COMMONWEALTH OF MASSACHUSETTS

Middlesex, ss.

Superior Court Department
Civil Action No. 08-04641

JOHNSON GOLF MANAGEMENT, INC.,
Plaintiff,
v.

CALM GOLF, INC. and CHARLES LANZETTA,
Defendants,
and

TOWN OF DUXBURY, and NORTH HILL ADVISORY COMMITTEE, consisting of MICHAEL DOOLIN, CHAIRMAN, SCOTT WHITCOMB, ROBERT M. MUSTARD, JR., MICHAEL MARLBOROUGH, ANTHONY FLOREANO, MICHAEL T. RUFO, THOMAS K. GARRITY, RICHARD MANNING, W. JAMES FORD, and GORDON CUSHING (EX OFFICIO),
Defendants,
v.

PILGRIM GOLF, LLC,
Intervener.

SUPPLEMENTAL JOINT PRE-TRIAL STATEMENT

Pursuant to the Procedural Order issued by the Court on June 11, 2012, the Plaintiff and the Defendants submit this Supplement Joint Pre-Trial Statement, supplementing the Joint Pre-Trial Statement filed on November 3, 2011.

Introduction and Procedural Background

This case involves an action brought by Johnson Golf Management, Inc. ("Johnson Golf") seeking declaratory judgment, injunctive relief and monetary damages (lost profits) pursuant to G.L. c. 30B and G.L. c. 93A from the Town of Duxbury ("Duxbury"), and others arising out of the alleged bad faith conduct of Duxbury and others in connection with the decision to award the contract (the "Contract") for the operation of the North Hill Golf Course in Duxbury, Massachusetts (sometimes referred to as "North Hill" or the "Golf Course") to an entity, CALM Golf. ("CALM"), other than Johnson Golf.

Parties

The plaintiff, Johnson Golf Management, Inc. ("Johnson Golf"), is a corporation in good standing duly organized pursuant to the laws of the Commonwealth of Massachusetts and has a principal place of business located in New Bedford, Bristol County, Massachusetts. At the time this case was filed, the Plaintiff was located in Weston, Middlesex County, Massachusetts.

The defendant, Town of Duxbury ("Duxbury"), is a body politic duly incorporated and existing under the laws of the Commonwealth of Massachusetts.

The defendants Michael Doolin, Chairman, Scott Whitcomb, Robert M. Mustard, Jr., Michael Marlborough, Anthony Floreano, Michael T. Rufo, Thomas K. Garrity, Richard Manning, W. James Ford, and Gordon Cushing (*ex officio*) comprise the North Hill Advisory Committee, a committee appointed by the Duxbury Board of Selectmen, as it existed when this case was filed in 2008.

The Defendant, CALM Golf, Inc. is a Massachusetts Domestic Business Corporation with its principal offices located in Rockland, Massachusetts.

Charles Lanzetta is an individual residing in Marshfield, Massachusetts engaged in the business of golf course operations and instruction.

The Intervener, Pilgrim Golf, LLC, of Duxbury, Massachusetts is not involved in the trial of the case in chief.

1. Agreed Facts.

1. Duxbury owns a nine-hole municipal golf course known as the North Hill Country Club Golf Course in Duxbury.

2. From 1996 until December 31, 2008, Johnson Golf operated North Hill pursuant to several contracts with Duxbury, the last of which ended on December 31, 2008.

3. In October 2008, in anticipation of the expiration of the existing contract, Duxbury issued a Request for Proposals in accordance with G.L. c. 30B, §6 ("RFP #1") for the management of North Hill from January 1, 2009 through December 31, 2013.

4. In December 2008, after receiving proposals in response to RFP #1, Duxbury rejected all the proposals, cancelled RFP #1 and reissued an RFP for the management of North Hill ("RFP #2").

5. Johnson Golf filed this action on December 12, 2008, after the rejection of the proposals in response to RFP #1.

6. In January 2009, Duxbury received five (5) proposals in response to RFP #2, including ones from Johnson Golf and CALM Golf. Duxbury awarded the North Hill contract

to CALM Golf.

