

SUPERIOR COURT  
STAMFORD-NORWALK  
JUDICIAL DISTRICT

2018 MAR 26 - 3:09

FST CV15 5015213S

PURSUIT PARTNERS, LLC

VS.

REED SMITH, LLP

CONNECTICUT SUPERIOR COURT  
JUDICIAL DISTRICT OF STAMFORD/  
NORWALK AT STAMFORD

March 26, 2018

**MEMORANDUM OF DECISION re: MOTION FOR SUMMARY JUDGMENT**

**(#159.00)<sup>1</sup>**

Nature the proceeding

This is but one of a number of cases brought by and against the Pursuit Partner entities (and their principals), in state courts in Connecticut and New York, and in arbitration. The Pursuit Partner entities have been described in an aggregate sense, including by their own principals, as hedge funds. (Hereafter, the court will refer to the Pursuit Partner entities collectively as Pursuit Partners or the plaintiffs.)

Virtually all of the pending litigation is directly or indirectly related to the resolution of litigation having origins in the financial market meltdown in 2007-08. Pursuit Partners sued UBS and Moody's, and the disposition of funds obtained in settlement of that litigation provides the primary focus of litigation. Secondary litigation, including this case, relate to other aspects of the relationships among the various parties, including the claimed breach of a confidential settlement agreement reached between Pursuit Partners and Alpha Beta Capital Partners L.P. (Alpha Beta is one of two investors/investor groups making claims for a share of those proceeds.) The defendant in this case, Reed Smith, is a law firm that represented

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<sup>1</sup> Although the plaintiffs filed their own motion for summary judgment (relying on the dual-purpose brief submitted in opposition to the defendant's motion), at argument, counsel indicated that he would be withdrawing the cross-motion. Although there does not appear to have been any formal withdrawal of that cross-motion, the recitation to that effect by counsel (and the related absence of any argument suggesting that the motion should be granted), is being treated by the court as an abandonment of the motion.

159.02

Alpha Beta in much of the litigation involving Pursuit Partners in New York, and in particular was involved in the negotiation and execution of the confidential settlement agreement. Indeed, a key point, and a critical basis for this lawsuit, is that Reed Smith is identified as a party to the confidential settlement agreement at least with respect to confidentiality, and signed the agreement for that purpose.

Three of the Pursuit Partners entities have sued Reed Smith and one of its attorneys; the third defendant is identified in the complaint as a principal of Alpha Beta. The plaintiffs contend that the defendants have violated the confidential settlement agreement's provisions relating to confidentiality by cooperating with the Claridge/Schneider group, the other investor group claiming entitlement to a share of the UBS/Moody's settlement proceeds. During the course of these proceedings, the case was withdrawn as to the two individuals, such that the law firm is the only remaining defendant.

As noted earlier, there has been extensive litigation in at least three forums, i.e., state courts in Connecticut and New York as well as arbitration proceedings (including at least one unsuccessful attempt to compel arbitration via proceeding in Connecticut state court). The defendant contends that the outcome of other/prior litigation, and especially the Alpha Beta litigation in this courthouse,<sup>2</sup> is determinative of the outcome of this case, primarily based on theories of res judicata and collateral estoppel. The defendant also contends that there is a fatal defect with respect to the claim for damages, which the defendant claims is an

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<sup>2</sup> Except as otherwise indicated, all references to the Alpha Beta litigation (and the decision in that litigation) are references to the final decision of the court dated October 14, 2016 – *Alpha Beta Capital Partners, LP v. Pursuit Investment Management, LLC*, J.D. Stamford/Norwalk at Stamford, No. X08FSTCV155014970S, 2016 WL 6884147 (Conn. Super. Ct. Oct. 14, 2016), which decision also can be found on the Judicial Branch website at <http://civilinquiry.jud.ct.gov/DocumentInquiry/DocumentInquiry.aspx?DocumentNo=11291638>

additional basis for judgment in its favor. The plaintiffs, of course, contend that none of the arguments advanced by the defendant entitles the defendant to summary judgment.

### Discussion

#### I. Preliminary Issues

Before addressing in detail the merits of the defendant's claim, the court feels compelled to identify issues raised by the parties that can be addressed in relatively summary fashion, due to inherent or patent problems/inadequacies, or otherwise should be addressed at the outset.

##### A. The Defendant's submission

The defendant repeatedly refers to the proceedings in a related matter, the Alpha Beta litigation, which is not improper in and of itself – but further refers to proceedings in connection with a prejudgment remedy in that matter, and particularly findings/conclusions of the court with respect to the application for a PJR. It is well-established, however, that the court cannot give any weight to any determination made in connection with a PJR hearing or other similar preliminary proceeding; see, *Gateway, Kelso & Co. v. West Hartford No. 1, LLC*, 126 Conn.App. 578 (2011). There are a number of practical reasons for such an approach, including the fact that the burden of proof is probable cause, the record is not a full trial but rather an abbreviated hearing, and typically there has been little or no opportunity for discovery.<sup>3</sup> In the Alpha Beta case itself, the PJR determinations would have been

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<sup>3</sup> Precisely because the burden is so low, a defendant might not feel compelled to put on much or any of a defense at that preliminary stage; if there were to be collateral consequences such as being urged here, then every PJR hearing (and every hearing relating to a temporary injunction) would become a full-blown trial.

entitled to no weight at the time of trial; they cannot be given any weight in the context of a separate proceeding. Arguably trumping all of the foregoing reasons, the decision on the merits in Alpha Beta necessarily supersedes anything that may have been decided in connection with the interlocutory decision relating to an earlier PJR application.<sup>4</sup>

The defendant has identified issues raised in a special defense as part of its analysis of res judicata, but defenses are irrelevant to a determination of applicability of res judicata. Res judicata is predicated on affirmative claims made or which could have been made, not defenses. That is especially so in Connecticut, as Connecticut is not a compulsory counterclaim jurisdiction, such that assertion of a defense does not identify an affirmative claim that potentially should have been pursued, or otherwise require or in any way affect a party's right to pursue (or not pursue) an affirmative claim, either as a counterclaim or as a separate claim – that is a matter of that party's choice.

