COMMONWEALTH OF MASSACHUSETTS

BARNSTABLE, SS.

SUPERIOR COURT
CIVIL ACTION NO. BACV2008-00630

ROBERT FONTAINE

Plaintiff,

v.

CAPE COD TIMES, a division of DOW JONES LMG MASSACHUSETTS, INC. (f/k/a Cape Cod Times, a division of Ottaway Newspapers)

Defendant.

MEMORANDUM IN SUPPORT OF DEFENDANT CAPE COD TIMES' MOTION FOR SUMMARY JUDGMENT

INTRODUCTION

Defendant Cape Cod Times ("CCT") submits this Memorandum in Support of its Motion for Summary Judgment, and incorporates its Statement of Material Facts in Support of Cape Cod Times' Motion for Summary Judgment [hereinafter "SOF ¶"], filed herewith.

This is a case about a business plaintiff, Robert Fontaine ("Fontaine") who sought out a business deal with CCT, engaged in extensive negotiations while represented by counsel, and got everything he bargained for in his fully negotiated written agreements, the Purchase and Sale Agreement ("P&S") and the Employment Agreement, both of which are unambiguous and defined all material terms of the parties' agreement. Now, through this litigation, Fontaine seeks to renegotiate the terms of that deal with the benefit of hindsight vision. Fontaine's Complaint sets forth six counts: breach of contract, rescission and restitution, detrimental reliance, fraud in the inducement, intentional misrepresentation, and a chapter 93A violation.

After two years of discovery, including five depositions and the exchange of documents and interrogatories, there is simply no evidence in the record that raises a genuine issue of

material fact, that CCT breached any term of either Agreement, made a fraudulent statement or misrepresentation, or acted in any way other than in good faith during the course of negotiations and performance. In fact, the evidence overwhelmingly shows that Fontaine was paid the amounts owed to him under both Agreements, that CCT negotiated openly and honestly, with full disclosure that its projections as to future revenues were just that – projections. Fontaine has had every opportunity to establish facts to support his claims, but the record is simply devoid of any genuine issue of material fact, and CCT is entitled to summary judgment on all counts.

SUMMARY JUDGMENT STANDARD

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to summary judgment as a matter of law." Mass. R. Civ. P. 56(c).

Where a defendant is able to demonstrate that a plaintiff will be unable to prove an essential element of his case, summary judgment is appropriate so as to avoid the cost and expense of an unnecessary trial. *Kourouvacilis v. General Motors Corp.*, 410 Mass. 706, 716 (1991). "A complete failure of proof concerning an essential element of the non-moving party's case renders all other facts immaterial." *Id.* at 711; *Trifiro v. New York Life Ins. Co.*, 845 F. 2d 30, 33-34 (1st Cir. 1988). Once the moving party demonstrates the absence of a triable issue, the non-moving party may not merely rely on his pleadings, but rather must set forth specific, relevant, admissible facts establishing the existence of a genuine issue for trial. *Correllas v. Viveiros*, 410 Mass. 314, 317 (1991). "Vague or general allegations of expected proof or inferences made by the opposing party are insufficient to defeat a motion for summary

judgment." *DiGaetano v. Lawrence Firefighters Federal Credit Union,* 15 Mass. L. Rep. 394, No. 01-01373, 2002 Mass. Super. LEXIS 447 at *7 (Mass. Super. Ct. Nov. 8, 2002) (citing *First Nat'l Bank of Boston v. Slade,* 379 Mass. 243, 246 (1979). So too are unsupported statements of belief. *Polaroid v. Rollins Environmental Services (NJ),* 416 Mass. 684, 696 (1993). The opposing party cannot rest on his pleadings and mere assertion of disputed facts to dispute the motion. *La Londe v. Eissner*, 405 Mass. 207, 209 (1989).

ARGUMENT

I. Fontaine's Breach of Contract Claim Fails Because CCT Fulfilled All of Its Obligations Pursuant to Both Contracts (Count II)

To prevail on a breach of contract claim, Fontaine must prove that: (1) there was a valid and enforceable contract[1]; and (2) CCT failed to fulfill an obligation under that contract. *Singarella v. City of Boston*, 342 Mass. 385, 386-87 (Mass. 1961). Fontaine cannot establish a breach of either Agreement, as CCT fully performed its obligations under both contracts. *See* Restatement, 2d, Contracts, § 235(2).