7. In November 2010, with the Court's permission, Duxbury cancelled its contract with CALM Golf and re-bid the contract Johnson Golf did not submit a bid.

8. From January 1, 2009 until April 2011, Johnson Golf operated North Hill pursuant to an order of this Court.

2. Expected Evidence.

A. Plaintiff's Expected Evidence

In addition to the proposed agreed upon facts itemized above, Plaintiff submits the following facts which the Plaintiff claims to be established for purposes of trial:

1. In 2004 Certain individuals including Michael Doolin and Michael Marlborough became dissatisfied with decisions Johnson Golf had made at the North Hill Country Club in Duxbury, Massachusetts. The crux of their disappointment was that they would no longer be automatically allowed to schedule 18 hole tee times at North Hill. North Hill is a 9 hole golf course, and prior to the policy change in 2004, individuals such as Doolin and Marlborough were scheduling 18 hole tee times each weekend morning. The effect of their actions was to prevent other golfers from scheduling tee times during the "prime time" weekend hours.

2. Doolin and Marlborough took their complaints to the Board of Selectmen and Town Manager in Duxbury. The Town's attorney advised all concerned that the policies implemented by Johnson Golf were entirely appropriate under the contract in effect between Duxbury and Johnson Golf.

3. Subsequently both Michael Doolin and Michael Marlborough, who had complained to the Selectmen, were appointed to the North Hill Advisory Committee. An additional appointee was Anthony Floreano. All three of these individuals work for the same company in Braintree, Massachusetts

4. In 2008 the North Hill Advisory Committee ceased issuing minutes of their meetings. It was during this period of time that members of the Committee, together with other Town officials, were drafting a new RFP for the North Hill Golf Course. In 2012 Duxbury allegedly found certain Minutes of the North Hill Advisory Committee from 2008, but said minutes cannot be authenticated as no one in Duxbury knows by whom the minutes were drafted.

5. When preparing for the new RFP in Duxbury, the Committee and Town officials ignored the advice of Johnson Golf that the best procedure is to follow the guidelines of the Massachusetts Inspector General's Office.

6. The RFP eventually drafted by the Town of Duxbury referred to "comparable

business enterprises" but town officials could not even tell the bidders what the term meant. Although the expression "comparable business enterprises" was drafted by Duxbury Town Counsel, Robert S. Troy, he misrepresented to this Court and to the citizens of Duxbury that the expression was drafted by a golf course "consultant" hired by Duxbury. (In fact there was no such consultant ever hired).

7. The new RFP in October 2008 included 18 hole tee times and "fivesomes" – in each instance these are issues that deprive the town of revenue and benefit nobody other than the chosen few such as the committee members.

8. In anticipation of the expiration of the contract, Duxbury issued a Request for Proposals ("RFP") in accordance with G.L. c. 30B, §6 to obtain proposals for a new contract for the management of North Hill from January 1, 2009 through December 31, 2013.

9. The RFP invited applicants to submit sealed proposals that included both a "price" and "non-price" proposal.

10. The RFP required that all proposers comply with the terms and conditions of the RFP, including but not limited to, the Criteria Evaluations Standards that were set forth therein.

11. All applicants were required to submit their bids by October 24, 2008. Duxbury received five (5) bids in response to its RFP, including a bid from Johnson Golf.

12. Douglas Johnson contacted Gordon Cushing, advising him that the real company that ran Rockland Golf Course was in bankruptcy. Cushing said that he had forwarded information to Richard MacDonald advising MacDonald that the actual company that ran Rockland was in bankruptcy.

13. When the proposals were received by the town of Duxbury Mr. Richard MacDonald appointed three individuals to review the proposals and evaluate them pursuant to the provisions Massachusetts Gen. Laws chapter 30 B the individuals were Gordon Cushing Anthony Floreano and Mr. William Dixon. The three individuals were required to rate the proposals in various categories and provide an overall rating of each proposal Mr. Gordon Cushing rated Johnson golf management highly advantageous in every category Mr. Anthony Floreano are now rated Johnson golf management highly advantageous in every category Mr. Dixon rated Johnson Golf Management highly advantageous in three out of four categories. Johnson Golf Management thus was rated highly advantageous in 11 out of 12 categories.