In an effort to establish that the plaintiffs have not alleged legally-recoverable damages, the defendant has made an essentially unqualified statement relating to damages recoverable in a breach of contract action under New York law: "attorneys' fees cannot form the basis for a damages claim in a breach-of-contract action." The cited authorities appear to stand for the unremarkable proposition that a party cannot assert a claim for attorney's fees incurred in connection with pursuing the breach of contract action itself. In effect, it is nothing more than a contractual-focused assertion of the so-called "American rule" whereby each litigant bears litigation expenses, absent a statute or contract (or other recognized basis) shifting that liability.

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<sup>4</sup> The parties might stipulate that evidence or findings could be utilized in a later stage or later proceeding, but there is no claim of any such agreement present here.

Even before reading the plaintiffs' response on this issue, the court was concerned about the mismatch between the issue and the claimed authorities – the issue at hand is not whether the plaintiffs can recover attorney's fees in this case for litigation costs in this case, but rather whether they can assert attorney's fees incurred due to litigation expenses incurred in other cases as a claimed result of the breach at issue. Are the defendants suggesting that under New York law, if there were a confidentiality agreement pertaining to trade secrets, the cost of litigation seeking to enjoin third parties from using improperly revealed information would not be recoverable as damages in an action against the improperly-disclosing party? If an insurer or indemnitor were to decline to provide a defense or reimbursement for defense costs in an underlying matter, would New York law categorically deny any recovery for attorney's fees incurred in the underlying dispute? In such situations, litigation costs in the underlying litigation, not the fees incurred in the direct breach-of-contract claim, would be presumptively available, and might well be a substantial if not dominant element of damages; if New York law truly does not allow such claims, then appropriate and specific authority needs to be identified, not generalized references to authorities articulating the American rule. The defendant does not appear to have cited any authority relating to that narrower and more accurately particularized framing of the issue, i.e., unavailability of a claim for damages based on litigation expenses in connection with earlier/antecedent litigation.

Somewhat related, the discussion of legal sufficiency of allegations appears to rely on this mis-focused claim. Further, it is far from clear that if the court had been presented with the issue by way of motion to strike, and if the court had agreed with the defendant, the plaintiffs would have been unable to assert any other possible claim for damages. See, e.g., *Larobina v. McDonald*, 274 Conn. 394, 404-05 (2005). The court is limited to issues actually raised by the moving party, *Greene v. Keating*, 156

Conn. App. 854 (2015), such that the court cannot venture into areas not explicitly raised by the moving party.

The defendant also contends that a dismissal of an action in New York – explicitly determined by an appellate panel to implicate insufficient allegations of compensable injuries – is a determination entitled to collateral estoppel or res judicata treatment. The defendant does not cite any authority that such a disposition constitutes a determination on the merits, sufficient to support either doctrine.<sup>5</sup>

In Connecticut, our Supreme Court recently had occasion to address the distinction between a party who prevails, and prevailing on the merits. Again, in Connecticut, a plaintiff may withdraw a complaint/action prior to commencement of trial, without permission or involvement of the court; other jurisdictions require a variation on a motion to dismiss (which may or may not be explicitly with or without prejudice). In *Connecticut Housing Finance Authority v. Alfaro*, 328 Conn. 134, 143, 176 A.3d 1146, 1152 (2018), the court reversed an Appellate Court decision, deeming a voluntary withdrawal of an action to be, at least presumptively, a situation in which the defendant was the prevailing party, even if not necessarily “on the merits.”

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<sup>5</sup> At one point, the defendant frames the issue in a manner that suggests that the court ruled on the merits of claims for damages (“dismissed Plaintiffs’ claim against Reed Smith and Alpha Beta for breach of the same confidentiality provision because Plaintiffs did not suffer any damages.”) Later, the defendant correctly notes that the decision was framed in terms of allegations of damages, not whether the parties actually suffered damages. As set forth in the decision: “The motion court erred in finding that all of the plaintiffs had asserted a claim for breach of the settlement agreement against defendants Alpha Beta and Reed Smith, since in the complaint it is sufficiently alleged that only plaintiff Pursuit Capital Management LLC suffered damages.” *Pursuit Investment Management, LLC v. Alpha Beta Capital Partners, L.P.*, 134 A.D.3d 502, 503, 20 N.Y.S.3d 529 (N.Y. App. Div. 2015). Pursuit Capital Management LLC, the only party with sufficiently-alleged damages, is not a party to this action; the parties in this case who were also in the New York proceeding, by process of elimination, had not sufficiently alleged damages.

