Koskoff, Esq.), William M. Bloss, Esq., Joel H. Lichtenstein, Esq. (collectively, "Koskoff, Koskoff & Bieder Defendants"); and Day Pitney, LLP, Keith Bradoc Gallant, Esq., Rebecca A. Iannantuoni, Esq. (collectively, "Day Pitney Defendants"), Defendants.	NO. CV146051836S Conn. Super. Ct.) Resolute Systems Ref. No. 5599689 JULY 15, 2021

STIPULATION ADDENDUM TO NOVEMBER 20, 2019 STIPULATION

WHEREAS, the above-referenced matter is being conducted pursuant to the Arbitration Stipulation dated and signed by the parties on November 20, 2019;

WHEREAS, the evidence in the matter concluded on June 30, 2021, and

WHEREAS, the Arbitrator Theodore Cheng has set forth a schedule with the last brief due on or before November 5, 2021; and

WHEREAS, Section 9 of the November 20, 2019 Arbitration Stipulation ("Stipulation") states as follows: "The Parties will work with the Arbitrator to reach a mutual agreement as to the deadline after the close of the record for the Arbitrator to render a decision. If the Parties disagree, the Arbitrator will decide, but in no event taking more than 120

days to issue a decision."

WHEREAS, Mr. Cheng has further requested of the parties 60 (sixty) days from the close of the record for his decision and award in this matter;

NOW, THEREFORE, in accordance with Paragraph 9 of the Stipulation permitting the parties to set the time in which an award must be rendered and to address the applicability of that part of Paragraph 5 of the Stipulation that may incorporate by reference Conn. Gen. Stat. § 52-416, the parties hereby agree that the time period for rendering a decision and award shall be 60 (sixty) days from the closing of the record on November 5, 2021 to and including January 4, 2022, unless further extended by the parties by written stipulation. The parties further agree that this Stipulation Addendum may be signed by facsimile signature and an original signature is not necessary.

DOMENIC D'ATTILO, CATHY CULLEN (F/K/A CATHY D'ATTILO), AND DANIEL JACOB D'ATTILO

By: _____ July 16, 2021

Howard Altschuler, Esq. **Date:**
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lawofficesofhowardaltschuler@gmail.com

KOSKOFF, KOSKOFF & BIEDER, P.C.,
KATHLEEN L. NASTRI, ESQ.,
JAMES D. HORWITZ, ESQ.,
JOSHUA D. KOSKOFF, ESQ. (AS EXECUTOR OF THE ESTATE OF MICHAEL P. KOSKOFF, ESQ.),
WILLIAM M. BLOSS, ESQ.,
JOEL H. LICHTENSTEIN, ESQ.

By: James C. Robertson Jr. 7/15/21
James K. Robertson, Jr., Esq. **Date:**
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DAY PITNEY, LLP,
KEITH BRADOC GALLANT, ESQ.,
REBECCA A. IANNANTUONI, ESQ.

By: 7/16/21
James T. Shearin, Esq. **Date:**
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EXHIBIT 5

AD HOC ARBITRATION TRIBUNAL

In the Matter of the Arbitration between Domenic D'Attilo, Cathy Cullen (f/k/a Cathy D'Attilo), and Daniel Jacob D'Attilo, Plaintiffs, V. Koskoff, Koskoff & Bieder, P.C., Kathleen L. Nastri, Esq., James D. Horwitz, Esq., Joshua D. Koskoff, Esq. (as Executor of the Estate of Michael P. Koskoff, Esq.), William M. Bloss, Esq., Joel H. Lichtenstein, Esq. (collectively, "Koskoff, Koskoff & Bieder Defendants"). Defendants.	NO. CV146051836S Conn. Super. Ct.) Resolute Systems Ref. No. 5599689 DECEMBER 1, 2021

SECOND STIPULATION ADDENDUM TO NOVEMBER 19, 2019 STIPULATION

WHEREAS, the above-referenced matter is being conducted pursuant to the Arbitration Stipulation dated and signed by the parties on November 20, 2019;

WHEREAS, the evidence in the matter concluded on June 30, 2021, and

WHEREAS, the Arbitrator Theodore Cheng set forth a schedule, as revised, with the last brief submitted on November 20, 2021; and

WHEREAS, Section 9 of the November 20, 2019 Arbitration Stipulation ("Stipulation") states as follows: "The Parties will work with the Arbitrator to reach a mutual agreement as to the deadline after the close of the record for the Arbitrator to render a decision. If the Parties disagree, the Arbitrator will decide, but in no event taking more than 120 days to issue a decision."

WHEREAS, Mr. Cheng has further requested of the parties until January 18, 2022 for his decision and award in this matter

NOW, THEREFORE, in accordance with the Stipulation permitting the parties to set the time in which an award must be rendered and to address the applicability of that part of Paragraph 5 of the Stipulation that may incorporate by reference Conn. Gen. Stat. § 52-416, the parties hereby agree that the time period for rendering a decision and award shall be on or before January 18, 2022, unless further extended by the parties by written stipulation. This Stipulation replaces the previous Stipulation Addendum dated July 15, 2021. The parties further agree that this Second Stipulation Addendum may be signed by facsimile signature and an original signature is not necessary.

DOMENIC D'ATTILO, CATHY CULLEN (F/K/A CATHY D'ATTILO), AND DANIEL JACOB D'ATTILO

By: _____ December 1, 2021

Howard Altschuler, Esq. **Date:**
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KOSKOFF, KOSKOFF & BIEDER, P.C.,
KATHLEEN L. NASTRI, ESQ.,
JAMES D. HORWITZ, ESQ.,
JOSHUA D. KOSKOFF, ESQ. (AS EXECUTOR OF THE ESTATE OF MICHAEL P. KOSKOFF, ESQ.),
WILLIAM M. BLOSS, ESQ.,
JOEL H. LICHTENSTEIN, ESQ.

By: _____ 12/1/21

James K. Robertson, Jr., Esq. **Date:**
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EXHIBIT 6

AD HOC ARBITRATION TRIBUNAL

In the Matter of the Arbitration between Domenic D'Attilo, Cathy Cullen (f/k/a Cathy D'Attilo), and Daniel Jacob D'Attilo, Plaintiffs, v. Koskoff, Koskoff & Bieder, P.C., Kathleen L. Nastri, Esq., James D. Horwitz, Esq., Joshua D. Koskoff, Esq. (as Executor of the Estate of Michael P. Koskoff, Esq.), William M. Bloss, Esq., Joel H. Lichtenstein, Esq. (collectively, the "Koskoff Defendants"); and Day Pitney, LLP, Keith Bradoc Gallant, Esq., Rebecca A. Iannantuoni, Esq. (collectively, the "Day Pitney Defendants"), Defendants.	No. CV146051836S (Conn. Super. Ct.) Resolute Systems Case No. 5599689

FINAL AWARD

THEODORE K. CHENG, Arbitrator January 17, 2022

I, THE UNDERSIGNED ARBITRATOR, having been appointed to hear this case; having been duly designated in accordance with the arbitration agreement, dated March 21, 2003, entered into between, on the one hand, Plaintiffs Domenic D'Attilo, Cathy Cullen (f/k/a Cathy D'Attilo), and Daniel Jacob D'Attilo (on his behalf by Mr. D'Attilo and Ms. Cullen), and, on the other hand, Defendant Koskoff, Koskoff & Bieder, P.C., as well as the Connecticut Superior Court's decision in *D'Attilo v. Koskoff, Koskoff & Bieder, P.C.*, No. CV146051836S (Conn. Super. Ct. Mar. 26, 2015) and the November 20, 2019 Stipulation executed between all the parties; having been duly sworn; and having heard the proofs and allegations of the parties, with Plaintiffs represented by

Howard Altschuler, Esq., of Law Offices of Howard Altschuler; the Koskoff Defendants represented by James K. Robertson, Jr., Esq., Brian T. Henebry, Esq., and Todd Michaelis, Esq., of Carmody Torrance Sandak & Hennessey LLP; and the Day Pitney Defendants represented by James T. Shearin, Esq. and Marcy T. Stovall, Esq., of Pullman & Comley, LLC, do hereby **FIND**, **CONCLUDE**, and **AWARD** as hereinafter set forth.

In issuing this Final Award, I have considered all of the material evidence adduced during the evidentiary hearing, which took a total of nineteen (19) hearing days beginning on June 3, 2021 and continuing through June 30, 2021. The hearing was conducted in a hybrid format with all participants appearing via the Zoom video teleconferencing platform and some participants also appearing physically in-person in Bridgeport, Connecticut. The evidentiary record included the sworn testimony of thirty (30) witnesses – eighteen (18) fact witnesses and twelve (12) expert witnesses – appearing either in-person, over Zoom, via affidavit, or via prior testimony, and approximately 630 documentary exhibits. I have also considered the arguments and submissions made by the parties throughout the proceeding, including their extensive post-hearing submissions and communications and the colloquy with me during a post-hearing conference that was held on December 3, 2021, as well as the relevant legal authorities. To the extent that I do not explicitly cite, discuss, or mention in this award any particular item of testimonial or documentary evidence, I have either determined that it is irrelevant to my determination or have accorded it little relative weight. To the extent that I have not explicitly addressed in this award any particular contention advanced by any party, I have nonetheless considered it. On these foregoing bases, I issue this Final Award as executed below.

After due and careful consideration, as further explicated below, I conclude that all of Plaintiffs' claims interposed in this proceeding against the Koskoff Defendants are **DENIED** and

DISMISSED WITH PREJUDICE in their entirety, with the exception of the civil conspiracy claim, which is **DENIED AS MOOT**. I also conclude that Plaintiffs have **WAIVED** any right to recover the alleged excessive fees, costs, expenses, and/or interest due under the 2003 Retainer Agreement based upon the legal theories of legal malpractice, intentional infliction of emotional distress, or negligent infliction of emotional distress, and they are **PRECLUDED** from bringing those claims again in an arbitral forum. Finally, I conclude that all of Plaintiffs' claims against the Day Pitney Defendants are **DENIED AS MOOT**. I set forth a complete recitation of the relief awarded in the Relief Awarded section of this Final Award.

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Jurisdiction

Under the applicable AAA Commercial Arbitration Rules, I am empowered to rule on my "own jurisdiction, including any objections with respect to the existence, scope, or validity of the arbitration agreement or to the arbitrability of any claim or counterclaim." Rule R-7(a); *see also* Case Management Order No. 1 ¶ 1 (parties agreeing to applicability of the AAA Commercial Arbitration Rules). I set forth below the relevant procedural history and the nature and scope of my arbitrable jurisdiction.

I. Plaintiffs' Commencement of the Arbitration Proceeding

1. At its core, this matter concerns a dispute arising from Plaintiffs' retention of the law firm of Koskoff, Koskoff & Bieder, P.C. as their trial attorneys in a medical malpractice action involving the minor, Daniel D'Attilo. The retainer agreement between Plaintiffs and the Koskoff Firm was executed on March 21, 2003 ("2003 Retainer Agreement") and contained an arbitration provision that read, in its entirety, as follows: "Any disagreements that arise between K K & B [the Koskoff Firm] and the Client [Plaintiffs], with respect to fees, costs, expenses, and/or interest due, shall be settled by binding arbitration." Ex. 23 at PL:00099 (Section V).

2. After the Koskoff Firm secured a favorable judgment in the medical malpractice action and negotiated a settlement with the physician's insurance company on Plaintiffs' behalf, Plaintiffs also retained the law firm of Day Pitney LLP to assist in, among other things, obtaining approval of the settlement and further planning for Danny's future needs. The settlement was approved in April 2012, and Plaintiffs' retentions of both the Koskoff and Day Pitney firms terminated shortly thereafter.

3. On December 23, 2014, Plaintiffs commenced a civil action in Connecticut Superior Court against the Koskoff Defendants and the Day Pitney Defendants. On January 27,

2015, Plaintiffs filed a First Amended Complaint, which became the operative complaint in that action. In 416 paragraphs supporting sixteen (16) counts, Plaintiffs interposed the following claims under Connecticut law, seeking, among other things, compensatory, consequential, punitive, and treble damages, along with reimbursement of their attorneys' fees and costs and pre-judgment (or pre-award) interest:

No.	**Count**	**Brought Against**
1	Fraud, Fraudulent Concealment, and/or Intentional Misrepresentation	All Defendants
2	Conversion	Only Koskoff Defendants
3	Statutory Theft (Conn. Gen. Stat. § 52-564)	All Defendants
4	Civil Conspiracy	All Defendants
5	Contingency Fee Recovery (Conn. Gen. Stat. § 52-251c(g))	Only Koskoff Defendants
6	Breaches of Fiduciary Duty	All Defendants
7	Legal Malpractice	Only Koskoff Defendants
8	Legal Malpractice	Only Day Pitney Defendants
9	Disgorgement	All Defendants
10	Intentional and/or Negligent Infliction of Emotional Distress	All Defendants
11	Unjust Enrichment	All Defendants
12	Connecticut Unfair Trade Practices Act (CUTPA), § 42-110a for Entrepreneurial Issues Related to the Practice of Law	All Defendants
13	Negligent Misrepresentation and/or Reckless Misrepresentation	All Defendants

14	Breach of Contract	Only Koskoff Defendants
15	Breach of the Implied Duty of Good Faith and Fair Dealing	Only Koskoff Defendants
16	Prima Facie Tort	All Defendants

4. The day before, on January 26, 2015, the Koskoff Defendants filed a motion to stay the state court action pending arbitration. On February 5, 2015, the Day Pitney Defendants similarly moved to stay the action pending arbitration.

5. In addressing these motions, the court initially concluded that the arbitration agreement contained within the 2003 Retainer Agreement was valid and enforceable. *See D'Attilo v. Koskoff, Koskoff & Bieder, P.C.*, No. CV146051836S, 2015 WL 1867335, at *3-5 (Conn. Super. Ct. Mar. 26, 2015) ("*D'Attilo* Court Decision").

6. The court then determined that portions of Plaintiffs' claims against the Koskoff Defendants were arbitrable. *See id*. at *5-9.

7. The court also stayed the entire action pending arbitration and further compelled to arbitration those claims interposed by Plaintiffs against the Day Pitney Defendants that the court had previously concluded were arbitrable, even though the Day Pitney Defendants were not signatories to any written arbitration agreement. *See id*. at *9-15; *see also id*. at *15 ("In sum, the same claims with regard to fees, costs, and expenses, and the allegations that the Koskoff defendants conspired with or were aided by the Day Pitney defendants that are to be arbitrated between the plaintiffs and the Koskoff defendants must also be arbitrated with the Day Pitney defendants before the stay is lifted.").

8. On October 1, 2019, the parties jointly engaged the AAA solely to assist them in selecting an arbitrator. The parties thereafter executed a Stipulation dated November 20, 2019 (the complete contents of which have not been made known to me) pertaining to various aspects of the

arbitration proceeding. In late February 2020, the AAA confirmed my appointment on this matter, and the AAA thereafter ceased to play any role in administering this proceeding, thereby converting this proceeding into one conducted solely by me, namely, an *ad hoc* (or non-administered) tribunal. (As the parties are aware, purely as a matter of personal practice, I utilized the services of Resolute Systems, LLC as a third-party administrator to assist me in the provision of neutral services in this proceeding, principally with regards to collecting arbitrator compensation deposits in advance and issuing invoices. The parties, however, were not charged for any of the services provided by Resolute Systems.)

II. Determining the Scope of Arbitral Claims and Issues

9. On March 31, 2020, in my role as the *ad hoc* appointed arbitrator, I held an initial case management conference in this proceeding. At that conference, the parties agreed that this proceeding would be governed by (1) the Connecticut General Statutes §§ 52-408 to 52-424, which were in effect on March 21, 2003; and (2) the AAA Commercial Arbitration Rules (effective October 1, 2013) and its procedures for Large, Complex Commercial Disputes. *See* Case Management Order No. 1 ¶ 1.

10. However, among other things, the parties also had a disagreement as to the precise issues and/or claims that would be the subject of this proceeding and upon which they desired a ruling from me. I thus ordered the parties to further meet-and-confer on these topics and, if necessary, submit briefing to me for a decision, which the parties ultimately did. *See* Case Management Order No. 1 ¶ 3.

11. After reviewing and considering the 2003 Retainer Agreement, the *D'Attilo* Court Decision, Plaintiffs' First Amended Complaint, and the parties' respective submissions, on May

4, 2020, I issued a Memorandum re: Arbitrable Issues and Claims. In that Memorandum, I concluded that, consistent with the *D'Attilo* Court Decision, the following nominal claims were properly arbitrable in this proceeding as seeking recovery of the fees, costs, expenses, and/or interest due under the 2003 Retainer Agreement:

Count	Nominal Legal Theory
1	Fraud, Fraudulent Concealment, and/or Intentional Misrepresentation
2	Conversion
3	Statutory Theft (Conn. Gen. Stat. § 52-564)
4	Civil Conspiracy
5	Contingency Fee Recovery (Conn. Gen. Stat. § 52-251c(g))
6	Breaches of Fiduciary Duty
9	Disgorgement
11	Unjust Enrichment
12	Connecticut Unfair Trade Practices Act ("CUTPA"), § 42-110A for Entrepreneurial Issues Related to the Practice of Law
13	Negligent Misrepresentation and/or Reckless Misrepresentation
14	Breach of Contract
15	Breach of the Implied Duty of Good Faith and Fair Dealing
16	Prima Facie Tort

See Mem. at 5.

12. I also concluded that, as to the remaining three claims – Count Seven (Legal Malpractice Against the Koskoff Defendants), Count Eight (Legal Malpractice Against the Day Pitney Defendants), and Count Ten (Intentional and/or Negligent Infliction of Emotional Distress)

– the allegations and issues underlying those claims that directly related to the fees, costs, expenses, and/or interest due under the 2003 Retainer Agreement were also arbitrable. *See id*. at 5-6.

13. In my Memorandum, I also set forth that, "as requested by all the parties, with their assistance, I will issue a reasoned final award with detailed factual findings and conclusions of law." *Id*. at 8 (citing the parties' submissions); *see also* Case Management Order No. 4 ¶ 6(d); *but see D'Attilo* Court Decision, 2015 WL 1867335, at *5 ("Common-law principles supplement the numerous statutory provisions governing the arbitration process. For example, although an arbitrator must render an award stating his decision resulting from his consideration of the matters submitted to him, the award need not contain factual findings or an explanation of the means by which the award was reached."; citations omitted).

14. Pursuant to Paragraph 4 of Case Management Order No. 1, on May 15, 2020, Plaintiffs submitted their Narrative of the Case re: Fee Related Issues. The Koskoff Defendants also submitted their Answering Statement, which comprised a narrative summary of the facts, a general denial of all claims interposed against them, and thirteen (13) enumerated affirmative defenses. Further, the Day Pitney Defendants submitted their Narrative Summary of Background Facts; Summary of Anticipated Defenses; and Statement of Case Management Positions, which, among other things, interposed three (3) affirmative defenses.

15. Pursuant to Paragraph 3(f) of Case Management Order No. 4 and Paragraphs 2 and 3 of Case Management Order No. 5, during October and November 2020, various discovery disputes arose between the parties, one of which pertained to Plaintiffs' articulation of the scope of arbitrable issues in this proceeding. After consideration of the parties' ensuing written submissions and a conference with counsel, I ordered Plaintiffs to provide an articulation, by way of factual and/or legal argument and theory, as to what portions of the following three claims –

Count Seven (Legal Malpractice Against the Koskoff Defendants), Count Eight (Legal Malpractice Against the Day Pitney Defendants), and Count Ten (Intentional and/or Negligent Infliction of Emotional Distress) – are properly before me for adjudication consistent with my May 4, 2020 Memorandum re: Arbitrable Issues and Claims. *See* Case Management Order No. 8 ¶ 1. Both the Koskoff Defendants and the Day Pitney Defendants submitted responses thereafter.

16. After considering their submissions, on December 29, 2020, I issued a Supplemental Memorandum re: Arbitrable Issues and Claims. In that memorandum, I reaffirmed the conclusions I had reached in my May 4, 2020 Memorandum and reiterated that I had left open the possibility that there may be portions of Counts Seven, Eight, and Ten that may be arbitrable before me under certain guiding principles, but did not mandate that result. *See* Supp. Mem. at 1.

17. I also noted that, while Plaintiffs were taking the position that none of the legal malpractice and emotional distress claims were arbitrable, I found that position surprising, and, specifically, that it seemed unlikely that there remained no portions of the legal malpractice claims that should be brought in the arbitral forum. *See id*. at 2-3.

18. I then proceeded to place Plaintiffs on notice of the potential adverse consequences of their choice not to prosecute any of those claims in this forum. *See id*. at 4-6. I concluded by noting that, "[i]nsofar as Plaintiffs are aware of the foregoing possible adverse consequences, it remains their choice whether to prosecute any portions of Counts Seven, Eight, and Ten in this forum. As far I am concerned, my understanding is that they have chosen not to arbitrate any portions of those three counts." *Id*. at 6.

III. The Evidentiary Hearing and Post-Hearing Proceedings

19. The evidentiary hearing in this proceeding ultimately took place between June 3, 2021 and June 30, 2021. During the colloquy with counsel after the conclusion of the hearing on June 30, 2021, in consultation with counsel, I set down a schedule that included simultaneous submissions of proposed findings of fact, followed by seriatim briefing on conclusions of law, namely, the submission of an opening brief by Plaintiffs, followed by the submission of responsive briefs by the Koskoff Defendants and the Day Pitney Defendants, a reply by Plaintiffs, and, finally, sur-replies by the Koskoff Defendants and the Day Pitney Defendants. The briefing was scheduled to conclude by November 5, 2021. *See* 6/30 Tr. at 124.

20. I also proposed that my award in this proceeding include a separate Findings of Fact section in numbered paragraphs, but that I employ simple prose with regards to my reasoning and conclusions of law, to which the parties consented. *See* 6/30 Tr. at 116.

21. I further requested that the parties modify Conn. Gen. Stat. § 52-416 and Rule R-45 so as to provide me with sixty (60) days from the close of the post-hearing briefing schedule to render the final award in this proceeding, and that, if they agreed, they draft a stipulation to that effect so as to comply with § 52-416. *See* 6/30 Tr. at 116-17.

22. Thereafter, by Stipulation dated July 15, 2021, the parties agreed, based upon the post-hearing briefing schedule, "that the time period for rendering a decision and award shall be 60 (sixty) days from the closing of the record on November 5, 2021 to and including January 4, 2022, unless further extended by the parties by written stipulation."

A. Settlement Between Plaintiffs and the Day Pitney Defendants

23. During the post-hearing briefing (the schedule having been adjusted by the parties' agreement), by letter dated November 13, 2021, Plaintiffs informed me "that the Day Pitney

Defendants and the Plaintiffs have reached a full and final settlement of all issues, including those related to both the arbitration and the civil case. Therefore, the Plaintiffs are hereby formally withdrawing with prejudice any and all claims in this arbitration against the Day Pitney Defendants only and will be withdrawing with prejudice all claims in the civil case against the Day Pitney Defendants only as well. The arbitration and civil suit against the [Koskoff] Defendants continue." Ltr. from H. Altschuler to T. Cheng (Nov. 13, 2021).

24. On November 26, 2021, Plaintiffs filed a formal withdrawal in the Superior Court of all the civil claims brought against the Day Pitney Defendants.

25. I invited Plaintiffs and the Koskoff Defendants to apprise me as to the impact, if any, that this settlement may have on the issues and claims that remained for me to decide with respect to Plaintiffs' claims against the Koskoff Defendants. The parties thereafter provided me with their respective submissions on this topic. *See* Ltr. from H. Altschuler to T. Cheng (Dec. 3, 2021); Ltr. from J. Robertson to T. Cheng (Nov. 24, 2021); Ltr. from H. Altschuler to T. Cheng (Nov. 19, 2021).

B. <u>Plaintiffs' Public Policy Contention</u>

26. In their post-hearing submissions, Plaintiffs contend (among other things) that the fees provision within the 2003 Retainer Agreement is contrary to public policy and law and, thus, should be held to be void. *See* Pls. Mem. at 7-27. In response, the Koskoff Defendants contend that Plaintiffs failed to plead a cognizable claim for this relief, and, thus, it is not before me for adjudication. *See* Koskoff Mem. at 4 n.2. Specifically, the Koskoff Defendants maintain that none of Plaintiffs' counts in the First Amended Complaint seeks a declaratory ruling that the 2003 Retainer Agreement should be deemed null and void on illegality grounds. Thus, according to them, any such claim is not properly before me.

27. In their reply, Plaintiffs retort that the Koskoff Defendants cite no authority for their contentions and ignore the fact that the complaint alleged violations of CUTPA and § 52-251c, which, by definition, are violations of public policy. *See* Reply at 19. Plaintiffs also note that "contracts that violate public policy are unenforceable" and point to their narrative summary, in which they had related that, "[o]n its face, an attorney asking a client to waive a future unknown protection for [a] client is a stark violation of public policy." *See id*. & n.12 (quoting *Geysen v. Securitas Sec. Servs. USA, Inc.*, 322 Conn. 385, 392 (2016) and Pls. Narrative of the Case re: Fee Related Issues (May 15, 2020), at 27).

28. In the meanwhile, due to adjustments in the briefing schedule, and at my request, Plaintiffs and the Koskoff Defendants further agreed to extend the time for the issuance of this Final Award to January 18, 2022. *See* Second Stip. Addendum (Dec. 1, 2021).

29. On December 3, 2021, because I had some discrete questions regarding the parties' post-hearing submissions, I held a conference at which I engaged counsel for Plaintiffs and the Koskoff Defendants in colloquy over various issues and claims in this proceeding. (Due to the settlement between Plaintiffs and the Day Pitney Defendants, counsel for the latter elected not to participate in this conference.) Pertinent to my jurisdiction and authority, Plaintiffs confirmed that they are not bringing any portions of the legal malpractice and emotional distress claims against the Koskoff Defendants in this proceeding.

30. Additionally, the parties informed me that they are in agreement that I should not apply Rule R-47(c) of the AAA's Commercial Arbitration Rules, which ordinarily mandates that I assess the administrative fees, expenses, and arbitrator compensation in this proceeding, apportioning them among the parties in such amounts as I deem appropriate.

31. Finally, it became clear that Plaintiffs' contention that the 2003 Retainer Agreement is void as contrary to public policy is, in fact, an argument being advanced in support of their claims, and not a separately interposed claim for adjudication. Thus, contrary to the Koskoff Defendants' contentions, I may properly consider the parties' respective perspectives on that public policy issue in deliberating on the claims brought by Plaintiffs in this proceeding.

C. Plaintiffs' Civil Conspiracy Claim

32. On December 6, 2021, partly in response to the colloquy during the December 3, 2021 conference, Plaintiffs filed a formal withdrawal in the Superior Court of the civil conspiracy claim (Count Four) brought against the Koskoff Defendants, which also operated to withdraw that claim from the arbitral forum. *See* Ltr. from H. Altschuler (Dec. 6, 2021); Ltr. from H. Altschuler to T. Cheng (Dec. 3, 2021).

33. Notably, however, Plaintiffs did not concomitantly withdraw their conspiracy and aiding and abetting allegations pled throughout their First Amended Complaint with respect to the conduct of both the Koskoff Defendants and the Day Pitney Defendants.

34. Thereafter, by e-mail dated December 6, 2021, I closed the hearing in this proceeding.

D. Plaintiffs' Standing

35. As a threshold matter, I note that the Koskoff Defendants have interposed affirmative defenses contending that Plaintiffs lack standing to pursue any of the claims they have interposed in this proceeding. *See* Koskoff Ans. Stmt. at 20 (§ IV., ¶¶ 9-10); *see also* Koskoff Findings of Fact ¶¶ 318-30 (which also incorporate by reference Day Pitney Findings of Fact ¶¶ 373-90). Because these defenses apply to the entirety of the proceeding and arguably impacts my jurisdiction, I elect to address them in advance.

36. Specifically, the Koskoff Defendants contend that the D'Attilos lack standing to prosecute their individual claims because they did not pay any of the fees or expenses at issue and, thus, have not been aggrieved. *See* Koskoff Mem. at 45. They also contend that the D'Attilos lack standing to prosecute any of Danny's claims in their capacity as either trustees of a trust (which is not a party to this proceeding), as Danny's guardians, through their authority as Danny's PPA, or as the conservators of Danny's estate. *See id*. at 45-47. ("Per proxima amici, or ppa, means by or through the next friend, and is employed when an adult brings suit on behalf of a minor, who was unable to maintain an action on his own behalf at common law." *Kinsella v. Toll CT II Ltd. P'ship*, No. UWYCV196048357S, 2021 WL 4902371, at *1 n.2 (Conn. Super. Ct. Oct. 1, 2021) (internal quotation marks and citation omitted)).

37. By e-mail dated December 13, 2021, Plaintiffs submitted a motion under Rule R-40, seeking "to briefly reopen [the] *D'Attilo v. KKB* hearing for the limited purpose of permitting the arbitrator to take judicial notice of the Norwalk-Wilton Probate Court December 8, 2021 Amended Order (Exhibit 1) and for the Order to be admitted as part of the record." On December 20, 2021, the Koskoff Defendants submitted an opposition to the motion.

38. On December 27, 2021, I exercised my discretion and granted Plaintiffs' application to reopen the hearing solely for the purpose of admitting this document into the evidentiary record. I also re-closed the hearing and proceeded to deliberations in furtherance of issuing this Final Award. *See* Case Management Order No. 21 at 3-4.

39. Initially, it is unclear to me – in light of both an agreement to arbitrate and the *D'Attilo* Court Decision compelling portions of Plaintiffs' claims to arbitration – that this doctrine of court subject matter jurisdiction ought to be applied in the arbitral forum. *See Wilcox v. Webster Ins., Inc.*, 294 Conn. 206, 214 (2009) ("Standing is the legal right to set judicial machinery in

motion. One cannot rightfully invoke the jurisdiction of the court unless he [or she] has, in an individual or representative capacity, some real interest in the cause of action, or a legal or equitable right, title or interest in the subject matter of the controversy."; internal quotation marks and citation omitted). No party has briefed this issue or identified any authority for this proposition. On this basis alone, and in view of the entire arbitral proceeding having been litigated to its conclusion, I would be inclined to exercise my discretion and deny the Koskoff Defendants' affirmative defenses.

40. Notwithstanding the foregoing, the *Wilcox* Court set forth the following:

> Standing is established by showing that the party claiming it is authorized by statute to bring suit or is classically aggrieved. . . . The fundamental test for determining [classical] aggrievement encompasses a well-settled twofold determination: first, the party claiming aggrievement must successfully demonstrate a specific, personal and legal interest in [the subject matter of the challenged action], as distinguished from a general interest, such as is the concern of all members of the community as a whole. Second, the party claiming aggrievement must successfully establish that this specific personal and legal interest has been specially and injuriously affected by the [challenged action].

