

PETITION FOR REHEARING

ROBERT FONTAINE vs. CAPE COD TIMES - 2012-P-1085

Honorable R. Marc Kantrowitz
Massachusetts Appeals Court
One Pemberton Square, Boston, MA.02108

May It Please The Court:

"It is impossible to frame definitions which embrace all unfair practices. There is no limit to human inventiveness in this field." H. R. Conf. Rep. No. 1142, 63d Cong., 2d Sess. (1914)."

IF THIS COURT CONSIDERS THE ARGUMENT BELOW, AND STILL THEN BELIEVES THE BARNSTABLE RULING WAS APPROPRIATE, APPELLANT WILL TAKE SOLICE IN KNOWING HE WAS GIVEN A FAIR CHANCE.

Appellant's failure to provide the court with the entire record was not due to a lack of effort, or to gain advantage. The totality of Appellant's current situation is profound. 12 years in, representing himself Pro se against now the 3rd corporate giant, 2nd major law firm.

This Court **cannot** be expected to reach a just conclusion unless ALL parties are held to account for the accuracy of their affidavits and representations to the court.

So Fontaine pleads with this court to make sure that anyone shown to have deceived it, pay a very high price!

A lack of counsel is not the reason this court's recent ruling conflicts with documented evidence available to it. No, the reason This Court's ruling is factually impossible is because Defendant, Appellee, CCTimes, has repeatedly provided affidavits, made of personal knowledge, that are incapable of being true.

Please consider, On several key issues of importance, CCT has sworn personal knowledge of two opposite facts. And Both Courts agreed with them anyway. In reading this honorable court's Rule 1:28 opinion, it is clear that Fontaine and the Barnstable Court are not the only victims of the deception by CCTimes and its various parts.

The "Bundle" is the basis for CCTime's entire scheme here! Planned BEFORE the sale, the manipulation Fontaine will

describe below allowed CCTimes to legitimize attributing 90% of the revenues from bundles to print department, away from Internet and Fontaine's Net Revenue Share Agreement. CCTimes has painted this as Fontaine simply being a sore loser.

This Court Just Ruled that *"After the agreement was executed, CCTimes began to sell Internet advertising in a 'bundle' with print advertising, charging a discounted price for the Internet advertising."*

But CCTimes has Admitted they had conceived of & Sold Bundles BEFORE, in 2002! CCTimes, when confronted with (A1) admits that document showed that CCT expected \$7,300 in 2002 from the Bundle concept. Plaintiff's Response 52: *"The document 'Real Estate Merger Analysis' showed the amount of revenue the Internet expected to receive each year from the bundle concept as follows: 2002-\$7,300, 2003-\$8,500, 2004-\$10,000,..."* Cape Cod Time's answer **"CCT does not dispute Plaintiff's Response 52"**. Those amounts being 10% of revenue, Print getting 90%. This is a key factual admission because they have sworn so many times to the contrary!

CCTimes ALSO vehemently DENIED they conceived of Bundles until 2003! Attempting to cover up false statements with statements that defy logic as CCTime's Brief claims *"The Real Estate Merger Analysis makes no reference to any bundled products"*, and *"It has nothing to do with bundled products"*, and *".substantiated evidence establishes that the CCTimes conceived of the bundling strategy in early 2003, after the execution of the Purchase and Sale Agreement"*. Who could blame them from running away from that prior admission? Who is doing all this substantiating?

There can be no dispute, (a1) speaks for itself. It HAS to be made BEFORE the sale when they assume 6 months STILL remain in 2002 after a sale (*2002 for 6 months). It assumes \$7,300 in revenues will go to Internet Department in 2002 from Real Estate Book Bundles.

CCTimes knows that Fontaine wont sell if he sees (a1) RE Book Bundles, or the 90%/10%) or the \$1,300,000 projection (The potential to Fontaine so minimal in the scope of the value of his business so as to make it laughable) so someone marks (a1) "Confidential" and creates (a7), falsely name it "Initial Projections" and present THAT \$4,310,000 "projection" to Fontaine instead of the real one.