14. The evaluation process included review by three (3) independent evaluators. One evaluator, Gordon Cushing, completely complied with the requirements of G.L. c.30B and a second evaluator also complied with the requirements of G.L. c.30B. As to the third evaluator, based upon his evaluations it could easily be

established that his overall evaluation of the proposals would rate Johnson Golf as "Highly Advantageous."

15. CALM Golf having a total experience of managing one municipal golf course for a period of four months in 2003 could not be fairly graded at anything higher than "not advantageous" in the category of relevant experience.

16. According to the RFP issued by Duxbury, no proposer could achieve a rating of "highly advantageous" in the area of Financial Information unless the proposer has provided three years of financial statements which were independently audited by a Certified Public accountant.

17. Despite CALM Golf's assertion that it had many previous and present contracts, the un-audited financial statements submitted by CALM Golf in its proposal show that CALM Golf had total assets of $4,411.92 in 2005 and total assets of $1,336.92 in 2006, and $169.00 in 2007. Furthermore, CALM Golf reported no income whatsoever for the years 2005, 2006 and 2007.

18. All evaluators and Duxbury Officials knew that CALM had only four months experience.

19. CALM provided no superintendent in proposal #1 in October, 2008 thus the best rating it could achieve was "Not- advantageous" or "Unqualified." That rating coupled with CALM's financial bid of $280,000.00 rendered their proposal completely unacceptable.

20. CALM Golf having a total experience of managing one municipal golf course for a period of four months in 2003 could not be fairly graded at anything higher than "not advantageous" in this category.

21. According to the RFP issued by Duxbury, no proposer could achieve a rating of "highly advantageous" in the area of Financial Information unless the proposer has provided three years of financial statements which were independently audited by a Certified Public accountant.

22. Despite CALM Golf's assertion that it had many previous and present contracts, the un-audited financial statements submitted by CALM Golf in its proposal show that CALM Golf had total assets of $4,411.92 in 2005 and total assets of $1,336.92 in 2006. Furthermore, CALM Golf reported no income whatsoever for the years 2005, 2006 and 2007.

23. Johnson Golf outbid CALM Golf $420,000.00 to $280,000.00 in the first RFP in October, 2008.

24. Duxbury exercised its right to reject all bids pursuant to G.L. c. 30B, § 9. However no written reasons for Duxbury's decision were provided.

25. MacDonald rejected the proposals on December 6, 2008 without specifying his reasons for doing so. Assuming MacDonald's reason was that two evaluators had not completed "overall ratings" of the proposals that could have been remedied in five minutes by having the evaluators add up their scores and provide an overall rating. Further, the overall rating of Johnson Golf by evaluators Floreano and Dixon could not have been anything other than "Highly Advantageous." Floreano rated Johnson Golf "Highly Advantageous" in all four categories and Dixon rated Johnson Golf "Highly Advantageous" three out of four categories. (Dixon's rating of Johnson Golf in the category of Finances should have been "Highly Advantageous as Johnson Golf was the only proposer which provided the required Audited financial Statements.)

26. After rejecting all the bids Mr. McDonald and other town officials removed the public records of the town of Duxbury and had the records transported to the office of town counsel, Attorney Robert Troy, whose offices were in Sandwich Massachusetts. Despite the fact that the price and non-price proposals of the respective proposers from the October 2008 RFP process were public records pursuant to General Laws c.30B, the documents were maintained in secrecy in Attorney Troy's office and when attempts were made by Johnson Golf in December 2008 to review the documents, the records were not made available for public inspection.

27. The Town of Duxbury asserted that the Massachusetts Inspector General had instructed the Town to reject all the proposals. In fact, no such recommendation was made prior to the rejection of the proposals on December 2, 2008. In an effort to deceive this Court, Duxbury, acting through its counsel lied to this Court in December 2008, advising the Court that the Inspector General had instructed Duxbury to reject all the proposals.