Id. at 214-15 (internal quotation marks omitted). Under this standard, I conclude that the D'Attilos both have standing to prosecute their own claims and those of their son, Danny.

41. As to the parents' own claims, the Koskoff Defendants contend that the D'Attilos did not pay any of the fees or expenses at issue and, thus, have not been aggrieved. They arrive at this position by positing that, "because Mr. and Mrs. D'Attilo received an amount from the settlement in excess of the amount of the damages awarded to them by the medical malpractice jury, it cannot be said that they paid any portion of the fee to the Koskoff Firm or paid any of the lawsuit expenses." Koskoff Mem. at 45; *accord* Sur-Reply at 16. The Koskoff Defendants acknowledge that they have not relied on any authority to establish that a jury verdict somehow

limits a settlement allocation. *See* Sur-Reply at 16. Notwithstanding the foregoing, construing whether Plaintiffs have been aggrieved by comparing the total settlement amount as against the jury verdict that was obtained in the underlying action is certainly one logical and mathematical way to view the issue.

42. However, in doing so, the Koskoff Defendants overlook a few salient facts. First, each of the three settlement authorizations in January 2012, all of which were drafted by the Koskoff Firm and approved and signed by each of the D'Attilos, began with the phrase "We authorize our attorneys, Koskoff, Koskoff & Bieder, P.C., ..." *See* Ex. 138, Ex. 139, Ex. 144. Thus, these authorizations evince that the Koskoff Firm was acting on behalf of all three plaintiffs. Moreover, the two authorizations accepting settlement offers further reference that the D'Attilos authorized their attorneys "to settle our case for [$22,500,000.00 / $25,000,000.00] present cash value. We understand that the net amount will be approximately [$15,602,620.00 / $17,402,620.43] present cash value, as set forth below." Ex. 139, Ex. 144. There is no mention of the jury verdict or any of the jury's findings. Nor do the authorizations show how the net proceeds would be allocated as between the three plaintiffs. Additionally, each of the authorizations shows the gross amount of the legal fees and lawsuit costs, without any allocation of those amounts as between the three plaintiffs. The authorization accepting the $25 million figure was also submitted to the Probate Court, which approved the settlement in April 2012.

43. Second, the General Release and Settlement Agreement was entered into by the D'Attilos, both individually and on behalf of Danny. *See* Ex. 142 at 1. In that document, the two parents, individually and on behalf of Danny, agreed to release the insurance company "for and in consideration of TWENTY FIVE MILLION DOLLARS ($25,000,000) to them paid." *See id.*

Similarly, nowhere in this document is there mention of the jury verdict, any of the jury's findings, or any allocation of the total settlement amount as between the three plaintiffs.

44. Finally, the settlement proceeds were issued in the form of a check in the amount of $25,000,000 made collectively payable to:

> CATHY D'ATTILO, (INDIVIDUALLY AND ON BEHALF OF HER MINOR CHILD, DANIEL JACOB D'ATTILO), DOMINIC D'ATTILO (INDIVIDUALLY AND ON BEHALF OF HIS MINOR CHILD, DANIEL JACOB D'ATTILO), THE GUARDIANSHIP ESTATE OF DANIEL JACOB D'ATTILO AND KOSKOFF, KOSKOFF & BIEDER, P.C.

Ex. 308. This check also does not mention any allocation of the funds as between the three plaintiffs. Moreover, the Koskoff Firm negotiated the check, deducted the legal fees and expenses, and then distributed the net amount of the settlement proceeds. *See* Ex. 312 at KKBNR007103; Ex. 333. There was no evidence that, during that entire process, an allocation of the net proceeds as between the three plaintiffs was discussed, let alone documented.

45. Under these circumstances, I conclude that the D'Attilos should be deemed to have paid some portion of the fees or expenses at issue in this proceeding such that they were classically aggrieved.

46. As to Danny's claims, the Koskoff Defendants essentially contend that D'Attilos have not properly presented themselves in this proceeding in a representative capacity on behalf of their son.

47. However, on December 8, 2021, the Norwalk-Wilton Probate Court issued a decree, naming Danny's parents as conservators of Danny and his estate. *See In re: Daniel J. D'Attilo*, Am. Decree/Apptmt. of Conservator, No. 21-00010, at 2 (Conn. Prob. Ct. Dec. 8, 2021). In particular, the court also noted that, as conservators of the estate, they "have the authority, nunc pro tunc, to handle claims and litigation, including the current arbitrations/litigation of D'Attilo

v. Koskoff, Koskoff & Bieder, PC et al., (1) UWY-CV146051836S (Conn. Super. Ct. 2014) and (2) Arbitration Resolute Systems Ref. No. 5599689." *Id*. at 3. Based upon this decree, I am satisfied that D'Attilos have proper standing, authorized by statute, to bring claims on behalf of their son.

48. Therefore, the Koskoff Defendants' affirmative defenses of lack of standing are **DENIED**.

Findings of Fact

Based upon the material, relevant, and credible evidence adduced during the hearing, I set forth below my findings of fact that support the ultimate conclusions of law in this Final Award.

I. The Parties

A. Plaintiffs

1. *Plaintiff Domenic D'Attilo* was born in Sicily and moved to the United States when he was about seven years old. He went to school in Norwalk and quit school in the eleventh grade to learn how to become a mason. Mr. D'Attilo eventually owned construction, paving, masonry, restaurant, and excavation businesses. He was the sole owner of some businesses and worked with partners and/or Plaintiff Cathy Cullen in others. *See* 6/18 Tr. (D'Attilo) at 87-91, 135-37. In one year, he grossed over $1,000,000. He also employed several workers, and owned heavy equipment. *See* 6/14 Tr. (Cullen) at 52-53. He considered himself to be a successful businessman and "pretty smart." *See* 6/18 Tr. (D'Attilo) at 135-36.

2. From his many business experiences, Mr. D'Attilo learned the importance of contracts, the importance of understanding the requirements of contracts, and reading contract terms carefully. *See* 6/18 Tr. (D'Attilo) at 90-92, 137-38.

3. It was in Mr. D'Attilo's nature to negotiate aggressively and effectively with vendors. Ms. Cullen testified that this was his basic personality throughout their marriage, negotiating essentially everything. *See* 6/9 Tr. (Cullen) at 177-78 ("I couldn't go to purchase anything without him negotiating the price. Bob's Discount Furniture, he wanted a discount."). As she summarized, "Like I said, it was his nature to get discounts with everything. It was his nature to question people. It was his nature to want even a continued discount knowing him, so, I mean, it's just Domenic." 6/9 Tr. (Cullen) at 224; *accord* 6/14 Tr. (Cullen) at 71 (not denying that "Domenic is demanding, he hasn't changed at all. He gets what he wants."); 6/14 Tr. (Cullen) at 72-74 (agreeing that she previously testified that "All I know is Dom is all about the money either he gets a discount from you, or takes it from me or Danny and the lawyers. It's just never enough. This is him daily. . . . I'm surprised I haven't landed in a [psychiatric] ward."). *See also* Ex. 562 (Mr. D'Attilo's e-mail to his landscaper, in which he wrote, "You no [*sic*] this hole job you keep using this same line you did not want to pay for right people at the meantime I'm $1 million over budget you think I'm an asshole you fucking rape us here . . . you know Mike I have a lot of words for you . . .").

4. *Plaintiff Cathy Cullen* has lived in Connecticut her entire life and has a high school diploma. *See* 6/9 Tr. (Cullen) at 155-57. She met Mr. D'Attilo in 1993, and they married in 1997. *See* 6/9 Tr. (Cullen) at 157. (Ms. Cullen was known as Cathy D'Attilo while she was married to Mr. D'Attilo. In 2017, she divorced Mr. D'Attilo. *See* 6/9 Tr. (Cullen) at 151. For ease of reference, I will refer to her throughout this Final Award as "Ms. Cullen" and the couple as the "D'Attilos.")

5. Ms. Cullen began working at age 14 at various doctor's offices, and continues to do so. She performed tasks such as office billing and collections, computer data entry

and programming, assisting in therapies, preparing month-end statements, obtaining consents and authorizations from patients, preparing insurance submissions, and understanding and explaining changes in health benefits and coverage. *See* 6/14 Tr. (Cullen) at 50-52; 6/9 Tr. (Cullen) at 157, 161-62.

6. Ms. Cullen developed expertise while working in the medical community in the review, interpretation, and application of the declaration pages of insurance contracts issued by different vendors with different requirements for billing under CPT codes. The correct interpretation of these codes was foundational for the billing of services. *See* 6/9 Tr. (Cullen) at 199-200. She was good at this type of work because she was able "to pay attention to detail." 6/14 Tr. (Cullen) at 50-52.

7. Ms. Cullen also provided business advice and business services to the businesses owned and operated by Mr. D'Attilo, including the creation and interpretation of contracts and specifications, as well as related communications with customers. *See* 6/9 Tr. (Cullen) at 162-63. Her work included anticipating unforeseen obstructions that would require the payment of additional funds and contractual language to accommodate such situations. *See* 6/9 Tr. (Cullen) at 163. She did all the bookkeeping, including putting oral agreements into written form. *See* 6/14 Tr. (Cullen) at 53.

8. Ms. Cullen used her experience and expertise in the underlying medical malpractice case (discussed further below) by insisting that the Koskoff Firm obtain the entire insurance policy(ies) applicable to the case, which Ms. Cullen wanted to interpret for herself based upon her prior experience in the interpretation and application of insurance policies. *See* 6/9 Tr. (Cullen) at 200.

9. *Plaintiff Daniel Jacob D'Attilo* was a healthy fetus until a few days before his birth. As a result of the OB/GYN's medical malpractice, Daniel (or Danny) has

> very, very severe cerebral palsy. He couldn't walk or talk or communicate in any meaningful way. He was able to express pain and he definitely recognized his parents, so there was some, you know, recognition there. He was able to use some assistive devices, but not really to communicate. He was in a wheelchair. He was not ablet o use the wheelchair himself or even an electric wheelchair. He was fed through a G-tube. Yeah, I mean, he had significant cerebral palsy. . . . [T]here was no chance that Danny was going to be miraculously cured.

6/7 Tr. (Nastri) at 152-153, 155.

10. As Ms. Cullen further testified, today, Danny

> is an 18-year-old young man with a goatee and an attitude like his father's. . . . I have to give him his water, I have to change his diapers, I'm still wiping his mouth, I'm still changing him, I shower him, I'm still cleaning his nose, he still is G tube fed. His cognitive level is that of a toddler age, he can't communicate in any meaningful way, but he's got the most amazing and infectious smile to this day. But he is now 5-foot four, which is actually shorter than he probably should have been based upon his family history, but it's due to not walking, and he's now 104 pounds.

6/9 Tr. (Cullen) at 265.

B. The Koskoff Defendants

11. *Defendant Koskoff, Koskoff & Bieder, P.C. (the "Koskoff Firm")* is widely recognized as the leading plaintiffs' medical malpractice firm in Connecticut. According to expert witness Michael J. Walsh, a medical malpractice attorney, the Koskoff Firm is the premier plaintiffs' medical malpractice firm in the state, and the results their attorneys have achieved in their cases demonstrate that. The results they achieve reflect not only the skill and experience of the Koskoff attorneys, but also their willingness and ability to take even difficult cases to trial (and their reputation for doing so) to obtain the optimal outcome for their clients. This is reflected in

the sheer number of medical malpractice cases tried to verdict by the Koskoff Firm. *See* Ex. 578 (M. Walsh Initial Report) at 3; *see also* Ex. 595 (Dubois Rebuttal Report) at 7.

12. All the expert witnesses, including Plaintiffs' expert witness (retired Probate Judge Robert J. Killian, Jr.), consistently agreed that all the defendants in this case were and remain among the best in Connecticut in their fields of practice. *See, e.g.*, 6/21 Tr. (Killian) at 54-56 (testifying that he held the Koskoff Firm "in very high regard").

13. The Koskoff Firm, which was founded in Bridgeport by Defendant Michael Koskoff's father Ted Koskoff, has a long history of advocating for the rights of not only medical malpractice victims, but also the civil rights of underserved and underrepresented members of cities like Bridgeport, where the firm continues to maintain its principal office. Over the years, the firm's work has included not only medical malpractice and other personal injury work, but also their representation of plaintiffs in actions to ensure fair hiring practices within the Bridgeport police and fire departments and of plaintiffs in an action to enforce the educational rights of Connecticut students. Attorneys Ted and Michael Koskoff were also involved in defending the Black Panthers in highly publicized criminal trials. The firm is currently involved in litigation against gun manufacturers in connection with the 2012 killings of grammar school children and their teachers in Newtown, Connecticut. *See* 6/4 Tr. (J. Koskoff) at 325-29; 6/3 Tr. (Lichtenstein) at 110-17; *see also* KKB-D3 (cover of *Best Lawyers* showing members of the Koskoff Firm).

14. At all times relevant to the *D'Attilo* case, compensation of partners at the Koskoff Firm was determined by Attorney M. Koskoff. There was no "compensation formula" used to determine partner compensation, and a particular partner did not know how much other partners made. *See* 6/4 Tr. (Bernard) at 241-45. Attorney M. Koskoff did not want partners to act as "businessmen" or worry about how a particular case result might affect the firm's finances; the

paramount issue was always maximizing the result for the client. *See* 6/4 Tr. (J. Koskoff) at 334-35. If a partner had a good year "economically" in terms of the dollar value of settlements or judgments generated during a particular year, that would not necessarily convert into that partner receiving increased compensation for that year. *See* 6/8 Tr. (Nastri) at 213-16; 6/3 Tr. (Lichtenstein) at 126-27, 183-86.

15. *Defendant Kathleen L. Nastri* has been practicing law since 1986. Her reputation for candor, ethics, integrity and professionalism has been recognized by the legal profession's leading and highly selective and exclusive trial organizations, including the American College of Trial Lawyers, the American Board of Trial Advocates, the International Academy of Trial Lawyers, the Society of Barristers, and the Inner Circle of Advocates. She was elected the first female President of the Connecticut Trial Lawyers' Association ("CTLA"). She is admitted and in good standing in the courts of the State of Connecticut, the District of Connecticut, the Southern District of New York, and the Second Circuit Court of Appeals. *See* 6/8 Tr. (Nastri) at 169, 176-78.

16. *Defendant James D. Horwitz* has been practicing law since 1984 and practices almost exclusively in the area of medical malpractice. He is currently the Managing Partner of the Koskoff Firm. Attorney Horwitz has been recognized for his achievements and abilities as a trial lawyer through his membership in multiple highly selective trial organizations, including the Best Lawyers in America, the American College of Trial Lawyers, and the American Board of Trial Advocates. In addition to active participation in Legal Aid work, the Bridgeport Bar Association, and the CTLA (of which he was president in 2017), he is actively involved in non-legal community work, including service on his local library commission and board of education, and on the Long Wharf Theater Board. *See* 6/11 Tr. (Horwitz) at 134-38.

17. *Defendant Michael P. Koskoff* passed away in 2019 and, thus, was represented in this proceeding by his son, Joshua D. Koskoff as Executor of the Estate of Michael P. Koskoff, Esq. Michael Koskoff began practicing law in 1966. He was a leader and principal architect of the growth and success of the Koskoff Firm and a highly acclaimed attorney whose practice areas included civil rights, plaintiffs' personal injury (including medical malpractice, wrongful death, and products liability), and criminal defense. The many honors and accolades he received over the course of his career include the following: Best Lawyers "Lawyer of the Year" in 2010; the Lifetime Achievement Award from the Connecticut Trial Lawyers Association; a member of the American College of Trial Lawyers, the American Board of Trial Attorneys, the International Society of Barristers, and the Inner Circle of Advocates; and membership on the Connecticut Judicial Selection Commission. He was also the co-writer of the screenplay of the film "Marshall" about Thurgood Marshall. *See* Ex. 555 (M. Koskoff) at 111-12; Ex. 602 (M. Koskoff curriculum vitae).

18. *Defendant William M. Bloss* has been practicing law since 1984. Since joining the Koskoff Firm in 2005, he has been the leader within the firm in terms of advancing the law of bad faith claims (*i.e.*, claims against an insurance company for negligent failure to settle the case), and the positioning of medical malpractice cases to allow the assertion of such claims in the event that a verdict in excess of the insurance policy is obtained. *See* 6/4 Tr. (Bloss) at 90-92; 6/3 Tr. (Bloss) at 234-35. He became involved in the *D'Attilo* matter to provide assistance to Attorneys Nastri and Horwitz in prosecuting a bad faith claim against the insurance company. *See* 6/4 Tr. (Bloss) at 119-23; 6/3 Tr. (Bloss) at 241-43. His excellence as a trial lawyer has been recognized through his recognition in Best Lawyers in America in the areas of personal injury law and criminal defense. In addition to his work as a trial lawyer, Mr. Bloss has served on two search committees

for federal magistrate judge positions, the federal grievance committee, and the local grievance committee. He has also served as Chair of the Connecticut Citizens' Action Group, Board President of the Guilford Land Conservation Trust, a 20-year member of the Guilford Board of Education, Vice-Chair of the Guilford Tax Stabilization Committee, a member of the State of Connecticut Property Tax Commission, the Connecticut representative to the National Center for State Courts, a member of the Chief Justice's Jury Selection Committee on Jury Diversity, and as a member of the *Connecticut Law Tribune*'s editorial committee. He also does a substantial amount of pro bono work in the areas of criminal defense, civil rights litigation, and election law. *See* 6/4 Tr. (Bloss) at 90-100.

19. *Defendant Joel H. Lichtenstein* has been practicing law for 57 years (since 1964). Before joining the Koskoff Firm in 1974, he worked for five years in a law firm in New York doing medical malpractice work and five years as the executive vice-president of an insurance company that wrote medical malpractice insurance. Since joining the Koskoff Firm, he has managed the intake process for all medical malpractice cases. In 2003, when the D'Attilos came to the Koskoff Firm, the intake staff included a nurse paralegal (Deborah Dinan) and Attorney Lichtenstein's secretary. As of 2003, the Koskoff Firm received approximately 1,000 inquiries per year about potential medical malpractice claims, and that number has now grown to 2,000. In addition to supervising the case intake/investigation process and making decisions on which medical malpractice cases to take, he also manages the process of having the client execute a retainer agreement and manages the case up through the filing of the complaint. He has been handling the meeting with clients at which the retainer agreement is executed for decades. *See* 6/3 Tr. (Lichtenstein) at 6-11, 106-09, 135-37.

C. The Day Pitney Defendants

20. The Day Pitney Defendants comprise the law firm of Day Pitney, LLP (the "Day Pitney Firm") and two of its attorneys, Defendants Keith Bradoc Gallant and Rebecca A. Iannantuoni.

21. In view of the settlement reached between Plaintiffs and the Day Pitney Defendants, I constrain any further findings of fact relating to the Day Pitney Defendants only to those relevant to my disposition of the claims and issues as between Plaintiffs and the Koskoff Defendants.

II. Relevant Prior Proceedings

22. By summons and complaint dated December 9, 2014, Plaintiffs filed a complaint in the Connecticut Superior Court, alleging sixteen (16) counts against the Koskoff Defendants and the Day Pitney Defendants. Plaintiffs subsequently filed a First Amended Complaint dated January 26, 2015.

23. The Koskoff Defendants and the Day Pitney Defendants separately moved to stay the litigation pending arbitration of all disputes relating to the fees, costs, and expenses of the Koskoff Firm. On March 26, 2015, the Court granted those motions as to all arbitrable claims. *See D'Attilo v. Koskoff, Koskoff & Bieder, P.C.*, No. CV146051836S (Conn. Super. Ct. Mar. 26, 2015).

24. In March of 2015, Plaintiffs Domenic D'Attilo and Cathy Cullen filed a sworn statement under penalty of false statement in support of a Grievance Complaint filed against Attorneys Nastri, Horwitz, M. Koskoff, Bloss, Lichtenstein, Gallant and Iannantuoni. The

grievances were based upon allegations similar to those asserted in the action filed in the Connecticut Superior Court. *See* 6/9 Tr. (Nastri) at 5-20.

25. In addition to filing the civil action and the grievance complaint, Plaintiffs (1) engaged in a concerted media campaign to publicize the detailed allegations made in the civil action and the grievance complaints, (2) met with the FBI in an attempt to convince law enforcement agencies to investigate the Koskoff Defendants and the Day Pitney Defendants, and (3) tried to involve the Connecticut Attorney General. *See* 6/18 Tr. (D'Attilo) at 155-56; *see also* 6/9 Tr. (Nastri) at 82-84; 6/8 Tr. (Nastri) at 184-86.

III. Contingency Arrangements in Personal Injury Actions

A. Maximum Contingent Attorneys' Fees

26. The recovery of contingent attorneys' fees on personal injury actions is governed, in the first instance, by an applicable statute. When originally enacted in 1986, Conn. Gen. Stat. § 52-251c (entitled "Limitation on attorney contingency fees in personal injury, wrongful death and property damage actions") provided, in subsection (b), as follows:

> In any such contingency fee arrangement such fee shall be the exclusive method for payment of the attorney by the claimant and shall not exceed an amount equal to a percentage of the damages awarded and received by the claimant or of the settlement amount received by the claimant as follows: (1) Thirty-three and one-third per cent of the first three hundred thousand dollars; (2) twenty-five per cent of the next three hundred thousand dollars; (3) twenty per cent of the next three hundred thousand dollars; (4) fifteen per cent of the next three hundred thousand dollars; and (5) ten per cent of any amount which exceeds one million two hundred thousand dollars.

27. In other words, the statute prescribed a maximum allowable contingent legal fee (or "mandatory fee cap") resulting from the sum of increasingly tiered levels of recovery,

each multiplied by a series of decreasing percentages, also referred to as the "sliding scale." In any particular case, under this statute, one arrives at the mandatory fee cap by applying the sliding scale to the total damages or settlement amount.

28. The enactment of this statute (hereinafter referred to as the "1986 version of § 52-251c") was the result of a legislative initiative by the insurance companies and medical providers broadly called "tort reform" in response to what those groups characterized as a "malpractice crisis." The mandatory fee cap as prescribed in § 52-251c(b) came out of this lobbying effort by the medical and insurance industries, and the goal of this provision was to limit the amount of fees malpractice attorneys could earn, thereby reducing the number of cases that were ultimately filed. *See* 6/3 Tr. (Lichtenstein) at 141-42; Ex. 555 (M. Koskoff) at 142-44.

29. In *In re: Estate of Salerno*, 42 Conn. Sup. 526 (1993), the Connecticut Superior Court held that the mandatory fee cap found in § 52-251c was a private right that could be waived, thereby permitting an attorney to recover a contingent fee beyond the maximum allowable amount. *See* 6/28 Tr. (Dubois) at 13-15. That is, even though the statute itself did not contain any explicit language permitting a plaintiff-client to waive her/his rights to pay only up to the mandatory fee cap under the sliding scale, the court concluded that such a waiver was permissible and valid. Notably, the court did not mandate any specific manner in which to accomplish the waiver, only that a plaintiff-client must "freely and voluntarily" waive her/his rights provided for in the statute. *See Salerno*, 426 Conn. Sup. at 533-34.

30. After *Salerno*, there was no "standard template" or "standard boilerplate language" used by plaintiffs' personal injury attorneys in Connecticut to obtain a waiver. Plaintiffs' attorneys like the Koskoff Firm typically all had their own versions of the language used to obtain the waiver. The language found in the "standard" Koskoff Firm retainer agreement was

generally consistent with the types of waiver language in use at the time. *See* Ex. 578 (M. Walsh Initial Report) at 5-6.

31. In 2003, Attorney M. Koskoff and others at the Koskoff Firm were keenly aware of and involved in efforts to revise § 52-251c to expressly allow for waivers of the mandatory fee cap. *See* 6/7 Tr. (Nastri) at 97-99; 6/4 Tr. (Bernard) at 256-58; 6/3 Tr. (Lichtenstein) at 143-44; Ex. 555 (M. Koskoff) at 133-34.

32. One of the legislative goals of the CTLA at this time was to "codify" the holding of *Salerno* by adding a provision to § 52-251c that expressly allowed for the waiver of rights under § 52-251c. *See* 6/7 Tr. (Nastri) at 97-99; 6/4 Tr. (Bernard) at 256-58; 6/3 Tr. (Lichtenstein) at 143-44; Ex. 555 (M. Koskoff) at 133-34.

33. The Koskoff Firm, through the leadership roles of many of its partners in the CTLA, was actively involved in the CTLA's legislative efforts to revise § 52-251c to include a provision that codified the trial court holding in *Salerno* by allowing plaintiffs to waive the mandatory fee cap and the sliding scale found in § 52-251c.

34. Specifically, Attorney Christopher Bernard, a Koskoff Firm partner, was president of the CTLA in 2002-2003 and was actively involved in opposing attempts by the insurance lobby to pass a cap on awards for pain and suffering in personal injury cases. During the 2003 legislative session, the Connecticut Legislature did not ultimately enact a cap on pain and suffering damages. *See* 6/4 Tr. (Bernard) at 250-58.

35. Additionally, following Attorney Bernard, Attorney Nastri was president of the CTLA in 2003-2004. During the 2004 legislative session, comprehensive tort reform legislation was passed by the Legislature, including a provision allowing for waivers of the

mandatory fee cap and the sliding scale found in § 52-251c, but that act was subsequently vetoed by the Governor. *See* 6/8 Tr. (Nastri) at 177-81; 6/7 Tr. (Nastri) at 71-81, 94-99.

36. During the 2005 legislative session, the Legislature passed, and the Governor signed, Connecticut Public Act No. 05-275, which, among other things, expressly allowed waivers of the mandatory fee cap in § 52-251c (hereinafter referred to as the "2005 version of § 52-251c"). Specifically, the newly enacted statute now contains a subsection (c) that provides as follows:

> Notwithstanding the provisions of subsection (b) of this section, a claimant may waive the percentage limitations of said subsection if the claim or civil action is so substantially complex, unique or different from other wrongful death, personal injury or property damage claims or civil actions as to warrant a deviation from such percentage limitations.

Moreover, in subsection (e), the 2005 version of § 52-251c enumerates specific requirements in order for a client's waiver to be valid, including that the waiver must be in writing, contain conspicuous language in boldface type, and be signed and acknowledged by the claimant under oath.

37. Although Attorney M. Koskoff was not an officer of the CTLA, he was actively involved in "behind the scenes" strategizing with CTLA leaders like Attorneys Bernard and Nastri about legislative initiatives and would consult frequently with them about the status of legislative initiatives, including, but not limited to, CTLA efforts to "codify" the *Salerno* holding. *See* 6/7 Tr. (Nastri) at 97-99; 6/4 Tr. (Bernard) at 256-58; 6/3 Tr. (Lichtenstein) at 143-44; Ex. 555 (M. Koskoff) at 133-34.

B. <u>The Koskoff Firm's Practice of Taking Medical Malpractice Cases</u>

38. The economic risks to firms who undertake the representation of plaintiffs in medical malpractice cases generally include the significant costs of investigating potential

claims during the intake process. Under Connecticut law, before filing a medical malpractice case, the plaintiffs' attorney must not only certify that there is a good faith basis to file the action, but s/he must also obtain a certification from a doctor specializing in the field at issue that there was a departure from the standard of care that caused the plaintiffs' injury. The search for an expert in a particular case is often a time-consuming and expensive process during which the Koskoff Firm intake staff would search for an expert who is involved in the day-to-day practice in that particular field. The Koskoff Firm must pay the significant fees charged by such medical experts, and these costs are never recovered if the firm ultimately rejects the case or if the case is filed but no recovery is obtained. *See* 6/3 Tr. (Lichtenstein) at 120-26.

39. When the Koskoff Firm is contacted about a potential new case (both now and in 2003), the intake and review process is an extensive effort involving both Attorney Lichtenstein and highly skilled nurse paralegals who work in the intake unit. The process includes extensively interviewing the potential client to gather the case history; gathering voluminous medical records and funding the often significant cost of such records (typically from multiple hospitals and multiple health care providers); reviewing the records and preparing comprehensive write-ups regarding the issues in the case; identifying potential experts and discussing the case with such experts after they have reviewed all the relevant records; having multiple communications with potential clients; and making the ultimate decision on whether to accept the case and file suit. *See* 6/3 Tr. (Lichtenstein) at 128-32. In 2003, the Koskoff intake group received approximately 1,000 contacts from potential clients per year, and that number is now approximately 2,000 contacts. Out of all these contacts, the Koskoff Firm files on average approximately 30 or fewer new medical malpractice cases each year. *See* 6/3 Tr. (Lichtenstein) at 136-37.

40. Following the *Salerno* decision, "top echelon" medical malpractice firms like the Koskoff Firm that had the ability to be highly selective in the medical malpractice cases they accepted (based upon their reputations and high level of skills) began requiring waivers of the mandatory fee cap and the sliding scale)provisions of Conn. Gen. Stat. § 52-251c as a condition of retaining those firms in complex cases such as those involving birth injuries. This shift in practices after the *Salerno* decision reflected the significant economic risks posed by virtually all medical malpractice cases generally, and, in particular, birth injury cases. *See* Ex. 578 (M. Walsh Initial Report) at 3; 6/28 Tr. (Dubois) at 11-13.

41. The practice of the Koskoff Firm since at least the time of the *Salerno* decision in 1993 was that it did not, and still does not, take medical malpractice cases under the mandatory fee cap and the sliding scale found in § 52-251c. Moreover, other than the 2003 Retainer Agreement (discussed further below), the Koskoff attorneys have not seen a contingent fee in a medical practice case at their firm of less than one-third (1/3). *See* 6/11 Tr. (Horwitz) at 53-55, 140-41; 6/4 Tr. (Bloss) at 110-11; 6/7 Tr. (Lichtenstein) at 7; 6/3 Tr. (Bloss) at 279-80; 6/3 Tr. (Lichtenstein) at 12-13, 39-40, 94-95.

42. For certain types of "simple" personal injury actions that do not involve complex issues, the Koskoff Firm has taken cases on which they are compensated based upon the sliding case. However, the firm generally does not take simple cases, and it does not take medical malpractice cases on which they are compensated based upon the sliding scale. *See* 6/11 Tr. (Horwitz) at 140-41; 6/4 Tr. (Bloss) at 110; Ex. 555 (M. Koskoff) at 122.

43. The reasons the Koskoff Firm has not and does not take medical malpractice cases, and, particularly, birth injury cases, under the sliding scale fee percentages set forth in Conn. Gen. Stat. § 52-251c are that: (1) birth injury cases are the most complex and difficult cases to

investigate; (2) the insurance industry and doctors have joined forces to vigorously defend against such claims; (3) the cases typically take a long time to prosecute; and (4) after all this effort and expense, the firm will lose some of these cases after many years of litigation and great expense. *See* 6/3 Tr. (Lichtenstein) at 36-37, 132-34, 137-41; Ex. 555 (M. Koskoff) at 142-43.