A. CCT Fully Performed According to the Terms of the P&S and the Employment Agreement

The material terms of the P&S defined, among other things, the property and information to be purchased by CCT, consideration, and performance. SOF ¶ 40. Under the P&S, CCT agreed to pay Fontaine a lump sum of $60,000 upon the closing of the deal. *Id.* ¶ 41. Fontaine agrees that CCT paid him $60,000 at the closing date, pursuant to the Agreement. *Id.* In further consideration, CCT agreed to pay Fontaine 20 percent of any Net Revenue in excess of $100,000, as identified in the P&S, for the years 2002 through 2006.[2]

[1] Through discovery, no issue was raised about the validity and enforceability of the two contracts.

[2] The P&S provided that Fontaine would receive five percent of CCT's net online revenue in excess of $50,000 from January 1, 2007 to June 30, 2007. SOF ¶ 43. In 2007, Fontaine received $3,856. *Id.* ¶ 46.

Id. ¶ 42. Fontaine acknowledges that he received yearly revenue shares, calculated in accordance with the P&S, which ranged from $12,209 to $37,692. *Id.* ¶ 46. Fontaine also acknowledges that CCT provided him access to CCT's pertinent books of account for purposes of verifying Fontaine's Net Revenue Share (NRS) in each of the three years Fontaine provided notice, according to the terms of the P&S. *Id.* ¶¶ 48-49.

CCT similarly performed all of its obligations pursuant to the Employment Agreement, under which CCT agreed to pay Fontaine an annual salary of $50,000. SOF ¶ 64. Fontaine agrees that CCT compensated Fontaine at least $50,000 per year per the Agreement, *id.* ¶ 65, as well has paid him ten percent commission on net revenue for commissionable sales he generated, pursuant to the Agreement. *Id.* ¶ 64. Fontaine further agrees that CCT paid Fontaine at least $12,000 in commission for each year that he was employed, per the terms of the Agreement. *Id.* ¶ 66. In fact, Fontaine earned up to $28,326 per year, as well as $15,649 in commissions during his six months of employment in 2007. *Id.* ¶ 67. CCT also paid Fontaine the full benefits provided for in the Employment Agreement. *Id.* ¶ 64.

In short, Fontaine has not offered any evidence of a breach of any of the terms of the Agreements. To the contrary, when reviewing the P&S and the Employment Agreement, he admitted that CCT complied with all material terms of both Agreements. Summary judgment for CCT on the breach of contract claim is therefore appropriate, as Fontaine cannot rest on his pleadings and mere assertion of disputed facts to dispute the motion. *La Londe* 405 Mass. at 209.

Realizing that the terms of the Agreements themselves do not provide a basis for a breach of contract claim, Fontaine attempts to write in new terms to the P&S and the Employment Agreement that were never agreed to by the parties, and in some instances, never

even discussed. He then proceeds to allege a breach of contract based on these unwritten terms. He cannot do so. *See Masingill v. EMC Corp.*, 449 Mass. 532, 542 (2007) (where a plaintiff signs a contract knowing that he had not received all of the terms he wants, he cannot later raise the content of negotiations to contradict what is finally and unequivocally agreed upon in the final version of the contract without creating the legally unacceptable result that the language of the contract simply would not matter anymore); *Silver v. Aabstract Pools & Spas, Inc.*, 376 S.C. 585 (Ct. App. 2008) (a homeowner cannot reinterpret written contract terms simply because he is "unhappy" with the contract he executed).

B. Fontaine Cannot Allege Breach of Contract on an Unexpressed Term, Where the Agreements Expressly Foreclosed the Inclusion of Unwritten Terms or Contemporaneous Oral Promises

It is without doubt that both the P&S and the Employment Agreement are integrated agreements representing Fontaine's and CCT's final expression. As expressed in section 13.2 of the P&S, "This Agreement constitutes the entire agreement among the parties . . . and supersedes all prior agreements, representations and understandings of the parties." SOF ¶ 38. Similarly, section 9.3 of the parties' Employment Agreement states, "No person acting or purporting to act on behalf of [CCT] has made any promise to [Fontaine] that is not contained in this Agreement, nor induced [Fontaine] to enter into this Agreement by making any promise to [Fontaine] that is not contained in this Agreement." Fontaine himself stated that he understood these terms prior to signing the Agreements. *Id.* ¶ 62. Here, where the parties reduced their agreement to writings, which in view of their completeness and specificity, reasonably appear to be complete Agreements, they are integrated Agreements unless otherwise established as not a final expression. *See Town & Country Fine Jewelry Group, Inc. v. Hirsch*, 875 F.Supp. 872, 876 (D. Mass. 1994).