The burden is on the defendant to establish that the dismissal upon which it relies constituted a sufficient determination on the merits so as to permit the doctrines favoring finality of judgments to be applicable to such a dismissal. Facially, the dismissal was based on the inadequacy of pleadings, and specifically allegations of actual/actionable harm. The very nature of a dismissal based on allegations suggests a mismatch with the purpose behind res judicata and collateral estoppel – parties should not be able to relitigate issues already litigated on the merits. The plaintiffs here are not litigating sufficiency of allegations, and the existence of proof was not before the New York court.<sup>6</sup>

Further, even if the New York judgment were to be deemed sufficiently conclusive for purposes of res judicata and/or collateral estoppel, that would not be determinative of this dispute. The New York case appears to have been based on events in 2011; the current litigation involves events extending years beyond that date. Therefore, even if there were no damages arising from the conduct described in the New York proceeding, that could not be determinative of whether conduct subsequent to the conduct described in the New York complaint might separately be actionable (with legally cognizable injuries). This is not a situation involving a singular act of breach, but rather a claim that extends over a period of time, such that resolution of the status of an earlier claimed breach does not necessarily resolve whether subsequent conduct was an actionable breach. See, e.g., *Pascarella v. Silver*, J.D. Stamford/Norwalk at Stamford, No. FSTCV166029529S, 2017 WL 2837641 (Conn. Super. Ct. June 5, 2017).<sup>7</sup> The defendant has not cited

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<sup>6</sup> At times, the plaintiffs have suggested that the discontinuance was without prejudice – the court need not address that affirmative contention, in the absence of authority that the dismissal on the pleadings does or might constitute a disposition on the merits.

<sup>7</sup> An appeal from this decision/order was dismissed by the Appellate Court for lack of a final judgment, and the Supreme Court denied an application for certification, *Pascarella v. Silver*, 327 Conn. 931, 171 A.3d 453 (2017).

authority that in a situation involving claims of ongoing violations, an earlier determination as to breach or non-breach is conclusive as to subsequent claims of breach.

#### B. The Plaintiffs' submission

Turning to the plaintiffs' response, there are problems/issues that warrant attention or recognition before getting into the actual merits.

In a number of instances (e.g., pp. 9-10 of their opposition brief), the plaintiffs appear to argue that Judge Genuario, in deciding the merits of the dispute between the plaintiffs and the defendant's client, Alpha Beta, mis-applied New York law (or otherwise may have been in error). Such arguments fly in the face of the very *raison d'être* for collateral estoppel and res judicata – finality of earlier determinations. If the judgment and/or necessary determinations qualify for treatment under either doctrine, then the court must accept those determinations on a facial basis. This court is not an appellate court that can review another judge's final decisions for error, and the purpose, again, for both doctrines is the avoidance of relitigation of an issue or claim that already has been litigated. If the doctrines are inapplicable, then the parties would be free to ask the court to follow or adopt (or not follow and not adopt) the approach taken in earlier and related proceedings, as part of an independent determination by this court. However, to the extent that the motion relies principally on the doctrines of res judicata and collateral estoppel, the court must disregard any suggestion that in reaching his decision, Judge Genuario made a factual or legal error.

Even more problematic is the "affidavit" of Mr. Canelas (#186.00). The affidavit of Mr. Canelas reads more like a supplemental brief than an affidavit. It

does contain some factual recitations, and there is no reason to assume that the affiant was not competent to make the factual assertions that seem to be based on personal knowledge. However, most of the recitations seem to have been taken from a brief or draft brief, minimally modified to appear to be assertions by a speaker (the affiant), going so far as to even have section headings such as "The issues before Judge Genuario and the New York Courts are not the issues before this Court" (followed, of course, by a series of paragraphs explaining why the affiant believes there to be differences). Indeed, the first paragraph in that section of the affidavit (¶64) starts with a recitation that "Reed Smith is an international law firm that for purposes of herein, was not acting in a representative capacity as is typical, but essentially as a party, acting for profit and gain.... After the signing of the CSA,<sup>8</sup> everything Reed Smith did with respect to breaching the CSA they did in their own name and at their own risk."<sup>9</sup> (In another area of the affidavit, there is a heading that is in all capital letters, in bold-face and underlined, analogous to a major division in a brief, stating "there can be no dispute that Reed Smith violated the CSA.")<sup>10</sup>

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<sup>8</sup> The "CSA" is the acronym for the confidential settlement agreement.

<sup>9</sup> Indeed, at least some of the language is not just suggestive of a brief; a number of passages are identical. For example, ¶¶ 64-66 in the affidavit filed on August 25, 2017 appear to be identical to the "preliminary statement" section of the brief filed that same day, even to the extent of typographical oddities, e.g., the lack of a space between the second hyphen and the phrase "not Reed Smith" as contained in ¶ 65, suggesting a pure cut-and-paste process. (Further confirmation can be found in ¶ 66 of the Canelas affidavit, which ends with a citation "See Canelas Aff.") Other passages were lightly edited to reflect the difference between the affidavit as a personal recitation by Mr. Canelas, and a reference to the affidavit as a claimed source document, e.g. "Attached hereto as Ex. [B, C, F in separate paragraphs]" in ¶ 79 of the affidavit became (or started as) "Attached to the Canelas Aff. as Ex. [B, C, F in separate paragraphs]" in the brief, with all remaining language in the paragraphs seemingly the same.

<sup>10</sup> There is even a conclusion – complete with a heading in all capital letters and in bold-face and underlined – reading: "Based on the foregoing and all of the prior proceedings had herein, Pursuit respectfully requests that the Court enter summary judgment in its favor on liability, and at the least, deny Reed Smith's motion for summary judgment. Pursuit further

The court does not wish to beat a dead horse, but the first sentence of ¶91 epitomizes the extreme departure from anything approaching proper content in an affidavit: "In my view, Reed Smith's reliance on the Appellate Division Decision as barring the instant action on res judicata grounds is wholly without merit." On a number of occasions, the court has been asked to strike an affidavit based on the substantial improper content contained in the document, and the court routinely takes the position that it is capable of filtering competent evidence from improper statements (and that conversely, it is rare for an affidavit to contain no improper statements). Here, however, that position has been put to the test – most of the 23 pages of the affidavit are more in the nature of arguments than competent factual statements, making it especially difficult to discern evidence that the court should consider (can properly consider).