44. Expert witness Michael J. Walsh confirmed that birth injury cases pose significant economic risks to plaintiffs' medical malpractice firms for several reasons, including the costs of experts needed to prosecute such claims; the complexity of the issues and the proof required to establish negligence in birth injury cases; the costs incurred during typically lengthy periods of discovery, trial preparation, trial, and appeal; the risk of multiple trials; the risks of a defense verdict or a "small" verdict; and the fact that such cases are less likely to settle because the defendant-doctor has authority to reject a settlement offer even if her/his insurance company is willing to accept it. *See* Ex. 578 (M. Walsh Initial Report) at 3.

45. Because most "top tier" plaintiffs' medical malpractice firms would not accept birth injury cases on the sliding scale in 2003, potential plaintiffs in the position of the D'Attilos might not have had adequate representation absent waivers of the mandatory fee cap and the sliding scale fee percentages. *See* Ex. 578 (M. Walsh Initial Report) at 9.

IV. The Retainer Agreement at Issue

46. On February 2, 2003, Danny was born at Stamford Hospital. *See generally* Ex. 6; Ex. 104; *see also* First Am. Compl. ¶ 3; KKB-D4 (contract formation chronology) at 1. The delivery entailed complications, resulting in Danny being born with cerebral palsy. Nearly 19 years old now, Danny cannot talk or walk, has to be fed with liquid only through a feeding tube

directly into his stomach, and will always require around-the-clock care. *See* First Am. Compl. ¶¶ 3, 13; 6/9 Tr. (Cullen) at 265; 6/7 Tr. (Nastri) at 152-53, 155.

47. At some point after Danny's birth, Ms. Cullen obtained from a friend the name of medical malpractice attorney Richard Silver. Ms. Cullen then contacted Attorney Silver, who had a conflict of interest and recommended that she contact the Koskoff Firm. *See* 6/9 Tr. (Cullen) at 170-73, 176; 6/3 Tr. (Lichtenstein) at 24; Ex. 4 at KKBNR004817; KKB-D4 at 1.

48. On February 24, 2003, the D'Attilos first contacted the Koskoff Firm. Attorney Lichtenstein instructed his staff to contact the family and obtain the medical records. *See* Ex. 4 at KKBNR004817; Ex. 5 at CTSH023347; KKB-D4 at 1.

49. On February 25, 2003, Deborah Dinan, a nurse paralegal at the Koskoff Firm, had a telephone conference with Mr. D'Attilo, during which she conducted an initial intake interview to get information related to Danny's birth. Nurse Dinan told Mr. D'Attilo she would send medical record authorizations and a proposed retainer agreement. *See* Ex. 4 at KKBNR004817; Ex. 5 at CTSH023344; KKB-D4 at 1.

50. On February 28, 2003, Nurse Dinan drafted an intake memorandum to Attorney Lichtenstein to convey the intake information she had received from Mr. D'Attilo on their February 25th call. In this memorandum she wrote, "Will send auths and retainer as per our t/c discussion." Ex. 6 at 4.

51. That same day, Nurse Dinan also mailed to the D'Attilos a cover letter, along with medical authorizations and a copy of the Koskoff Firm's standard retainer agreement, which set forth a contingent fee of 33 1/3% and a waiver of the mandatory fee cap provisions of Conn. Gen. Stat. § 52-251c. Specifically, the proposed retainer agreement included the following

provisions regarding the contingent payment of attorneys' fees and the waiver of the mandatory fee cap:

> II. FEES - The Client agrees that K K & B shall receive fees of thirty-three and one-third percent (33 1/3%) of the total recovered, whether by way of settlement or award, before deduction of liens, costs and expenses. The Client authorizes K K & B to deduct said fees, liens, costs and expenses out of monies received from said party or parties. If all or any part of the settlement or award is to be paid in installments (a "structured settlement") the fee shall be based upon the present cost of such settlement or award; all fees, liens, costs and expenses will be paid from the first monies received.
>
> It is agreed that this employment is on a contingent fee basis. If no recovery is made, the Client shall not owe K K & B any sum as attorneys' fees.
>
> At the conclusion of the case all documents relating to the case will be electronically stored for six (6) years. Documents conferring or imposing legal rights upon you will be provided to you at the conclusion of the case.
>
> III. WAIVER - There is a statute which sets forth fee limits in contingent fee contracts which limits are set forth in attached Exhibit A. The law allows voluntary waiver of this statute. In view of the complex nature of this case, the expense involved in prosecuting this case, the agreement by K K & B to advance all costs and expenses on the Client's behalf, and the expertise of K K & B in handling cases of this nature, the Client hereby knowingly waives the statutory fee limits. In no event, will the fee exceed thirty-three and one-third percent (33 1/3%).
>
> IV. COSTS AND EXPENSES - Costs and expenses include court fees, investigation expenses, expert fees, and all other disbursements incurred in the prosecution or settlement of this action. K K & B agrees to advance all out of pocket costs and expenses in connection with this litigation. Upon settlement of the case, K K & B is authorized to deduct these costs and expenses from any settlement or award after the legal fee has been deducted.

Ex. 9 at KKBNR007126. The referenced Exhibit A showed the following:

Connecticut General Statutes Section 52-251c

33 1/3% of the first $300,000.00
25% of the next $300,000.00
20% of the next $300,000.00
15% of the next $300,000.00

10% of any amount in excess of $1,200,000.00

52. Nurse Dinan mailed these materials to the D'Attilos' home address at 36 Beecher Avenue in Shelton, which the D'Attilos confirmed was their address at the time. *See* Ex. 9; 6/18 Tr. (D'Attilo) at 95; 6/15 Tr. (Cullen) at 127-28; *see also* Ex-4 at KKBNR004817, KKBNR004821; Ex. 5 at CTSH023344; Ex. 6 at 4.

53. Although the D'Attilos each could not recall whether they had received the February 28, 2003 letter and materials from the Koskoff Firm, they set forth averments in their Grievance Complaint, from which it could be inferred that they had, in fact, received a proposed retainer agreement from the Koskoff Firm. *Compare* 6/18 Tr. (D'Attilo) at 94-96; 6/9 Tr. (Cullen) at 173 *with* Grievance Compl. ¶¶ 15-18. The fact that the D'Attilos had received the proposed retainer agreement was established and corroborated by the allegations made in their First Amended Complaint and the Grievance Complaint, Rosanna Mercuri's affidavit, and Attorney Mark Greany's affidavit. *See* First Am. Compl. ¶¶ 19-20; 6/15 Tr. (Cullen) at 132-33, 139 (referencing Grievance Compl. ¶¶ 15, 18); Ex. 519 (Mercuri Aff.) ¶¶ 5-6, 8; Ex. 527 (Greany Aff.) ¶¶ 5-7.

54. On March 5, 2003, Mr. D'Attilo had a telephone conversation with Nurse Dinan and told the Koskoff Firm that he wanted to proceed with obtaining the medical records related to Danny's birth. *See* Ex. 4 at KKBNR004821.

55. At some point after receiving the Koskoff Firm's standard retainer agreement, Mr. D'Attilo asked his sister, Rosanna Mercuri, to talk to Attorney Mark Greany, an

attorney for whom she babysat, about the agreement he had received from the Koskoff Firm because Mr. D'Attilo thought that the contingency fee sounded "high." Ms. Mercuri "told [Attorney Greany] that my brother Dom had questions about contingency fee rates for a case related to Danny. I said Dom told me he thought the contingency fee asked by another law firm for [*sic*] sounded high. [Attorney Greany] said as a favor to me he would look into it and call my brother. I gave Dom's phone number to [Attorney Greany]. . . . At some point after that (I don't remember when), I asked [Attorney Greany] if he had called my brother. [Attorney Greany] said he had. I remember [Attorney Greany] said that he had been able to help Dom get a better rate." Ex. 519 (Mercuri Aff.) ¶¶ 5-6, 8; *accord* Ex. 556 (Mercuri) at 98-105; Ex. 527 (Greany Aff.) ¶¶ 5-7; 6/15 Tr. (Cullen) at 132-33 (referencing Grievance Compl. ¶ 18); First Am. Compl. ¶ 20.

56. On or about March 12, 2003, Attorney Greany called the Koskoff Firm and spoke to Attorney Lichtenstein. Attorney Lichtenstein described his conversation with Attorney Greany and his subsequent conversation with Attorney M. Koskoff as follows:

> So he called, he introduced himself as – himself as Attorney Mark Greany, that he was calling on behalf of the D'Attilos, and that they would like to have a reduction of our fee to 28 percent. And then he made a comment, something about not fully understanding statute and case law, but they would like a reduction to 28 percent. I took his name down and his phone number, and I told him that I could not make that decision on my own; it would have to be a discussion with my partners. We ended the call. I got up from my office, walked to Michael Koskoff's office, related the conversation, handed him the piece of paper with Mark Greany's name and phone number. And Michael said that he would call him.

6/3 Tr. (Lichtenstein) at 163-64; *accord* 6/7 Tr. (Lichtenstein) at 30-32; 6/3 Tr. (Lichtenstein) at 100-15; Ex. 555 (M. Koskoff) at 115-16.

57. The call from Attorney Greany stood out in Attorney Lichtenstein's mind because it is the only time he recalled an attorney calling to ask the Koskoff Firm to provide a discount off its usual 33 1/3% contingent fee. *See* 6/3 Tr. (Lichtenstein) at 15-17.

58. That same afternoon, Attorney M. Koskoff had a telephone conversation with Attorney Greany regarding the latter's request that the Koskoff Firm discount its contingent fee as a professional courtesy. Attorney M. Koskoff described Attorney Greany's concern about Conn. Gen. Stat. § 52-251c as follows:

> And what [Attorney Greany's] concern was that the statute that was in effect at that time did not have specific language about waiver. And I said, Well there's a statute. I know. I told him, look it. We were working on this at the time in the legislature, that there was going to be a – a legis – what they call a legislative fix, but what it means is to get the statute in accordance with the case law. And, so, I said, Well, okay. I said, Well, if the statute that's in effect at the time allows for the waiver, would that be okay with you? And he said, That's fine. So I drafted a sta – I drafted the retainer agreement to say – because if you see the first line there, it says, pursuant to statute, we're going to receive that. That was the current statute and if that particular statute was not in effect, that statute up there didn't have a waiver provision. And I said if that statute isn't in effect, at the time of distribution, the fee will be 28 percent and he was absolutely fine with that. And then, because he was representing the D'Attilo's, and this is as far as I was concerned at any rate, I sent him – I don't know if it was that day or the next day, I think, I sent him the agreement and asked him to have the D'Attilo's [*sic*] sign it.

Ex-555 (M. Koskoff) at 116-17; *accord* Ex. 555 (M. Koskoff) at 120 ("[I]t was clear to me [Attorney Greany] had only one problem with the retainer. He agreed that 28 percent was fine. He understood there was a statute. He didn't care about waiving that, what he cared about was that the waiver was not contained within the statute in 2003. So he said, Okay, as long as at the

time of distribution the statute is changed, we're entitled to 28 percent. And he – that's why I drafted it the way I did."); Ex. 555 (M. Koskoff) at 131-32; Ex. 13 at 2.

59. Attorneys M. Koskoff and Greany agreed that, under the revised language of the retainer agreement they discussed, the Koskoff Firm would be entitled to a 28% fee if § 52-251c was revised to allow for waivers. It was not their understanding that the 28% would apply only if § 52-251c was repealed in its entirety. *See* Ex. 555 (M. Koskoff) at 136-38; *see also* Ex. 555 (M. Koskoff) at 118-19, 135-36; Ex. 13 at 2; Ex. 16.

60. Both Attorneys Lichtenstein and M. Koskoff apparently believed that Attorney Greany was representing the D'Attilos in his role as their attorney. *See* 6/3 Tr. (Lichtenstein) at 49; Ex. 555 (M. Koskoff) at 117. However, while Attorney Greany may have given both Koskoff attorneys that impression during those telephone conversations, it appears that Attorney Greany was not acting in that capacity when he made those calls and had a much more limited role. *See* Ex. 527 (Greany Aff.) ¶¶ 4-7; Ex. 12.

61. The next day, on March 13, 2003, Attorney M. Koskoff's assistant, Joyce Russ, created a new retainer agreement in Word at 3:12 p.m. that was drafted by Attorney M. Koskoff. This is the retainer agreement that was eventually signed by the D'Attilos on March 21, 2003. *See* Ex. 17; Ex. 555 (M. Koskoff) at 134-35.

62. In the sections pertaining to the contingent legal fees and the costs of the lawsuit, the new retainer agreement provided as follows:

> II. **FEES** – Pursuant to statute, K K & B shall receive fees of 33 1/3% of the first $300,000.00, 25% of the next $300,000.00, 20% of the next $300,000.00, 15% of the next $300,000, and 10% of the any amount in excess of $1,200,000.00 of the total recovered, whether by way of settlement or award, before deduction of liens, costs and expenses. If that statute is not in effect at the time money is to be distributed to the Client, K K & B shall receive fees of

> twenty-eight percent (28%) of the total recovered. The Client authorizes K K & B to deduct said fees, liens, costs and expenses out of monies received from said party or parties. If all or any part of the settlement or award is to be paid in installments (a "structured settlement") the fee shall be based upon the present cost of such settlement or award; all fees, liens, costs and expenses shall be paid from the first monies received.
>
> It is agreed that this employment is on a contingent fee basis. If no recovery is made, the Client shall not owe K K & B any sum as attorneys' fees or repayment of costs.
>
> III. **COSTS AND EXPENSES** – Costs and expenses include court fees, computer search/research fees, investigation expenses, expert fees, and all other disbursements incurred in the prosecution or settlement of this action. K K & B agrees to advance all out of pocket costs and expenses in connection with this litigation. Upon settlement of the case, K K & B is authorized to deduct these costs and expenses from any settlement or award after the legal fee has been deducted.

Ex. 23 at PL:00098.

63. A few minutes later, at 3:53 p.m., Ms. Russ sent the revised retainer agreement to Attorney Greany by e-mail, with a cover note stating, "Mr. Koskoff asked me to forward the attached Retainer Agreement to you with a request that you have it signed by Mr. & Mrs. D'Attilo and returned to this office." Ex. 4 at KKBNR004823; *see also* 6/15 Tr. (Orozco) at 201-02.

64. Had the only change requested by Attorney Greany been a reduction in the contingent attorneys' fee rate from 33 1/3% to 28%, that change would have only necessitated a simple numerical revision to the Koskoff Firm's standard retainer agreement. Rather, the new language inserted in the fees provision (Section II.) – namely, "If that statute is not in effect at the time money is to be distributed to the Client, K K & B shall receive fees of twenty-eight percent

(28%) of the total recovered." – memorialized the negotiations that had taken place between Attorneys M. Koskoff and Greany.

65. Moreover, the testimony of Attorneys Lichtenstein and M. Koskoff – that Attorney Greany raised questions about the waiver – is consistent with the inference that Attorney Greany raised issues with the Koskoff Firm about not only reducing the fee to 28%, but also about the meaning of the mandatory fee cap found in the 1986 version of § 52-251c. Otherwise, there was no reason for Attorney M. Koskoff to have modified the standard Koskoff Firm retainer agreement in the manner that he did. *See* 6/4 Tr. (Bloss) at 18-19.

66. Five days later, on March 18, 2003, there was a telephone conversation between Nurse Dinan and Ms. Cullen, and a meeting was scheduled at the Koskoff Firm's offices in Bridgeport for March 21, 2003. *See* Ex. 4 at KKBNR004825.

67. On March 21, 2003, the D'Attilos met with Attorney Lichtenstein and Nurse Dinan at the Koskoff Firm and signed the 2003 Retainer Agreement. *See* 6/3 Tr. (Lichtenstein) at 167-68; Ex. 4 at KKBNR004826; Ex. 23.

68. Attorney Lichtenstein did not have a specific recollection of the March 21, 2003 meeting, but he said that he would have followed the same practice with the D'Attilos that he follows with all clients before he and the D'Attilos signed the 2003 Retainer Agreement. *See* 6/7 Tr. (Lichtenstein) at 10-13 (testifying as to his regular practice in reviewing a retainer agreement with a new client).

69. Specifically, pursuant to his regular practice and procedure, at the March 21, 2003 meeting with the D'Attilos, Attorney Lichtenstein would have reviewed the entire agreement with the D'Attilos "line by line" to make sure that they understood each provision. *See* 6/3 Tr. (Lichtenstein) at 46-47, 85-86.

70. Attorney Lichtenstein would also have provided a history of tort reform in Connecticut. *See* 6/7 Tr. (Lichtenstein) at 12; 6/3 Tr. (Lichtenstein) at 46-47.

71. Attorney Lichtenstein would further have explained that the Koskoff Firm does not take cases under the sliding scale found in Conn. Gen. Stat. § 52-251c. *See* 6/7 Tr. (Lichtenstein) at 11-12; 6/3 Tr. (Lichtenstein) at 47.

72. Attorney Lichtenstein would also have discussed the need for the D'Attilos to waive the mandatory fee cap and the sliding scale found in Conn. Gen. Stat. § 52-251c if they wanted to retain the Koskoff Firm. *See* 6/7 Tr. (Lichtenstein) at 12; 6/3 Tr. (Lichtenstein) at 47.

73. Attorney Lichtenstein would further have refused to sign the agreement until he had reviewed every line of the document with the D'Attilos and made sure that they understood the entire agreement and understood that they were waiving the mandatory fee cap and the sliding scale. *See* 6/7 Tr. (Lichtenstein) at 12-13, 59; 6/3 Tr. (Lichtenstein) at 99-100, 166.

74. Finally, Attorney Lichtenstein would also have provided the D'Attilos with an executed copy of the agreement in an envelope and told them to keep the agreement in a place where they keep their important papers so that they would always have it because he "always made a big deal about the importance of keeping the retainer with their important documents." 6/3 Tr. (Lichtenstein) at 38-39.

75. As to the meaning of the fees provision of the 2003 Retainer Agreement, Attorney Lichtenstein explained that the first sentence of the fees provision (Section II.), which begins "Pursuant to statute …," is "a recitation of what the statutory fee cap was in 2003. It is referred as the 'sliding scale,' which we have discussed, but it's part of the statutory fee cap at that time." 6/7 Tr. (Lichtenstein) at 5.

76. He further explained that the second sentence of the fees provision, which begins "If that statute is not in effect at the time money is to distributed to the Client, …," "is a modifier of the first sentence, in that if at the time of distribution of any award or settlement the statutory fee cap was rewritten or changed, then a 28 percent fee would be used." 6/7 Tr. (Lichtenstein) at 6.

77. When asked if this would have been his understanding of the 2003 Retainer Agreement on March 21, 2003, Attorney Lichtenstein stated: "Since I have no recollection of the signing of the – of the retainer, the first time I saw it again was at the time of the grievance, I believe. They showed it to me at the grievance hearing. As soon as I read it, I understood what happened. It was just very, very clear to me. Michael Koskoff was not concerned about this, because he knew, as we all knew, that whether in the next legislative session or the one after that, that there was going to be a change. That statute was going to be rewritten, in which it would be permitted to waive the sliding scale in favor of any fee, but no more than one third." 6/7 Tr. (Lichtenstein) at 9.

78. Finally, Attorney Lichtenstein stated that he would always ask the clients if there was anything about the agreement that they did not understand and would respond to all their questions, and that his nurse paralegal would remind him if there were any matters about the agreement that he had failed to cover during the meeting. *See* 6/7 Tr. (Lichtenstein) at 12-14.

79. Attorney Lichtenstein fully explained the meaning of the fees provision of the 2003 Retainer Agreement to the D'Attilos before they signed it. *See* 6/3 Tr. (Lichtenstein) at 222-24.

80. According to Plaintiffs' Grievance Complaint, Mr. D'Attilo recalled that, "At some point during the March 21, 2003 meeting Domenic shook Attorney Lichtenstein's hand

and said that he appreciated that Koskoff had lowered its rate 'but that doesn't mean you're not going do [*sic*] the same job as for other people? You know I am mason [*sic*], and if I give a lower price I do the same job but I may have to use a little less gravel.' Joel laughed, shook Domenic's hand and said 'I am going to remember that one, don't worry, we will do the same job.'" 6/3 Tr. (Lichtenstein) at 101-02, 151-52 (quoting Grievance Compl. ¶ 25).

81. By contrast, at the hearing, both the D'Attilos testified that they had no memory of Attorney Greany or his role in securing a discount for them, and neither had any memory of speaking to him. *See* 6/18 Tr. (D'Attilo) at 100-01; 6/9 Tr. (Cullen) at 175-78.

82. Specifically, Mr. D'Attilo had virtually no recollection of the events after Danny's birth that led to Plaintiffs' signing of the retainer agreement at the Koskoff Firm's offices on March 21, 2003, including no recollection of having any conversations with anyone from the Koskoff Firm in February or March of 2003; no recollection of having received the initial retainer agreement; no memory of requesting Ms. Mercuri to obtain a fee discount, as averred in his sworn Grievance Complaint; no memory of Attorney Greany or of Attorney Greany having negotiated a 5% discount; no recollection of the March 21, 2003 meeting with Attorney Lichtenstein and Nurse Dinan; and no recollection of thanking Attorney Lichtenstein for the discount or the allegations about that incident that appeared in his Grievance Complaint. *See* 6/18 Tr. (D'Attilo) at 93, 95-101, 141, 143, 144.

83. Ms. Cullen also claimed that she had minimal recall of the events after Danny's birth that led to Plaintiffs' signing of the retainer agreement at the Koskoff Firm's offices on March 21, 2003, including no recollection of the communications leading up to the engagement of the Koskoff Firm; no memory of having received the initial retainer agreement; no memory or recollection whatsoever about the formation of the 2003 Retainer Agreement and the discounted

fee; no memory of Ms. Mercuri having had anything to do with the fee discount; no recollection about anything pertaining to Attorney Greany; no recollection of the March 21, 2003 meeting or of ever meeting Attorney Lichtenstein; no recollection of Mr. D'Attilo shaking Attorney Lichtenstein's hand and thanking him for the discount, even though she pled it in her Grievance Complaint. *See* 6/15 Tr. (Cullen) at 116, 122, 139, 141-42, 162-63, 165; 6/9 Tr. (Cullen) at 170-80.

84. The language of the 2003 Retainer Agreement was "unique" both in terms of the 28% fee and the language of the agreement. The Koskoff attorneys have not seen a firm retainer agreement with a 28% fee or with the language in the fees provision like that found in the 2003 Retainer Agreement. *See* 6/4 Tr. (Bloss) at 110-11; 6/7 Tr. (Lichtenstein) at 7; 6/3 Tr. (Lichtenstein) at 39-40.

85. Diana Orozco, who manages the Koskoff Firm's computer network, performed a search of all documents on the firm's computer system and did not find any retainer agreements with language similar to that of the 2003 Retainer Agreement. *See* 6/15 Tr. (Orozco) at 258. In her administrative role maintaining the retainer agreement form directory, Ms. Orozco herself had never seen a retainer agreement similar to the 2003 Retainer Agreement. *See* 6/15 Tr. (Orozco) at 258-60.

86. Under the terms of the 2003 Retainer Agreement, the proper fee would have been based on the sliding scale percentages if the case had settled in 2003, 2004, or 2005 before the passage of Public Act 05-275 or if the statute had never been revised. *See* 6/29 Tr. (M. Walsh) at 44. Attorney M. Koskoff testified he was willing to take this risk. The likelihood of such an early settlement was extremely low, and Attorney M. Koskoff believed the probability that § 52-251c would be revised to allow for waivers was very high. *See* Ex. 555 (M. Koskoff) at 132-34.

87. According to Attorney Lichtenstein, based on his decades of practice in the medical malpractice field, it would be "very, very rare" for a medical malpractice case to settle within a year. Most medical malpractice cases lasted "[m]any years," and a "typical" case would settle only after at least four years after the filing of the suit. *See* 6/3 Tr. (Lichtenstein) at 35-37.

88. In February of 2003, a plaintiffs' medical malpractice attorney such as Attorney M. Koskoff who was monitoring the efforts of the CTLA would reasonably have anticipated that the version of Conn. Gen. Stat. § 52-251c that existed in 2003 (which did not expressly allow for waivers of the sliding scale) would be replaced with a statute that would expressly allow for such waivers by the time a settlement or judgment was reached in an action filed by the D'Attilos. *See* Ex. 578 (M. Walsh Initial Report) at 9; 6/28 Tr. (Dubois) at 14.

89. Attorney M. Koskoff testified that he would not take a cerebral palsy case like the one presented by the D'Attilos under the sliding scale fee because "[i]t wouldn't be fair to the client. It wouldn't be fair to us. It wouldn't be fair to anybody to take a case of this complexity on a sliding scale." Ex. 555 (M. Koskoff) at 139.

V. The *D'Attilo* Medical Malpractice Action

90. Following the execution of the 2003 Retainer Agreement, the Koskoff Firm began investigating the case, which included the collection and review of medical records and consultation with several experts. Five board-certified expert doctors consulted by the firm were unable to support a claim that there had been any violation of a standard of care that had led to Danny's birth injury. *See* 6/3 Tr. (Lichtenstein) at 168-78; Ex. 4 at KKBNR004826-74; Ex. 24.

91. On July 28, 2004, Attorney Lichtenstein drafted a letter to the D'Attilos informing them that the Koskoff Firm would not take their case because they were unable to obtain

an expert that would opine that there had been malpractice in connection with Danny's delivery. *See* Ex. 24. Under the 2003 Retainer Agreement, the Koskoff Firm agreed to bear all lawsuit costs if there is no recovery, including, but not limited to, the cost of all experts consulted during the investigation phase. *See* Ex. 23 at PL:00098 ("If no recovery is made, the Client shall not owe K K & B any sum as attorneys' fees or repayment of costs."). Thus, in the event the D'Attilos' case had ultimately been rejected by the Koskoff Firm, the firm would have borne the cost of consulting with these five expert doctors. Moreover, it would not have received any compensation for all the attorney and paralegal time spent during this initial investigation phase. *See* 6/7 Tr. (Lichtenstein) at 15-16.

92. However, the letter was never sent because, after the D'Attilos were orally informed of the Koskoff Firm's intention to decline the case, Plaintiffs became upset and asked the firm to reconsider its decision. The firm subsequently agreed to continue the investigation to try to find an expert to support the filing of a complaint. *See* 6/9 Tr. (Cullen) at 183-84; 6/3 Tr. (Lichtenstein) at 174-78; Ex. 4 at KKBNR004873-75.

93. The medical malpractice case was ultimately filed in the Connecticut Superior Court on January 5, 2005, and the case was assigned to Attorney Nastri in March 2005. *See* 6/7 Tr. (Nastri) at 137; 6/3 Tr. (Lichtenstein) at 59-60; Ex. 26.

94. On April 29, 2009, a Fifth Revised Complaint was filed. *See* Ex. 45.

95. The D'Attilos' medical malpractice case was hotly contested and resulted in two lengthy trials. *See* 6/8/Tr. (Nastri) at 204-15.

96. The claims against the medical malpractice defendants comprised personal injury claims by Danny and claims for economic loss by his parents associated with the need to pay for Danny's medical expenses until he reached the age of eighteen. *See generally* Ex. 45.

97. The Koskoff Firm originally tried to assert an emotional distress claim on behalf of Ms. Cullen, but the court struck the claim as not cognizable under Connecticut law. *See* 6/11 Tr. (Horwitz) at 146; 6/8 Tr. (Nastri) at 204-07; Ex. 26; Ex. 29. Mr. D'Attilo also had no personal claims, other than for medical expenses related to Danny up to the age of eighteen. *See* 6/11 Tr. (Horwitz) at 146; Ex. 29.

98. The first trial was conducted in May 2009 and ended in a mistrial due to a hung jury. *See* 6/8 Tr. (Nastri) at 211-12.

99. Attorneys Nastri and Horwitz learned all they could from the first trial, and they tried the case a second time. *See* 6/8 Tr. (Nastri) at 208-09.

100. The second trial ended with a jury verdict on May 25, 2011 comprising: (a) $50,000,000 in non-economic damages awarded solely to Danny; and (b) $8,619,989.13 in economic damages awarded jointly to the D'Attilos and Danny. *See* Ex. 85 at PL:04843. The verdict exceeded the available insurance coverage, which was $4 million at most. *See* 6/4 Tr. (Bloss) at 121-23.

VI. The Settlement of the *D'Attilo* Action

A. Re-Discovery of the 2003 Retainer Agreement

101. Following the verdict, the parties entered into efforts to mediate a settlement, and the first day of the mediation was held on November 3, 2011. *See* Ex. 1 at KKBNR005277, KKBNR005363; Ex. 97; Ex. 104.

102. Before the initiation of the mediation process, the Koskoff Firm was focused on taking actions to protect the verdict, and the insurance company had not made an offer. *See* 6/7 Tr. (Nastri) at 233-35.

103. The first day of the mediation was not very productive. *See* 6/7 Tr. (Nastri) at 235-36.

104. By November 18, 2011, however, the insurance company had made an offer of $18,000,000, and, on November 18, 2011, the mediator met with the D'Attilos at the Koskoff Firm's offices. *See* 6/7 Tr. (Nastri) at 237-39; 6/4 Tr. (Bloss) at 5-6. The mediator had requested the meeting because the D'Attilos had not been present at the first day of the mediation process and would also not be attending the second day. *See* 6/8 Tr. (Nastri) at 7-8; 230-31; 6/7 Tr. (Nastri) at 239-40.

105. On that same day after the meeting with the mediator, Attorney Nastri began to compile the paperwork that would be needed to effectuate a settlement, part of which was the 2003 Retainer Agreement. *See* 6/7 Tr. (Nastri) at 240-41. There were "a lot of moving parts" at that point in time, one of which was that Attorney Nastri "had discovered a retainer agreement that was not what [she] had anticipated." 6/8 Tr. (Nastri) at 232-33; *accord* 6/10 Tr. (Larocca) at 45-46; 6/7 Tr. (Nastri) at 243.

106. After reading the 2003 Retainer Agreement for the first time on November 18, 2011, Attorney Nastri talked to Attorney Lichtenstein, who did not recall anything about it at that time, and she may have also tried to get in touch with Attorney M. Koskoff (who was in California) to see if he knew anything about it. In addition, she called the D'Attilos. *See* 6/8 Tr. (Nastri) at 11, 60; 6/7 Tr. (Nastri) at 243, 245; Ex. KKB-D6 (K. Nastri cell phone records chronology) at 1.

107. Attorney Nastri knew that the 2003 Retainer Agreement was for a 28% fee after she reviewed it, along with reviewing the relevant provisions of § 52-251c, and explained that any other reasonable attorney experienced in personal injury law would interpret it similarly.

