

Commonwealth of Massachusetts

Supreme Judicial Court

ROBERT FONTAINE

V

CAPE COD TIMES

On Appeal From A Judgment Of The
Superior Court Of Barnstable County

BACV2008-00630

Massachusetts Appeals Court 2012-P-1085

Application for Further Appellate Review
By Plaintiff/Appellant

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May It Please The Court:

Robert Fontaine respectfully requests leave of the Court to obtain Further Appellate Review.

In The Interest Of Justice, Fontaine seeks review of an Appeals Court of Massachusetts Rule 1:28 Opinion dated 12/23/2013, in which the Appeals Court affirmed Barnstable Superior Court's decision in favor of Defendant / Appellee / CCTimes on 05/02/12.

Fontaine on 01/02/14 Filed Petition For Rehearing with the Appeals Court.

Pro se Appellant appreciates the lengths the court goes to in accommodating self represented litigants. It surely must also know that there can be no substitute for competent legal representation. Fontaine does not need the help of counsel in order to tell the truth. He will try his best.

CCTimes has concealed their fraudulent misrepresentations against Fontaine by committing fraud upon the court(s).

On October 31, 2002 CCTimes purchased Fontaine's growing internet advertising business under a Revenue Sharing plan and an Employment Agreement. Fontaine complains that this sale was the result of a complex scheme by CCTimes to defraud Fontaine out of his valuable business by disguising their intentions, hiding good numbers and replacing them with bad, by altering the P&S, among other unfair actions.

"Bundles" are the basis for CCTime's scheme! Advertisements That are placed in a Real Estate handout and the ad is also placed on the real estate website, for a single price.

Because CCTimes bundle plan allocated 90% of the revenues in favor of CCTimes Print department, at the expense of their Internet department, where Fontaine's NRS would be counted, CCTIMES WOULD HAVE BEEN OBLIGATED TO INFORM FONTAINE OF THESE SPECIFIC PLAN, WHEN HE INQUIRED. They deny it still.

So CCTimes HAS to convince the court this plan came AFTER.

Both Lower Courts have been lulled into the factually impossible conclusion that "bundles" were something that came about in 2003, AFTER the signing of the P&S, meaning therefore, that Fontaine's claims never get off the ground because CCTimes could not have possibly withheld a plan from Fontaine that did not exist at the time. The predominate question is 2002 or 2003 - Before or After.

Points to which further appellate review is sought:

CCTimes KNOWS BEFORE THE SALE that Internet will get \$53,000 total from Bundles for the entire deal (A1). But before the sale CCTimes had given Fontaine a projection for of up to \$4,310,000(A7). CCTimes set in motion a plan that allowed them to control everything, and it was going to look like (a1) and \$1,300,000+- total over the deal, NOT \$4,310,000. It should be noted that the record shows CCTimes argue that

They told Fontaine they expected to "average \$100,000 a

year" over the same 5 year period without Fontaine.
\$500,000, and they provide Fontaine with a projection of
\$4,310,000 for the same exact period of time.

Cape Cod Times Has Stated Unequivocally in multiple
affidavits, over a dozen distinct times, that Bundles were
not "conceived" (a10) "hatched" (a13) "offered" (a14) until
2003 - AFTER the sale. They prevailed on Summary Judgment
claiming personal knowledge of it. These are the folks with
the corporate records at their disposal. CCTimes created
(a1) to analyze how their revenue would look if they
acquired Fontaine's dominant business, 100+ leading
Realtors, all the major franchises, 150+ advertisers,
valuable domain names with 1,000,000 yearly visitors, #1
Google & Yahoo search positions. Developed over years.

The Barnstable Court relied **specifically** on CCTime's
affidavits in it's decision. Both Courts Agree Bundles came
AFTER. As CCTimes prevailed in Summary Judgment conveying
to the court, **somehow**, personal knowledge that
"substantiated evidence" proves that bundles had not even
been conceived until AFTER the sale, in 2003. Having
already conceded in Response #52(discussed below) make
obvious, bundles were conceived and determined with
specificity, in 2002. BEFORE.

CCTimes would for the duration of the 5 year deal attribute
90%+- of the revenues from this bundle to their Print
department, away from Fontaine's Revenue Share deal. The
REST of the company working on this bundle. **Nobody** would
have sold under those terms had they been made aware of
this plan. Fontaine's due diligence was simply no match

against the wealth and deceit of his opponent.

CCTimes is on record saying *"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"*(A13).

The key factor to remember in this matter is "Product Bundling" - because 70 days after the P&S signed and Fontaine is Employed by CCTimes, they SUPPOSEDLY introduce a new concept 'Bundles', A print publication where the Realtors Listing would also go on the CCTimes Real Estate website, which was the dominant CapeCodRealEstate.com after they acquired it from Fontaine. He had just spent a year negotiating terms and attempting due diligence, so this was an unwelcome surprise.

Statement Of Why Further Appellate Review is Appropriate:

BOTH Courts ruled CCTimes came up with Bundles AFTER THE SALE. Yet CCTimes itself admits that is false, and their official corporate documents show that cannot be true.

Appeals Court on Dec 23/2013 Ruled *"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."*

Barnstable Court Rule 05/02/2102: *"THUS, CCT COULD NOT HAVE MISREPRESENTED TO PLAINTIFF AN ADVERTISING PROGRAM THAT DID NOT EXISTS DURING THE 2002 NEGOTIATIONS"*.