How did CCTimes prevail at Summary Judgment by claiming personal knowledge that no material fact remained in dispute, when they are under oath admitting they **DID** conceive of Bundles in 2002, and **DIDN'T** conceive of Bundles until 2003? CCTimes: "Second, the bald allegation that Fontaine reasonably relied on any such statement is squarely contradicted by the uncontested evidence in the record that the bundling plan wasn't even hatched until months after contract execution"(A13).

CCTimes had The Sale in Mind when forming the 90/10 Plan.

1) (A1) CCTime's Own Records Show them COUNTING BUNDLES for the entire deal at the 90%/10% sham split, in 2002! Each of the other deceptive actions CCTimes took was in furtherance of their plan "Real Estate Merger Analysis, attachment c".

2) CCTimes ADMITTED that A1 Showed they expected \$7,300 in 2002 revenue from the RE Book concept. Plaintiff's Response 52: "The document "Real Estate Merger Analysis" showed the amount of revenue the Internet expected to receive each year from the bundle concept as follows: 2002-\$7,300, 2003-\$8,500, 2004-\$10,000, 2005-\$12,000, 2006-\$14,000 Fontaine Aff. Exhibit K, page 15, para 66" - CCT'S Reply 52 "**CCT does not dispute Plaintiff's Response 52**" (A15).

3) CCTimes Managers DETAIL the terms of the 2002 Bundle. CCT's Print and Internet Managers discuss the 2002 Real Estate Book Bundle split between them in a September 13, 2003 email: Kempf to Print Managers: Subject: RE: Budget RE Book" (A16). They speak directly about the 11.4% Internet got for Real Estate Book Bundles in 2002, as they negotiate the 2003 version. The full exchange is in Fontaine's brief.

4) Archive.Org shows The July - August 2002 Issue of CCTimes Real Estate Book Bundle: *"Your advertised properties will appear online at No Extra Charge! In addition to On-Cape distribution, Cape@Home will be available at drop site locations in affluent Boston suburbs."* **They were actually selling the Bundle at the same time they were hiding it!**
<http://web.archive.org/web/20020812124634/www.capecoddirectories.com/capeathome/marketing.htm>

It is clear from ANY one of those examples that this Bundle concept scheme was in place prior to the sale, in 2002, AND

NOT "hatched" on January 9, 2003, as CCTimes continues to allow the court to believe. (a17).

Judge Nickerson, RELYING on CCTime's representations was ALSO quite convinced that "AFTER" was true. Why wouldn't he, CCTimes and it's representatives have sworn to it over a dozen different times now? **Judge Nickerson's Decision:** *"Indeed, contrary to Plaintiff's assertion, documentary evidence indicates that CCT did not propose - much less implement- a "bundled" print and online advertising strategy until 2003". CCTimes had this entire deal mapped out in 2002, BEFORE hiding it from Fontaine - 5 years, \$53,000+ @ 90%+/-/10%+/-.* The court goes on to reference that January 9, 2003 email several times (a17). What level of collusion needed to take place? Kempf is supposedly "proposing" a Real Estate Book-Internet Bundle to the Print department a mere 70+- days after the P&S. **The Court quotes Meyer** *"In his affidavit, Meyer states that such product "bundling" began "in early 2003". and "...and the record reflects that this concept was not formally proposed until January 2003".*

"THUS, CCT COULD NOT HAVE MISREPRESENTED TO PLAINTIFF AN ADVERTISING PROGRAM THAT DID NOT EXISTS DURING THE 2002 NEGOTIATIONS" said the court. **BUT THEY COULD CERTAINLY MISREPRESENT ONE THAT DID!** I can't imagine his honor in Barnstable would be too pleased with CCTimes Response #52.

This January 9, 2003 letter (a17) is a FARCE, part of the SCHEME. CCTimes had already determined when drafting that letter (A17) barely 70 days after signing the P&S that their business model is to have this 90%/10% allocation in place for the entire deal, 2002-2006 as (a1) shows us. CCT had JUST created (a1) a projection of what a "bundle" plan would look like, in the very context of purchasing Fontaine's CapeCodRealEstate.com. \$53,000 will be Internet's 10% share of the "Real Estate Book Bundle" Plan over the entire deal. A1 is the plan CCT would have sent to Dow Jones for their side to rely on and approve the sale. THEN A7 is created in it's place and given to Fontaine. Fraudulent Inducement.