"Furthermore, where, as here, the parties are sophisticated business entities, who, represented by attorneys, freely entered into a contract, it is not appropriate for a court to rewrite their agreement. *Davis v. Dawson, Inc.*, 15 F.Supp.2d 64, 107 (D. Mass 1998). "Rather, courts must give effect to the language of such agreements and to their discernible meaning." *RCI Ne. Servs. Div. v. Boston Edison Co.*, 822 F.2d 199, 205 (1st Cir. 1987). Therefore, Fontaine has absolutely no support for his claim that CCT is bound by terms that do not exist within either the P&S or the Employment Agreement. *See Winchester Gables, Inc. v. Host Marriott Corp.*, 70 Mass. App. Ct. 585, 592-93 (2007) (in a breach of contract case, the court declined to admit evidence concerning earlier negotiations, which might rewrite or dramatically alter the meaning of the written agreement, where there was an ambiguity concerning the application of an unambiguous term).

C. Even Without the Integration Clauses, Fontaine Cannot Establish Breach of Contract

Fontaine sets forth three allegations in support of his breach of contract claim and his alternate theories of recovery: (1) CCT misrepresented that its expected online revenue for 2002 was $100,000; (2) CCT misappropriated the online revenue through its subsequently adopted plan to "bundle" its print and online products, incorporated months after the Agreements were executed, thus removing profits from the online revenue share which should have been attributable to Fontaine; and (3) CCT failed to provide adequate sales support and resources to allow for growth of the online business. Complaint ¶¶ 8, 12, 16-17. First, there is no evidence *at all* that the parties agreed to the terms Fontaine now seeks to impose. Second, even if Fontaine could raise a genuine issue as to whether we agreed to those terms, he has produced no evidence that CCT breached them.

In *Winchester Gables*, the terms of a purchase and sale agreement between the parties for property failed to address a contingency that ultimately arose when the buyer later resold the property that was the subject of the agreement. 70 Mass. App. Ct. at 595-86. The resale might have triggered additional compensation to the original seller, but the formula contained in the agreement for calculating the additional compensation did not contemplate a portfolio sale of properties. *Id.* at 586. The court refused to allow parol evidence, as doing so "would not merely clarify a possible ambiguity, but would impermissibly broaden the integrated writing." *Id.* at 592 (citing *Robert Indus., Inc. v. Spence,* 362 Mass. 751, 755-756 (1973) ("the lease nowhere says that activities not expressly permitted are forbidden .... [but instead] simply does not deal with competition other than competition by lessees"); *Lydon v. Allstate Ins. Co.,* 5 Mass. App. Ct. 771 (1977) ("[t]he intent of the parties entering into the contract must be gathered from construing the contract as a whole and not by placing special emphasis on any one part")).

Here, like in *Winchester Gables*, the Agreements do not contemplate the offering of a combination print and online real estate advertising product; the level of human and financial support CCT would provide Fontaine; or a minimum guaranteed online revenue that CCT would generate independent of the merger. SOF ¶¶36-45, 48, 62-64, 68-71; 70 Mass. App. Ct. at 593. The benefit of hindsight does not permit him to now undo what was done simply because he bound himself to terms that now appear unfavorable to him.

1. Neither Agreement Prohibits CCT From Offering Advertising Space in Print and Online Editions at Reduced Price; Therefore "Bundling" Does Not Constitute A Breach of Contract

To warrant trial on this issue, Fontaine must offer more than just "vague" generalizations of "expected proof or inferences" that CCT agreed not to bundle (which

Fontaine cannot, since he admits the parties did not discuss it), and that CCT breached that Agreement by a 90 percent/10 percent allocation to print/online departments. *DiGaetano,* 15 Mass. L. Rep. 394 at *7. He cannot do so.

In January, 2003, AFTER the contract had been executed, CCT developed a marketing concept which was a combination real estate advertising product offering advertising space in CCT's print edition of its quarterly publication *Cape at Home* in addition to online advertising. SOF ¶ 50. This "bundled" product was sold at a discounted price, and was a minor part of an overall strategy to leverage existing print customers. *Id.* This was done in an effort to increase internet real estate revenue, and thus Fontaine's net revenue share, and to better compete with competitors. *Id.* ¶ 51.