See 6/8 Tr. (Nastri) at 33-34. Attorney Horwitz also explained that an interpretation of the agreement was straightforward to anyone with knowledge of personal injury attorneys' fees in Connecticut. *See* 6/11 Tr. (Horwitz) at 29-32, 36-37, 43-44; *accord* 6/29 Tr. (Kennedy) at 223; 6/29 Tr. (M. Walsh) at 104.

108. Despite Attorney Nastri's understanding that the 2003 Retainer Agreement called for a 28% fee, she wanted to hear from the D'Attilos as to their understanding. *See* 6/7 Tr. (Nastri) at 266. Before reviewing the 2003 Retainer Agreement, Attorney Nastri had always assumed that the fee was 33 1/3%, in conformity with all of the firm's prior retainer agreements. Indeed, in most discussions regarding potential settlements, demands, or offers with the D'Attilos, Attorneys Nastri and Horwitz would have referred to a 33 1/3% contingency fee, and the two attorneys did not recall any time when the D'Attilos ever questioned that contingency fee percentage. Thus, because the D'Attilos questioned everything and had many demands and a significant interest in every aspect of the case, she wanted to have a discussion about the agreement with them. *See* 6/11 Tr. (Horwitz) at 20-21; 6/8 Tr. (Nastri) at 28-32; 6/7 Tr. (Nastri) at 140, 250.

109. Later in the day on November 18, 2011, after the D'Attilos had left the Koskoff Firm's offices following their meeting with the mediator and after Attorney Nastri had read the 2003 Retainer Agreement for the first time, Attorney Nastri spoke with the D'Attilos by telephone. *See* 6/7 Tr. (Nastri) at 245-46.

110. In contacting the D'Attilos, Attorney Nastri wanted the D'Attilos to come into the Koskoff Firm's offices so that she could tell them that the 2003 Retainer Agreement contained a different contingency fee rate (*i.e.*, lower) from what they had been discussing for the last six years – namely, a 33 1/3% fee – and to get their understanding, their recollections, and any other information they could give her about the genesis of the 2003 Retainer Agreement. *See* 6/7

Tr. (Nastri) at 264-65; *see also* 6/7 Tr. (Nastri) at 247-48; Ex. KKB-D6 at 1; Ex. 112 at KKBNR008439.

111. In an internal e-mail that Attorney Nastri sent to her partners, Attorney Nastri described her November 18th call with the D'Attilos as follows:

> I did talk to Domenic and Kathy on Friday and asked them to come into the office on Monday to talk about the fee agreement. Domenic, of course, wanted to know what the issue was and why they had to come in. I tried to explain that we had been looking through the file as part of the settlement negotiations to make sure we had all the paperwork necessary and were able to answer any questions they might have about the net settlement. He did not seem to understand (or did not want to understand) and put Kathy on the phone. She confirmed for me that it was her assumption all along that the fee was 1/3. I told her we had looked at the fee agreement and that it talked about a statute that had been modified and did not cover any work after the verdict. I assured her that there we were not planning to increase the fee for all of our post-verdict work, and that in the end the fee would be more favorable to them. She seemed fine, but I'm sure they will have a lot of questions.

Ex. 120.

112. After Attorney Nastri realized that the 2003 Retainer Agreement was different than the standard Koskoff Firm retainer agreement she had expected, she consulted with her colleagues, and they agreed that it was important to discuss the 2003 Retainer Agreement with the D'Attilos and to determine their understanding of and recollection of the agreement. *See* Exs. 119-121; *see also* 6/4 Tr. (Bloss) at 8-9.

113. These internal e-mails between the Koskoff Firm attorneys took place during the time period in which the Koskoff team was getting ready for the second day of the mediation, which was scheduled for November 22, 2011. The Koskoff team had scheduled a video conference to prepare for the mediation at 3:00 p.m. on November 20, 2011. *See* Exs. 113-123.

114. On November 20, 2011, Attorney Nastri had two telephone calls with the D'Attilos. *See* 6/7 Tr. (Nastri) at 258-68; Ex. 112 at KKBNR008439; Ex. KKB-D6 at 1.

115. The first call was at 1:03 p.m. and lasted 20 minutes. *See* Ex. 112; Ex. KKB-D6 at 1. Attorney Nastri had this call while she was in the parking lot at a Stop & Shop, where she was shopping in preparation for her family's Thanksgiving dinner. *See* 6/7 Tr. (Nastri) at 258-59; Ex. KKB-D6 at 1.

116. Attorney Nastri's telephone records reflect that the 1:03 p.m. call was an outgoing telephone call to Mr. D'Attilo's cell phone. However; it is reasonable to infer that she was returning a call from the D'Attilos because (a) she listened to her voicemails two times shortly before she called Mr. D'Attilo's number, and (b) she was not planning on calling the D'Attilos on that Sunday; she was planning on meeting with them in her office on Monday. *See* Exs. 112, 120, 121.

117. The second call was at 2:42 p.m. and lasted 15 minutes. *See* 6/7 Tr. (Nastri) at 260; Ex. 112 at KKBNR008439; Ex. KKB-D6 at 1.

118. These calls were "extraordinarily unpleasant and difficult" for Attorney Nastri because the D'Attilos had inexplicably turned on her, conveying a lack of trust in her because they believed that Attorney Nastri was attempting to secure a higher fee than the fee she had told them on November 18th they were supposed to pay. *See* 6/9 Tr. (Nastri) at 80; 6/8 Tr. (Nastri) at 74-75; 6/7 Tr. (Nastri) at 268. By their own admission, the D'Attilos "have trust issues" and "are always questioning peoples [*sic*] intentions." Ex. 472 (e-mail from C. Cullen to K. Nastri). They did not hesitate to ask many questions of their Koskoff attorneys. *See* 6/10 Tr. (Larocca) at 76-77, 116; 6/8 Tr. (Nastri) at 195-96.

119. Attorney Nastri was on the second call with the D'Attilos when the Koskoff team's video conference began and went straight into that conference after concluding the call with the D'Attilos. *See* Ex. 122. The fact that Attorney Nastri was upset by the D'Attilos' accusatory behavior was apparent to at least Attorney M. Koskoff, who sent her an e-mail to try to cheer her up after the video conference ended. *See* Ex. 123.

120. In the calls on November 18 and 20, Attorney Nastri wanted the D'Attilos to know that the percentage fee was different from what they had talked about, that there was language about a statute, and that there was language in the agreement about it not covering post-verdict work, which is not something she had paid attention to before. She wanted to talk to them "to understand what they understood about the fee agreement and to go over it with them." 6/7 Tr. (Nastri) at 255.

121. By contrast, Ms. Cullen testified that she had no recollection of any of the events that took place in November 2011, including any recollection of an $18 million dollar settlement offer and a mediation that took place in November. *See* 6/9 Tr. (Cullen) at 210.

122. As to the 2003 Retainer Agreement, she expressed a lack of understanding as to what Attorney Nastri was attempting to communicate to her. *See* 6/15 Tr. (Cullen) at 113. Additionally, she claimed that a telephone call had taken place on January 9, 2012, in which Attorney Nastri attempted to force them to agree to a 33 1/3% contingent fee; that the Koskoff Firm "wanted to know what our net was, what we wanted to collect net for the settlement, they needed at least that much to go on"; and that this information was needed by the Koskoff Firm "to be able to know how to negotiate." 6/9 Tr. (Cullen) at 214-17; *accord* 6/18 Tr. (D'Attilo) at 116; *see also* 6/8 Tr. (Nastri) at 50-53.

123. From their refusal to come into the Koskoff Firm's offices to discuss the 2003 Retainer Agreement and, instead, their engagement of Attorney Nastri in multiple, disjointed conversations, it is reasonable to infer that Plaintiffs either misheard or misunderstood the import of Attorney Nastri's calls on November 18 and 20, 2011. The purpose of those calls was to convey that it was important that they all meet to review the 2003 Retainer Agreement and to ascertain their understanding and recollection of the agreement because the contingent fee amount would affect what the D'Attilos would net from any settlement, especially given that the second day of the mediation was scheduled for November 22, 2011. It appears that the D'Attilos became confused and assumed the worst because of their inherent distrustful nature, drawing adverse conclusions about the Koskoff Firm and the motivations of their attorneys, which, understandably, then made them upset.

124. Having apparently some recollection of having negotiated a discount from the Koskoff Firm's normal 33 1/3% contingent fee, the D'Attilos incorrectly believed that the Koskoff Firm was trying to somehow eliminate that discount, and that the firm was attempting to have them execute a new retainer agreement for work going forward, possibly at a higher contingency fee rate. Specifically, not only was Ms. Cullen's recollection of the January 9, 2012 date incorrect, but it appears that she also conflated Attorney Nastri's acknowledgement of a lower contingency fee rate with the arguable need for a new retainer agreement (to cover post-verdict work or settlement of a bad faith claim), believing that the firm was trying to force them to agree to a higher fee. However, the record contains no evidence that Attorney Nastri told the D'Attilos that the fee would be increased to 33 1/3%.

125. The D'Attilos also did not meet with Attorney Nastri on November 21, 2011, even though preparations had been made by Attorney Nastri in furtherance of that meeting

taking place. Specifically, Attorney Nastri had requested and was ready for that meeting, including having relevant documents such as Nurse Dinan's February 28, 2003 (Ex. 9) letter printed out. *See* 6/8 Tr. (Nastri) at 240-41. The D'Attilos also recollected that a meeting had been requested by Attorney Nastri and they had refused to attend it, although they claimed (incorrectly) that the proposed meeting was to take place on January 9, 2012. *See* 6/9/21 Tr. (Nastri) at 75; 6/8 Tr. (Nastri) at 240-241.

126. The second mediation session took place on November 22, 2011. *See* 6/8 Tr. (Nastri) at 241-44. Afterwards, on that same day, Attorney Nastri had a short, three-minute, telephone call with Plaintiffs. *See* Ex. KKB-D6 at 1.

127. After the Thanksgiving holiday, on November 29, 2011, Attorney Nastri had another telephone conversation with the D'Attilos. *See* Ex. KKB-D6 at 2; Ex. 126.1. She summarized the results of the mediation session for Ms. Cullen, and then spoke with her about the 2003 Retainer Agreement, which she summarized in an e-mail to her colleagues:

> I also told her that she was correct and that I was wrong about the fees when I assumed all along that it was 1/3. I told her they had negotiated a 28% fee, which would save Danny close to a million dollars if the case settled for $18 million. I also told her that she did not need to worry about the language in the fee agreement that it does not cover our work after the verdict; that we were continuing to work under the terms of the original fee agreement, and were not looking or any change/increase based on work since the verdict. She seemed to understand both the settlement status and the fee agreement.

Ex. 126.1; *see also* 6/8 Tr. (Nastri) at 247. On an $18 million settlement, the difference in the attorneys' fees between a contingency rate of 33 1/3% versus 28% would have been $960,000 (*i.e.*, $18 million x (33 1/3 – 28 = 5)%).

128. In addition to telephone conversations with Plaintiffs on November 18, 20, 22, and 29, 2011, Attorney Nastri also spoke to Mr. D'Attilo twice in early December. *See* 6/8 Tr. (Nastri) at 245; Ex. 112 at KKBNR008444, KKBN008446; Ex. KKB-D6 at 2. On one of her calls with the D'Attilos, Attorney Nastri discussed with them the mandatory fee cap, the sliding scale, and the fact that the statute was no longer in effect. *See* 6/8 Tr. (Nastri) at 240.

129. In view of their prior business and work experiences with contracts and their focus on the monetary aspects of the *D'Attilo* action, the D'Attilos would not have engaged in multiple conversations with Attorney Nastri about the 2003 Retainer Agreement during the months of November and December 2011 without requesting a copy of the agreement unless they already had one in their possession.

130. Moreover, the 2003 Retainer Agreement expressly provided that it did not apply to post-verdict work. *See* Ex. 23 at PL:00098 ("IV. **SERVICES** - This fee agreement applies to all services rendered up to, and including, the award of damages by the trier of fact, but not to matters ancillary to the above claims, such as probate court proceedings, guardianships, post trial hearings, and appeals."). However, the Koskoff Firm continued to do work under this agreement after the verdict in the second trial and agreed that the terms of the 2003 Retainer Agreement would apply to the post-verdict work. *See* 6/3 Tr. (Bloss) at 285-86; Exs. 120, 126.1.

131. The 2003 Retainer Agreement was never modified and was in effect at all times relevant to this proceeding, including during the period of post-verdict negotiations with the insurance company that ultimately led to the settlement of the *D'Attilo* action. *See* 6/3 Tr. (Bloss) at 285-86; Ex. 578 (M. Walsh Initial Report) at 6.

132. It was the practice of the Koskoff Firm that, if they obtained a plaintiff's verdict for a client, the firm would continue to represent the client under the terms of the original

fee agreement. The purpose of this provision in the agreement was to provide the firm with the option of not appealing a defense verdict if the firm did not consider there to be a meritorious ground for appeal. *See* 6/4 Tr. (Bloss) at 39-40; 6/3 Tr. (Lichtenstein) at 280-81. Provisions like the one found in the 2003 Retainer Agreement stating that it did not cover work done after the verdict is typical of contingent fee agreements used by plaintiffs' attorneys in Connecticut in 2003 and currently. *See* Ex. 578 (M. Walsh Initial Report) at 6.

133. Because the 2003 Retainer Agreement by its terms did not apply to post-verdict work, the Koskoff Firm had the ability to modify the contingent rate at that time if it had chosen to do so, but the firm did not. Because the Koskoff Firm chose to continue under the original agreement for the entire post-verdict recovery, no new fee agreement or written amendment to the prior agreement was required. *See* Ex. 595 (Dubois Rebuttal Report) at 5. Nor did the post-verdict negotiations with the insurance company regarding its failure to settle the case require the execution of a new retainer agreement. *See* Ex. 578 (M. Walsh Initial Report) at 6.

B. <u>The January 4, 2012 Meeting at the Koskoff Firm's Offices</u>

134. The D'Attilos came to the Koskoff Firm's offices on January 4, 2012 and met with Attorney Nastri in her office. *See* 6/15 Tr. (Orozco) at 239-41; 6/10 Tr. (Larocca) at 83-85; 6/8 Tr. (Nastri) at 250; Ex. 1 at KKBNR005277, KKBNR005363. This meeting was reflected in the Needles calendars of both Attorneys Nastri and Horwitz, but Attorney Nastri was the only Koskoff attorney at this meeting. *See* 6/15 Tr. (Orozco) at 240-241; 6/10 Tr. (Larocca) at 83-85; 6/8 Tr. (Nastri) at 250.

135. Attorney Nastri met with the D'Attilos in preparation for the third mediation session, which was scheduled to take place on January 11, 2012. The purpose of the meeting was to once again explain the settlement process and to address the D'Attilos' frustrations with the fact

that the process was taking a long time. At that time, there was an offer of $18,000,000 from the insurance company, and Attorney Nastri's concern was that there was no guarantee that the offer was ever going to change. Thus, she wanted to make sure that the D'Attilos understood what it meant to reject that offer. *See* 6/8 Tr. (Nastri) at 248-50.

136. During this meeting, the D'Attilos signed two documents, respectively authorizing the Koskoff Firm to decline the present offer of $18,000,000 and to settle the case for $22,500,000. *See* Exs. 138, 139. Barbara Larocca, a medical malpractice paralegal at the Koskoff Firm, wrote-in the date (January 4, 2012) on these documents. *See* 6/10 Tr. (Larocca) at 56-57, 87-89.

137. Attorney Nastri used these authorization documents to explain to the D'Attilos what the net settlement amount to the D'Attilos would be, and how it would be calculated, so that they would know what they were turning down and what they were authorizing the Koskoff Firm to accept. *See* 6/8 Tr. (Nastri) at 248-56. According to Attorney Nastri, the issue of the net settlement amount was important to Mr. D'Attilo because "[he is] very much a 'bottom line' guy" and wanted Attorney Nastri to "net it out" for him. 6/8 Tr. (Nastri) at 250-51. Indeed, the D'Attilos had decided that their bottom-line net amount was going to be $15 million. *See* 6/14 Tr. (Cullen) at 53-54. It was also important to Attorney Nastri because there was a significant difference between the total amount of the settlement and the portion that would go to the clients, and Attorney Nastri wanted the D'Attilos to see all of that. *See* 6/8 Tr. (Nastri) at 251.

138. At a 28% contingent attorneys' fee, a settlement offer of $18 million would net the D'Attilos only $12,960,000, while a settlement offer of $22,500,000 would net the D'Attilos $16,200,000. Thus, at a 28% fee, the D'Attilos' rejection of the $18 million offer and

concomitant acceptance of a $22,500,000 offer was consistent with their objective of netting greater than $15 million.

139. As shown on the documents, the net amount to the D'Attilos would be arrived at after deducting the attorneys' fees and lawsuit costs, as well as setting aside an escrowed amount for future costs, including probate-related issues. *See* Exs. 138, 139. Specifically, the first deduction shown on the documents was the attorneys' fees at 28%. *See* 6/8 Tr. (Nastri) at 251. Attorney Nastri printed out a copy of the 2003 Retainer Agreement and was prepared to go through it one more time to explain the attorneys' fee deduction, but Mr. D'Attilo "insisted rather vigorously that he was done talking about the fee agreement," motioned with his hands to express to Attorney Nastri that she should stop, and told Attorney Nastri, in sum and substance, "Enough. We get it. I don't want to talk about it anymore." 6/8 Tr. (Nastri) at 69-71, 252.

140. After Mr. D'Attilo had told Attorney Nastri that he did not want to go over the 2003 Retainer Agreement again, Attorney Nastri said to him that he is the only person she had ever heard of who was able to get a discount from Attorney Lichtenstein, and Mr. D'Attilo chuckled about that. *See* 6/8 Tr. (Nastri) at 71.

141. Other than questions regarding the purpose for the escrow deduction, the D'Attilos did not have any other significant questions about the two documents. *See* 6/8 Tr. (Nastri) at 253-54. Attorney Nastri described the meeting as cordial, upbeat, and optimistic, and the lack of trust the D'Attilos had expressed in November and December was apparently gone. *See* 6/8 Tr. (Nastri) at 254. From her perspective, the D'Attilos seemed positive, happy, and comfortable with everything the Koskoff Firm was doing for them. *See* 6/8 Tr. (Nastri) at 255. Whatever issues or concerns the D'Attilos had had with the 2003 Retainer Agreement or the 28% contingency fee rate back in November 2011 had apparently been resolved in their minds.

142. By contrast, the D'Attilos had no recollection whatsoever of either the January 4th meeting or signing the two authorization documents. *See* 6/18 Tr. (D'Attilo) at 111; 6/15 Tr. (Cullen) at 93.

C. The January 11, 2012 Settlement of the *D'Attilo* Action

143. One week later, on January 11, 2012, the third mediation session took place at the Koskoff Firm's offices, and the case settled for $25,000,000. *See* 6/8 Tr. (Nastri) at 256.

144. Two documents were prepared for and executed by the D'Attilos that day. *See* 6/8 Tr. (Nastri) at 258-59. The first document authorized the Koskoff Firm to settle the case for $25,000,000. *See* Ex. 144. This document was identical in format to the prior authorization documents that the D'Attilos had executed on January 4, 2012, including showing a deduction for attorneys' fees of 28%. The second document, entitled "General Release and Settlement Agreement," memorialized the terms and conditions of the settlement. *See* Ex. 142.

145. The D'Attilos had already authorized the Koskoff Firm to settle the case for $22,500,000. Thus, because the $25,000,000 offer was above that amount, there was essentially no doubt that the D'Attilos would be willing to settle the case for $25,000,000. However, in every case, the Koskoff Firm tries to obtain the client's final authority in writing for the file so that they absolutely know they have the authority to settle the case. *See* 6/8 Tr. (Nastri) at 259.

146. The settlement agreement was drafted by counsel for the insurance company and first reviewed by Attorney Bloss on January 11, 2012. *See* 6/4 Tr. (Bloss) at 140-43, 188-91.

147. Attorney Bloss took the D'Attilos' acknowledgement of their signatures on the settlement agreement. *See* Ex. 141 (Attorney Bloss transmitting settlement agreement executed by the D'Attilos to the insurance company and its counsel). Aside from that discrete

task, Attorney Bloss had not previously interacted with or met the D'Attilos. *See* 6/3 Tr. (Bloss) at 249-50.

148. At the time of the settlement discussions in late 2011 and early 2012, Plaintiffs had a specific recollection that a 28% contingent fee was part of the 2003 Retainer Agreement and recalled that they themselves (rather than Attorney Nastri) represented that 28% was the correct fee under the agreement. For example, Plaintiffs admitted in their sworn Grievance Complaint filed in 2015 that, during a conversation with Attorney Nastri regarding the agreement, Plaintiffs "vaguely remembered that 28% was somehow a part of the Agreement." 6/15 Tr. (Cullen) at 106 (testifying about Grievance Complaint ¶ 55).

149. During the time period from November 2011 through January 2012, the D'Attilos had access to an attorney, Gerald Poch, who was a friend to Ms. Cullen's father and who could have answered any questions they had. *See* 6/9 Tr. (Cullen) at 242-43. Indeed, at some point before the settlement, Mr. D'Attilo spoke to Attorney Poch at a party at Ms. Cullen's parent's home. It was Attorney Poch who had recommended to the D'Attilos that their settlement goal should be to get a net settlement of at least $15 million so that they would be "fine for life," and the D'Attilos relied on this advice as guidance in their settlement strategy and goals. *See* 6/18 Tr. (D'Attilo) at 148-49; 6/14 Tr. (Cullen) at 53-56.

150. The D'Attilos could have consulted Attorney Poch or any other attorney during the time period from November 2011 through January 2012 regarding the 2003 Retainer Agreement, but they did not do so.

VII. The Probate Court's Approval of the *D'Attilo* Settlement

A. Filing of the Initial Applications in the Norwalk Probate Court

151. In 2004, the D'Attilos moved from Shelton to Norwalk to secure a home that was more appropriate for Danny's disabilities. *See* 6/9 Tr. (Cullen) at 186-87.

152. On January 12, 2012, the day after the settlement, the Koskoff Firm filed the D'Attilos' applications for appointment as guardians and to compromise the claim in the Norwalk Probate Court. *See* Ex. 145.

153. On January 24, 2012, Probate Judge DePanfilis appointed Attorney Colleen Fries as guardian ad litem and scheduled a hearing on the applications for February 29, 2012. *See* Exs. 152, 153.

154. Attorney Fries believed she had been appointed "because the court wanted [her] to review the application to compromise, and also probably based upon the amount of money involved." 6/22 Tr. (Fries) at 9.

155. That same day, on January 24, 2012, Mr. D'Attilo contacted Attorney Gallant to discuss retaining the Day Pitney Firm to assist in the upcoming guardianship proceedings and to create a special needs trust for Danny. *See* 6/16 Tr. (Gallant) at 5-6. The D'Attilos signed a retainer agreement with the Day Pitney Firm dated February 10, 2012. *See* Ex. 171. The Day Pitney Firm would be handling the probate matter directly, but with the Koskoff Firm's "continued involvement." 6/8 Tr. (Nastri) at 95; *accord* 6/16 Tr. (Gallant) at 35; 6/8 Tr. (Nastri) at 105-06.

156. On February 9, 2012, Attorney Fries requested a copy of the operative complaint, the retainer agreement, and an explanation of the lawsuit costs. *See* 6/22 Tr. (Fries) at 10-11; 6/9 Tr. (Nastri) at 43; Exs. 161, 174.

157. On February 15, 2012, Ms. Larocca sent to Attorney Fries the documents she requested, including the 2003 Retainer Agreement. She also sent them to Attorney Gallant, at his request. *See* Ex. 174.

158. Attorney Nastri did not have any concerns with the 2003 Retainer Agreement or filing the agreement with the Probate Court. *See* 6/8 Tr. (Nastri) at 147.

159. Attorney Nastri told Ms. Larocca that she thought Attorney Horwitz or Attorney Bloss had some concerns about sending the 2003 Retainer Agreement to Attorney Fries. *see* Ex. 174, but the evidence makes clear that she was mistaken. Attorney Horwitz had received a copy of Attorney Nastri's offer to Attorney Fries that she or Attorney Horwitz would provide whatever documents she needed. *See* Ex. 161. Although Attorney Horwitz did not have concerns about sending Attorney Fries the 2003 Retainer Agreement, he was concerned about sending her the authorization document to settle for $25,000,000 because that document also contained an 80%/20% allocation as between the D'Attilos and their son, and he was concerned about the Probate Court potentially finding the allocation of 20% to the parents as too high. *See* 6/11 Tr. (Horwitz) at 162, 178-80; Ex. 174. The record contains no evidence that Attorney Bloss expressed any concerns.

B. <u>The D'Attilos' Move Away From Their Norwalk Home</u>

160. During the ensuing weeks, the D'Attilos made a decision to move away from their then current home in Norwalk.

161. In his initial phone call with Attorney Gallant, Mr. D'Attilo commented that he and his family intended, at some point in the future, to move from their house in Norwalk. *See* 6/16 Tr. (Gallant) at 7.

162. As of February 2012, the D'Attilos were also defendants in a foreclosure action on their Norwalk home. *See* 6/9 Tr. (Nastri) at 47.

163. The possibility of the D'Attilos moving was discussed at greater length during a February 1, 2012 meeting attended by the D'Attilos and Attorneys Gallant, Nastri, and Horwitz. *See* 6/16 Tr. (Gallant) at 6-7. Specifically, the D'Attilos expressed a preference for not remaining Norwalk because it appeared that they would not get what they wanted, namely, possession of and control over Danny's money. *See* 6/9 Tr. (Cullen) at 245-46.

164. There was discussion about Attorney Fries and her involved approach to her duties as guardian ad litem, about which Mr. D'Attilo was unhappy. Moreover, Mr. D'Attilo wanted to have a certain percentage of the settlement allocated to him and Ms. Cullen, and Attorney Gallant was concerned that neither Attorney Fries nor Probate Judge DePanfilis would approve that allocation. Further, their current home was inadequate to meet Danny's needs. Additionally, the D'Attilos had concerns about the publicity and unwanted attention surrounding the verdict. Finally, Ms. Cullen had some issues with her parents that she would be able to avoid by moving out of Norwalk. *See* 6/9 Tr. (Cullen) at 245-46, 254; 6/9 Tr. (Nastri) at 39-44; 6/8 Tr. (Nastri) at 106-07, 109-10; *see also* 6/16 Tr. (Gallant) at 39-40, 260-61 (testifying that the D'Attilos wanted to move from Norwalk due to unwanted publicity in connection with the large verdict); 6/14 Tr. (Iannantuoni) at 179-80 (testifying that she and Attorneys Nastri and Gallant discussed concerns related to Norwalk, specifically, about parents having to pay before seeking reimbursement); Ex. 374 (e-mail from C. Cullen to B. Gallant discussing the D'Attilos' concerns, including the desire to avoid unwanted publicity).

165. The fact that the D'Attilos would need a new home to properly care for Danny was part of the underlying medical malpractice trial and is summarized in the expert report of Lawrence S. Forman. *See* Ex. 79 at CTSH035272; 6/9 Tr. (Nastri) at 45-47.

166. One of the principal issues for the D'Attilos with remaining under the Norwalk Probate Court's jurisdiction was that they would be subject to oversight by Attorney Fries, and, under her approach, the D'Attilos would be required to spend their own money to fulfill their parental support obligation to Danny, not Danny's money. Moreover, if they wanted to be reimbursed, the D'Attilos would have to seek court approval and show why any particular expenses were Danny's obligation, and not theirs. *See* 6/17 Tr. (Cullen) at 40; 6/16 Tr. (Gallant) at 19-25; 6/15 Tr. (Iannantuoni) at 6-8, 67-69, 78; 6/14 Tr. (Iannantuoni) at 89-92, 97, 179-84, 190, 216-18; 6/9 Tr. (Nastri) at 41-42; 6/8 Tr. (Nastri) at 94-95, 106-07, 121; *see also* 6/22 Tr. (Fries) at 20-22, 24-25.

167. The D'Attilos believed that they should have unfettered access to Danny's money, and they were concerned over being "micromanaged" in Norwalk. *See* 6/9 Tr. (Cullen) at 254 ("Domenic was not going to be happy with her, he made that pretty clear, and that she was going to micromanage us for the rest of our lives. And after everything we had been through, when you tell us we're going to be micromanaged, that's a problem, a big problem."). The approach espoused by the Norwalk Probate Court was not a universally held view of the parental support obligation in Connecticut probate courts, and it was one with which Attorney Gallant disagreed. *See* 6/16 Tr. (Gallant) at 18; 6/9 Tr. (Cullen) at 249-50; 6/9 Tr. (Nastri) at 23, 39-41, 126, 129-30; 6/8 Tr. (Nastri) at 109.

168. The allocation that the D'Attilos wanted for themselves (as compared to the allocation for their son) was also a reason why Norwalk would not have been a favorable

jurisdiction for them because it would be hard to justify the requested allocation in light of what their actual damages were on their surviving claims for medical and related expenses that they had incurred (and would incur through Danny reaching age 18) in connection with Danny's birth injuries. *See* 6/17 Tr. (Gallant) at 210-11; 6/16 Tr. (Gallant) at 59-62, 223-25, 238-39; Ex. 178.

169. The D'Attilos understood from the Koskoff attorneys that, once the Norwalk Probate Court had jurisdiction, it would be unlikely to approve the trust's transfer to another probate court, even if they moved, which was not something the D'Attilos were happy about. *See* 6/17 Tr. (Cullen) at 40.

170. Shortly after this first meeting with Attorney Gallant at the Koskoff Firm's offices, the D'Attilos met with Attorney Gallant at his office on February 9, 2012, without the Koskoff attorneys. *See* 6/16 Tr. (Gallant) at 202; Ex. 349. The same concerns with obtaining what the D'Attilos wanted in Norwalk were discussed, but, overall, the meeting with Attorney Gallant concluded positively. The D'Attilos "were on a mission to go find a place to live, and that's what [they] did until [they] found it." *See* 6/9 Tr. (Cullen) at 250-56. In fact, the first thing that the D'Attilos did after the meeting was to call their real estate agent, Jeff Foito, with whom they had worked on "all of [their] purchases." *See* 6/9 Tr. (Cullen) at 258-59.

171. Attorney Gallant discussed his experience with the Norwalk Probate Court again with the D'Attilos at a February 16, 2012 meeting. He noted that, with the D'Attilos intending to move from Norwalk, there existed the possibility of having the probate matter proceed in another jurisdiction, pointing out that probate judges in other jurisdictions have different views. *See* 6/16 Tr. (Gallant) at 252-53; 6/14 Tr. (Iannantuoni) at 183-84; *see also* Ex. 178 (Attorney Gallant writing that obtaining substantial discretionary funds "wouldn't be an issue in most [probate courts] but it is likely to be in Norwalk"); 6/16 Tr. (Gallant) at 238-39.