In their opposition memorandum (as well as in the affidavit of Mr. Canelas – see footnote, immediately above), references are made to the need for further discovery in order to respond fully to the defendant's motion for summary judgment. The court generally is solicitous of an expressed need for additional time to respond to summary judgment, and often does not require the formality of an affidavit as provided in (required by) *Practice Book* § 17-47. In this case, however, the plaintiffs have had more than adequate time, and a brief recitation of the relevant history demonstrates that fact.

The motion for summary judgment was filed on May 8, 2017 (#159.00). Approximately 4 weeks later, the plaintiffs filed a motion and affidavit pursuant to *Practice Book* § 17-47, seeking additional time to respond to the motion for summary judgment, based on a need for further discovery. On July 31, the parties

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requests that the court grant Pursuit's Motion for Compliance, so discovery can proceed where Reed Smith will produce the requested documents and appear for its deposition."

filed an agreement relating to new deadlines for the presentation of summary judgment, with September 5 as the scheduled date for argument (#179.00). On August 25, the plaintiffs filed their own motion for summary judgment, with an accompanying memorandum that was intended to both oppose the defendant's motion as well as support the affirmative claims of the plaintiffs. On October 6, there was a further request for a continuance relating to argument of the motions for summary judgment (#192.00). Argument eventually was heard on December 4, 2017.

The foregoing history reflects some seven months between the time the motion was filed by the defendant, and argument, presumptively more than adequate time to prepare. Further, the foregoing history recites at least two agreements concerning scheduling of argument. More subtly, the fact that the plaintiffs filed their own cross-motion for summary judgment necessarily implies that they had all of the information they needed (or thought they needed) to demonstrate the existence of a material issue of fact relating to the defendant's position, if not that the defendant was wrong in an affirmative sense. In order to prevail on the cross-motion they filed, the plaintiffs would be required to establish, essentially conclusively (no material issue of fact), that they were entitled to judgment, which necessarily would require conclusively refuting any contrary claim by the defendant (again, to a standard of no material issue of fact). See, e.g., *Williams v. Housing Authority of the City of Bridgeport*, 327 Conn. 338, 174 A.3d 137 (2017) (to obtain summary judgment based on defense of governmental immunity, defendants needed to negate applicability of potentially-applicable exception to immunity); see, also, *TD Bank, N.A. v. J and M Holdings, LLC*, 143 Conn. App. 340, 351 (2013) (reversing entry of summary judgment because trial court had not considered fifth special defense (in turn, because Appellate Court had concluded that that defense

erroneously had been stricken)). If they thought they had enough information to establish, essentially conclusively, that they were entitled to judgment, necessarily they must have thought they had more than ample information to negate the claims being asserted by the defendant – enough to identify a material issue of fact.

With this procedural/historical background, the court cannot allow “we need more time for discovery” to be the equivalent of an always-available “get out of jail free” card, delaying or preventing resolution of summary judgment on the merits.<sup>11</sup>

## II. Res Judicata

The defendant contends that the outcome of the Alpha Beta litigation is conclusive of the outcome of this case, based on the doctrine of res judicata. The court cannot conclude that of the defendant has established potential of applicability of res judicata in this situation. Clearly, in the Alpha Beta litigation, there was no claim directly asserted by or against the defendant, as it was not a party. The counterclaim may have identified the defendant as having acted in concert with Alpha Beta, but again, to the extent that the focus in res judicata is on claims that were or could have been asserted, no claim was could have been asserted by or against the defendant. Properly, then, the focus turns to privity, as privity with a party might circumvent this facially fatal problem with application of res judicata.

“Privity is a difficult concept to define precisely. ... There is no prevailing definition of privity to be followed automatically in every case. It is not a matter of form or rigid labels; rather it is a matter of

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<sup>11</sup> The court further notes that the motion for summary judgment was argued more than three months after the plaintiffs had filed their objection and affidavit. No request was made for permission to submit any supplemental materials, in an effort to present any additional information that might have been obtained between the filing of papers in late August and the actual argument in early December.

substance. In determining whether privity exists, we employ an analysis that focuses on the functional relationships of the parties. Privity is not established by the mere fact that persons may be interested in the same question or in proving or disproving the same set of facts. Rather it is, in essence, a shorthand statement for the principle that collateral estoppel should be applied only when there exists such an identification in interest of one person with another as to represent the same legal rights so as to justify preclusion." (Citation omitted.)

"... While it is commonly recognized that privity is difficult to define, the concept exists to ensure that the interests of the party against whom collateral estoppel [or res judicata] is being asserted have been adequately represented because of his purported privity with a party at the initial proceeding. ... A key consideration in determining the existence of privity is the sharing of the same legal right by the parties allegedly in privity." (Internal quotation marks and citations, omitted.) *Girolametti v. Michael Horton Associates, Inc.*, 173 Conn. App. 630, 654, 164 A.3d 731, 746–47 (2017)

On page 27 of its brief, the defendant states: "Furthermore, at most relevant times, Reed Smith was acting in a representative capacity on behalf of Alpha Beta." In a footnote, the defendant notes situations in which it had not participated, but it fails to acknowledge allegations concerning matters that seemingly – or at least potentially – were outside the scope of representation. The defendant does not explain, adequately, how this is sufficient to establish the requisite level of privity for purposes of res judicata. Privity generally implicates an identity or near-identity of interests, and there is an inadequate discussion of how it could apply here. (On a somewhat simplistic level, if the Pursuit Partner parties had prevailed in the Alpha Beta litigation, how would that have affected the rights of Reed Smith?) Privity is not required for collateral estoppel, and collateral estoppel focuses on issues; res judicata requires privity with respect to claims. (It is not free from doubt as to

whether the defendant is relying on the claims made by Pursuit Partners, or claims asserted against it.)