First, Fontaine alleges breach of the P&S on the grounds that CCT withheld online revenue profits as a result of the "bundling" of its print and online product. Complaint ¶ 12. Specifically, he alleges that by allocating only ten percent of the "bundled product" revenue to the online net revenue pool, CCT reduced the overall online net revenue and thus reduced Fontaine's NRS. *Id.* Fontaine cannot offer this court any evidence that the P&S prohibits CCT from combining the real estate advertising products that it marketed or sold, *id.* ¶ 59, or from discounting the price of the online product. *Id.* ¶ 58. Rather, the P&S concerned only the purchase and sale of Fontaine's Website Business. *Id.* ¶ 40. It did not contemplate CCT's print advertising or marketing, nor did it restrict CCT from determining how to generate advertising revenues. *Id.* ¶ 59. Moreover, Fontaine was aware that CCT reserved the right to change the plan to redirect sales efforts and adjust to market conditions. *Id.* ¶ 15, 57. Additionally, Fontaine acknowledged that businesses have to tailor the products that they sell to meet consumer demand. *Id.* ¶ 56. He also agreed that companies engaged in internet real

estate advertising must tailor their products to meet what is going on in the marketplace to be able to adopt and change as the market changes. *Id.*

Here, like in *Winchester Gables*, any "anticipation [of bundling the print and online products] was never made a part of the agreement[s] reflecting the contract[s] between [the parties]." 70 Mass. App. Ct. at 593. Moreover, the terms "Net Revenue Share" and "Net Revenue" are unambiguous. *Compare id.* at 594 (the term, "actual gross consideration" was unambiguous; that there turned out to be a potentially ambiguous application of that term did not change the terms of the contract). The P&S did not intend to tie CCT's hands as to the prices for which it could sell advertising. SOF ¶¶ 57-58. The parties must be held to the Agreement they bargained for and negotiated, with the help of counsel. *Winchester Gables,* 70 Mass. App. Ct. at 594.

In short, Fontaine hasn't offered a shred of evidence to prove there was either a secret plan to implement such a proposal or that CCT somehow concealed it from him. Fontaine cannot overcome summary judgment, as he relies merely on "unsupported statements of belief." *Polaroid,* 416 Mass. at 696.

2. Neither Agreement Promises That CCT Will Provide "Strong Sales Support" or "Adequate Resources" to Fontaine, and Even If They Did, Fontaine Cannot Offer Any Evidence That CCT Breached Those Unwritten Terms

Likewise, Fontaine cannot establish breach of contract simply because, in his opinion, CCT failed to provide "strong sales support" as promised, and had "inadequate resources." to help him. SOF ¶ 72. Fontaine's sole evidence to support his claim is a statement by Peter Meyer, in March, 2002, over seven months prior to execution of the P&S, that CCT "anticipated" that strong sales support would allow Fontaine to surpass $80,000 in sales. *Id.* ¶ 14. However, even after discovery, there is not a shred of evidence that CCT agreed to any

amount of human or financial resources, either to Fontaine personally or the entire online department.

Nowhere in either the P&S or the Employment Agreement does CCT agree to provide any level of marketing, sales or technical support, yet CCT did make those services available to him. *Id.* ¶¶ 73, 77. Similarly, both contracts are void of any provision regarding growth of the business. *Id.* ¶ 73. Fontaine cannot read such a provision into an express contract. *Masingill*, 449 Mass. at 542. Even if such a vague and ambiguous phrase could be interpreted to constitute a contract term, there is absolutely no evidence of a breach. CCT employed a full-time webmaster and an independent contractor, who both assisted Fontaine with technical and online support. SOF ¶¶ 75-76. In addition, CCT aggressively advertised the products Fontaine was charged with selling in its print advertisements. *Id.* ¶ 74.

Standing alone, the absence of those terms in the Agreements merits summary judgment in favor of CCT on Fontaine's breach of contract claim. *See RCI Ne. Servs. Div.*, 822 F.2d at 205. Still, even if those terms were part of the deal (which they are not), Fontaine offers this court nothing more than vague accusations, without any further evidence, that CCT failed to allocate sufficient human or financial resources to the real estate section of its online paper.

Moreover, the evidence shows that CCT's online revenue increased each year that the Agreements were in effect. SOF ¶ 67. Fontaine therefore cannot provide any evidence to support his claims concerning support and growth; instead, the indisputable evidence points to the opposite conclusion.

Put simply, Fontaine was free, in the negotiations leading up to the agreement, to bargain for a provision in the Agreements that defined the levels of sales support, marketing or a minimum amount of revenue growth that CCT would guarantee him. His failure to do so

was not through any fault of CCT, and does not constitute a breach of contract. *Winchester Gables*, 70 Mass. App. Ct. at 594; *see also Waldo Bros. Co. v. Platt Contracting Co.*, 305 Mass. 349, 355-356 (1940) (contract interpretation generally "yields to the purpose of the parties as disclosed by the words used and by the nature of the understanding disclosed by the instrument").