172. On February 22, 2012, the D'Attilos and Attorneys Nastri, Horwitz, and Gallant attended a meeting, at which they discussed several issues, including moving from Norwalk. *See* Ex. 197. In a memorandum to the file, Attorney Gallant specifically noted that "Danny's life expectancy is to age 35/40. Need, say, $150,000 for Danny in 12 years. Brookfield, Stratford, Stamford, Westport, Bethel, Ridgefield, North Haven, East Haven." *Id*. These were towns where Attorney Gallant "felt that the court would be sympathetic to parents in cases like this." 6/16 Tr. (Gallant) at 259.

173. Thus, the D'Attilos chose to move away from Norwalk for a myriad of reasons, including that they were already contemplating a move and they did not want to be subject to the type of oversight that the Norwalk Probate Court would require. *See, e.g.*, 6/9 Tr. (Cullen) at 251-52 (testifying that, while the D'Attilos may not have had immediate plans to relocate, it was on their list of things to do); *see also* Ex. 194 (Ms. Cullen writing "We really want to get this case settle [*sic*] and funds released so we can move on. We are willing to take this move to get this done we are anxious as everyone to get this to probate. . . . Domenic and I talked this over and really don't want to rush a decision on our final move, but we do feel it is important for us to get out of town.").

174. No one from the Koskoff Firm advocated for the D'Attilos to move from Norwalk, and it was not in the Koskoff Firm's interest for it to do so because having to proceed in a new jurisdiction would necessarily entail a delay in the firm's receipt of its fee. *See* 6/17 Tr. (Gallant) at 178-79; 6/16 Tr. (Gallant) at 283-84; 6/9 Tr. (Nastri) at 52-53. No one from the Koskoff Firm even suggested that they would prefer that the probate proceedings move forward in a jurisdiction other than Norwalk. *See* 6/17 Tr. (Gallant) at 178.

175. On February 26, 2012, the D'Attilos did, in fact, sign a lease for a new house in Bethel, which is located in Fairfield County. *See* 6/9 Tr. (Cullen) at 261, 268; Ex. 218.

176. The record contains no evidence that any of Plaintiffs' reasons for moving out of Norwalk had anything to do with any concerns they may have had over the 2003 Retainer Agreement or the amount of the attorneys' fees they were paying to the Koskoff Firm. The advice about the Norwalk Probate Court had nothing to do with the Koskoff Firm's fee. *See* 6/16 Tr. (Gallant) at 283; 6/14 Tr. (Iannantuoni) at 191; 6/9 Tr. (Nastri) at 52. The D'Attilos moved for a variety of reasons unrelated to that subject. *See* 6/9 Tr. (Nastri) at 43-44; 6/8 Tr. (Nastri) at 106-07; *see also* Ex. 202; 6/17 Tr. (Cullen) at 38-49; 6/9 Tr. (Cullen) at 251-52.

C. Proceedings in the Northern Fairfield County Probate Court

177. On February 24, 2012, Attorney Nastri withdrew the applications that had been initially filed by the Koskoff Firm in the Norwalk Probate Court. *See* Ex. 213.

178. On April 2, 2012, the Day Pitney Firm prepared and filed the following papers in the Northern Fairfield County Probate Court: an Application to Appoint Guardians of the Estate; an Application to Compromise a Doubtful or Disputed Claim; an Application for Authority to Create, Approve and Fund the Daniel Jacob D'Attilo Trust and to Appoint Trustee; and Trustee's Application for Authority to Expend Funds from Restricted Account. *See* Ex. 266 at PL:05809-63.

179. Through this set of applications, the D'Attilos asked the Probate Court to approve their appointment as guardians of their son's estate, permit them to create a trust for Danny's benefit, fund the trust with Danny's share of the settlement proceeds, and appoint Attorney Gallant as Trustee. *See* 6/14 Tr. (Iannantuoni) at 206-207.

180. Attorneys Nastri and Horwitz filed appearances in that court on behalf of Danny (*see* Exs. 272, 293), and Attorney Horwitz attended the April 24, 2012 hearing before Probate Judge Egan on the submitted applications and related filings because Attorney Nastri had a scheduling conflict. The role of Attorney Horwitz at the hearing was to explain to Probate Judge Egan the history of the underlying medical malpractice case and the settlement that was obtained. *See* 6/17 Tr. (Gallant) at 179-80; 6/16 Tr. (Gallant) at 287.

181. When the D'Attilos appeared at the April 24, 2012 hearing, Probate Judge Egan canvassed them to ensure that they had approved of everything in each of their three applications. The D'Attilos "were in complete support" of the applications; "were very pleased that everything had been approved, they were getting their 25 percent [and] budget"; and not once did either of them express any dissatisfaction with any aspect of the settlement, the Koskoff Firm's fee, or any of the arrangements put in place. *See* 6/18 Tr. (D'Attilo) at 197, 212-13; 6/17 Tr. (Gallant) at 103-04; 6/17 Tr. (Cullen) at 64; 6/16 Tr. (Gallant) at 163; 6/15 Tr. (Cullen) at 160-61; 6/11 Tr. (Horwitz) at 151. Mr. D'Attilo confirmed that Probate Judge Egan had canvassed him and Ms. Cullen on their approval of the settlement a total of ten (10) times. *See* 6/18 Tr. (D'Attilo) at 197. Probate Judge Egan then approved the settlement, including the total amount of the attorneys' fees and costs. *See* Ex. 295 at FAIRFIELDPC0021, FAIRFIELDPC0046; Ex. 296.

182. Plaintiffs did not appeal the Probate Court's approval of the attorneys' fees and lawsuit costs. *See* 6/17 Tr. (Gallant) at 165-66.

183. In signing the Application to Compromise, the D'Attilos represented to the Probate Court that: (1) the net settlement amount was anticipated to be approximately $17.3 million, an amount that reflected their agreement to the deduction of an attorneys' fee of 28% (or $7,000,000), and certain costs, from the $25,000,000 settlement amount, as stated in the settlement

statement referenced in and attached to the Application to Compromise; and (2) the net payment to the guardianship estate would be $9.8 million plus a $3 million structured payment settlement, reflecting their request that the court approve an allocation to them of 25% of the net settlement proceeds, as indicated on the settlement statement referenced in and attached to the Application to Compromise. *See* Ex. 263; 6/14 Tr. (Iannantuoni) at 204-06.

184. Probate Judge Egan granted the Application to Compromise, thereby approving each of the matters set forth in that application, including the requested fees, costs, and other disbursements set forth in the settlement statement attached to and referenced in the D'Attilos' application, as amended to remove the structure. *See* Exs. 295, 296.

185. The Koskoff Firm created the settlement statement document attached to and referenced in the Application to Compromise submitted to the Probate Court on April 2, 2012. *See* Ex. 263; 6/17 Tr. (Gallant) at 93; 6/14 Tr. (Iannantuoni) at 122-123, 193, 195-96; 6/10 Tr. (Larocca) at 101-04. The D'Attilos received copies of all drafts of the settlement statement, and they signed the final version on May 9, 2012 (*see* Ex. 316), which was later filed in the Probate Court.

186. Throughout the probate proceedings, the D'Attilos never expressed any concern to Attorney Gallant with any aspect of the Koskoff Firm's services or with the fee paid for them, and they never asked Attorney Gallant to provide them with a copy of the 2003 Retainer Agreement. *See* 6/16 Tr. (Gallant) at 216-17.

187. At no time did the D'Attilos ever question or express concern about the 28% attorneys' fee amount or with respect to the lawsuit costs. *See* 6/17 Tr. (Gallant) at 130-32. To the contrary, the D'Attilos were proud of having negotiated a reduced 28% fee with the Koskoff

Firm, and, at some point in March or April of 2012, they told that to Attorney Gallant. *See* 6/16 Tr. (Gallant) at 107-09.

188. The provisions of Conn. Gen. Stat. § 45a-151, which authorize fiduciaries "to compromise and settle any doubtful or disputed claims or actions," are permissive, not mandatory. *See* Ex. 592 (Gaffey Rebuttal Report) at 2-5. Nevertheless, the D'Attilos did seek and obtain the Probate Court's approval to settle their claims in the *D'Attilo* action.

189. In that approval process, however, there is no requirement that the Probate Court also specifically review and approve the 2003 Retainer Agreement. *See* Ex. 594 (Kurmay Rebuttal Report) at 7-8; Ex. 592 (Gaffey Rebuttal Report) at 5-7. In fact, there was also no requirement for anyone to provide the 2003 Retainer Agreement to the Probate Court. *See* Ex. 594 (Kurmay Rebuttal Report) at 8-11. Indeed, the D'Attilos had the inherent authority to waive whatever rights were conveyed to Danny by Conn. Gen. Stat. § 52-251c without prior approval of the Probate Court. *See* Ex. 594 (Kurmay Rebuttal Report) at 3-4, 7-8; Ex. 592 (Gaffey Rebuttal Report) at 5-7.

190. Probate Court Rule of Procedure 39, which, among other things, addresses the court's approval of "a proposed fee arrangement before the attorney renders services or a proposed fee for services already rendered," did not become effective until well after the Probate Court's 2012 approval of the D'Attilos' application to compromise. *See* Ex. 593 (Cooper Rebuttal Report) at 1-2, 8-11; Ex. 592 (Gaffey Rebuttal Report) at 7-9.

191. In 2012, probate court procedures were not consistent among all probate courts. *See* Ex. 593 (Cooper Rebuttal Report) at 1-2, 8-11; Ex. 592, Gaffey Rebuttal, at 7-9. Probate Court Rule of Procedure 39 did not merely codify some pre-existing procedure. *See* Ex. 593 (Cooper Rebuttal Report) at 8-11; Ex. 592 (Gaffey Rebuttal Report) at 7-9.

192. Even if Rule 39 were applicable or codified some pre-existing procedure, it would not have required submission of the 2003 Retainer Agreement in the *D'Attilo* action to the Probate Court without a specific request from Probate Judge Egan. *See* Ex. 593 (Cooper Rebuttal Report) at 4-6.

193. In fact, as a point of reference, the rule that governed matters brought under Conn. Gen. Stat. § 45a-151 after the 2013 enactment of the Probate Court Rules of Procedure was (and is) Rule 34.5, not Rule 39. *See* Ex. 593 (Cooper Rebuttal Report) at 6-8.

194. Moreover, because the D'Attilos had no questions, concerns, or issues with the 28% fee reflected on all the settlement documents they reviewed and executed, the Koskoff Defendants had no obligation or duty to request that Probate Judge Egan appoint a guardian ad litem. They also had no obligation or duty to refer Plaintiffs to independent counsel. *See* Ex. 615 (M. Walsh Rebuttal Report) at 5-6; Ex. 596 (Kennedy Rebuttal Report) at 6-7; Ex. 595 (Dubois Rebuttal Report) at 3-4.

195. The record also contains no evidence that the Koskoff Defendants, acting in concert with the Day Pitney Defendants or aided and abetted by the Day Pitney Defendants, sought to avoid the Probate Court's review of the 2003 Retainer Agreement.

196. Based upon the foregoing, the Probate Court, the Koskoff Defendants, and the Day Pitney Defendants all acted properly under the law and the prevailing rules of professional conduct in their practice before the Probate Court. *See* Ex. 594 (Kurmay Rebuttal Report) at 14.

197. On May 8, 2012, the insurance company issued a check for $25 million made collectively payable to:

> CATHY D'ATTILO, (INDIVIDUALLY AND ON BEHALF OF HER MINOR CHILD, DANIEL JACOB D'ATTILO), DOMINIC D'ATTILO (INDIVIDUALLY AND ON BEHALF OF HIS MINOR CHILD, DANIEL

JACOB D'ATTILO), THE GUARDIANSHIP ESTATE OF DANIEL JACOB D'ATTILO AND KOSKOFF, KOSKOFF & BIEDER, P.C.

Ex. 308.

198. On May 9, 2012, Ms. Cullen sent the Koskoff Firm an authorization, signed by her and Mr. D'Attilo, to accept the $25 million check and make disbursements in accordance with the settlement statement approved by the probate court. *See* Ex. 315.

199. On May 15, 2012, the D'Attilos went to the Koskoff Firm's offices and picked up their settlement check. *See* Ex. 312 at KKBNR007103; Ex. 333.

VIII. The Lawsuit Costs

A. Generally

200. Under the 2003 Retainer Agreement, the D'Attilos authorized the Koskoff Firm "to deduct [its contingent attorneys'] fees, liens, costs and expenses out of monies received from said party or parties." Ex. 23 at PL:00098. "[C]osts and expenses" were defined in the agreement to "include court fees, computer search/research fees, investigation expenses, expert fees, and all other disbursements incurred in the prosecution of settlement of this action." *Id*. Moreover, the Koskoff Firm agreed "to advance all out of pocket costs and expenses in connection with this litigation," and, "[u]pon settlement of the case, [the Koskoff Firm] is authorized to deduct these costs and expenses from any settlement or award after the legal fee has been deducted." *Id*.

201. On or about March 9, 2010, the Koskoff Firm sent Plaintiffs a listing of all lawsuit costs incurred to date, in response to a specific request from Plaintiffs for lawsuit cost information. *See* Exs. 69, 70.

202. As discussed above, between January 4, 2012 and May 9, 2012, Plaintiffs reviewed and executed a series of documents in connection with the settlement of the medical malpractice action and the subsequent proceedings in Probate Court in connection with the Application to Compromise. These documents showed lawsuit costs to be deducted from the settlement ranging from $597,379.57 to $632,138.87. *See* Exs. 138, 316. These documents provided notice to Plaintiffs that substantial lawsuit costs would be deducted from the settlement.

203. The record contains no evidence that the Plaintiffs ever questioned these lawsuit costs in any manner. Nor does the record contain any evidence that the Plaintiffs ever requested in 2011 or 2012 that the Koskoff Firm provide them with a detailed list of all the individual expenses comprising the total lawsuit costs. The Plaintiffs were aware that they could request and obtain such a listing from the Koskoff Firm because they had made such a request in 2010 and had obtained the listing of lawsuit costs as of March 9, 2010. *See* Exs. 69, 70.

204. On February 15, 2012, Ms. Larocca sent to Attorney Fries certain documents the latter had requested, namely, the operative complaint, the 2003 Retainer Agreement, and a breakdown of the categories (*e.g.*, expert costs, court reporters, mediation costs) of the $597,379.57 in lawsuit costs incurred as of December 16, 2011. *See* Ex. 175.

205. Ms. Larocca prepared the series of settlement statements that the Plaintiffs reviewed, including the final settlement statement the Plaintiffs executed on May 9, 2012. In preparing the lawsuit costs listed on these settlement statements, Ms. Larocca obtained the figure for lawsuit costs from the expense tracking system maintained within the Needles case management system. Under the Needles system, vendor invoices paid for a particular file are tracked on a file-by-file basis. *See* 6/10 Tr. (Larocca) at 92, 101-04; Ex. 307 (Needles Value Code Report summarizing lawsuit costs).

206. After the disbursement of the net settlement proceeds to Plaintiffs in May 2012, the Koskoff Firm subsequently issued three separate reimbursements to Plaintiffs related to the lawsuit costs that had been charged to them.

207. The first reimbursement occurred on October 31, 2012 when the Koskoff Firm returned $2,200.00 to Plaintiffs (split between the three plaintiffs under the settlement allocation percentage) after Cindy Walsh, the Koskoff Firm's controller, learned during the course of a review of the lawsuit costs on the *D'Attilo* case that a check sent to a vendor had been voided. *See* 6/10 Tr. (C. Walsh) at 179-81; Ex. 425.

208. The second reimbursement occurred on May 13, 2013 when the Koskoff Firm returned $2,170.81 to Plaintiffs (again, split between the three plaintiffs under the settlement allocation percentage) after the Koskoff Firm received a reimbursement for overpayment to a vendor. *See* 6/10 Tr. (C. Walsh) at 181-83; Exs. 488, 489.

209. The third reimbursement occurred after the filing of the instant lawsuit against the Koskoff Defendants Ms. Walsh conducted a review of the costs billed, and she determined that the Koskoff Firm owed an additional $1,636.59 as a refund of lawsuit costs billed to the D'Attilos because some vendors had not cashed checks that had been issued or certain costs were posted twice. By letter dated May 19, 2015 to Plaintiffs' attorney Howard Altschuler, the Koskoff Firm's counsel Anthony Nuzzo asked for instructions on how these funds should be repaid. When Attorney Altschuler did not respond to Attorney Nuzzo's letter, the refund due Plaintiffs was held in escrow until 2019 when disagreements between Attorneys Altschuler and Nuzzo as to how the payment should be made were resolved. *See* 6/10 Tr. (C. Walsh) at 183-94; Ex. 570.

210. Expert witness David Gannaway reviewed the records of the Koskoff Firm regarding the lawsuit costs that had been incurred in the *D'Attilo* case and rendered the following four opinions.

211. First, as a normal course of their business recordkeeping and accounting, the Koskoff Firm, upon receiving third-party invoices for lawsuit costs, made original entries into the Needles program to allocate expenses to the respective case name/number. Upon approval for the invoices to be paid, the Koskoff Firm issued a check to the professional/vendor for invoices received during the accounts payable cycle. *See* Ex. 580 (Gannaway Report) at 6.

212. Second, based upon a review of the accounting workflows, business bank checks, internal check vouchers, and internal cost reports (all records made/kept in the ordinary course of business) by the Koskoff Firm, the lawsuit costs paid by the firm during the period April 1, 2003 through April 5, 2012 were contemporaneously recorded within common business accounting practices and documented through business bank records, thereby validating the costs paid as reflected on the May 2012 Settlement Statement in the amount of $635,064.73, subject to the three reimbursements made by the firm. *See* Ex. 580 (Gannaway Report) at 1, 3.

213. Third, the Koskoff Firm's accounting records and documents confirmed that the firm paid the retained professionals/vendors detailed in the Value Code Report in the total amount of $635,064.73, subject to the three reimbursements made by the firm. *See* Ex. 580 (Gannaway Report) at 4-6.

214. And fourth, there were several expense transactions noted where the firm had paid a professional/vendor for services that involved more than one case. This method is an acceptable practice to combine and pay open invoices to the same professional/vendor during the accounts payable cycle as detailed in paragraph 12 of Mr. Gannaway's report. These instances

were separately recorded by amount due to the corresponding case number through the firm's internal computer recording software called Needles and were separately listed on the internal check vouchers for the check written. *See* Ex. 580 (Gannaway Report) at 5-6.

215. Although the Koskoff Firm maintained complete electronic records of all the costs disbursed on the *D'Attilo* case, when it closed the *D'Attilo* file, the firm did not retain the individual, hard copy invoices supporting the expenses paid out to various vendors on the *D'Attilo* case or make electronic copies of those documents. *See* 6/10 Tr. (C. Walsh) at 208. However, the record contains no evidence that this failure to keep invoices harmed Plaintiffs in any way or caused any damages to them. Nor is there any evidence that the lawsuit costs incurred in the *D'Attilo* case, as summarized in the Needles case management system, were inaccurate or overstated, with the exception of the three expense reimbursements made to Plaintiffs before the commencement of the instant litigation.

216. With the exception of those three reimbursements, the record contains no evidence to suggest that the amounts charged to the D'Attilos for lawsuit costs were not, in fact, paid to the vendors listed on the Value Code Report (a summary of lawsuit costs found in Needles). *See* Ex. 307.

217. With the exception of those three reimbursements, the record contains no evidence that the D'Attilos were overcharged in any manner for the lawsuit costs. Likewise, the record contains no evidence of any accounting errors made in connection with the payment and tracking of lawsuit costs incurred on the *D'Attilo* case.

218. The D'Attilos attended the April 24, 2012 Probate Court hearing and did not raise any objection to the attorneys' fees or lawsuit costs referenced in the Application to Compromise when the court canvassed them ten (10) times. *See* 6/18 Tr. (D'Attilo) at 197; 6/17

Tr. (Cullen) at 64. Plaintiffs also did not appeal the Probate Court's approval of the attorneys' fees and lawsuit costs. *See* 6/17 Tr. (Gallant) at 165-66.

B. <u>The Costs Relating to Lawrence Forman</u>

219. Lawrence S. Forman of Comprehensive Rehabilitation Associates, Inc. provided expert witness testimony in connection with the *D'Attilo* action. In birth injury cases like the *D'Attilo* action, experts like Mr. Forman are commonly used to prepare life care plans that serve as the basis for illustrating the nature and cost of future care that will be required. *See* Ex. 579 (Kennedy Initial Report) at 8. Mr. Forman prepared multiple life care plans for Danny (*see* Exs. 35, 79) and testified at both trials regarding the projected cost of care for Danny over the course of his lifetime. *See* Exs. 43, 82. Mr. Forman's testimony was critical to the $58.6 million verdict because the jury adopted the entire amount of economic damages calculated in his report. *See* 6/11 Tr. (Horwitz) at 130-32; 6/9 Tr. (Nastri) at 45.

220. The total billings by Mr. Forman on the *D'Attilo* action were $82,309.87 (Ex. 30), and the total amount paid to Mr. Forman on the *D'Attilo* action case was $82,238.42 (Ex. 28).

221. The total fees paid to Mr. Forman were included in the $635,064.73 of "Lawsuit Costs" that were deducted from Plaintiffs' settlement proceeds. *See* Ex. 579 (Kennedy Initial Report) at 8. A sizable portion of those fees ($68,712.92) were paid just before the settlement disbursement made to Plaintiffs in May of 2012. *See* 6/3 Tr. (Lichtenstein) at 91-92; Ex. 579 (Kennedy Initial Report) at 8.

222. Attorney Lichtenstein, who approved the final payment to Mr. Forman of $68,712.92, considered Mr. Forman's charges on the matter to be reasonable given the duration of the case and the fact that there were two trials. *See* 6/3 Tr. (Lichtenstein) at 91- 92. Similarly,

expert witness John J. Kennedy, Jr., who has previously handled cases with rehabilitation experts from Comprehensive Rehabilitation Services, opined that the total amount billed and paid to Comprehensive Rehabilitation Services for Mr. Forman's work on the *D'Attilo* action was reasonable and consistent with his expectation for the cost of such services extending over two trials and the preparation of multiple life care plans. *See* Ex. 579 (Kennedy Initial Report) at 8.

223. On Koskoff Firm cases in which Mr. Forman has been retained during the time that Ms. Walsh served as the firm's controller, the practice was that Mr. Forman would be paid a retainer by the firm at the beginning of the case, with the balance of the amount owed to him paid at the end of the case. *See* 6/10 Tr. (C. Walsh) at 163-64. This practice was not unusual, as Mr. Forman was not the only expert witness retained by the firm who was paid in this manner (*i.e.*, an initial retainer payment, followed by the balance for unpaid invoices remitted at the end of the case). *See* 6/10 Tr. (C. Walsh) at 168-70. Ms. Walsh was unaware of any matters in which Mr. Forman or any other expert witness who was paid under a similar arrangement did not receive payment on the balance due at the end of the case. *See* 6/10 Tr. (C. Walsh) at 170.

224. According to Ms. Walsh, all payments for lawsuit costs on a case had to be based on an invoice, but some payments made to a vendor may cover more than one invoice. *See* 6/10 Tr. (C. Walsh) at 171, 174-75.

225. During the first trial, Mr. Forman testified that his total fees to-date, not including his testimony that day and preparation for testifying, were at least $12,000-$15,000. *See* Ex. 43 (4/28/09 Tr. (Forman)) at 33-34.

226. Before the commencement of the second trial, there was an agreement discussed between the judge and counsel regarding how to handle questions directed to expert witnesses about the fees they had charged, given that there had been two trials, and the judge and

the parties did not want the second jury to know that there had been an earlier trial. *See* 6/11 Tr. (Horwitz) at 128-29.

227. During the second trial, Mr. Forman provided on cross-examination a rough "ballpark" approximation of his average fees for a case in which he testified at deposition and trial to be $23,000-$25,000. *See* Ex. 82 (5/10/11 Tr. (Forman)) at 10. The Koskoff Firm was unaware of the total amount of Mr. Forman's total billings to-date when he testified during the second trial. *See* 6/11 Tr. (Horwitz) at 103-04. In the middle of a long, complex trial in a birth injury case like the *D'Attilo* action, plaintiffs' attorneys would not typically know the level of billings that a particular expert had issued over the course of multiple years and multiple trials. *See* Ex. 579 (Kennedy Initial Report) at 7.

228. The fee estimates provided by Mr. Forman in both trials were simply rough estimates. Mr. Forman was not testifying from any accounting records or billing summaries, and his testimony in the second trial was about average fees, not the fees in the *D'Attilo* action. Moreover, Mr. Forman was only testifying during the second trial about the fees incurred after the first trial. *See* 6/11 Tr. (Horwitz) at 128-29; *see also* Ex. 579 (Kennedy Initial Report) at 7.

229. Although Mr. Forman's rough approximations of his total billings during the two trials did not match the amount of actual billings, Plaintiffs do not dispute that Mr. Forman was, in fact, paid a total of $82,238.42. *See* Ex. 28.

230. After the second trial, the Koskoff Firm filed a bill of costs which included charges of $14,143.74 related to Mr. Forman. *See* Ex. 91.

C. The Costs Relating to Robert Wood

231. The Koskoff Firm paid tax expert Robert Wood total fees of $27,044.33, comprising $24,118.47 in fees incurred as of March 28, 2012 and $2,925.86 of fees incurred after

March 28, 2012. *See* 6/10 Tr. (Larocca) at 92-93; Ex. 307 at KKNBR 007238; Ex. 313; *see also* Ex. 579 (Kennedy Initial Report) at 9.

232. Plaintiffs do not dispute or challenge the fact that the Koskoff Firm actually paid total fees of $27,044.33 to Mr. Wood.

233. The Koskoff Firm believed that it was necessary to consult with a tax expert because of the unique nature of the settlement, in that most of it was in excess of the underlying policy limits (which was, at most, $4 million) and, thus, the settlement was primarily for the bad faith (*i.e.*, negligent failure to settle) claim against the insurance company, and because bad faith law was very underdeveloped in Connecticut. Although Attorney Bloss and the other Koskoff attorneys were well aware that, under 26 U.S.C. § 104, amounts paid "on account of" personal injury claims are not subject to federal income tax, this settlement was largely or entirely paid as a result of the bad faith claim. Thus, the purpose of consulting with Mr. Wood was to confirm that Plaintiffs had a legitimate basis for taking the position that the entire $25 million settlement was not taxable. Based on the input they received from Mr. Wood, Attorneys Bloss and M. Koskoff ultimately concluded that they had a strong basis for concluding that the $25 million was not taxable. *See* 6/4 Tr. (Bloss) at 143-50; *see also* Ex. 135, 137.

234. Specifically, there were multiple communications from Mr. Wood to the Koskoff Firm, in which he informed the Koskoff Firm that it could reasonably take the position that the entire settlement of $25 million was not taxable income because it arose from a $58.6 million verdict for personal injury damages. Although Mr. Wood emphasized that the D'Attilos could "argue that the $25 million settlement is fully excludable from gross income," he also noted that, "given some of the arguments raised in the post-trial briefs, the IRS could conceivably argue that all payments beyond $2 million represent taxable interest." Ex. 278 at KKBNR3418. Thus,

one of Mr. Wood's recommendations was to consider revising the settlement agreement to specifically allocate a portion of the $25 million to taxable interest income. *See* Ex. 278 at KKBNR3418; Ex. 239 at KKBNR006994; Ex. 177 at PL:05577.

235. Attorney Bloss discussed with Attorney M. Koskoff that recommendation, and Attorney M. Koskoff disagreed with Mr. Wood's position for the following reasons: (1) he believed that if you conceded to the IRS that some of the settlement was taxable, the IRS would then argue that more of the settlement should be allocated to taxable interest income, and he felt that this was unnecessary and a poor strategy because the $25 million settlement was less than half of the $58.6 million verdict for personal injuries; (2) it was unlikely the insurance company would have agreed to revise the agreement to allocate a specific portion of the settlement in that manner because doing so would subject the insurance company to the potential of an IRS audit and investigation; and (3) the insurance company would not have been willing to concede that its policy provided any coverage for offer of judgment interest. *See* 6/4 Tr. (Bloss) at 151-54, 196-97.

236. In another of his communications with the Koskoff Firm, Mr. Wood had informed the Koskoff Firm that the settlement agreement would have to be revised if the D'Attilos ultimately chose to use a structured settlement for all or a portion of the $25 million. *See* Ex. 177 at PL:005575-76. The Koskoff Firm believed that a modification to the settlement agreement could have been made had Plaintiffs chosen a structure; indeed, representatives of the insurance company were in the process of preparing the necessary modifications to the settlement agreement had they been needed. *See* 6/4 Tr. (Bloss) at 76, 157-61; Exs. 223, 269. But Plaintiffs ultimately elected not to put any of the settlement into a structure. Thus, the issue became moot. *See* 6/4 Tr. (Bloss) at 156.

237. The record contains no evidence that Plaintiffs suffered any tax liability or adverse tax consequences as a result of their receipt of proceeds from the settlement agreement.

Conclusions of Law

I. Claims Against the Koskoff Defendants

As I have construed my jurisdiction, in this proceeding, Plaintiffs have interposed a total of thirteen (13) claims against the Koskoff Defendants seeking recovery of the fees, costs, expenses, and/or interest due under the 2003 Retainer Agreement: (1) fraud, fraudulent concealment, and/or intentional misrepresentation; (2) conversion; (3) statutory theft under Conn. Gen. Stat. § 52-264; (4) civil conspiracy; (5) a violation of the contingency fee recovery provisions under Conn. Gen. Stat. § 52-251c(g); (6) breaches of fiduciary duty; (7) disgorgement; (8) unjust enrichment; (9) a violation of the Connecticut Unfair Trade Practices Act ("CUTPA") (§ 42-110A); (10) negligent misrepresentation and/or reckless misrepresentation; (11) breach of contract; (12) breach of the implied duty of good faith and fair dealing; and (13) prima facie tort. *See* Mem. at 5. Plaintiffs have also confirmed that they are not bringing any portion of their legal malpractice and emotional distress claims against the Koskoff Defendants in this proceeding.

In an effort to streamline the discussion in this portion of the Final Award, I address my conclusions in the following order: (1) Plaintiffs' civil conspiracy claim; (2) Plaintiffs' contract-based claims; (3) Plaintiffs' CUTPA claim; (4) Plaintiffs' other remaining claims; and then (5) the Koskoff Defendants' other affirmative defenses.