HOW would CCTimes explain to the Court, this January 9, 2003 "Proposal", for this new "concept" called "Bundles" which proposes that Internet department should get 40%+- share of the sale (Print \$220-Internet \$140 it assumes)? **They can't.**

#1. Kempf **already knows** CCTimes policy is to allocate 90%+- to Print, 10%+- to internet from 2002, as the Print & Internet Managers discussed in that September 2003 email about the 2002 Real Estate Book Bundle (A16) **#2.** Real Estate Merger Analysis (a1) informs us that CCT already had planned what the Real Estate Book Bundle will do during the entire deal prior to July 2002 - and the 10%+- is predetermined.

So why is Kempf Proposing this new concept, to Managers who know it isn't new, knowing that CCTime's current policy is that Internet gets 10%, and talk of 40% share is meaningless? So they could mark it "Confidential" and CC it to Fontaine - To show him that a Bundle Plan has just been conceived, and to make it seem like the 40% is a good deal. **The Bundle was not born on January 9, 2003.** They had no intention of paying Fontaine his 20%. That is what the entire scheme was designed to accomplish, acquire Fontaine's valuable business as cheap as possible.

CCTimes told Judge Nickerson they allocated 90% to print due to "COSTS". CCTimes brief told This Court the 90% allocation was based on the relative "VALUE" in the sale. The fact is, this wasn't a plan, it was a scheme. CCTimes was getting 100% regardless of their "bookkeeping". But made 20% MORE each dollar they could divert from Fontaine. CCT Told different things to different courts and both courts agreed with them, just as they had with "before" and "after".

This Court Ruled that *"The agreement specifically provides that in calculating the plaintiff's net Internet revenue share, 'discounts' will be deducted from the gross revenue".* Fontaine has NEVER argued they couldn't Discount or Bundle. **But discounts weren't deducted from gross revenue!** THEY WERE EXCLUSIVELY TAKEN FROM FONTAINE'S REVENUE! AFTER the sale they raised the price of the RE Book Bundle from \$225 to \$405, as the Bundle then became attractive to the Realtors once Fontaine's dominant traffic from CapeCodRealEstate.com and CapeCodRental.com was the Internet part of the Bundle - as CCT Manager's refer to in that September 13 03 discussion (a16). The "Discount" was taken out of Fontaine's pocket alone. That was the scheme!

This Court Ruled that *"In addition, the plaintiff concedes that no provision prohibits CCTimes from bundling print*

and Internet advertising."? **The following is perhaps the most important email in this case!** October 16 (a3/a4) EXACTLY two weeks prior to the October 31 closing, **Fontaine asks CCTimes** "...I don't understand why CCT can't simply define what is excluded? To remove the word 'expenses' and leave this term: 'various costs and charges, including but not limited to' Tell, me what IS IT LIMITED TO? What other factors effect the net? That is a BIG TIME legitimate question for me to ask. If you can define it, is there some reason you can't define it in the agreement?".

CCT replies **"[Robert Kempf] We have deleted 'but not limited to' from the language here. See attached revision"**. And the term "but not limited to" is removed from the attachment in that email. But it is back in the P&S, signed in their offices without attorneys. *If they tell Fontaine of Bundles now, he walks. So they invent them in Jan 03 instead.

*This Court made NO mention of Fontaine's claim that CCTimes altered the P&S - Inserting "But Not Limited To" back in the P&S. PLEASE RE-READ that portion of Appellant's Brief.

So on October 16/17 2002 they reluctantly agree to remove "but not limited to" from the P&S, Fontaine not knowing what CCTimes knows, but is withholding, about "Real Estate Book Bundles" 90/10. They REMOVE it from the P&S and send it to Fontaine.