3. The P&S Does Not Guarantee That CCT's Net Revenue For Any Given Year Will Meet Or Exceed $100,000, and Even If It Did, Fontaine Cannot Establish Breach Of Contract

During negotiations, both parties needed to determine the estimated revenues each other's business generated. SOF ¶ 26-28. In fact, when CCT and Fontaine discussed future projected revenue from combining the businesses, Fontaine's estimates for such projected revenue were higher than CCT's estimate. SOF ¶ 18. The parties therefore conducted due diligence review of CCT and Fontaine's Website Business for several months before entering into the P&S and the Employment Agreement. *Id.* ¶ 23. At the time the parties were negotiating these Agreements, the internet industry was new and unpredictable. *Id.* ¶ 27. Furthermore, CCT's rough projections of future revenue for the years 2003-2007 was based on a number of variables, none of which were capable of precise calculation at the time. *Id.* ¶ 27. These variables included how many advertisers CCT would have, what the rate would be; whether the growth rate would continue to be what it was; what the mix of advertising products would be; and whether CCT would do as much development work. *Id.* ¶ 27. Because of this uncertainty, CCT provided Fontaine with various possible projections of its earnings, i.e., its earnings expectations. *Id.* ¶ 18. CCT informed Fontaine that it could only give a "best estimate" as to what its future revenue would be. *Id.* ¶ 26. Fontaine acknowledged that any estimate was a mere expectation, rather than a representation regarding CCT's revenue for

2003-2007. *Id.* ¶ 29. CCT's expected revenue for 2002, the year the parties executed the Agreements, was equally difficult to predict because there was still a full quarter remaining during CCT's negotiations with Fontaine. SOF ¶ 29. Fontaine himself acknowledged that estimating the year's revenue part-way through the year was "difficult," *id.* ¶ 25, because it necessarily concerned a future event, i.e., the end of 2002.

Fontaine alleges that CCT breached the Agreements by representing to him that CCT would generate $100,000 in net revenue in 2002, and that this would be the baseline for Fontaine's NRS for the years 2002-2007. Complaint ¶ 5. In other words, Fontaine would receive 20 percent of whatever monies CCT generated in excess of $100,000. *Id.* According to Fontaine, the baseline number of $100,000 was to be based on CCT's net revenue for the year 2002. *Id.* There isn't a scintilla of evidence that such representation took place. To the contrary, Fontaine was specifically informed by Kempf in writing on September 27, 2002, more than 30 days before he executed the Agreements, that CCT estimated its 2002 revenue to total $75,000. SOF ¶ 30. In truth, CCT's 2002 revenue exceeded $77,000. *Id.* ¶ 30.

Fontaine's claim for breach of contract on the grounds that CCT allegedly misrepresented that it would generate $100,000 in 2002 fails because neither Agreement includes such a term. SOF ¶ 45. Specifically, neither Agreement provides that CCT's internet revenue from 2002 totaled $100,000, or that the baseline number for Fontaine's NRS was based on CCT's revenue from 2002. *Id.* ¶ 45. Rather, the evidence shows that many revenue projections were entertained by both parties during the negotiations period. *Id.* ¶ 18. These projections did not constitute representations of what CCT's 2002 revenue would total. *Id.* ¶ 18.

In addition, evidence shows that the parties agreed upon $100,000 as the baseline because it was a projection of the annual average real estate revenue CCT expected to independently yield (and exceed) in the ensuing five years, independent of the merger. SOF ¶ 31. Therefore, CCT cannot have breached either Agreement. The evidence leads only to one conclusion: Fontaine made an informed decision, after months of negotiations, with the assistance of counsel, to bind himself to a term he may not have been satisfied with. *See Masingill*, 449 Mass. at 536, 538 (despite employee's persistence that the contract contain specific stock options, the written contract made no mention of stock option vesting, and she knew upon signing the agreement that she was only owed what was promised her in the written contract). He cannot now, through litigation, renegotiate a lower, more favorable baseline number to him that would have given him a higher NRS. This claim should be dismissed.

II. Fontaine Cannot Prevail On His Claims For Rescission and Restitution, As Any Representation By CCT Constituted a "Mere Expectation," Was Related to a Future Event, and Was Contradicted by the Written Agreements (Count II).