A. Burden of Proof

Initially, Plaintiffs raise a burden of proof issue for my consideration. Specifically, Plaintiffs contend that Connecticut courts "scrutinize transactions made between attorneys and

clients during the existence of the relationship with great care and if there are doubts, they will be resolved in favor of the client." Pls. Narrative of the Case re: Fee Related Issues (May 15, 2020), at 27. Plaintiffs principally rely on that portion of *McKnight v. Gizze* in which the Connecticut Supreme Court of Errors opined that "dealings between an attorney and his client are held, as against the attorney, to be prima facie fraudulent, that is to say, the burden is not upon the client to establish fraud and imposition, but the burden rests upon the attorney to show fairness, adequacy and equity." 107 Conn. 229, 235 (1928) (internal quotation marks and citation omitted). Plaintiffs also contend that, because the Koskoff Defendants were acting in the capacity of fiduciaries to Plaintiffs, their burden rises to "either by clear and convincing evidence, clear and satisfactory evidence or clear, convincing and unequivocal evidence." Am. Identification of Pls. Experts (Feb. 12, 2021), at 2 (quoting *Murphy v. Wakelee*, 247 Conn. 396, 400 (1998)). According to Plaintiffs, the Koskoff Defendants fraudulently misrepresented the meaning of the 2003 Retainer Agreement to the D'Attilos, withheld the agreement from the Probate Court, and then withheld evidence of their fraud from the Statewide Grievance Committee, solely for their own financial gain, justifying a shift in the burden of proof. *See* Pls. Pre-Hrg. Mem. at 1-2.

To be clear, to the extent that any burden of proof was shifted in *McKnight*, the situation was highly confined to the facts of that case and distinguishable from the case here. There, additional security for the payment of legal services was demanded of the client by the attorney during the representation while the client was facing first-degree murder charges. Moreover, the client himself was ignorant, uneducated, and "wholly unable to protect himself." Under these circumstances, the court concluded that the burden shifted in view of the existent coercion and duress. *See* 107 Conn. at 234-35; *see also DiFrancesco v. Goldman*, 127 Conn. 387, 392 (1940) ("[A]n attorney is not prohibited from contracting with his client respecting his fees, and a contract

thus made after the commencement of the relationship of attorney and client is not per se void but will by reason of the confidential nature of the relationship be closely scrutinized by the court."). By contrast, here, the 2003 Retainer Agreement commenced the relationship between Plaintiffs and the Koskoff Defendants; it was not executed during the course of that relationship. Thus, on Plaintiffs' contract-related claims, there is no basis upon which to shift Plaintiffs' burden of proof.

Moreover, having reviewed the decisional authority cited and relied upon by the parties, and contrary to Plaintiffs' contentions, Connecticut law does not presumptively deem all retainer agreements to be fraudulent or shift the burden of proof to a client's attorney to disprove the client's claims that attorneys' fees should not be paid in accordance with the terms of that agreement. Thus, for example, Plaintiffs bear the burden of proof to establish, in the first instance, that the 2003 Retainer Agreement was procured by fraudulent or other illicit means. *See DiFrancesco*, 127 Conn. at 393. To the extent that Plaintiffs' other claims derive directly from the underlying validity and enforceability of the 2003 Retainer Agreement – such as their claims for conversion, statutory theft, and a violation under Conn. Gen. Stat. § 52-251c(g) – they also bear the burden of proof.

Moreover, under the cited and relied upon authority, even when fraudulent, deceptive, or other dishonest conduct has been alleged, the burden only shifts in the context of contracting between attorneys and clients during the course of the attorney-client relationship, and not in the context of a dispute as to the meaning of the terms and conditions of a pre-existing retainer agreement. In particular, Plaintiffs have cited no authority for the proposition that an attorney's contentions regarding the appropriate fee amount, even if relayed fraudulently, deceptively, or dishonestly to the client, would upend their bearing of the burden of proof.

The only exception appears to be with respect to Plaintiffs' breach of fiduciary duty claim. On such a claim, the Connecticut Supreme Court has held that "the burden to prove fair dealing by clear and convincing evidence shifts to the defendant" where the allegations "involve claims of fraud, self-dealing or conflict of interest." *Murphy*, 247 Conn. at 397. In such cases, "the standard of proof for establishing fair dealing is not the ordinary standard of fair preponderance of the evidence, but requires proof either by clear and convincing evidence, clear and satisfactory evidence or clear, convincing and unequivocal evidence." *Id*. at 400 (internal quotation marks and citation omitted). Thus, on this claim, contrary to the Koskoff Defendants' contentions otherwise (*see* Koskoff Pre-Hrg. Mem. at 8-9), the burden of proof does shift to the Koskoff Defendants.

In sum, the breach of fiduciary duty claim is the only claim on which the burden of proof shifts to the Koskoff Defendants, who must meet a "clear and convincing evidence" standard. For all the other claims, Plaintiffs bear the burden of proof, and the standard is a preponderance of the evidence. I will apply the foregoing framework in my analysis and conclusions regarding the claims interposed in this proceeding.

B. Plaintiffs' Civil Conspiracy Claim

In Count Four, Plaintiffs alleged that the Koskoff Defendants, aided and abetted by the Day Pitney Defendants, had engaged in a criminal scheme designed to defraud and commit larceny against Plaintiffs, namely, to improperly obtain legal fees and expenses under the 2003 Retainer Agreement, to which the Koskoff Defendants were not entitled. *See* First Am. Compl. ¶¶ 287-96.

After the conclusion of the evidentiary hearing in this proceeding, but before I had initially closed the hearing, Plaintiffs settled all of the claims that they had interposed against the Day Pitney Defendants. Plaintiffs and the Koskoff Defendants then briefed the issue of the so-called "intracorporate conspiracy doctrine" in connection with Plaintiffs' contention that the individual

Koskoff Defendants could have conspired with each other and, thus, satisfied the elements of the civil conspiracy claim. *See* Ltr. from H. Altschuler to T. Cheng (Dec. 3, 2021) at 2; Ltr. from J. Robertson to T. Cheng (Nov. 24, 2021) at 3-8; Ltr. from H. Altschuler to T. Cheng (Nov. 19, 2021) at 1-3; *see also* Pls. Mem. at 52; Koskoff Mem. at 41. However, after the December 3, 2021 conference with counsel, Plaintiffs formally withdrew their civil conspiracy claim against the Koskoff Defendants, thereby obviating the need for me to further analyze the impact of this legal doctrine.

Therefore, in light of the above developments, the civil conspiracy claim is **DENIED** and **DISMISSED AS MOOT**.

As noted above, however, Plaintiffs did not withdraw their conspiracy and aiding and abetting allegations pled throughout their First Amended Complaint with respect to the conduct of both the Koskoff Defendants and the Day Pitney Defendants. Under Connecticut law, aiding and abetting liability is demonstrated by a showing that (1) the party receiving the aid must perform a wrongful act that causes an injury; (2) the tortfeasor must be generally aware of its role as part of an overall illegal or tortious activity at the time that it provides the assistance; and (3) the tortfeasor must knowingly and substantially assist the principal violation. *See Flannery v. Singer Asset Fin. Co., LLC*, 312 Conn. 286, 328 (2014).

Based on the evidence adduced during the hearing of the contacts and interactions between the Koskoff Defendants and the Day Pitney Defendants, the record is devoid of any basis on which to conclude that the two sets of defendants, in any way, aided and abetted each other in the commission of the alleged claims interposed by Plaintiffs in this proceeding. Not only did the Koskoff Firm not recommend to the D'Attilos that they retain Attorney Gallant for the Probate Court proceedings, but Attorney Nastri also explained to the D'Attilos that they did not need to

make Attorney Gallant the trustee over the trust that he was drafting. *See, e.g.*, 6/16 Tr. (Gallant) at 192-93 (explaining that Frank Mercede had recommended Attorney Gallant to the D'Attilos); 6/9 Tr. (Cullen) at 247 ("[Attorney Nastri] had walked [Attorney Gallant] out, came back, and that's when we had the discussion about, like she said, you know, you don't have to keep him . . . ."); 6/9 Tr. (Cullen) at 246-47 ("I wanted [Attorney Gallant] because of the referral that was given to me and I trusted those people and I trusted their referral.").

Thus, even if I were to assume, at this stage, that the Koskoff Defendants had committed some alleged wrong in connection with procuring their fees and expenses under the 2003 Retainer Agreement, there is no evidence that the Day Pitney Defendants provided assistance of any kind to the Koskoff Defendants in furtherance of that wrong; that there was any awareness on the part of the Day Pitney Defendants of any wrongful conduct on the part of the Koskoff Defendants; or that there was any kind of conspiratorial agreement between the two sets of defendants to undertake any wrongful act.

Therefore, for the foregoing reasons, all of the aiding and abetting and acting in concert allegations advanced by Plaintiffs are **REJECTED** and **DENIED**. Accordingly, in considering Plaintiffs' remaining claims, I will disregard any allegations that the Day Pitney Defendants aided and abetted or acted in concert with the Koskoff Defendants.

C. Plaintiffs' Contract-Based Claims

The crux of the dispute between Plaintiffs and the Koskoff Defendant depends, in large measure, on the validity and enforceability of the 2003 Retainer Agreement. Thus, even though Plaintiffs have pled the breach of contract claim in this proceeding in the alternative, it logically makes sense for me to address the contract-based claims and issues in the first instance.

In Count Fourteen, Plaintiffs alleged that the Koskoff Defendants breached the 2003 Retainer Agreement by improperly seeking to recover a 28% legal fee and undocumented litigation expenses. *See* First Am. Compl. ¶¶ 406-10. "The elements of a breach of contract claim are the formation of an agreement, performance by one party, breach of the agreement by the other party, and damages." *Meyers v. Livingston, Adler, Pulda, Meiklejohn & Kelly, P.C.*, 311 Conn. 282, 291 (2014) (citation omitted).

1. Interpretation of the Fees Provision in the 2003 Retainer Agreement

The parties do not appear to dispute that Plaintiffs and the Koskoff Firm entered into the 2003 Retainer Agreement. *See, e.g.*, Pls. Mem. at 44 ("There is no dispute that the parties have an agreement."). In noting this, I also note that, while Plaintiffs have interposed their breach of contract claim against each of the Koskoff Defendants, only they and the Koskoff Firm are parties to the 2003 Retainer Agreement. *See* Ex. 23. Thus, this lack of privity between Plaintiffs and the individual Koskoff attorney-defendants with respect to the agreement could alone result in a denial of the breach of contract claim as against the latter. *See FCM Group, Inc. v. Miller*, 300 Conn. 774, 797 (2010) ("[T]he obligation of contracts is limited to the parties making them, and, ordinarily, only those who are parties to contracts are liable for their breach."; internal quotation marks and citations omitted). However, because the parties have not fully briefed that issue for me, I will leave it to the side for the moment.

Plaintiffs and the Koskoff Defendants do, however, disagree as to how the attorneys' fees provision should be construed. Thus, critical to my analysis of this claim is the proper interpretation of that section of the 2003 Retainer Agreement.

Under Connecticut law, it is well-settled that a contract must be construed to effectuate the intent of the parties. *See Foley v. Huntington Co.*, 42 Conn. App. 712, 730 (1996). "The intent of

the parties is to be ascertained by a fair and reasonable construction of the written words and the language used must be accorded its common, natural, and ordinary meaning and usage where it can be sensibly applied to the subject matter of the contract. Where the language of the contract is clear and unambiguous, the contract is to be given effect according to its terms." *Chang v. Chang*, 197 Conn. App. 733 (2020). "In arriving at the intent of the parties to a contract as expressed or implied in the language used by them, it is always admissible to consider the situation of the parties and the circumstances connected with the transaction, and every part of the writing should be considered with the help of that evidence." *Foley*, 42 Conn. App. at 730 (internal quotation marks and citations omitted). However,

> a contract is ambiguous if the intent of the parties is not clear and certain from the language of the contract itself. [A]ny ambiguity in a contract must emanate from the language used by the parties. . . . . The contract must be viewed in its entirety, with each provision read in light of the other provisions . . . and every provision must be given effect if it is possible to do so. . . . If the language of the contract is susceptible to more than one reasonable interpretation, the contract is ambiguous.

Konover v. Kolakowski, 186 Conn. App. 706, 714 (2018). "When only one interpretation of a contract is possible, [an arbitrator] need not look outside the four corners of the contract. Extrinsic evidence may be considered in determining contractual intent only if a contract is ambiguous." *Id.* at 720 (internal quotation marks and citations omitted).

Here, in the attorneys' fees provision of the 2003 Retainer Agreement, the parties agreed that, "[p]ursuant to statute," the firm would receive contingent fees based upon the sum of increasingly tiered levels of recovery, each multiplied by a series of decreasing percentages. Ex. 23 at PL:00098 (Section II.). But "[i]f that statute is not in effect at the time money is to be distributed," then the firm would receive 28% "of the total recovered." *Id.* Thus, the principal interpretive task is to construe the foregoing two sentences to ascertain the parties' intent as to

what fees the Koskoff Firm would be entitled if there was any recovery and under what circumstances.

Initially, unlike the initial retainer agreement that was mailed to the D'Attilos, nowhere in the 2003 Retainer Agreement did the parties identify the referenced "statute." Thus, the meaning of that reference must be determined. By the time this agreement was executed on March 21, 2003, it had been well settled since 1986 that the recovery of contingent attorneys' fees on personal injury actions was governed by Conn. Gen. Stat. § 52-251c. Moreover, at the time the 2003 Retainer Agreement was executed, the only version of that statute in existence and codified in the Connecticut General Statutes was the 1986 version. That statute contained a sliding scale identical to the one contained in the 2003 Retainer Agreement for calculating the contingent attorneys' fees, namely, a sum of increasingly tiered levels of recovery, each multiplied by a series of decreasing percentages. Thus, under the plain language of the agreement, there is no ambiguity or uncertainty that the "statute" being referenced is, in fact, the 1986 version of § 52-251c, and, in the context of the fees provision, the entirety of the first sentence set forth that the Koskoff Firm would, in the first instance, be entitled to a contingent fee calculated using the sliding scale.

Next, having determined the identity of the statute being referenced, I turn to the condition precedent in the agreement, namely, that, "[i]f that statute is not in effect at the time money is to be distributed," then the Koskoff Firm would be entitled to a different fee than would have been calculated under the sliding scale. The meaning of this condition turns on the phrase "not in effect." The word "effect" has a number of ordinary English language definitions, the most applicable being "[t]he condition of being in full force or execution; operativeness." Am. Heritage Dictionary of the English Language (available at https://www.ahdictionary.com/). Thus, for something to be "in effect," it must be in full force or execution; conversely, for something to be

"not in effect," it must be not in full force or execution. Because the specific item that is the subject of this phrase is the 1986 version of § 52-251c, the condition precedent agreed-to by the parties is that the 1986 version of § 52-251c no longer be in full force or execution at the time money is distributed.

There are many ways in which a statute may no longer be in full force or execution. For example, the Legislature could repeal it in its entirety and provide for no substitute statute; it could repeal it and replace or substitute it with some other statutory scheme; it could also leave the statute in place, but amend or revise it in some way. Alternatively, a court could deem the statute unenforceable on some constitutional or other ground. In any of the foregoing scenarios, even though the plain and ordinary language of the 2003 Retainer Agreement does not distinguish between them, it would be proper to construe the 1986 version of § 52-251c as being no longer in full force or execution such that the condition precedent would be satisfied.

In reaching this conclusion, I do not find that the language of the 2003 Retainer Agreement is ambiguous. That is, a proper interpretation of the fees provision and the condition precedent can be achieved without resort to any extrinsic evidence. However, to the extent that there is any latent ambiguity in the condition precedent language, an examination of the circumstances surrounding the execution of the 2003 Retainer Agreement, along with the motives of the parties and the purposes that they sought to accomplish, both confirm the foregoing interpretation and provide additional, specific evidence of the parties' intent.

As set forth in my Findings of Fact above, the D'Attilos contacted the Koskoff Firm to engage their services in pursuing a possible medical malpractice action against the doctor who delivered Danny. After an initial intake, the firm sent them its standard retainer agreement, which included a 33 1/3% contingent attorneys' fee provision and an acknowledgment of an explicit

waiver of the mandatory fee cap found in the then applicable 1986 version of § 52-251c. Mr. D'Attilo then asked his sister, Ms. Mercuri, to speak with her employer, Attorney Greany, to see if he could negotiate a lower rate than the 33 1/3% in the firm's retainer agreement. In turn, Attorney Greany spoke with Attorneys Lichtenstein and M. Koskoff, expressing concern that the then applicable contingent attorneys' fee statute (the 1986 version of § 52-251c) did not contain an express provision allowing plaintiffs to waive the mandatory fee cap and the sliding scale. Informed by Attorney M. Koskoff that he anticipated that the current statute would be revised to expressly permit such waivers (essentially a codification of the *Salerno* decision and subsequent practice in the personal injury field), Attorney Greany negotiated to have revisions made to the Koskoff Firm's retainer agreement such that the firm would be entitled to a 28% fee if the 1986 version of § 52-251c was so revised.

In passing, I note that the parties have raised and briefed the issue of whether Attorney Greany was acting in the capacity of Plaintiffs' attorney when he negotiated these revisions with Attorney M. Koskoff. *See, e.g.*, Reply at 22-24; Koskoff Mem. at 42-43; Koskoff Ans. Stmt. at 18 (§ IV., ¶¶ 1-2) (interposing affirmative defenses of actual and apparent authority on the part of Attorney Greany to bind Plaintiffs to the 2003 Retainer Agreement under the Koskoff Defendants' preferred construction of the condition precedent). As I found in my Findings of Fact, Attorney Greany was not acting in that capacity, but he was speaking on behalf of the D'Attilos and for their benefit when he engaged Attorney M. Koskoff about the retainer agreement. In the end, as discussed further below, Plaintiffs themselves appeared at the March 21, 2003 meeting, where all of the terms and conditions of the 2003 Retainer Agreement were explained to them by Attorney Lichtenstein before Plaintiffs signed the agreement. Thus, while the evidence appears to support the finding that Attorney Greany had actual or apparent authority of some kind to bind Plaintiffs

when he spoke to Attorney M. Koskoff, it is ultimately not germane to the conclusion that Plaintiffs independently affirmed their agreement to, among other things, the fees provision in the 2003 Retainer Agreement when they met with Attorney Lichtenstein on March 21, 2003.

In that meeting, Attorney Lichtenstein reviewed the entirety of the agreement with the D'Attilos, including the fees provision. He also provided them with a history of tort reform in Connecticut and explained that the Koskoff Firm does not take cases under the sliding scale found in § 52-251c. He also informed the D'Attilos that they would have to waive the mandatory fee cap and the sliding scale found in that statute if they wanted to retain the Koskoff Firm. Attorney Lichtenstein fully explained to the D'Attilos the meaning of the fees section in the 2003 Retainer Agreement before they signed it, including how the condition precedent operated, namely, that if § 52-251c were revised so as to expressly permit waivers of the mandatory fee cap and the sliding scale – thereby rendering the 1986 version of the statute no longer in full force or execution – the firm would be entitled to 28%.

Although Attorney Lichtenstein did not have an independent recollection of the March 21, 2003 meeting, based upon his many decades of experience counseling clients on the signing of retainer agreements, the substance of his testimony after having reviewed various documentary exhibits during the hearing, and his corroboration of Attorney M. Koskoff's testimony, contrasted by the D'Attilos' complete or poor lack of any memory or recollection concerning the pertinent events in February and March of 2003, I find his testimony credible, consistent, and reliable.

Moreover, Plaintiffs do not advance any contention that they did not understand the 2003 Retainer Agreement or were unsatisfied with its terms after Attorney Lichtenstein reviewed all of its provisions with them and before they signed the document. *See Friezo v. Friezo*, 281 Conn. 166, 199 (2007) ("[c]ontracting parties are normally bound by their agreements, without regard to

whether the terms thereof were read and fully understood and irrespective of whether the agreements embodied reasonable or good bargains"; quoting *Simeone v. Simeone*, 525 Pa. 392, 400 (1990)). To be sure, Attorney M. Koskoff could have revised the original retainer agreement to include more explicit language regarding how the condition precedent was intended to operate. Even Attorney M. Koskoff appeared to have later believed that the agreement could have benefited from better drafting. *See* Ex. 121 at KKBNR006864 (Attorney M. Koskoff characterizing the agreement as being the product of "bad drafting"). However, the inquiry at this time is not what the contracting parties could have been done back in 2003, but what the parties' intent was when they entered into the 2003 Retainer Agreement, and, specifically, the fees provision.

On that score, the interpretation that the Koskoff Firm would be entitled to a 28% contingent fee if the 1986 version of § 52-251c were revised to expressly permit waivers of the mandatory fee cap and the sliding scale is wholly supported by the evidence adduced at the hearing. The language of the agreement, the situation of the parties, and the circumstances connected with entering into this retention were all consistent with the D'Attilos' desire to negotiate a discount from the standard 33 1/3% contingent fee percentage; the concern raised by Attorney Greany regarding the lack of an express waiver provision in the 1986 version of § 52-251c; the optimistic view of the Koskoff Firm that a revision to § 52-251c to expressly permit a waiver of the mandatory fee cap and the sliding scale was likely to happen; and the economic realities for a plaintiffs' personal injury firm to take on a birth injury case.

More than two years after the execution of the 2003 Retainer Agreement, the 2005 version of § 52-251c was enacted. *See* P.A. 05-275 ("Section 52-251c of the general statutes is repealed and the following is substituted in lieu thereof."). Although characterized by the Legislature as a repeal of the earlier statute and substitution with new statutory language, a close textual

comparison between the two versions of the statute reveals that the Legislature kept intact the vast majority of the language used in the earlier version of the statute, and then also amended certain portions by replacing some words with others and adding wholly new provisions, specifically, the explicit allowance of a waiver provision that had not previously existed in the earlier version of the statute. Accordingly, because the Legislature's enactment of the 2005 version of § 52-251c satisfied the condition precedent in the 2003 Retainer Agreement, in that the 1986 version of the statute was no longer in full force or execution, by the time of the settlement of the *D'Attilo* action, the Koskoff Firm was entitled to a 28% fee.

Plaintiffs' conduct after the execution of the 2003 Retainer Agreement further supports the conclusion that they had agreed to and understood that, by the time of the 2012 settlement of the *D'Attilo* action, the Koskoff Firm was entitled to a contingent fee of 28%. During the January 4, 2012 meeting at the Koskoff Firm's offices, the D'Attilos signed two authorization documents, each of which disclosed a 28% fee to the firm. Their rejection of the $18 million offer and concomitant acceptance of a $22,500,000 offer was entirely consistent with an understanding and agreement that the correct calculation of the attorneys' fees would necessarily entail using a 28% rate because only the latter would result in the D'Attilos netting more than their $15 million bottom-line objective. When the *D'Attilo* action settled on January 11, 2012, the D'Attilos also signed an additional authorization that, once again, disclosed the 28% fee. The D'Attilos were rightly proud of having negotiated a discount from the Koskoff Firm's standard 33 1/3% fee, on which Attorney Nastri complimented them (and about which Mr. D'Attilo chuckled) and which they shared with Attorney Gallant. While the D'Attilos generally exhibited poor memory and recollection regarding this time period, they appear to have had some recollection, at least as late as 2015, that a 28% fee was a part of the 2003 Retainer Agreement. Moreover, in seeking Probate

Court approval for the settlement, the D'Attilos signed documents and submitted papers in that court, all of which reflected the 28% fee; they never expressed any concern with any aspect of the Koskoff Firm's services or with the fee paid for them; they never expressed any dissatisfaction with any aspect of the settlement, including the Koskoff Firm's fee; and they never questioned, challenged, or objected to the 28% figure during this entire timeframe. Thus, by their conduct, Plaintiffs acknowledged that the Koskoff Firm was entitled to a 28% fee. For its part, the Koskoff Firm also acted properly under the law and the prevailing rules of professional conduct in their practice before the Probate Court.

In applying the above interpretation of the condition precedent to the evidentiary record, I reject any construction of the 2003 Retainer Agreement that would render the 1986 version of the statute as no longer in full force or execution for all purposes, as Plaintiffs urge, which would lead to an absurd and, assuredly, problematic result. *See Konover*, 186 Conn. App. at 716 (noting that, in Connecticut, "[o]ur courts refuse to construe a contract's language in such a way that it would lead to an absurd result"; internal quotations marks and citation omitted). For example, if the 1986 version were to be no longer in full force or execution for all purposes, then there would be no governing contingent attorneys' fee statute to which the 2003 Retainer Agreement would be subject at all. In enacting Public Act 05-275, the Legislature expressly provided that the 2005 version of § 52-251c will be "[*e*]*ffective from passage and applicable to causes of action accruing on or after said date*." Thus, by its very terms, the 2005 version of the statute does not apply or govern the terms and conditions of the 2003 Retainer Agreement because the newer statute was only enacted in 2005. In that case, if the earlier statute is also no longer in full force or execution for all purposes, then neither the earlier nor the revised statute would govern the 2003 Retainer

Agreement, which Plaintiffs admit is nonsensical. *See* Pls. Mem. at 24-25 ("It cannot be the case that the March 2003 agreement is not subject to either version.").

Moreover, even if the 2005 version of § 52-251c could somehow apply to the 2003 Retainer Agreement, doing so would raise problematic retroactivity concerns. Under the 1986 version of the statute, there was no express language permitting waivers of the mandatory fee cap and the sliding scale. However, at least as of 1993, under the *Salerno* decision, plaintiffs could voluntarily waive those rights so as to pay their attorneys contingent fee amounts greater than the fee calculated using the sliding scale. Under *Salerno* and its progeny, a waiver only had to be knowing and voluntary. *See Salerno*, 426 Conn. Sup. 526, 533-34 (1993) (finding that the client "understands her rights under the fee cap statute and that she has freely and voluntarily waived her rights under that statute"). By contrast, under the 2005 version of § 52-251c, there are now quite specific, codified requirements that must be satisfied in order for a waiver to be valid and effective. *See* §§ 52-251c(e), (g). Thus, as of the enactment of the 2005 version of § 52-251c, a waiver of the mandatory fee cap and the sliding scale could only be accomplished through compliance with those specific requirements. To have those requirements apply to the 2003 Retainer Agreement *ex post facto* would raise, among others, serious constitutional concerns. *See* Koskoff Ans. Stmt. at 18 (§ IV., ¶ 8) (interposing affirmative defense of unconstitutional retroactive application of the 2005 version of Conn. Gen. Stat. § 52-251c).

The record also does not contain any evidence to support Plaintiffs' alternative construction that the 28% fee would apply only if the Legislature repealed the 1986 version of § 52-251c and failed to replace it with another statute or eliminated the sliding scale altogether. *See, e.g.*, Pls. Mem. at 32 ("The plaintiffs do not believe that the fee provision is ambiguous and, instead, it means exactly what it says – KKB would be entitled to 28%, assuming the fee provision is not

void as against public policy, but only if the sliding scale is 'not in effect' at the time funds are distributed."). Not only is that narrow interpretation contradicted by the plain language of the 2003 Retainer Agreement, but also no one in or around March of 2003 ever held the belief that either the statute or the sliding scale itself would simply disappear from the Connecticut General Statutes. Under those circumstances, it strains credulity to conclude that the Koskoff Firm would have intended to ascribe such a meaning to the condition precedent in the fees provision and explained the operation of that condition in that manner to Plaintiffs.

In that regard, Plaintiffs misunderstand the import of *LeConche v. Elligers*, 215 Conn. 701 (1990). *See* Pls. Pre-Hrg. Mem. at 4 & n.1. There, the plaintiffs contended that the "repeal" of General Statutes (Rev. to 1987) § 52-190a resulting from the enactment of a 1987 public act postponed the application of the pre-complaint inquiry and good faith certificate requirements to injuries occurring on or after October 1, 1987. Thus, according to the plaintiffs, those requirements did not apply to their claim for injuries, which had occurred before that date. *See* 215 Conn. at 706. However, the Connecticut Supreme Court rejected that contention because "[t]he use . . . of the words 'repeal' and 'substituted in lieu thereof' simply reflected the legislature's drafting convention of amending statutes by cast[ing] acts which alter language within existing statutory subsections in the form of repeal and substitution." *Id*. at 707 (internal quotation marks and citations omitted). The Court also noted that the legislative history "makes clear that the legislature intended to amend the statute with respect to actions for injuries occurring on or after October 1, 1987, and to continue the application of the 1986 public act to actions that occurred on or after October 1, 1986, but before October 1, 1987." *Id*. Thus, the Court held that the provisions of the earlier statute continued to apply to the plaintiffs. *See id*.

Like in *LeConche*, here, when the Legislature enacted the 2005 version of § 52-251c, it used the same "repealed" and "substituted in lieu thereof" language. As in *LeConche*, in doing so, the Legislature did not eliminate the continued applicability of the 1986 version of the statute in terms of its governance over the 2003 Retainer Agreement (or, for that matter, over any other retainer agreement executed before the effective date of the 2005 version of § 52-251c). The parties could not have intended that the older statute had no applicability whatsoever to the 2003 Retainer Agreement as a whole because such an intention would have run afoul of the teachings of *LeConche*. Nothing in *LeConche*, however, addresses how the phrase "[i]f that statute is not in effect" should be construed in the context of an agreed-upon condition precedent that impacts how the parties have agreed the Koskoff Firm will be paid its contingent attorneys' fees. Plaintiffs have erroneously advanced alternative constructions of the 2003 Retainer Agreement's condition precedent by expanding the plain language of the agreement beyond its proper context and conflating it with the continuing applicability of a statute to an agreement consummated at a particular point in time.

Accordingly, under the terms of the 2003 Retainer Agreement, had the *D'Attilo* case settled at any time prior to the enactment of the 2005 version of § 52-251c, the contingent fee due to the Koskoff Firm would have been based on the sliding scale. However, after the new statute's effective date, the older 1986 version of § 52-251c was no longer in effect for purposes of the condition precedent in the agreement because it now contained an explicit waiver provision (although it still had continued applicability to the agreement as a whole), and, thus, the contingent fee due to the firm thereafter would be 28%. Because that percentage was properly applied to Plaintiffs' total recovery amount of $25 million, resulting in a $7 million fee to the Koskoff Firm

when those monies were distributed, I conclude that none of the Koskoff Defendants breached the fees provision in the 2003 Retainer Agreement.

2. Whether the Agreement is Void as Against Public Policy

Irrespective of the above interpretation, Plaintiffs also facially challenge the validity of the 2003 Retainer Agreement in its entirety, contending that it is void as against public policy and law. *See* Pls. Mem. at 7-28. Specifically, Plaintiffs contend that the 2003 Retainer Agreement (a) violates Rules of Professional Conduct 1.5 because it "did not specify the methodology the clients would need (at some point likely many years in the future) to determine whether the sliding scale or the 28% applied"; (b) violates all versions of § 52-251c because it "permit[s] the KKB defendants to exceed the sliding scale at some point in the future, using a method other than the 'exclusive method' set forth in the statute"; and (c) does not comply with either version of § 52-251c because a waiver was not properly effectuated. I reject each of these contentions.