The case at hand should be contrasted with *Girolametti*, supra, 173 Conn. App. 663–64, where the rights of the parties were essentially identical and the rights sought to be vindicated in the then-current litigation could have been vindicated earlier:

Contrary to the trial court's conclusion, we find privity in the relationship between Horton and Rizzo. As noted, Rizzo subcontracted with Horton to provide structural engineering services in conjunction with the PEB. To whatever extent Horton may have failed to meet its obligation to Rizzo resulting in any design or engineering defects in the project, these claims implicated Rizzo's overarching obligations to Girolametti under the contract. Rizzo and Horton shared the same legal rights, binding them in privity for purposes of the project. In short, Girolametti's present claims against Horton are simply a restatement of claims Girolametti either did make or had the full and fair opportunity to make against Rizzo in the arbitration. Applying the transactional test, we conclude that the subject of Girolametti's claim against Horton in the present litigation relates directly to the subject of the arbitration, and thus, that the claim asserted herein is the same as one that Girolametti either did assert or could have asserted in the arbitration. On that basis, summary judgment should have been granted on the ground of res judicata." (Internal citations, omitted.)

The court is required to evaluate the motion for summary judgment based on the arguments presented, and the defendant has not identified how the plaintiffs had a fair and adequate opportunity to litigate aspects of the claimed breach of confidentiality, unrelated to the representation of Alpha Beta by the defendant. The court perceives this to be an attempt to force-fit what should be a collateral estoppel

analysis into a claims-focused res judicata resolution, but does not see such a result to be feasible.

### III. Collateral Estoppel

The claims of collateral estoppel are narrower in scope, and the lack of any mutuality requirement (*Aetna Casualty & Surety Co. v. Jones*, 220 Conn. 285, 302, 596 A.2d 414, 424 (1991)) means that the privity and analogous considerations discussed above, essentially are inapplicable. If an issue has been adjudicated adversely to the plaintiffs, and if that adjudication was a necessary component for a judgment that was rendered, then issues of mutuality (which may be related to privity, but are legally distinct) do not need to be addressed. The issue, however, has to have been actually addressed on the merits, and identifying issues that were addressed on the merits, and were essential to the judgment, become the focus of attention.

Returning to the basics of summary judgment, the focus of attention must be on determinations that are fatal to the plaintiffs' claims. Collateral estoppel may conclusively establish a defense, or conclusively establish an inability to prove a necessary element of a cause of action; therefore, only a matter conclusively determined by way of collateral estoppel that has either affect (either alone or in conjunction with other facts) can be considered. Thus, if an issue simply limits the ability to recover, but does not preclude recovery, it cannot form the basis for summary judgment.

The premise of its collateral estoppel argument is framed by the defendant at page 13 of its brief:

“Plaintiffs’ breach-of-contract claim against Reed Smith is barred by collateral estoppel because the *Alpha Beta* court found that: (1) all of the alleged breaches of the Settlement Agreement occurred after Pursuit’s material breach, which relieved Alpha Beta and Reed Smith of their confidentiality obligations under the agreement, and (2) even if the confidentiality provision was breached, it was only a partial breach and caused Pursuit no damages.”

The defendant then breaks this argument down into components, but the gist of the argument is that the *Alpha Beta* court having found that the plaintiffs (in this case) breached the agreement first – the settlement aspect, not the confidentiality aspect – excused further performance by Alpha Beta and defendant. Somewhat separately, the defendant contends that the determination in the earlier proceeding that the Pursuit Partner parties had not sustained any injury also is conclusive and precludes any possible recovery.

Assuming that there were to be preclusive effect given to the determination of no damages, the defendant does not provide the necessary linkage to entitlement to judgment. In Connecticut, party proving a breach of contract without proof of damages technically may be entitled to nominal damages, *Meadowbrook Center, Inc. v. Buchman*, 149 Conn. App. 177, 186, 90 A.3d 219, 227 (2014). The defendant claims that in New York – which law is claimed to control, based on a provision in the settlement agreement – the existence of actual damages is a necessary element of any breach of contract claim. Accepting that to be true, there remains a more critical flaw to application of collateral estoppel – the existence or non-existence of damages was not essential to the outcome. In *Alpha Beta*, the court stated, in that regard: “The court concludes that if there was a breach of the confidentiality provision it was a partial breach and one that caused the defendants no damages” (emphasis added). The conditional nature of the language of the court indicates that it was not essential to the outcome. In effect, the court was stating

that the Pursuit Partners parties were in material breach well before any possible breach by Alpha Beta and/or Reed Smith, and that if there had been a (subsequent) breach by Alpha Beta, it was only partial and therefore would not have vitiated the claim against Pursuit Partners. Somewhat simplistically, the court was saying that it did not matter if there had been a subsequent breach by Alpha Beta, because it would have been only partial and without any associated damages.