In Massachusetts, rescission based on fraud requires (1) a misrepresentation was made as to a matter of material fact; (2) with knowledge of its falsity, or, in the alternative, though not known to be false by the speaker, a statement which is false and which is reasonably susceptible of actual knowledge; (3) for the purpose of inducing another to act upon it; and (4) reasonable reliance on the representation by the plaintiff to his or her detriment. *See Zimmermann v. Kent,* 31 Mass. App. Ct. 72, 77 (1991).

The statements allegedly relied upon by Fontaine must be ones of fact, not of "expectation, estimate, opinion, or judgment." *Rodowicz v. Mass. Mut. Life Ins. Co.*, 192 F.3d 162 (1st Cir. 1999) (internal quotations omitted). "A representation is one of opinion if it expresses only . . . the belief of the maker, *without certainty,* as to the existence of the fact."

Restatement 2d Torts § 538A (1977) (emphasis supplied). Any representation that relates to a future event and is promissory in nature does not give basis for a rescission. *Lolos v. Berlin*, 338 Mass. 10, 14 (1958). Further, neither side can rescind a contract merely because the known and assumed risk turned out to be greater than either or both had expected. *Cook v. Kelley*, 352 Mass. 628, 632 (1967).

For example, in *Rodowicz,* former employees brought an action seeking damages for misrepresentation, claiming that their former employer misled them by failing to reveal that a retirement plan providing enhanced benefits was under consideration, as a result of which, the employees retired early and lost eligibility for substantially increased benefits. 192 F.3d at 162. In response to plaintiffs' questions regarding whether there would be changes in the retirement package, the defendant employer made the following statements: "absolutely not, there will be no golden handshake;" "I really don't think there will be anything;" "I am not aware of anything coming down the road;" and "[A]nything can happen, but we have no definite plans [to adopt any enhanced benefits]." *Id.* at 168. In addition to these specific statements, each of the plaintiffs asserted that they were misled by the CEO's statements, quoted in an issue of *MassMutual News,* to the effect that the Company was in good financial condition and there would be "no change" in the Company's course. *Id.*

Affirming summary judgment for the employer, the Court held that "the statements allegedly made fall within the ordinary rule that false statements of opinion, of conditions to exist in the future, or of matters promissory in nature are not actionable in a claim for misrepresentation." *Id.* at 175 (internal quotations omitted). Moreover, the statements were "cautionary in nature" and "represented nothing more than the opinion or belief of the declarant as to the prospect of future changes in retirement benefits. *Id.* at 176. *See also*

Yerid v. Mason, 341 Mass. 527, 530-31 (1960) (home seller's statements to the effect that buyers "would have no further trouble with water" in cellar were expressions of strong belief, not statements of fact).

Here, as in *Rodowicz*, discussions with Fontaine regarding future revenues, levels of support, and bundling products were clearly estimates or opinions. SOF ¶¶ 24-32. Thus, to the extent that Fontaine's claims are premised upon these statements, his misrepresentation claims should be dismissed as they do not meet the "statement of fact" requirement under Massachusetts law. 192 F.3d at 176.

For all the same reasons set forth above, which Fontaine bases on precisely the same unsupported allegations and vague assertions, the Court should dismiss this claim as well.

A. CCT's Representations Regarding Its Projected Future Earnings Were Mere Expectations and Are Therefore Not Actionable

In Massachusetts, representations about projected future earnings do not provide a basis for rescission as they are not statements of fact. *Rodowicz*, 192 F.3d at 176. According to Fontaine's Complaint, CCT fraudulently represented its projected future revenue for the years 2002 to 2007. SOF ¶ 57. But Fontaine cannot present any evidence, let alone evidence that raises a genuine issue of material fact, that CCT made a single fraudulent statement during contract negotiations.

As described more fully in Section I.C.3., both CCT and Fontaine wanted to verify revenues for each other's companies prior to joining forces, and CCT provided Fontaine with various projections of its earnings for 2002-2007, i.e., its earnings expectations for the duration of the agreements. SOF ¶ 24-32. The P&S cannot be rescinded simply because those expectations did not come into fruition. *See Lolos*, 338 Mass. at 14. Moreover, any reliance by Fontaine on these representations – for the notion that they were somehow promises as

opposed to a mere forecast of earnings – was unreasonable given that he was represented by counsel throughout the negotiations period, and signed written Agreements that constitute the parties' entire agreement. *See Masingill*, 449 Mass. at 542 (plaintiff cannot prevail on a claim of fraud merely because he didn't get all of the terms he wanted in his contract).