In pertinent part, under Rule of Professional Conduct 1.5 in effect in 2003, "[a] contingent fee agreement shall be in writing and shall state the method by which the fee is to be determined, including the percentage or percentages of the recovery that shall accrue to the lawyer as a fee in the event of settlement, trial or appeal." Ex. 621 at 2 (Rule 1.5(c)). Plaintiffs arrive at an incorrect understanding of how the 2003 Retainer Agreement sets forth the methodology for how the contingent attorneys' fees is calculated because they continue to seek refuge in their favored, but now rejected, construction of when the 1986 version of § 52-251c is "not in effect."

Here, the language in the fees provision provided that the contingent fee to which the Koskoff Firm would be entitled would be calculated by multiplying the "total recovered" by either the "sliding scale" percentages found in § 52-251c, or by 28% "if that statute is not in effect at the time money is to be distributed to the Client." The agreement also made clear that the firm would

not be entitled to any fee if there was no recovery to Plaintiffs. Moreover, the "total recovered" would be determined before the deduction of any liens, costs, and expenses, and, if any part of the settlement or award was paid in installments, the fee would be calculated using the present cost of the settlement or award, with all fees, liens, costs and expenses paid from the first monies received. Under the agreement, the firm would also advance, on behalf of the D'Attilos, the payment of any lawsuit costs and expenses, and the D'Attilos would be responsible for the repayment of those costs and expenses from any settlement or award after the fee had been deducted.

Thus, based upon a plain reading of the terms of the 2003 Retainer Agreement, along with the interpretation set forth above for when the condition precedent would be satisfied, the agreement more than amply set forth the methodology under which the D'Attilos would be obligated to pay contingent attorneys' fees to the Koskoff Firm, thereby complying with Rule of Professional Conduct 1.5. *See* Ex. 595 (Dubois Rebuttal Report) at 5 (opining that the 2003 Retainer Agreement complied with Rule 1.5); Ex. 578 (M. Walsh Initial Report) at 4-5 (same).

Plaintiffs' contention that a proper waiver of the mandatory fee cap and the sliding scale was not effectuated is also undercut by the evidence. "Waiver is a question of fact. . . . Waiver is the intentional relinquishment or abandonment of a known right or privilege. . . . Waiver does not have to be express, but may consist of acts or conduct from which waiver may be implied. In other words, waiver may be inferred from the circumstances if it is reasonable to do so." *Dinan v. Patten*, 317 Conn. 185, 194-95 (2015) (internal quotation marks and citation omitted).

Here, the D'Attilos reached out to the Koskoff Firm after not being able to successfully retain an attorney who had had a conflict. After the intake process, the Koskoff Firm sent them its standard retainer agreement containing an express waiver provision; thus, Plaintiffs were already aware that a waiver was being proposed by the firm. Attorney Lichtenstein's unrebutted testimony

established that, at the March 21, 2003 meeting, he had fully explained to the D'Attilos the meaning of the fees provision in the 2003 Retainer Agreement before they signed it, including how the condition precedent operated. In doing so, he provided the D'Attilos with a history of tort reform in Connecticut and explained that the Koskoff Firm does not take cases under the sliding scale found in § 52-251c. Thus, in order for the D'Attilos to retain the Koskoff Firm, they would have to waive the mandatory fee cap and the sliding scale found in that statute, manifested within the language comprising the condition precedent. In the absence of any evidence that the D'Attilos, at that time, expressed any reluctance or unwillingness to waive the mandatory fee cap and the sliding found in § 52-251c, the foregoing facts wholly support a knowing and voluntary waiver. *See* 6/29 Tr. (M. Walsh) at 153-56; Ex. 578 (M. Walsh Initial Report) at 6-8.

Because a proper waiver was effectuated, the 2003 Retainer Agreement complied fully with the 1986 version of § 52-251c. Relatedly, Plaintiffs' faulty premise that the 2003 Retainer Agreement improperly permitted the firm to exceed the fee calculated under the sliding scale at some point in the future using a method other than the "exclusive method" set forth in § 52-251c relies wholly on a determination that a waiver of the mandatory fee cap and the sliding scale was not effectuated here by the D'Attilos. Again, because a waiver was properly effectuated, Plaintiffs' contention fails because the firm, in doing so, was permitted to exceed the total fee calculated under the sliding scale using a different method, *i.e.*, a straight 28% rate. And finally, I have already concluded that the 2005 version of § 52-251c does not apply to the 2003 Retainer Agreement, and, thus, of course, the issue of the agreement's compliance with that statute is entirely inapposite.

Accordingly, I conclude that the 2003 Retainer Agreement is not void as against public policy and law.

3. Whether the Lawsuit Costs Were Properly Deducted

Plaintiffs further contend that the Koskoff Defendants breached the 2003 Retainer Agreement by deducting expenses related to Messrs. Forman and Wood without having "provided any comprehensible proof as to the accuracy of the payments" due to their failure to electronically retain documents pertaining to the invoices submitted by those individuals. Pls. Mem. at 55.

Under the 2003 Retainer Agreement, the D'Attilos authorized the Koskoff Firm to deduct any "costs and expenses from any settlement or award after the legal fee has been deducted," and "costs and expenses" were defined to include "expert fees, and all other disbursements incurred in the prosecution or settlement of this action." Ex. 23 at PL:00098 (Section III.); *accord id*. (Section II; authorizing the firm to deduct any attorneys' "fees, liens, costs and expenses out of monies received"). The agreement also provided that "[a]t the conclusion of the case all documents relating to the case will be electronically stored for six years." *Id*. (Section IV.).

Thus, when the agreement was executed, the D'Attilos had already given the Koskoff Firm permission to deduct any disbursements that the firm incurred in the prosecution or settlement of this action. By the plain language of the agreement, the firm's entitlement to deduct these disbursements was not contingent on maintaining invoices or, for that matter, on anything else. Consequently, the firm was entitled to reimbursement for all payments it had advanced on the D'Attilos' behalf to Comprehensive Rehabilitation Associates (for the services of Mr. Forman) and to Mr. Wood. *See* Ex. 579 (Kennedy Initial Report) at 7-11.

As set forth in my Findings of Fact, the evidence is replete with support for the propriety of these expenses. Moreover, the evidence demonstrated that the Koskoff Firm complied with the standard of care and prevailing practices among Connecticut attorneys by tracking the payment of expenses advanced during the *D'Attilo* action and subsequently obtaining reimbursement from the

settlement funds for such expenses. The only exception was that the Koskoff Firm had failed to retain copies of the invoices related to costs and expenses incurred on the D'Attilo file when the file was closed, although it had maintained electronic records of all disbursements that were made in both the Needles system and the general ledger system. *See* Ex. 579 (Kennedy Initial Report) at 6. Although the firm did not electronically store the case documents as set forth in the agreement, Plaintiffs incurred no damages from that failure on the part of the Koskoff Firm.

In any event, the review and approval by the Northern Fairfield County Probate Court of the settlement statement reflecting lawsuit costs of $635,064.73 implicitly determined that the fees and costs incurred in the *D'Attilo* action were reasonable. *See id*. Plaintiffs did not appeal this approval, and, thus, they are precluded from now challenging these costs in this proceeding. *See* Ex. 594 (Kurmay Rebuttal Report) at 11-14. With the exception of the amounts that were later reimbursed to Plaintiffs, the total costs and expenses that were ultimately deducted from the D'Attilos' settlement proceeds were properly deducted from the gross settlement amount of $25 million in accordance with the terms of the 2003 Retainer Agreement. *See* Ex. 579 (Kennedy Initial Report) at 6.

At bottom, Plaintiffs presented no evidence to establish that these lawsuit costs had not, in fact, been incurred, and the evidence adduced at the hearing regarding the amounts paid to Comprehensive Rehabilitation Services and Mr. Wood failed to establish any issues as to the payments for those services or any basis for a claim of reimbursement. To the contrary, the evidence established that, throughout the entirety of the *D'Attilo* action, the Koskoff Defendants acted in accordance with prevailing practices and the standard of care for plaintiffs' counsel in billing all costs of Messrs. Forman and Wood to the D'Attilos. Specifically:

- In personal injury cases, it is not uncommon that payment of large invoices owed to experts on contingent fee cases is

sometimes deferred until receipt of funds from the insurance company, particularly when a verdict or settlement has occurred and payment is expected. *See* Ex. 579 (Kennedy Initial Report) at 8.

- The amount included in a bill of costs is not representative of the total fees charged by an expert witness for her/his work on a case, let alone the total fees charged in case where there are two trials. Under Connecticut law, the expert witness charges that can be included in taxable costs are the charges for the time spent testifying at trial. Thus, the bill of costs has no bearing on Plaintiffs' claim that they are somehow entitled to a partial reimbursement of the $82,238.42 paid to Mr. Forman. *See* Ex. 579 (Kennedy Initial Report) at 7-8.

- Because the settlement had certain unique aspects, namely, that the insurance company was agreeing to pay significantly more than the $4 million policy limit that the Koskoff Defendants asserted applied, it was reasonable and consistent with the standard of care for the Koskoff Firm to investigate whether the "unreasonable failure to settle" context of this settlement rendered all or some portion of the settlement taxable, *i.e.*, to consider whether payments for a contract-based bad faith claim arising from a personal injury case would be "on account of" personal injury. It was reasonable and prudent for the Koskoff Defendants to seek the assistance of a tax expert given that they had not faced this particular, unique issue before. *See* Ex. 579 (Kennedy Initial Report) at 9.

- The actions of the Koskoff Defendants in connection with their retention of Mr. Wood, their interactions with Mr. Wood, and how they used the input provided by Mr. Wood was in accordance with the applicable standard of care. *See* Ex. 579 (Kennedy Initial Report) at 9.

- To the extent that Plaintiffs contend that Mr. Wood's fee should not have been charged to them because there was no attempt to modify the settlement agreement to allocate a portion of the settlement to taxable interest income as Mr. Wood had suggested, expert witness Robert K. Killian, Jr. testified that Plaintiffs have incurred no tax liability in connection with the settlement agreement and agreed that any claims by Plaintiffs alleging negligent drafting of the settlement agreement were a case of "no harm no foul" because Plaintiffs have sustained no tax liability, and the statute of limitations for any IRS claims with regard to the 2012 settlement have passed. *See* 6/21 Tr.

> (Killian) at 103-05; *see also* Ex. 579 (Kennedy Initial Report) at 10 (opining that the insurance company would have refused to make such revisions, which would require it to admit that its policy covered claims for interest).

Accordingly, I conclude that none of the Koskoff Defendants breached the 2003 Retainer Agreement when they deducted the expenses related to Messrs. Forman and Wood.

* * *

Therefore, for the foregoing reasons, the claim for a breach of contract is **DENIED** and **DISMISSED WITH PREJUDICE**.

4. Plaintiffs' Implied Duty of Good Faith and Fair Dealing Claim

In Count Fifteen, Plaintiffs alleged that the Koskoff Defendants breached the implied covenant of good faith and fair dealing in the course of their performance of the 2003 Retainer Agreement. *See* First Am. Compl. ¶¶ 411-13. Specifically, according to Plaintiffs, "it was bad faith for the KKB attorneys to decide among themselves whether the sliding scale calculation with the 20% [*sic*] calculation applied without having that issue reviewed by independent counsel, or, at a minimum, by the probate court judge. It was bad faith to tell Cathy and Domenic that 28% would save them $1 million when it actually cost them millions of dollars compared to the sliding scale." Pls. Mem. at 46.

As the Connecticut Supreme Court has instructed:

> To constitute a breach of [the implied covenant of good faith and fair dealing], the acts by which a defendant allegedly impedes the plaintiff's right to receive benefits that he or she reasonably expected to receive under the contract must have been taken in bad faith. Bad faith in general implies both actual or constructive fraud, or a design to mislead or deceive another, or a neglect or refusal to fulfill some duty or some contractual obligation, not prompted by an honest mistake as to one's rights or duties, but by some interested or sinister motive. . . . Bad faith means more than mere negligence; it involves a dishonest purpose.

De La Concha of Hartford, Inc. v. Aetna Life Ins. Co., 269 Conn. 424, 433 (2004) (internal quotation marks and citation omitted). Under Connecticut law, claims for an alleged breach of the implied covenant (or duty) of good faith and fair dealing "sound in contract." *Collins v. Anthem Health Plans, Inc.*, 275 Conn. 309, 333 (2005).

Thus, the threshold inquiry on a claim alleging a breach of the implied duty of good faith and fair dealing is whether the defendant has "impede[d] the plaintiff's right to receive benefits that he or she reasonably expected to receive under the contract." On that inquiry, the record contains no evidence that Plaintiffs experienced any such impediment at the hands of the Koskoff Defendants. I have already concluded above that the fees provision in the 2003 Retainer Agreement is valid and enforceable; that the condition precedent had been satisfied such that the contingent attorneys' fee was to be calculated using a 28% rate, and not the sliding scale; that the 2012 settlement authorizations did, in fact, authorize the payment of a 28% fee to the Koskoff Firm; that none of the Koskoff Defendants breached the 2003 Retainer Agreement; and that the 2003 Retainer Agreement is not void as against public policy and law. In fact, nothing in the record contradicts the conclusion that Plaintiffs received precisely the benefit in the 2003 Retainer Agreement for which they had bargained.

Having not been the attorney who met with the D'Attilos and explained to them in detail the terms and conditions of the 2003 Retainer Agreement, Attorney Nastri was understandably surprised to discover in November 2011 that the operative retainer agreement here was not the standard Koskoff Firm agreement, which customarily would have called for a 33 1/3% contingent attorneys' fees. Indeed, Attorneys Nastri and Horwitz had always assumed that the fee would be calculated based upon a 33 1/3% rate, and they had always conveyed that percentage rate to the D'Attilos throughout the underlying medical malpractice action. Thus, after consultation with her

colleagues, when Attorney Nastri related to the D'Attilos that she had been incorrect and that Plaintiffs had, in fact, negotiated a 28% fee, and that the calculation of the fees due on an $18 million settlement offer would save the D'Attilos "close to a million dollars," her statements were true, in that they were entirely consistent with the terms and conditions of the 2003 Retainer Agreement, and, specifically, the operation of the condition precedent. Any comparison of the 28% rate to the amount the D'Attilos would have received under an application of the sliding scale, as Plaintiffs urge, would be contrary to the plain language of the fees provision and the operation of the condition precedent. Moreover, such a contention sets forth a false comparison – 28% versus the sliding scale – which is unsupported by the evidence, when the real comparison is between 28% and 33 1/3%.

Moreover, as I have already found in my Findings of Fact, during the time period from November 2011 through January 2012, the D'Attilos had access to an attorney with whom they could have consulted if they had had any issues, objections, challenges, concerns, or even doubts about what the Koskoff Defendants were telling and advising them regarding the 2003 Retainer Agreement and, specifically, the 28% rate. On that point, they did, in fact, seek the advice of Attorney Poch with regards to the net amount of any settlement that he thought they should accept, *i.e.*, $15 million. However, the record is clear that the D'Attilos did not consult with him regarding the fees provision in the agreement, and, further, that they had had no questions, concerns, or issues with the 28% fee that was reflected on all the settlement-related documents they reviewed and executed, some of which were filed in the Probate Court to support their request for approval of the settlement. Under these circumstances, having not been apprised by the D'Attilos that they had any issue with the 28% fee, not only did the Koskoff Defendants have no obligation to raise with the D'Attilos any notion of retaining separate, independent counsel on an issue on which there

was no dispute between them, but they also had no obligation or duty to raise such an issue with the Probate Court or request that Probate Judge Egan appoint a guardian ad litem. *See* Ex. 615 (M. Walsh Rebuttal Report) at 5; Ex. 595 (Dubois Rebuttal Report) at 3-4; Ex. 596 (Kennedy Rebuttal Report) at 6-7.

Accordingly, I conclude that the Koskoff Defendants did not impede Plaintiffs' right to receive the benefits of the 2003 Retainer Agreement by informing Plaintiffs that the contingent attorneys' fees would be calculated using a 28% rate, and they certainly did not do so with any intent to mislead or deceive Plaintiffs or in derogation of any duty or contractual obligation they owed to Plaintiffs. In short, the record does not contain any evidence of a dishonest purpose on the part of the Koskoff Defendants, and, thus, no indicia of bad faith.

Therefore, for the foregoing reasons, the claim for a breach of the implied duty of good faith and fair dealing is **DENIED** and **DISMISSED WITH PREJUDICE**.

5. Plaintiffs' Unjust Enrichment Claim

In Count Eleven, Plaintiffs alleged that the Koskoff Defendants would be unjustly enriched if they were allowed to retain the monies derived from their wrongful, unethical, and criminal conduct and breaches of contract. *See* First Am. Compl. ¶¶ 392-94.

A plaintiff seeking recovery under an unjust enrichment theory of liability "must prove (1) that the defendants were benefited, (2) that the defendants unjustly did not pay the plaintiffs for the benefits, and (3) that the failure of payment was to the plaintiff's detriment." *Hartford Whalers Hockey Club v. Uniroyal Goodrich Tire Co.*, 231 Conn. 276, 283 (1994) (internal quotation marks and citation omitted). The premise of the doctrine is that "in a given situation it is contrary to equity and good conscience for one to retain a benefit which has come to him at the expense of another." *Id*. at 282 (citation omitted).

Plaintiffs appear to have abandoned this claim, as they submitted no briefing on this claim either before or after the hearing. In any event, I have already concluded above that a valid and enforceable written contract governing the subject matter of the dispute between Plaintiffs and the Koskoff Firm existed, *i.e.*, the 2003 Retainer Agreement. Under these circumstances, recovery under a quasi-contract theory such as unjust enrichment is precluded. *See* ***Polverari v. Peatt***, 29 Conn. App. 191, 199 (1992) ("[P]arties who have entered into controlling express contracts are bound by such contracts to the exclusion of inconsistent implied contract obligations. Proof of a contract enforceable at law precludes the equitable remedy of unjust enrichment."; internal quotation marks and citation omitted).

Therefore, for the foregoing reasons, the claim for unjust enrichment is **DENIED** and **DISMISSED WITH PREJUDICE**.

D. Plaintiffs' Contingency Fee Recovery Claim

In Count Five, Plaintiffs alleged that the Koskoff Defendants are not entitled to the payment of any legal fees – let alone a 28% fee – because they failed to comply with the waiver requirement under Conn. Gen. Stat. § 52-251c(g). *See* First Am. Compl. ¶¶ 297-305.

Subsection (g) of § 52-251c only came into effect with the enactment of Public Act 05-275 in July 2005 and provides that "[n]o fee shall be payable to any attorney who seeks a fee that exceeds the percentage limitations of subsection (b) of this section unless the claimant has waived such limitations pursuant to this section and the contingency fee agreement complies with the requirements of subsection (e) of this section."

Among other things, I have already concluded above in Section I.C. that the 2005 version of § 52-251c does not apply to the 2003 Retainer Agreement; rather, the 1986 version of the statute has continued applicability to a document that was executed in March of 2003. Thus, the newer

statute's requirements are not germane to evaluating whether the Koskoff Defendants properly obtained a waiver of the mandatory fee cap and the sliding scale. In any event, I have also already concluded above in Section I.C. that the 2003 Retainer Agreement is a valid and enforceable written contract governing the appropriate legal fees to which the Koskoff Firm is entitled in connection with the underlying medical malpractice action; that Plaintiffs knowingly and voluntarily waived the application of the mandatory fee cap and the sliding scale; and that the Koskoff Firm was properly paid a 28% contingent attorneys' fee pursuant to both the 2003 Retainer Agreement and the applicable law. Because the factual predicates underlying Plaintiffs' contingency fee recovery claim are not present, there is no evidence in the record to support their theory that the Koskoff Firm (or the individual Koskoff Defendants) failed to comply with the waiver requirement under the 2005 version of § 52-251c(g).

Therefore, for the foregoing reasons, the claim for a violation of Conn. Gen. Stat. § 52-251c(g) is **DENIED** and **DISMISSED WITH PREJUDICE**.

E. Plaintiffs' Connecticut Unfair Trade Practices Act Claim

In Count Twelve, Plaintiffs alleged that the Koskoff Defendants engaged in conduct with respect to its legal fees and the 2003 Retainer Agreement amounting to a violation of the Connecticut Unfair Trade Practices Act ("CUTPA"), Conn. Gen. Stat. § 42-110a *et seq*. *See* First Am. Compl. ¶¶ 395-403. Specifically, Plaintiffs reiterate that the Koskoff Firm committed public policy violations, and that "there was a continuing course of conduct with further public policy violations related to events beginning in November 2011, and events in probate court in 2012, all geared to KKB preserving a 28% fee with deceptive practices when KKB was only entitled to the sliding scale." Pls. Mem. at 31. Plaintiffs also contend that the Koskoff Defendants withheld certain documents from the Statewide Grievance Committee, thereby evincing a violation of the

duty of candor to that tribunal and, substantively, an attempt to cover-up their "deceptive practices in the course of entrepreneurial activities related to billing and their later attempts to justify the fees." *Id*. at 33. Plaintiffs further contend that "[t]he KKB defendants continued their deceptive practices by not informing Colleen Fries of the issues (including Nastri not returning Colleen Fries phone calls, *FF:289*) and then, after having convinced the D'Attilos to move to avoid Colleen Fries, the KKB attorneys failed to alert Judge Egan, or even provide a copy of the retainer to Judge Egan." *Id*. at 38.

Conn. Gen. Stat. § 42-110b(a) prohibits any person from "engag[ing] in unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce." CUTPA authorizes any person "who suffers any ascertainable loss of money or property . . . as a result of the use or employment of a method, act or practice" that falls within the definition of an "unfair or deceptive act[] or practice[] in the conduct of any trade or commerce" to file an action seeking recovery. Conn. Gen. Stat. § 42-110g(a). In order to establish a CUTPA violation against an attorney or a law firm, a plaintiff must prove that the challenged conduct arose out of aspects of the practice, "such as the solicitation of business and billing practices, as opposed to claims directed at the competence of and strategy employed by the" defendant attorney. *Stuart v. Freiberg*, 142 Conn. App. 684, 709-10 (2013) (quoting *Haynes v. Yale-New Haven Hosp.*, 243 Conn. 17, 35-36 (1997)).

Initially, the Koskoff Defendants contend that this claim is time-barred. *See* Koskoff Mem. at 32. Specifically, they contend that "[t]he conduct at issue in Plaintiffs' CUTPA claim occurred on or before May 15, 2012, when they paid the 28% fee," and because "Plaintiffs did not commence this Arbitration until 2019, well beyond the three-year period during which the

purported causes of action regarding their CUTPA claims could be brought," "their CUTPA claims fail as a matter of law because they are untimely." *Id*.

Under Conn. Gen. Stat. § 42-110g(f), "[a]n action under this section may not be brought more than three years after the occurrence of a violation of this chapter." As a preliminary matter, it is unclear to me, especially in light of the minimal language contained in the parties' arbitration agreement, that statutes of limitations ought to be applied in the arbitral forum. *See, e.g.*, *Skidmore, Owings & Merrill v. Conn. Gen. Life Ins. Co.*, 25 Conn. Sup. 76, 83-91 (1963) (holding that, because "[a]rbitration is not a common-law action, and the institution of arbitration proceedings is not the bringing of an action under any of our statutes of limitation," "in the absence of express statutory direction, the determination that the Statute of Limitations is a bar to the arbitration proceedings is one which cannot be made by the court but must be left to the arbitrators"); *see also* Reply at 15 (contending that the "very narrowly drawn arbitration provision . . . does not include any time limitations or incorporation of the statutes of limitations"). Although no party has directly briefed the issue of my discretion to consider applying statutes of limitations in this proceeding, I will address the Koskoff Defendants' contention here.

From the undisputed procedural history, it is clear that the conduct at issue that forms the basis of Plaintiffs' CUTPA claim occurred no later than when the Koskoff Firm was paid its fees on May 15, 2012. Moreover, Plaintiffs did not commence this arbitration proceeding until October 1, 2019 when they (joined by the Koskoff Defendants and the Day Pitney Defendants) engaged the AAA to assist them with selecting an arbitrator. But the operative date for limitations purposes is when Plaintiffs tolled the applicable three-year statute by filing and preserving their rights to pursue a CUTPA claim. On that score, the pertinent date is when they first commenced the civil

action in the Connecticut Superior Court on December 23, 2014. Thus, under that analysis, Plaintiffs' CUTPA claim was timely brought.

I agree with the Koskoff Defendants that a blatant misfiling of an action in the wrong forum should not be countenanced so as to operate to toll the running of any applicable statute of limitations. *See* Sur-Reply at 11. However, as demonstrated by the *D'Attilo* Court Decision and my two memoranda, the nature and scope of arbitrability was far from clear based upon the limited language contained within the arbitration provision of the 2003 Retainer Agreement. Thus, in the exercise of my discretion, I reject the Koskoff Defendants' contention that Plaintiffs' filing in the Superior Court did not toll the running of the statute of limitations on their CUTPA claim.

In any event, on the merits of the CUTPA claim, Plaintiffs do not fare as well. I have already concluded above in Section I.C. that the fees provision in the 2003 Retainer Agreement is valid and enforceable; that the condition precedent had been satisfied such that the contingent attorneys' fee was to be calculated using a 28% rate, and not the sliding scale; that the 2012 settlement authorizations did, in fact, authorize the payment of a 28% fee to the Koskoff Firm; that none of the Koskoff Defendants breached the 2003 Retainer Agreement or the implied duty of good faith and fair dealing; and that the 2003 Retainer Agreement is not void as against public policy and law.

As to Plaintiffs' other contentions, I appreciate that Plaintiffs seek to advance some kind of argument that the Koskoff Defendants have continued their allegedly deceptive conduct by engaging in some kind of "cover-up." However, as I noted numerous times to the parties throughout this proceeding and specifically during the evidentiary hearing, the purpose of this proceeding is not to pass judgment on whether the Koskoff Defendants committed any transgressions before the Statewide Grievance Committee or to re-litigate the issues that were

presented in that other tribunal. As all the parties have acknowledged, the information and document exchange in this proceeding has been more robust and fulsome than whatever was conducted in that forum, and my findings and conclusion are based upon the totality of the evidence adduced in this proceeding, irrespective of whether the evidence was previously produced or exchanged before the Statewide Grievance Committee. Moreover, aside from informal attorney proffers, representations, and argument, no competent evidence was introduced as to the nature of the procedures that are used during grievance hearings, and no evidence – not even expert witness testimony – was submitted during the hearing to substantiate how and in what manner documents that were later produced in this proceeding may or may not have been properly withheld from production or submission during the grievance proceeding.

In any event, even if such evidence had been introduced, it would only be relevant if the underlying facts regarding the 2011-2012 timeframe themselves demonstrated some kind of conduct actionable under the CUTPA statute. On this point, I have already concluded above in Section I.C. that nothing in the record contradicts the conclusion that Plaintiffs received precisely the benefit in the 2003 Retainer Agreement for which they had bargained; that none of the Koskoff Defendants acted with any intent to mislead or deceive Plaintiffs about the fees provision in the 2003 Retainer Agreement; that the record does not contain any evidence of a dishonest purpose on the part of the Koskoff Defendants, and, thus, no indicia of bad faith; and that the Koskoff Firm acted properly under the law and the prevailing rules of professional conduct in their practice before the Probate Court. Moreover, as I found in my Findings of Fact, the record contains no evidence that any of Plaintiffs' reasons for moving out of Norwalk had anything to do with any concerns they may have had over the 2003 Retainer Agreement or the amount of the attorneys' fees they were paying to the Koskoff Firm. Indeed, one of Plaintiffs' reasons for the move was to

avoid being subjected to oversight by Attorney Fries and her involved approach to her duties as guardian ad litem. Thus, because the underlying facts do not amount to any actionable conduct under CUTPA, the Koskoff Defendants' conduct before the Statewide Grievance Committee is not germane to my analysis.

In pursuing recovery of the $7 million fee earned by the Koskoff Defendants, Plaintiffs appear to have largely cherry-picked selective items in the evidentiary record, as well as relied on innuendo, speculation, spins, and inferences favorable to them, posing questions and doubts about what had transpired over the course of the relevant timeframe, but without any proof of wrongdoing and without a proper appreciation of the entire context. By doing so, Plaintiffs have convinced themselves into believing that the Koskoff Defendants exhibited bad faith conduct to enrich themselves to Plaintiffs' detriment. Time and space limitations with respect to rendering this Final Award constrain my ability to respond to each and every one of Plaintiffs' contentions regarding the evidentiary record. However, under the totality of the circumstances, the material and relevant evidence adduced at the hearing simply does not support the kind of narrative Plaintiffs are advancing.

Under the circumstances, where Plaintiffs have failed to establish any breach of the underlying retainer agreement on which the CUTPA claim is premised, they also cannot prevail on the latter. *Cf., e.g.*, *Mazzarella v. Amica Mut. Ins. Co.*, 774 Fed. Appx. 14, 17-18 (2d Cir. 2019) (holding that, where a CUTPA claim is premised on breach of contract claim and defendant properly interpreted the contract, the CUTPA claim fails); *Richards v. Direct Energy Servs.*, LLC, 915 F.3d 88, 100-04 (2d Cir. 2019) (same). The record contains no evidence that the Koskoff Defendants engaged in any unfair or deceptive act or practice in violation of CUTPA. To the contrary, the Koskoff Defendants consistently acted in accordance with what they understood to

be the correct interpretation of the 2003 Retainer Agreement, which Plaintiffs also acknowledged through their subsequent conduct. *Cf., e.g., Enderle v. Amica Mut. Ins. Co.*, No. 3:17-cv-1510 (WWE), 2018 WL 2048364, at *4 (D. Conn. May 2, 2018) ("[W]here a defendant properly interpreted the contract, a claim that defendant violated CUTPA due to its oppressive, unethical or unscrupulous manner in interpreting the contract must fail."; citation omitted).

Therefore, for the foregoing reasons, the claim for a violation of the CUTPA is **DENIED** and **DISMISSED WITH PREJUDICE**.

F. Plaintiffs' Misrepresentation Claims

In Count One, Plaintiffs alleged that the Koskoff Defendants engaged in a fraudulent scheme to deceive Plaintiffs into believing that the Koskoff Firm was entitled to $7,000,000 in legal fees and reimbursement of improper expenses. *See* First Am. Compl. ¶¶ 1-267. In the alternative, in Count Thirteen, Plaintiffs alleged that, to the extent that the Koskoff Defendants' conduct do not support a claim for an intentional tort, the Koskoff Defendants' alleged misrepresentations and omissions were negligent and/or reckless. *See id*. ¶¶ 404-05. In their opening brief, Plaintiffs conclusorily contend that "[t]here is documentary evidence defendants misrepresented the facts and withheld facts. If it was done negligently, then claim [*sic*] for negligent misrepresentation would be appropriate." Pls. Mem. at 50.