Conversely, the court could not reach the issue of damages unless there first were a determination of liability – a breach. Is the defendant conceding that there was a breach of the confidentiality aspect of the agreement by Alpha Beta (and/or Reed Smith), prior to the breach by Pursuit that is described in the first part of the passage quoted above, such that the court was required to determine the existence of damages (putting aside the theoretical issue of availability of nominal damages)? The court is satisfied that the damages perspective is not sufficient or sufficiently clear to apply collateral estoppel.

That leaves the contention that the court found that the conduct alleged by Pursuit to have constituted a breach occurred well after Pursuit had materially breached its obligations under the agreement, thereby effectively releasing Alpha Beta (and perhaps Reed Smith) from their otherwise-existing confidentiality obligations under the agreement. The “perhaps Reed Smith” aspect is the focus of the remaining potentially-dispositive issue that needs resolution.

Repeatedly in their objection, the plaintiff’s quote the relevant language from the settlement agreement, relating to confidentiality. The court believes that that is an appropriate starting point, because the plaintiffs appear to overstate its scope.

The parties have generally cited only the final portion of the confidentiality provision, but the entire provision provides context:

"7. Confidentiality: The Parties and their respective counsel agree to maintain in the strictest confidence and not disclose to the public, media, any outside attorney, attorney organization, or any third parties (except upon order of a court or governmental body, or as required by law or for reporting to their auditors, investors or similarly interested parties under an obligation to maintain confidentiality) the contents and terms of this Agreement, including but not limited to the Consideration for this Agreement. For the avoidance of doubt, this confidentiality provision expressly prohibits, among other things, the issuance of any press release regarding the Agreement, and the electronic or internet publication to any third party, whether by e-mail, social media site, or any other oral or written transmission (whether in hard copy or electronic format) of the Agreement or the terms of the Agreement. In the event that any of the Parties receives a subpoena or court order that would require the production of this Agreement or information governed by this confidentiality provision, such Party shall provide each of the other Parties as reasonable as possible, and to the extent permitted by law, notice of such subpoena or court order prior to the production or disclosure of any such information sufficient to provide the other Parties adequate opportunity to prevent disclosure or production of such information and the Party receiving the subpoena or court order agrees to provide any reasonable assistance necessary to secure the protection and non-disclosure of such information. To further ensure the confidentiality of this Agreement, the Parties and their respective counsel agree not to use or provide any information relating to any claim arising out of an investment in the Funds to any other person in connection with the initiation of any lawsuit, claim, arbitration or action related to or concerning any investment in PCM, POF or any other investment vehicle managed by PIM."

The language of the provision clearly focuses on maintaining confidentiality of the terms of the settlement itself. The language quoted by the parties in their arguments/discussions is the final sentence, sometimes omitting the introductory language of that sentence – "To further ensure the confidentiality of this

Agreement....” To be sure, the subsequent language in that sentence is far broader than a prohibition on discussion of terms of the settlement, but the explicit purpose for the entire provision is a necessary reference point.

As broad as this prohibition is, the plaintiffs – on a number of occasions – appear to overstate its breadth. The plaintiffs claim that alleged communication with the SEC by the defendant constituted a breach of the provision in the last sentence (the sole provision to which reference has been made). As applicable to this situation, defendant agreed “not to use or provide any information relating to any claim arising out of an investment in the Funds to any other person in connection with the initiation of any lawsuit, claim, arbitration or action related to or concerning any investment in [Pursuit investments].” Does the SEC come within the scope of “any other person in connection with the initiation of any lawsuit, claim, arbitration or action related to or concerning any investment in [Pursuit investments]”? Or more narrowly, does a complaint to the SEC come within the scope of “the initiation of any lawsuit, claim, arbitration or action related to or concerning any investment in [Pursuit investments]”? The court cannot resolve disputed issues, but the language cannot be reasonably extended to encompass the SEC.<sup>12</sup>

What remains, then, is claimed communication with, and claimed assistance to, the Claridge/Schneider group of individuals/entities. Such communications would appear to come within the scope of “[providing] any information relating to any claim arising out of an investment in the Funds to any other person in connection with the initiation of any lawsuit, claim, arbitration or action related to or concerning any

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<sup>12</sup> Yet again, it is not clear whether the brief is repeating verbatim (as an argument) what Mr. Canelas put into his affidavit (supposedly as a fact), or whether there was a copying of the argument into the affidavit. Compare ¶¶ 80 and 81 of the affidavit with the text of the brief at the bottom of page 13 – the introductory language in the paragraphs may be different in the brief, but the substance of those paragraphs is exactly the same.

investment in [Pursuit investments],” or at least sufficiently likely to be so categorized as to present a material issue of fact, unless otherwise explained or justified or excused.

The claimed breach of confidentiality, as asserted in the Alpha Beta litigation, appears to have been precisely this type of communication (these communications). The documents submitted to this court all reflect conduct of Alpha Beta through this defendant as its attorneys. Conversely, there has been no suggestion of any basis or reason why the defendant, while representing Alpha Beta, might be communicating with the Claridge/Schneider parties other than in furtherance of the interests of its client, reinforced by the professional obligation of loyalty to the client. While the court must give the non-moving party (the plaintiffs) the benefit of reasonable favorable inferences, it would be speculation rather than a reasonable inference to assume that the defendant may have been communicating with the Claridge/Schneider parties for personal gain or for any reason unrelated to the zealous representation of Alpha Beta. Whether reasonable or misguided, all identified conduct seems to have been directed to applying pressure to the plaintiffs to provide the amounts claimed to be due to Alpha Beta. Other than conclusory statements that the defendant had been acting for reasons other than representation of its client, no plausible reason was articulated to the court or can be implied from the conduct itself.