B. CCT's Representations Regarding Its Levels of Marketing and Support Are Not Grounds for Rescission Based on Fraud

Fontaine's claim that CCT falsely represented the amount of marketing, support, and resources it would provide, *see* Section I.C.2, is also not grounds for rescission. With respect to Fontaine's claim that CCT fraudulently represented to him that it would provide adequate resources, Fontaine fails to produce any evidence that CCT ever agreed to provide "adequate resources" or that CCT made any representation regarding "resources" prior to entering into the Agreements. SOF ¶ 72. Accordingly, rescission on this basis is inappropriate.

Fontaine's allegation that CCT allegedly promised "strong sales support" does not lend itself to rescission of the Agreements. SOF ¶¶ 72-77. The term "strong sales support" by itself is too vague to support the cause of action. *See Masingill*, 449 Mass. at 544 (a representation that an employee would be "made whole" at a six-month review ruled too vague to support action for misrepresentation). Nor has Fontaine presented any evidence that "offer[s] any definition or further explanation of the term [] sufficiently precise to determine what the representation meant." *Id.*

Likewise, any representation that CCT expected aggressive growth of the online business, *see* Complaint ¶ 9, is nothing more than a vague statement of expectation, which does not support a breach of contract claim. *Compare Hogan v. Riemer*, 33 Mass. App. Ct. 360, 365 (1993) (vague statements of expectation do not constitute fraud).

Finally, Fontaine is simply incorrect in alleging that CCT "did not provide sales support to allow for growth of the online business." Complaint ¶ 16. In fact, CCT's total net revenue increased each year from 2002 to 2006. SOF ¶ 46, 47. For the aforementioned reasons, CCT is entitled to summary judgment on this claim also.

C. The Record is Devoid of Any Evidence Showing That CCT Ever Promised Fontaine It Would Not Combine Its Print and Online Real Estate Advertising Space for Sale and Allocate the Revenue Between Print and Online Departments

Nowhere in the record is there any evidence of a statement by CCT prior to the execution of the Agreements (or anytime thereafter) that it would never offer its customers a combination of advertising space in its print and online editions. *See* Section I.C.1. Silence does not constitute a material misrepresentation. *See Zimmermann*, 31 Mass. App. Ct. at 77 (a claim for fraudulent misrepresentation requires a false representation of a material fact). Therefore, because CCT had not yet developed the marketing strategy of offering its customers a combination of advertising space in its print and online editions, rescission is inappropriate. *Id.*

Moreover, even if CCT made any statement that it would not allow print to take money away from online cannot be construed to mean that CCT would refrain from bundling its print and online advertising and allocating the revenue. *See Rodowicz*, 192 F.3d 162 (statement by CEO about company's good financial shape and CEO's intention not to make any fundamental changes could not be construed as affirmative misrepresentations that changes would not be made). 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. *See Forbes v. Thorpe*, 209 Mass. 570, 578 (1911) (rescission appropriate only if plaintiff "acted reasonably").

In short, this is not a case where the parties had "not agreed with respect to a term which is essential to a determination of their rights and duties." *President & Fellows of Harvard College v. PECO Energy Co.*, 57 Mass. App. Ct. 888, 896 (2003). Rather, if Fontaine, a businessman represented by counsel throughout the negotiations, wanted to ensure that CCT generated a certain amount of revenue, or that it would provide him with a level of support, or that it wouldn't combine its print and online advertising space to sell in a packaged deal, he should have insisted upon such provisions in the Agreements. *See Bromberg v. Fleet Nat'l Bank*, 2004 WL 5049669 (Mass. Super. Feb. 11, 2004) (Trial Order) (refusing to rescind an agreement where a business plaintiff, represented by counsel, could have insisted that explicit language regarding a security interest be inserted into the agreement; by failing to do so, he risked that the security interest might be insufficient to protect his own interests). CCT is therefore entitled to summary judgment on this count.

III. Fontaine Cannot Demonstrate Fraud in the Inducement, As Any Statement By CCT Concerning Its Ability to Market, Support, and Generate Internet Business Was Not a Statement of Material Fact (Count IV)

Fontaine also claims that CCT induced him by falsely representing its ability to market, support, and generate Internet business. SOF ¶¶ 72-77. For the same reasons Fontaine cannot prevail on his claim for rescission based on fraud, Fontaine's claim for fraud in the inducement must fail. *See* Section II.B; *Masingill,* 449 Mass. at 542-43 (Where an employment contract was fully negotiated and voluntarily signed, the plaintiff may not raise as fraudulent any prior oral assertion made during negotiations that is inconsistent with the contract provision that specifically addressed the particular point at issue). Accordingly, CCT is entitled to summary judgment on this count.