In order to establish a claim for fraud, a plaintiff must establish that: "(1) a false representation was made [by the defendant] as a statement of fact; (2) the statement was untrue and known to be so by [the defendant]; (3) the statement was made with the intent of inducing reliance thereon; and (4) the other party relied on the statement to his detriment." *Nazami v. Patrons Mut. Ins. Co.*, 280 Conn. 619, 628 (2006). Moreover, "[r]eckless misrepresentations are

merely a subset of the broader class of fraudulent representations." *Capasso v. McGowan*, No. CV-11-6025501, 2013 WL 1715478, at *3 (Conn. Super. Ct. Mar. 26, 2013).

Additionally, under Connecticut law, "an innocent misrepresentation of fact may be actionable if the declarant has the means of knowing, ought to know, or has the duty of knowing the truth. Traditionally, an action for negligent misrepresentation requires the plaintiff to establish (1) that the defendant made a misrepresentation of fact (2) that the defendant knew or should have known was false, and (3) that the plaintiff reasonably relied on the misrepresentation, and (4) suffered pecuniary harm as a result." *Coppola Constr. Co. v. Hoffman Enterp. Ltd. P'ship*, 309 Conn. 342, 351-52 (2013) (internal quotation marks and citation omitted).

Aside from their mere parroting of the elements for the misrepresentation claims, among other things, fatal to Plaintiffs' claims under any of the foregoing legal theories is the complete absence of any identifiable, actionable false representation or omission, any evidence that any of the Koskoff Defendants were aware that anything they had told the D'Attilos was untrue, or any evidence that they withheld any critical information from Plaintiffs. That is, the record contains no evidence that any of the Koskoff Defendants knowingly made a misrepresentation or omission to the D'Attilos that would support Plaintiffs' claims under any of the legal theories set forth in Counts One and Thirteen. Moreover, I have already concluded above in Sections I.C. and I.E. that none of the Koskoff Defendants acted with any intent to mislead or deceive Plaintiffs about the fees provision in the 2003 Retainer Agreement; that the record does not contain any evidence of a dishonest purpose on the part of the Koskoff Defendants, and, thus, no indicia of bad faith; and that none of the conduct committed by the Koskoff Defendants amounts to an unfair or deceptive trade practice.

Therefore, for the foregoing reasons, the claims for fraud, fraudulent concealment, and/or intentional misrepresentation and negligent misrepresentation and/or reckless misrepresentation are both **DENIED** and **DISMISSED WITH PREJUDICE**.

G. Plaintiffs' Breaches of Fiduciary Duty Claim

In Count Six, Plaintiffs alleged that the Koskoff Defendants engaged in dishonest behavior, disloyalty, and conflicts of interest. Specifically, Plaintiffs alleged that the Koskoff Defendants intentionally and secretly worked against Plaintiffs' interests for their own financial benefit, taking advantage of Plaintiffs in ways that breached the fiduciary duty they owed Plaintiffs. *See* First Am. Compl. ¶¶ 306-12. According to Plaintiffs, "when KKB rediscovered the retainer agreement, the defendants put their interests above those of the D'Attilos. . . . The defendants gained a multimillion-dollar financial benefit by deciding unilaterally that the 28% calculation applied. Cathy and Domenic were never given a chance to consult independent counsel or have this reviewed by the GAL or the probate judge because of the defendants' nondisclosure." Pls. Mem. at 51.

To establish a breach of a fiduciary duty, a plaintiff must prove: (1) that a fiduciary relationship existed which gave rise to a duty of loyalty, an obligation to act in the best interests of the plaintiff, and an obligation to act in good faith in any matter relating to the plaintiff; (2) that the defendant advanced her/his own interests to the detriment of the plaintiff; (3) that the plaintiff sustained damages; and (4) that the damages were proximately caused by the fiduciary's breach of her/his fiduciary duty. *See Chioffi v. Martin*, 181 Conn. App. 111, 138 (2018).

Plaintiffs are correct that the Koskoff Defendants owed a fiduciary duty to them. *See* Pls. Mem. at 51 ("There is no dispute that the defendants were fiduciaries."). However, I have already concluded above in Section I.C. that Plaintiffs understood and agreed to the terms of the 2003

Retainer Agreement when they signed it on March 21, 2003, including how the condition precedent operated, and that the Koskoff Firm was properly paid a 28% contingent attorneys' fee when the 1986 version of § 52-251c was revised in 2005. I have also already found in my Findings of Fact that the D'Attilos always had the opportunity to consult separate counsel during the months after Attorney Nastri re-discovered the 2003 Retainer Agreement up through the time when they settled the D'Attilo action, but declined to do so. Moreover, the Koskoff Defendants had no obligation to ask a guardian ad litem or the Probate Court to review the 2003 Retainer Agreement, with which, in any case, the D'Attilos expressed satisfaction when they confirmed their approval of the settlement in the Probate Court. *See* Ex. 615 (M. Walsh Rebuttal Report) at 5; Ex. 596 (Kennedy Rebuttal Report) at 6-7; Ex. 595 (Dubois Rebuttal Report) at 3-4. Accordingly, because the evidence fails to establish the factual predicate underlying Plaintiffs' claim, none of the Koskoff Defendants breached their fiduciary duties owed to Plaintiffs.

Therefore, for the foregoing reasons, the claim for a breach of fiduciary duty is **DENIED** and **DISMISSED WITH PREJUDICE**.

H. Plaintiffs' Conversion Claim

In Count Two, Plaintiffs alleged that the Koskoff Defendants intentionally and knowingly converted funds held in trust belonging to the D'Attilos, after defrauding Plaintiffs by, among other things, failing to comply with the waiver requirement in Conn. Gen. Stat. § 52-251c(g). In doing so, the Koskoff Defendants allegedly exercised absolute rights of ownership to funds belonging solely to Plaintiffs, amounting to unlawful conversion. *See* First Am. Compl. ¶¶ 268-78. In their opening brief, Plaintiffs further contend that, "[i]f the fee provision is invalid, or if the 2012 'authorizations' are held not to have authorized 28%, then KKB converted the D'Attilos['] settlement funds. Similarly, if KKB breached its contract, or wrongfully withheld the money by

breaching the covenant of good faith and fair dealing . . . , KKB is liable for conversion." Pls. Mem. at 47 (citation omitted).

Conversion is "[a]n unauthorized, assumption and exercise of the right of ownership over goods belonging to another, to the exclusion of the owner's rights. . . . It is some unauthorized act which deprives another of his property permanently or for an indefinite time; some unauthorized assumption and exercise of the powers of the owner to his harm." *Macomber v. Travelers Prop. & Cas. Corp.*, 261 Conn. 620, 649 (2002) (internal quotation marks and citation omitted).

Initially, I note that, by Plaintiffs' own contentions, this claim appears directed at the Koskoff Firm, and not the individual Koskoff attorneys. Indeed, the record contains no evidence that any of the individual Koskoff Defendants were paid anything by Plaintiffs or deprived Plaintiffs of any monies, even when considering how the individual attorneys are compensated at the firm from the origination generated by all the attorneys as a whole.

Notwithstanding the foregoing, as to the Koskoff Firm, it is undisputed that Plaintiffs paid the firm a 28% fee in connection with the settlement of the underlying medical malpractice action. However, contrary to Plaintiffs' contentions, I have already concluded above in Section I.C. that the fees provision in the 2003 Retainer Agreement is valid and enforceable; that the condition precedent had been satisfied such that the contingent attorneys' fee was to be calculated using a 28% rate, and not the sliding scale; that the 2012 settlement authorizations did, in fact, authorize the payment of a 28% fee to the Koskoff Firm; and that none of the Koskoff Defendants breached the 2003 Retainer Agreement or the agreement's implied covenant of good faith and fair dealing. Accordingly, Plaintiffs have not established the elements of a conversion claim and, thus, cannot prevail. *Cf., e.g., Bratter v. Nova 22 Constr. Inc.*, No. HHDCV126033502S, 2014 WL 1674208,

at *2 (Conn. Super. Ct. Mar. 27, 2014) (striking conversion count because plaintiff authorized the transfer of funds at issue pursuant to a contract).

Therefore, for the foregoing reasons, the claim for conversion is **DENIED** and **DISMISSED WITH PREJUDICE**.

I. Plaintiffs' Statutory Theft Claim

In Count Three, Plaintiffs alleged that the Koskoff Defendants intentionally sought to deprive them of monies belonging solely to them in violation of Conn. Gen. Stat. § 52-564. Specifically, they alleged that, "[a]t the moment the insurance carrier's representative signed the January 11, 2012 Med-Mal Agreement, the plaintiffs had exclusive legal rights to that $25 million minus only documented expenses and legal fees as permitted by law and as memorialized by the March 21, 2003 retainer agreement," and that the Koskoff Defendants knew that the 2003 Retainer Agreement "subjected any contingency fee to the statutory sliding scale found in §251c . . . [and] also knew that this meant they were only entitled to be paid a maximum of $280,000 in legal fees for the first $1.2 million recovered and then a maximum of 10% of legal fees ($2,380,000) for the remaining $23.8 million recovered, for a total maximum legal fee of $2,660,000." *See* First Am. Compl. ¶¶ 279-86. In their opening brief, Plaintiffs further contend that the Koskoff Defendants "used their considerable legal skills and powers of persuasion to convince Cathy and Domenic a 28% fee would save them million dollars or more" "by withholding critical information from the D'Attilos, . . . the probate court, [and] . . . from the grievance committee." Pls. Mem. at 49.

Conn. Gen. Stat. § 52-564 provides that "[a]ny person who steals any property of another, or knowingly receives and conceals stolen property, shall pay the owner treble his damages." As the Connecticut Supreme Court has instructed:

> Statutory theft under § 52-564 is synonymous with larceny under General Statutes § 53a-119. . . . Pursuant to § 53a-119, [a] person

> commits larceny when, with intent to deprive another of property or to appropriate the same to himself or a third person, he wrongfully takes, obtains or [withholds] such property from an owner. . . . Conversion can be distinguished from statutory theft as established by § 53a-119 in two ways. First, statutory theft requires an intent to deprive another of his property; second, conversion requires the owner to be harmed by a defendant's conduct. Therefore, statutory theft requires a plaintiff to prove the additional element of intent over and above what he or she must demonstrate to prove conversion.

Deming v. Nationwide Mut. Ins. Co., 279 Conn. 745, 771 (2006) (internal quotation marks and citation omitted); *see also Hi-Ho Tower, Inc. v. Com-Tronics, Inc.*, 255 Conn. 20, 47 (2000) ("[A]n essential element of the tort of conversion is the *unauthorized* use of another's property. Similarly, statutory theft requires that a defendant 'wrongfully' take, obtain or hold the property of another."; internal quotation marks and citation omitted).

Here, it is undisputed that Plaintiffs paid the firm a 28% fee in connection with the settlement of the underlying medical malpractice action. However, contrary to Plaintiffs' contentions, I have already concluded above in Sections I.C., I.F., and I.H. that the fees provision in the 2003 Retainer Agreement is valid and enforceable; that the Koskoff Defendants made no actionable misrepresentations or omissions to Plaintiffs; and that the Koskoff Defendants did not commit the tort of conversion with respect to the fees the firm received. Accordingly, Plaintiffs have not established the elements of a statutory theft claim and, thus, cannot prevail. *Cf., e.g., Hi-Ho Tower*, 255 Conn. at 45-47 (concluding that the jury's finding that there was no breach of contract, and that "the defendants' use of the plaintiff's tower facility was authorized" was "fatal to the plaintiff's cause of action for conversion and statutory theft").

Therefore, for the foregoing reasons, the claim for statutory theft under Conn. Gen. Stat. § 52-564 is **DENIED** and **DISMISSED WITH PREJUDICE**.

J. Plaintiffs' Disgorgement Claim

In Count Nine, Plaintiffs alleged that the Koskoff Defendants should be disgorged of the improperly obtained legal fees and undocumented legal costs. *See* First Am. Compl. ¶¶ 369-70. However, the Koskoff Defendants contend that there is no cause of action under Connecticut law for disgorgement because disgorgement is, instead, an equitable remedy. Thus, in their view, this count is not a cognizable claim. *See* Koskoff Mem. at 4 n.2; *id*. at 49; *accord* Day Pitney Mem. at 6-7.

Although they hardly make any mention of it in their opening brief, in their reply, Plaintiffs acknowledge that disgorgement is an equitable remedy, and not a stand-alone claim cognizable under Connecticut law. *See* Reply at 40 ("Disgorgement is an equitable remedy some courts allow to be tried by a jury. . . . Again, given the forfeiture provision of §52-251c, and punitive damages available under CUPTA, disgorgement provides another benchmark for punitive damages."; citation omitted). Notwithstanding this acknowledgment, Plaintiffs have not voluntarily withdrawn this claim.

Upon review of the cited authorities, I agree that disgorgement itself is not a cognizable claim under Connecticut law. *See Tunick v. DiPreta*, No. FSTCV176031598S, 2018 WL 3203874, at *2 (Conn. Super. Ct. Jun. 12, 2018) (granting motion to strike paragraph of complaint seeking disgorgement of fees previously paid because "[a] cause of action for disgorgement does not exist in Connecticut"; citing *Kosiorek*); *Kosiorek v. Smigelski*, No. CV074014607S, 2008 WL 4779846, at *2 (Conn. Super. Ct. Oct. 9, 2008) (granting motion to strike count of complaint alleging claim for disgorgement because "disgorgement is an equitable remedy," and the court was "not persuaded that the two cases cited by the plaintiff support the plaintiff's claim that a cause of action for disgorgement exists in Connecticut").

Therefore, for the foregoing reasons, the claim for disgorgement is **DENIED** and **DISMISSED WITH PREJUDICE**.

K. Plaintiffs' Prima Facie Tort Claim

In Count Sixteen, Plaintiffs alleged that the Koskoff Defendants had engaged in intentional, wrongful, and culpable acts, causing losses to Plaintiffs that were not justifiable under the circumstances and in contravention of public policy. *See* First Am. Compl. ¶¶ 414-16.

"The theory of a prima facie tort requires an intentional, wrongful or culpable act causing injury if the conduct is not justifiable under the circumstances. Liability may be imposed on the actor under this theory if the actor's conduct does not come within a traditional category of tort liability." *Brandt v. Walker Digital, LLC*, No. X08CV0194566, 2004 WL 2757440, at *5 (Conn. Super. Ct. Nov. 1, 2004) (citing Restatement 2d Torts § 870). However, "such a cause of action is interstitial in nature, that is, it is appropriate only when intentional, culpable and unjustified conduct causing injury does not fall into any other theory of tort liability." *Id*. at *7. Thus, a claim for prima facie tort may be stricken (or dismissed) when it is essentially duplicative of other claims stating traditional tort claims based on the same alleged conduct. *See Deutsch v. Backus Corp*., No. X07CV106022074S, 2012 WL 1871398, at *12 (Conn. Super. Ct. May 2, 2012) (citing cases).

Here, in their First Amended Complaint, Plaintiffs have alleged multiple traditional tort claims covering the same alleged conduct committed by the Koskoff Defendants, including fraud, conversion, breaches of fiduciary duty, and various forms of misrepresentation. Reviewing the allegations set forth in the First Amended Complaint, the interposition of a claim for prima facie tort adds nothing to Plaintiffs' case and is duplicative of these other claims. The prima facie tort doctrine was not intended to supplant traditional tort elements or traditional tort defenses, and Plaintiffs have shown, by their extensive allegations and array of alleged tort claims, that the

conduct alleged to be at issue here is adequately encompassed by those existing tort theories. *Cf., e.g., id.* at *12-13 (granting motion to strike prima facie tort claim). Moreover, I have already concluded above in Sections I.C., I.E., I.F., I.G., I.H., and I.I. that none of the Koskoff Defendants had engaged in any intentional, culpable, and unjustified conduct causing injury to Plaintiffs. Accordingly, Plaintiffs have, in any case, also failed to demonstrate the requisite elements of a prima facie tort.

Therefore, for the foregoing reasons, the claim for prima facie tort is **DENIED** and **DISMISSED WITH PREJUDICE**.

L. Plaintiffs' Other Interposed Claims Against the Koskoff Defendants

It is always a prosecuting plaintiff's choice to pursue or not pursue the claims that it has originally interposed. Here, before I had initially closed the hearing in this proceeding, Plaintiffs confirmed that they are not bringing any portion of their legal malpractice and emotional distress claims against the Koskoff Defendants in this proceeding, *i.e.*, Counts Seven and Ten.

In this Final Award, I have concluded that Plaintiffs have not suffered any losses based upon the alleged excessive fees, costs, expenses, and/or interest due under the 2003 Retainer Agreement. Consistent with that conclusion, having made the affirmative decision not to bring claims for legal malpractice and either intentional or negligent infliction of emotional distress seeking recovery for that alleged loss, Plaintiffs have **WAIVED** any right to recover those specific, delineated losses based upon those foregoing legal theories. That is, absent authority contrary to the *D'Attilo* Court Decision, Plaintiffs are **PRECLUDED** – under principles of issue and claim preclusion and/or the doctrines of res judicata and collateral estoppel – from bringing those claims again in an arbitral forum.

In making the foregoing conclusion, I express no opinion on whether Plaintiffs may be able to recover any other articulable alleged loss under any of the foregoing legal theories in the currently stayed civil action consistent with the *D'Attilo* Court Decision.

M. The Koskoff Defendants' Other Affirmative Defenses

As noted above, the Koskoff Defendants interposed seven (7) other affirmative defenses that I have not yet addressed, namely: (1) equitable estoppel (Fourth Affirmative Defense); (2) unclean hands (Fifth Affirmative Defense); (3) res judicata and collateral estoppel (Sixth Affirmative Defense); (4) unconstitutionality of the 2003 version of Conn. Gen. Stat. § 52-251c (Seventh Affirmative Defense); (5) unconstitutional retroactive application of the 2005 version of Conn. Gen. Stat. § 52-251c (Eighth Affirmative Defense); (6) laches (Twelfth Affirmative Defense); and (7) failure to state a cognizable claim (Thirteenth Affirmative Defense). *See* Koskoff Ans. Stmt. at 18-20 (§ IV., ¶¶ 4-8, 12-13).

Although the Koskoff Defendants have briefed and submitted proposed findings of fact relating to these affirmative defenses (*see, e.g.*, Koskoff Mem. at 43-44, 48-49; Sur-Reply at 14-15; Koskoff Findings of Fact ¶¶ 364-77, 340-51, 386-401), my conclusions above on the merits of Plaintiffs' claims obviates the need for me to analyze or consider further these other affirmative defenses. Indeed, the Koskoff Defendants state that their seventh affirmative defense has been mooted by Plaintiffs' acknowledgment that their rights under § 52-251c were waivable in 2003, and that their eighth affirmative defense is also moot so long as I conclude that the 2005 version of the statute does not apply retroactively. *See* Koskoff Mem. at 44.

Therefore, for the foregoing reasons, the Koskoff Defendants' remaining affirmative defenses are all **DENIED AS MOOT**.

II. Claims Against the Day Pitney Defendants

After the conclusion of the evidentiary hearing in this proceeding, but before the hearing was initially closed, Plaintiffs and the Day Pitney Defendants reached a full and final settlement of all issues and disputes as between them, including those related to both the arbitration proceeding and the stayed civil action. Thus, consistent with that settlement, Plaintiffs withdrew with prejudice all the claims that they had interposed in this proceeding against the Day Pitney Defendants.

Therefore, in view of this development, I conclude that all of Plaintiffs' claims interposed in this proceeding against each of the Day Pitney Defendants are **DENIED AS MOOT**.

* * *

In light of the above conclusions, I do not reach the issues of the appropriate measures of relief or pre-award interest on any of Plaintiffs' claims brought against any of the Koskoff Defendants or the Day Pitney Defendants.

Relief Awarded

For the reasons set forth above, I **AWARD** as follows:

1. The Koskoff Defendants' affirmative defenses that Plaintiffs lack standing in this proceeding are hereby **DENIED**.

2. All of Plaintiffs' claims interposed in this proceeding against each of the Koskoff Defendants are hereby **DENIED** in their entirety. Specifically:

    a. The following claims are **DENIED** and **DISMISSED WITH PREJUDICE**:

i. fraud, fraudulent concealment, and/or intentional misrepresentation (Count One);

ii. conversion (Count Two);

iii. statutory theft under Conn. Gen. Stat. § 52-264 (Count Three);

iv. violation of the contingency fee recovery provisions under Conn. Gen. Stat. § 52-251c(g) (Count Five);

v. breaches of fiduciary duty (Count Six)

vi. disgorgement (Count Nine)

vii. unjust enrichment (Count Eleven)

viii. violation of the Connecticut Unfair Trade Practices Act (§ 42-110A) (Count Twelve);

ix. negligent misrepresentation and/or reckless misrepresentation (Count Thirteen)

x. breach of contract (Count Fourteen)

xi. breach of the implied duty of good faith and fair dealing (Count Fifteen); and

xii. prima facie tort (Count Sixteen).

b. The civil conspiracy claim (Count Four) is **DENIED AS MOOT**. Additionally, all of Plaintiffs' allegations regarding any aiding and abetting and acting in concert as between the Koskoff Defendants and the Day Pitney Defendants are **REJECTED** and **DENIED**.

3. Plaintiffs have hereby **WAIVED** any right to recover the alleged excessive fees, costs, expenses, and/or interest due under the 2003 Retainer Agreement against each of the

Koskoff Defendants based upon the legal theories of legal malpractice (Count Seven) or negligent and/or intentional infliction of emotional distress (Count Ten). Plaintiffs are **PRECLUDED** from bringing those claims again in an arbitral forum.

4. The Koskoff Defendants' affirmative defenses of (1) equitable estoppel; (2) unclean hands; (3) res judicata and collateral estoppel; (4) unconstitutionality of the 2003 version of Conn. Gen. Stat. § 52-251c; (5) unconstitutional retroactive application of the 2005 version of Conn. Gen. Stat. § 52-251c; (6) laches; and (7) failure to state a cognizable claim are hereby **DENIED AS MOOT**.

5. All of Plaintiffs' claims interposed in this proceeding against each of the Day Pitney Defendants are hereby **DENIED AS MOOT**.

6. This is the Final Award in this arbitration. It is effective immediately, without the necessity of further hearing and may be confirmed in any court having jurisdiction. This Final Award is in full and complete settlement and satisfaction of any and all claims, counterclaims, defenses, and set-offs properly submitted to the jurisdiction of this arbitration. Any claim, counterclaim, defense, or set-off not specifically granted or sustained herein is hereby denied.



Dated: January 17, 2021
Princeton Junction, New Jersey

THEODORE K. CHENG
ARBITRATOR

I, Theodore K. Cheng, do hereby affirm upon my oath as arbitrator that I am the individual described in and who executed the foregoing instrument, which is the Final Award in this proceeding.



Dated: January 17, 2021
Princeton Junction, New Jersey

THEODORE K. CHENG
ARBITRATOR

EXHIBIT 7

AD HOC ARBITRATION TRIBUNAL

In the Matter of the Arbitration between Domenic D'Attilo, Cathy Cullen (f/k/a Cathy D'Attilo), and Daniel Jacob D'Attilo, Plaintiffs, v. Koskoff, Koskoff & Bieder, P.C., Kathleen L. Nastri, Esq., James D. Horwitz, Esq., Joshua D. Koskoff, Esq. (as Executor of the Estate of Michael P. Koskoff, Esq.), William M. Bloss, Esq., Joel H. Lichtenstein, Esq. (collectively, the "Koskoff Defendants"); and Day Pitney, LLP, Keith Bradoc Gallant, Esq., Rebecca A. Iannantuoni, Esq. (collectively, the "Day Pitney Defendants"), Defendants.	No. CV146051836S (Conn. Super. Ct.) Resolute Systems Case No. 5599689

ADDENDUM TO THE FINAL AWARD

THEODORE K. CHENG, Arbitrator February 14, 2022

On January 17, 2022, I issued the Final Award in this proceeding. I issue this Addendum to the Final Award in response to an application submitted by the Koskoff Defendants under AAA Commercial Arbitration Rule R-50 seeking certain corrections to the Final Award. Rule R-50 authorizes arbitrators to correct "any clerical, typographical, or computational errors in the award" upon a request by a party made within twenty (20) days after issuing the award, but not to alter any of the determinations made in the award. All defined terms in this Addendum have the same meaning as in the Final Award.

Discussion

By letter dated January 20, 2022, the Koskoff Defendants submitted an application seeking corrections to the Final Award with respect to references therein to the contingent attorneys' fees statute (Conn. Gen. Stat. § 52-251c) that was in force at the time Plaintiffs executed the 2003 Retainer Agreement.

Specifically, the Koskoff Defendants contend that, in various places in the Final Award, there are references to the "1986 version of § 52-251c," but that "[a]ll parties agreed that the statute in effect at the time the Agreement at issue in this Arbitration was executed in 2003 was Connecticut General Statutes § 52-251c (1991)." Koskoff Ltr. (Jan. 20, 2022) at 2 & Ex. A thereto. They further contend that the language I quoted and called the 1986 version of the statute was, in fact, the 1991 version, and that my references to the 1986 version and the use of the defined term "1986 version of § 52-251c" thereafter in the Final Award amount to clerical or typographical errors. *See id*. On January 30, 2022, Plaintiffs submitted their opposition.

After consideration of the parties' respective submissions, I hereby **GRANT** the Koskoff Defendants' application.

In Section III.A. of my Findings of Fact, I set forth the legislative evolution of the contingent attorneys' fees statute, Conn. Gen. Stat. § 52-251c. Having reviewed the texts of the original 1986, the 1991, and the 2005 versions of § 52-251c, it is clear now that the subsection (b) I quoted in ¶ 26 of my Findings of Fact (*see* Final Award at 29) was, in fact, from the 1991 version of the statute, and not from the original 1986 version. Thus, in setting forth the evolution of that statute, by mistake, I had inadvertently omitted discussing the originally enacted statute and its amendments in 1987 and 1991. Accordingly, the clause that precedes the quotation of that subsection (b) – "When originally enacted in 1986, Conn. Gen. Stat. § 52-251c (entitled

'Limitation on attorney contingency fees in personal injury, wrongful death and property damage actions') provided, in subsection (b), as follows" – unintentionally referred to the original 1986 statute instead of referring to the 1991 version. All the places in the Final Award noted by the Koskoff Defendant that they contend need correcting stem from this single error.

Moreover, having re-reviewed the parties' prior submissions on the historical development of the contingent attorneys' fee statute, I have confirmed that the parties did, in fact, agree that the 1991 version of § 52-251c was the version of the statute in force at the time the 2003 Retainer Agreement was executed. *See* Pls. Mem. at 16 n.3; Koskoff Mem. at 12-13; Sur-Reply at 4-5; Koskoff Pre-Hrg. Mem. at 4. Thus, the language of the statute I quoted in ¶ 26 of my Findings of Fact was, in fact, the relevant statute in force at the time, *i.e.*, the 1991 version.

Because the starting point of my analysis later in the Final Award was the 1991 version of the statute that all parties had agreed was the applicable statute at the time (*see* Final Award at 93), contrary to Plaintiffs' contentions (*see* Pls. Ltr. (Jan. 30, 2022) at 4 (my "legal determination as to what the provision means cannot be changed via Rule 50")), the ensuing analysis and conclusions as to the impact of the subsequent enactment of Public Act No. 05-275 remain wholly unchanged. *See* Final Award at 93-98 (concluding that, "because the Legislature's enactment of the 2005 version of § 52-251c satisfied the condition precedent in the 2003 Retainer Agreement, in that the [1991] version of the statute was no longer in full force or execution, by the time of the settlement of the *D'Attilo* action, the Koskoff Firm was entitled to a 28% fee"; with correction in brackets). For example, in conducting the textual comparison between the two different versions of the statute (*see* Final Award at 97-98), I was obviously not comparing the 1986 and 2005 versions, but, rather, the 1991 version against the 2005 version, which, in fact, was the correct comparison to undertake.

Therefore, while I regret the oversight I made that led to this error, because this proceeding concerned whether the 1991 version of the statute was "not in effect" when the Plaintiffs received their settlement monies (the condition precedent in the 2003 Retainer Agreement), and because there is no dispute that the 1991 version was in force when the agreement was executed, the references to the statutory language quoted in ¶ 26 and the related references elsewhere in the Final Award should be corrected to refer to the 1991 version of § 52-251c.

In opposing the Koskoff Defendants' application, Plaintiffs raise several contentions, none of which are meritorious.

First, they fault the Koskoff Defendants for citing "no published or unpublished cases where such litany of errors has been deemed to be clerical." Pls. Ltr. (Jan. 30, 2022) at 1. Insofar as an application under Rule R-50 is left to the exercise of my discretion, I see nothing disqualifying about the application simply because the Koskoff Defendants did not cite to any authority.

Second, and principally, Plaintiffs contend that "none of [my] multiple references to the '1986 version' are clerical errors but are the result, inter alia, of [my] faulty interpretation of the fee agreement, [my] incorrect analysis of the text of the 1986 and 2005 statutes, and [my] misunderstanding of the hearing evidence," which they urge are not grounds for correction under Rule R-50. *Id*. at 2. Specifically, they contend that my lack of appreciation of the full evolution of the statute over time impacts "the legal and public policy issues in this case," *id*. at 3, and they characterize the proposed corrections as somehow evincing my misunderstanding of the applicable law or changing my determinations of fact or law. Along the way, Plaintiffs raise numerous critiques concerning my underlying analyses and conclusions, the evidence I chose to credit, and my application of Connecticut law on contract interpretation. *See id*. at 4-10.

At its core, Plaintiffs' opposition to the application is based on the misapprehension that the error I made in nomenclature, *i.e.*, calling the 1991 version of § 52-251c as the 1986 version of the statute, somehow reveals a misunderstanding of the applicable law, and, thus, cannot be corrected on a Rule R-50 application. Admittedly, that single nomenclature error in ¶ 26 – the substance of which Plaintiffs do not appear to dispute – carried through to multiple locations in the Final Award. But more to the point, Plaintiffs fail to appreciate that the critical issue here was that I had applied the correct statute that was in force on March 21, 2003 when the 2003 Retainer Agreement was executed, thus rendering the error in ¶ 26 and its later carry-over errors clerical and typographical in nature. Having re-reviewed my Final Award in view of the corrections sought by the Koskoff Defendants, my analyses and conclusions remain unchanged, and I would still deny all of Plaintiffs' claims in this proceeding under the same exact grounds I had previously set forth.

Therefore, for the foregoing reasons, the Koskoff Defendants' Rule R-50 application is **GRANTED**. Consistent with my analysis above, all references to the 1986 version of § 52-251c and the use of the defined term "1986 version of § 52-251c" in the Final Award are hereby corrected to refer to the 1991 version of § 52-251c. These corrections affect the following pages in the Final Award: 29 (Findings of Fact, ¶ 26), 30 (Findings of Fact, ¶ 28), 43 (Findings of Fact, ¶ 65), 93-100, 102-03, 105, 113, and 123.

Dated: February 14, 2022
Princeton Junction, New Jersey

THEODORE K. CHENG
ARBITRATOR