With that in mind, the court now must turn to the earlier determination relating to actual or possible breach by Alpha Beta. The court determined in the earlier litigation that prior to any such possible breach by Alpha Beta, the plaintiffs had been in material breach of their obligation to Alpha Beta, thereby excusing Alpha Beta from any confidentiality obligation. (As a backup position, the court also stated

that if there had been a breach, the breach by Alpha Beta had only been a partial breach.)

The key determination by the court, then, was not with respect to the conditional analysis that any breach by Alpha Beta would have been only a partial breach, but rather that the plaintiffs were in material breach prior to any such conduct thereby excusing Alpha Beta. The court was addressing conduct that primarily if not exclusively was that of this defendant, acting on behalf of Alpha Beta as the client.

The plaintiffs correctly point out, however, that the defendant law firm was a separate signatory to the agreement, particularly (exclusively) for purposes of the confidentiality provisions. This requires a return to the court's rationale for citing the entire confidentiality provision of the confidential settlement agreement. The focus was on the confidentiality of the settlement agreement itself. The plaintiffs wanted to ensure that there was no attempt to distinguish between Alpha Beta as client and the defendant as attorney – both/each assumed confidentiality obligations. While the plaintiffs may be correct in a purely literal sense in arguing that the defendant was a separate obligor under the confidentiality provision, the practical consequences of such an approach lead to nonsensical results. Given the earlier determination that the plaintiffs' breach of the settlement agreement relieved Alpha Beta from its confidentiality obligation, the plaintiff effectively are saying that with respect to communication by a principal through an agent, the agent is liable for breach of confidentiality in a situation in which the principal has been excused from any such obligation. Emphasizing the irrationality of the result, the plaintiffs are implicitly stating that (given the legal context of a court determination that the principal was excused from confidentiality) Alpha Beta could have communicated with the Claridge/Schneider parties through anyone other than the defendant, and

that only the defendant was precluded from communicating with the Claridge/Schneider parties on behalf of Alpha Beta.

Synthesizing the foregoing: In the earlier litigation, a central issue was whether the Pursuit Partner parties or Alpha Beta had been first to breach the settlement agreement – the current plaintiffs relating to their failure to make payments (or timely payments), or Alpha Beta relating to improper communications. The position of the Pursuit Partner parties was that the violation by Alpha Beta excused its compliance with the performance of payment obligations (which were at least substantially late if not outright refused to be made). Alpha Beta claimed that the plaintiffs' refusal to make required payments – timely or at all – was a material breach that would, in turn, excuse adherence to the confidentiality provision (and especially the broader prohibition that the parties have cited). The court concluded that the Pursuit Partner parties had materially breached the agreement prior to any possible breach by Alpha Beta, which then excused Alpha Beta from its confidentiality obligation. And again, the court is unaware of any evidence that there was a breach of the core confidentiality concern – the actual terms of the settlement agreement. (The court further notes that the discontinuance of the previously-pending litigation almost necessarily would give rise to an inference that there had been a settlement between the Pursuit Partner parties and Alpha Beta, such that the existence of a settlement was effectively publicly known.)

At page 11 of their opposition, the plaintiffs identify and quote authority for the independence of the obligation of Reed Smith:

“Under New York law, in the case of a contract with multiple obligors or multiple obligees, whether contract rights or duties are joint, several, or joint and several is ultimately a question of the parties' intent, as revealed by the language of their contract and the subject matter to which it relates, as well as the surrounding circumstances.” (Internal

quotation marks and citations, omitted.) *Tobin v. Gluck*, 137 F. Supp. 3d 278, 307 (E.D.N.Y. 2015), *aff'd*, 684 F. App'x 61 (2d Cir. 2017).

The principle as cited by the plaintiffs focuses on intent – but the plaintiffs do not articulate a comprehensible intent as to the interrelationship of the obligations of Alpha Beta and its attorneys. There presumably is no dispute that the goal was to “muzzle” both the client and its attorneys, but there certainly had to be the expectation and understanding that the inclusion of the attorneys was intended to avoid any practical circumvention of an obligation that might be imposed solely on the client – an “I didn’t say anything, it was my attorney” excuse for violations of the terms of the confidentiality provisions. Once the situation might evolve (or degenerate) to the point that the client was no longer bound – as was found by Judge Genuario – was there any reason to believe that the prohibition would or should remain in effect solely as to the defendant law firm and its attorneys? Again, the net effect of the ruling in the Alpha Beta litigation was that Alpha Beta had been excused from the confidentiality agreement by the more egregious conduct of the Pursuit Partner parties, such that through any agent it might choose (except Reed Smith?), it could speak about its issues with Pursuit Partners.

This addresses the contention that the ruling of Judge Genuario only addressed a single communication, the letter of November 16, 2011. In a sense, that might literally be true, but the import of his ruling was that once the Pursuit Partners parties had breached their agreement with Alpha Beta, Alpha Beta was excused from further compliance with the confidentiality provision. From an alternate perspective, while the plaintiffs perceive the single letter as a limitation on the applicability of the Alpha Beta decision, it more accurately is a different type of limitation, a cutoff for enforceability of confidentiality.

Although the plaintiffs have conclusorily stated that some or many statements made by the defendant were made for its own benefit, none have been identified with any clarity, and again, the court cannot assume that the defendant acted in a manner that was adverse to its client's interests. (If the defendant were to have done anything for its own benefit, that might constitute a violation of the confidentiality provisions, which in turn might likely have had an adverse impact on Alpha Beta's rights under the settlement agreement, particularly since there likely would be actual or apparent agency with respect to any or all of such communications.)