CCTimes explains this in their Brief suggesting that this wasn't a final resolution on this issue, that a lot of things were being passed back and forth. NONSENSE. All they had to do is include ANYTHING showing the subject was even mentioned again before closing - to impeach Fontaine's claim. They cant.

Its not as if Fontaine didn't try to define all the terms just as much as CCT was trying to disguise them. But instead of disclosing Bundles to Fontaine, they agreed in that October email to remove the term that would allow them to write off those costs (**[Robert Kempf] "We have deleted 'but not limited to' from the language here. See attached revision". Only to place it back in the P&S and suggest to This Court it was later agreed to.**

This Court Ruled that "a month before the agreement was

signed, CCTimes clearly informed the plaintiff through electronic mail message (email) correspondence that its Internet income for 2002 would be closer to \$75,000...".

SEPTEMBER 27TH! **But Cape Cod Times knew back on August 9th**, the day Fontaine transferred Administrative control of the domain name assets to CCTimes, when Fontaine INFORMED THEM IN WRITING that he was "relying" on the \$100,000+ figure. And they knew his reliance was false! Fontaine's brief (p26) points out that "On August 10, 2002, Kempf emails Meyer and Evans: **"Additionally though, he seems to be operating under the assumption that our '02 revenues will be \$100k+. He's also beginning to indicate that he wants us to show exactly what those are."**(A 20/A21).

They don't tell Fontaine that his reliance which they created was wrong and they allow the assets to transfer. **What does this tell the court?** 3 days later, Aug 13, they send Fontaine a Draft P&S with the \$100k deductible and an August ___, 2002 closing date. Appendix P20 shows what did after learning Fontaine was relying on the \$100k+ figure for 2002: (#33 Aug 20 date is an error, it was Aug 10).

#30. On August 12th they want to close within "days".

#31. On August 14th they want an August 27th closing.

#32. On August 17th they "pencil us in for the 27th".

#34. On August 26th Fontaine AGAIN informed CCT he was relying on their representation of \$100,000 for 02. **STILL NO DISCLOSURE.** Cape Cod Times was more than happy to allow Fontaine to proceed deeper into the deal, and in fact close, without informing him that his reliance they fostered was false. Fontaine was running a busy business during this entire time. 70+- hr weeks before the sale, and after.

#35. On September 27th they suggest we "accelerate this thing to closure, with or without the attorneys" **AND BY THE WAY**, WE NOW ESTIMATE OUR 2002 REVENUES TO BE \$75,000. In August they had let the \$198,000 figure they gave to Fontaine stand, knowing he 'relied' on their representations they were already doing \$100k+ in 2002.

#36. On September 30th CCT "explains" to Fontaine that the \$100,000 was "just a baseline" - This is the "negotiation" the lower court mentions about the Bundle. How WOULD one negotiate a "baseline" into October when there was a P&S

with all the terms and a closing aimed for on August 27th?

Fontaine had a VERY good reason to TRUST that CCT was doing \$100K+!: In June CCTimes gave him an offer with 3 estimates (a7) "Initial Projections" (they weren't). July they gave him another 3 estimates (a7)"Enhanced Offer" 20% version. THOSE FAKE PROJECTIONS THEY GIVE FONTAINE SHOW CCTIMES EXPECTS \$198,000 2002 FOR REVENUE. Molly Evans explained in Deposition (A18/A18B). *"We looked at the middle-of-the-road scenario and said that's probably the most likely based on data that's available to us, which wasn't a lot."* **\$198,000.** August 9th, they know Fontaine is relying on \$100k+.

These Were Not Oversights, CCTimes Forgetting "Bundles" had been conceived in 2002 and not Jan 2003, that \$198,000 is really \$75,000, that \$4,310,000 is really \$1,300,000, 'But Not Limited To' secretly back in the agreement, to become the controlling term to allow the 90%/10% scam to work. Because Molly Evans depo tells us how much scrutiny top management gave these calculations: *"I remember that Peter and Bob Kempf and I poured over it and poured over it. Bob Kempf had prepared it, massaged it and massaged it"*. *This isn't A1 they were molding, this was the fake projections!