But CCTimes has Admitted they had conceived of & Sold Bundles BEFORE, in 2002! CCTimes, when confronted with their own document, Appellant's (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, ..)* Answer **"CCT does not dispute Plaintiff's Response 52".**

CCTimes ALSO vehemently DENIED they conceived of Bundles until 2003! Attempting to cover up false statements CCTimes Brief tells the court "bundles" are not mentioned in (a1):

"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 denying that prior admission?**

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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 - the very document THEY used in purchasing Fontaine's business. Any inferences caused by the ambiguity in the Agreement as to bundles should be held against them. To say the least.

Judge Nickerson Stated:

*"First, nothing in the p&s prohibited from "bundling" products specifically, or changing its advertising strategy more broadly". **But** CCTimes had surreptitiously added the term "but not limited to" into the P&S, which allowed them to argue that 90%/10% is perfectly acceptable.*

*"Second, the record does not support Plaintiff's allegation that CCT executives had discussed or implemented bundled advertising until 2002. To the contrary, the record reflects that Robert Kempf did not propose the concept until January 2003:..". *Court must have meant "until 2003", not 2002.*

Had the court relied on truthful affidavits he may not have reached that same conclusion.

2) 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, **BUT** also that they **DIDN'T** even conceive of Bundles until 2003? Mass Rule 56(g)?

Once the Court sees "A1", and if it becomes satisfied that Bundles **HAD To Be CONCEIVED PRIOR TO** 2003 - no matter how many times CCTimes swears otherwise (you cannot plan to receive a full year of Bundle revenue in 2002, from a plan you conceived of in 2003)

CCTimes Appears to Have a Form "Corporate Memory", because several executives and two large law firms have their signatures on the following statements!

"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).

"In January, 2003, AFTER the contract had been executed, CCT developed a marketing concept which was a combination real estate advertising product". (A10).

"..in early 2003, CCT introduced the concept of offering a combination real estate advertising product"(A11).

* "The record evidence involving the package pricing for the real estate book Cape at Home and Internet advertising for real estate was part of an overall plan set out in a memo dated Jan 9, 2003" (A12).

* "Therefore, because ccT had not yet developed the marketing strategy of offering its customers a combination of advertising space in its print online editions, rescission is inappropriate."(A13).

* "In early 2003, as a way to drive more internet real estate revenue by leveraging existing print customer, CCT began offering print and internet advertising products with a monthly print product, Cape at Home, and its real estate internet site" A14).

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) The full exchange is in Fontaine's Appellate brief.

It is clear from ANY one several documents and statements that **this Bundle concept 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).

The Appeals Court Decision, blinded by false assertions of CCTimes, misconstrues the equation here: (FN3) "The

plaintiff's focus on when CCTimes conceived of the bundling idea and his insistence that CCTimes knew of and failed to tell him of its plan to bundle services is misplaced. In a July 18, 2002, letter from the plaintiff to CCTimes, he specifically questions how commissions on customers opting for both online and print advertising would be credited, indicating that if CCTimes "sells them "print" and "gives" them internet, I would never have much chance to earn a commission or count that money towards the sale price, which would in turn defeat my ability to make money from helping you build a rental portal. . . . I will need some clarification on this." Thus relatively early in negotiations, the plaintiff was aware that bundle sales were a possibility."

BUT THAT MISSES THE POINT, Respectfully, This was Fontaine trying to rightly perform his due diligence! Unless CCTimes would suggest they honestly responded to Fontaine and Disclosed this 90%/10% plan which A1 shows us was already

in place? But They Cant! Because they have sworn otherwise.

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".*

YET (A1) SHOWS 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).

The Barnstable Court: *"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". Meyer President of CCTimes.*

"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.

KEY EVIDENCE OF INTENTIONAL MISREPRESENTATION (A17) Jan 9
January 9, 2003 letter that Barnstable Court specifically relies on as when Bundles were hatched (a17) is a FARCE, part of the SCHEME.

PLEASE CONSDIER: CCTimes had **already** determined when drafting that letter 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.

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. RE Merger Analysis (a1) informs us that CCT already had planned what the RE Estate 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 30%/40% share is meaningless? So they could mark it "Confidential", CC it to Fontaine, To show him Bundles had just been conceived.

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.

3) The Appeals 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 NOT argued they couldn't Discount. **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!

4) The Appeals Court Ruled that *"In addition, the plaintiff concedes that no provision prohibits CCTimes from bundling print and Internet advertising."* **The following is THE most important email in this case!** October 16 (a3/a4) EXACTLY two weeks prior to the October 31 closing, **Fontaine writes 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 the term 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.

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. As if Fontaine would have allowed that term back in without considerable discussion, and darn good reason!

Fontaine tried 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. **Only to place it back in the P&S and suggest to This Court it was later agreed to.**

6) The Appeals Court Ruled *"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..."*. **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 CCT knew his reliance was both reasonable AND false! Fontaine's brief (p26) "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 to their administrative control. 3 days later, Aug 13, they send Fontaine a Draft P&S with the \$100k deductible and an August ___, 2002 closing date.

7) The Appeals 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 complains here 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.

What good did it do Fontaine to confirm CCT's 2002 figures in 03, when CCT said Bundles didn't exist in 02, when they clearly did? Which year could their representations be trusted? THEY DID NOT PROPERLY ACCOUNT FOR REVENUES.

The Barnstable Court Ruled (p8) the 90% 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 The Appeals Court that 90% went to print and only 10% to Internet **DUE TO IT'S VALUE 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**". **The Appeals 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.

"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).

Your Honors, Respectfully, if it is shown that any entity was less than honest to this institution, there should be significant and serious sanctions. These people cannot begin to fathom the pain they have cause my family, as they manipulate their way through the system. They have more lawyers than I have socks.

If we're going to treat corporations like people, shouldn't we make sure that corporations are required to do the same?

With Respect, Thank you,

Robert Fontaine, Appellant. Jan 09, 2014