IV. Fontaine Has Produced No Evidence Of Any Intentional Misrepresentations Allegedly Occurring After He Entered Into the Agreements (Count V)

For the same reasons Fontaine cannot survive summary judgment on his rescission and restitution claim and fraud in the inducement claim, he cannot demonstrate a genuine issue of material fact with respect to whether CCT made any intentional misrepresentations occurring after the parties consummated the Agreements, as alleged in his Complaint. *See* Section II.

V. Fontaine Cannot Prevail On His Claim of Detrimental Reliance, As Any Reliance On Oral Representations Is Unreasonable in these Circumstances (Count III)

To prevail on his claim for detrimental reliance, Fontaine must establish that CCT made a representation to him with the intention of inducing a course or reliance; that Fontaine reasonably relied on the representation, and that Fontaine suffered a detriment as a result of the reliance. *Loranger Const. Corp. v. E.F. Hauserman Co.*, 376 Mass. 757, 760-61 (1978). As demonstrated above, *see* Sections I-II, Fontaine is unable to establish these elements, and therefore summary judgment in favor of CCT is appropriate on this count.

VI. Fontaine's Chapter 93A Claim Fails Because the Statute Does Not Apply to Employment Relationships and CCT Was Not "Unfair" or "Deceptive" in Negotiating and Entering Into the P&S with Fontaine (Count VI)

Although whether a particular set of acts, in their factual setting, is unfair or deceptive is a question of fact, the boundaries of what may qualify for consideration as a Chapter 93A violation is a question of law. *Chervin v. Travelers Ins. Co.*, 448 Mass. 95, 112 (2006). To succeed on a claim under Chapter 93A, Fontaine must show that CCT's action "fits within a common law conception of unfairness or was 'immoral, unethical, oppressive, or unscrupulous.'" *Levings v. Forbes & Wallace, Inc.*, 8 Mass. App. Ct. 498, 504 (1979). Ordinary contract disputes generally do not rise to c. 93A liability. *Kobayashi v. Orion Ventures, Inc.*, 42 Mass. App. Ct. 492, 505 (1997).

A. Chapter 93A Does Not Apply to Employment Relationships

It is axiomatic that disputes between employers and employees fall outside the scope of section 11. *See Manning v. Zuckerman*, 388 Mass. 8, 13 (1983) ("An employee and an employer are not engaged in trade or commerce with each other.") Consequently, Chapter 93A only applies to CCT's purchase of Fontaine's Website Business.

B. CCT Did Not Engage in Any Unfair or Deceptive Act In Purchasing Fontaine's Website Business or Performing Under the P&S

In determining whether conduct is "unfair" under the statute, courts focus on the nature of the challenged conduct and on the purpose and effect of that conduct. *Mass. Employers Ins. Exh. v. Propac-Mass, Inc.*, 420 Mass. 39, 43-44 (1995). A practice can be "deceptive" if it is reasonably found to have caused a person to act differently from the way he otherwise would have acted. *Fraser Eng'g Co. v. Desmond*, 26 Mass. App. Ct. 99, 104 (1988).

Courts have interpreted section 2(a) of the statute to require a greater burden for actions filed by a business consumer, such as Fontaine. *See Madan v. Royal Indem. Co.*, 26 Mass. App. Ct. 756, 763 n.7 (1989). "One can easily imagine cases where an act might be unfair if practiced upon a commercial innocent yet would be common practice between two people engaged in business." *Spence v. Boston Edison Co.*, 390 Mass. 604, 616 (1983). Fontaine, as a business plaintiff, must therefore show greater "rascality," as required under section 11. He cannot do so.

Fontaine has produced no evidence whatsoever that points to any action taken by CCT which would constitute the level of "rascality" as required under section 11. This was an arm's length transaction between two businesses, both represented by counsel throughout the negotiations, which resulted in Fontaine freely and voluntarily executing agreements that he

now seeks to re-write because he was unhappy with how things turned out. Chapter 93A is not applicable in these circumstances.

CONCLUSION

For the foregoing reasons, this Court should grant Defendant Cape Cod Times' Motion for Summary Judgment on all six counts.

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Dated: February 1, 2011

CERTIFICATE OF SERVICE

I, Sarah H. Manning, of Nutter, McClennen & Fish, LLP, hereby certify that I have this 1st day of February, 2011, forwarded a copy of the within, by email and first class mail to: Kenneth M. Levine, Esq., Kenneth Levine & Associates, 370 Washington Street, Brookline, MA 02445.

Sarah H. Manning (BBO #559713)

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