This Court Ruled: *"Equally fatal to the plaintiff's claim, the record also does not reflect that the plaintiff pursued the contractually-prescribed avenue for challenging the allocation."* Fontaine IS challenging it In THIS proceeding! Fontaine complains of fraud and deception. He could not know what he could not know, he could not see what CCTimes was hiding, he could not detect CCTimes altering of the P&S, or hiding of the Real Estate Book Bundle Scheme or setting up the Jan 9th date as the conception date for Bundles, when we know it was prior.

What good did it do Fontaine to check CCT's 02 figures in 03, when CCT said Bundles didn't exist in 02? Which year could their representations be trusted? THEY DID NOT PROPERLY ACCOUNT FOR REVENUES. Clearly.

The Barnstable Court (p8) stated the 90%-10% allocation was due to "COST". *"Ninety percent of the resultant revenue was allocated to the print department and 10% to the online department, based on the relative expense associated with the production and distribution of each product"*. (Meyer Aff. 26). **YET CCTimes Brief p33:** TELLS THIS COURT they

attributed 10% to Internet **DUE TO THE VALUE** OF THE PRODUCT IN THE SALE.- *"because such a percentage approximated revenue that could be attributed to internet advertising".*

The Barnstable Opinion Agreed with CCTimes that the 90/10 split was due to "COST". This Court's Opinion Agreed with CCTimes position that it was due to "VALUE". The fact they have two different answers should cast doubt with this Court on the legitimacy of either. CCTime's Bookkeeping Shouldn't Matter! This was a plan to misappropriate revenues and hide it from Appellant.

This Court Ruled: *"Because of the associated costs for print, ninety percent of the income from bundle sales was thereafter allocated to print and ten percent was allocated to Internet. A portion of the plaintiff's net Internet revenue share was derived from the ten percent attributed to Internet advertising".*

Fontaine brief points out that 2 weeks prior to closing - Oct 16 2002, CCTimes agreed to remove their right to deduct "expenses" and remove the term **"But Not Limited To"** from the P&S. **THEY DID: [Robert Kempf] "We have deleted "but not limited to" from the language here. See attached revision".**(A 2,3,4). Only to place it back in.

This Court Ruled: *"Discussion. A. Fraud in the inducement/misrepresentation. The plaintiff contends that during most of the negotiations, CCTimes misrepresented that its pre-deal Internet income was expected to be in the vicinity of \$100,000 for 2002. He contends he relied to his detriment on the \$100,000 figure in agreeing to the \$100,000 deductible before calculation of his share in the net Internet revenue. Statements of expectation and prediction, however, may not form the basis of a claim for misrepresentation."*

On August 9 CCTimes knows Fontaine is working under the assumption CCT is doing \$100k+ in 2002, because HE TOLD THEM HE WAS RELYING ON THAT, BECAUSE THE MONTH BEFORE THAT THEY TOLD FONTAINE \$198,000 WAS "MOST LIKELY" TOTAL FOR 2002.

Fontaine told this court the truth in the Conclusion of his Brief: *"The Cape Cod Times attempted to circumvent the truth at every critical point in Fontaine's attempt at*

making a fair and beneficial deal for both parties. Obstructing his quest for 2 full months as they "negotiated" the "baseline". When they didn't lie they played ignorant, when they didn't like the numbers they created new ones, when they created false reliance they exploited it, when they didn't like the terms of the agreement they switched it, when they didn't like being questioned they used their ill gained absolute authority and intimidated and retaliated.". The same CANNOT be said for CCT!

Fontaine wasn't looking to sell his business because it was dying, he needed a partner because it was exploding. CCT didn't buy Fontaine's business as a mere "subset" of it's other businesses, they needed Fontaine's business because their model was dying. The sad part is, they could have done it honestly, but they didn't. They made \$1,500,000+ because of Fontaine they didn't have before Fontaine. **Fontaine has been truthful about everything.** The whistleblower complaint, being hospitalized protecting advertisers, lying to DOL, 3000 hours of unpaid overtimes, retaliation.

Appellant therefore respectfully asks that in the interest of justice, the Court considers the above stated matters.

Thank you, /s/ Robert Fontaine 01/02/2014