At page 7 of their brief, the plaintiffs seem to argue that the obligation of confidentiality on the part of the defendant was absolute and seemingly literally forever: "With respect to Reed Smith, however, Pursuit had fully performed and Reed Smith was bound to the CSA. Pursuit owed Reed Smith no further obligations – meaning that Pursuit could never be in breach of the CSA with respect to Reed Smith." Are the plaintiffs truly claiming that the obligation of confidentiality would continue to exist even after the details of the settlement agreement itself might become non-confidential i.e. disclosed? Could the parties rationally have intended the obligation of the agent to persist even after there might be no obligation on the part of the principal with respect to confidentiality?

### Conclusion

The court has been required to sift through mountains of chaff in order to focus on the central issue in dispute. The court is mindful of the constraints imposed upon the court by virtue of the issues being raised by way of summary judgment – the court cannot be concerned about the relative strength or weakness of a party's

position but rather whether it is a sure winner or sure loser. Perhaps more colorfully: "A judge's function when considering a summary judgment motion is not to cull out the weak cases from the herd of lawsuits waiting to be tried; rather, only if the case is dead on arrival, should the court take the drastic step of administering the last rites by granting summary judgment." (Internal quotation marks and citations, omitted.) *Mott v. Wal-Mart Stores East, LP*, 139 Conn. App. 618, 631, 57 A.3d 391, 398 (2012)

In the earlier Alpha Beta litigation, Judge Genuario concluded that the breach by the Pursuit Partner parties was sufficiently egregious as to excuse – or make irrelevant – Alpha Beta's compliance with the confidentiality provisions of the confidential settlement agreement. The defendant here – Alpha Beta's counsel – was a signatory to ensure the strictest level of compliance with confidentiality (coupled with potential separate liability in the event of a breach), but once the client was excused from compliance, there is no rational reason for insistence on continued compliance by Reed Smith. Again, as noted earlier, under the plaintiffs' interpretation, with the ruling of Judge Genuario as a predicate, Reed Smith would be the only possible agent of Alpha Beta who would be bound by the confidentiality provisions – any other agent or representative would not be so bound. That could not have been the intent of the parties. "It is an abiding principle of jurisprudence that common sense does not take flight when one enters a courtroom." *American National Fire Insurance Co. v Schuss*, 221 Conn. 768, 778 (1992).

This is somewhat analogous to the principle that the liability of a principal and its agent are generally (subject to exceptions) inextricably linked; a release of one generally is a release of the other, and a liability determination as to one is generally a liability determination as to the other (to the extent that the principal is claimed to be responsible solely on the basis of the conduct of the agent). *Alvarez v. New*

*Haven Register, Inc.*, 249 Conn. 709, 735 A.2d 306 (1999) (releases); *Burton v. City of Stamford*, 127 Conn.App. 651, 18 A.3d 590 (2011) (final determination in earlier proceeding<sup>13</sup> of relative liability of drivers in motor vehicle accident given collateral estoppel effect in subsequent action against employer of one of the drivers). There can be exceptions, but none has been identified by the plaintiffs, and in the context of a confidentiality agreement where there has been a determination that the principal is/was excused from compliance with confidentiality requirements, the court cannot see any possible basis for holding the agent to a continuing duty. In that context, the plaintiffs are arguing that the agent is/was precluded from acting on behalf of the principal in a manner that the principal could act directly or through any other agent. Somewhat simplistically, once confidentiality is abrogated, it would be solely form over substance, at best.

This is also related to the contention of the plaintiffs that any finding by Judge Genuario relating to the conduct of the defendant was in the context of the defendant's capacity as an agent for Alpha Beta, whereas in this litigation, the defendant is being sued as a party that signed the confidentiality agreement in a "personal" capacity. The plaintiffs have not identified any conduct that even plausibly might have been directed to furthering the interests of the defendant in a non-agent capacity, rather than seeking to put pressure on the plaintiffs to comply with their obligations to the defendant's client, Alpha Beta, in as many ways as possible.


This is not a matter of passing on the credibility of the plaintiffs' submission. See, e.g., *Windsor Federal Savings & Loan Assn. v. Reliable Mechanical Contractors, LLC*, 175 Conn. App. 651, 660 (2017), reversing summary judgment

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<sup>13</sup> Specifically, an arbitration decision subsequently confirmed, pursuant to General Statutes § 52-417.

that had been based on the trial court's stated perception that the defendant had presented "no credible opposition" to the plaintiff's motion. In the earlier litigation, the issue of "who breached first" and the consequences relating to the enforceability of the confidentiality provisions had been litigated fully. The Pursuit Partners parties were determined to be the culpable parties, excusing further adherence to the confidentiality provisions – and the conduct of Reed Smith was the primary if not sole focus of the Pursuit Partners parties' claims. While perhaps not framed in this manner, effectively the conduct of the Pursuit Partners parties had frustrated the purpose of the obligation of confidentiality, including as to Reed Smith once the court had ruled in favor of Alpha Beta with respect to the claim that it had breached its confidentiality obligation.

For all of these reasons, then, the motion for summary judgment, filed by defendant Reed Smith, is granted.



POVODATOR, J.

Decision entered in accordance with the  
Forementioned 3/26/18.

NOTICE sent to: Zeldes Needlet Cooper, Cummings  
& Lockwood, Messers Matthew, Abraham Robert  
Ulman & Perlmutter, Amin; Bijan,  
and Doubo Edward.

Megan McCreary, DCC