28. Duxbury notified all of the applicants that it had rejected the bids and reissued the RFP. The reissued RFP provided that proposals were due by January 9, 2009.

29. In response to the reissued RFP, Duxbury received five (5) bids, including a bid from Johnson Golf.

30. The Non-Price Proposals were delivered to three new (3) evaluators.

31. When the new RFP was issued, there was one substantive change made in the document. In RFP #1 proposers were told to submit a financial proposal as a "flat payment." Out of the original proposers only CALM Golf failed to comply with the "flat payment" requirement. In the second RFP the expression "Flat Payment" was removed. In a document totaling 44 pages, this was the only change other than submission dates and it was done to assist CALM Golf to qualify.

32. In the second bid CALM claimed that it had "many prior and present contracts" in

an attempt to earn a higher qualitative rating. The claim was not true as can be seen from Mr. Lanzetta's deposition testimony.

33. In its proposal CALM Golf stated that it had entered into and been awarded many previous and present contracts including a contract at the Rockland Golf Course in Rockland, Massachusetts. Despite CALM Golf's assertion that it had many previous and present contracts, the financial statements submitted by CALM Golf in its proposal show that CALM Golf has not had any income in the years 2005, 2006 and 2007. These were the only years for which CALM Golf provided financial data. Despite CALM Golf's assertion that it had many previous and present contracts, the financial statements submitted by CALM Golf in its proposal show that CALM Golf had total assets of $4,411.92 in 2005 and $1,336.92 in 2006.

34. In its second proposal CALM increased its financial bid by 83% during the worst economic period since the great depression. When asked why he increased his bid Lanzetta repeatedly testified under oath that his attorney, John Geary told him to do it and gave him the number to bid.

35. Duxbury officials such as Richard MacDonald and Gordon Cushing purportedly do not remember whether or not they told John Geary (Attorney for CALM Golf) what the price proposals were in the October 2008 RFP Process.

36. Evaluator Steven Studley gave CALM "highly advantageous" in every category. An honest evaluation of CALM's proposal would result in the following ratings: Relevant Experience - Not advantageous; Organizational Capability - Not advantageous; Maintenance Equipment/Staff - Not advantageous/Unacceptable; Financial Information - Unacceptable.

37. Richard MacDonald's decision to make an award to CALM Golf relied upon the following "facts" in justifying an award of the contract to CALM - (a) CALM operating Rockland Golf Course (b) CALM in business since 1978 (c) CALM has all equipment (d) CALM Golf is currently managing a golf course (e) CALM's experience at Rockland confirms its ability to run North Hill (f) CALM has sufficient financial information to be considered the most advantageous proposer for the Town (g) Financial data provided must give the Town confidence that the Proposer could administer a significant business such as North Hill.

38. The President of CALM admitted under oath that each and every "fact" relied upon by Mr. Richard MacDonald was untrue. For example (a) CALM never operated Rockland (b) CALM was established in May 2003 (c) CALM owned no equipment (d) CALM not managing any course golf course and in its entire corporate history CALM managed only one course for four months in 2003 (e) CALM never ran Rockland (f) CALM had total assets of $169.00 and no income at all. CALM provided no evidence to the Town that it ever had any income or assets (g) CALM had total assets of $169.00 and no income at all.

39. According to the Town of Duxbury's prior Town Counsel, Robert S. Troy, Esq., the proposal of CALM Golf, which was submitted in October 2008, was not eligible for an award of a contract due to the fact that CALM's price proposal included a percentage of revenue as part of its proposed rent. As such, Duxbury, acting through its Town Counsel, determined that CALM's proposal was non-responsive.

In addition to the proposed agreed upon facts itemized above, Plaintiff submits the following facts:

The North Hill golf course is a nine-hole municipal golf course by the town of Duxbury. In 2005 a group of disgruntled golfers unhappy with the tee time policies of Johnson Golf Management, approached the town of Duxbury Board of Selectmen with complaints about the tee time policy. The response of the Board of Selectmen was to appoint several of the disgruntled golfers to the North Hill Advisory Committee a town would oversaw the operation golf course and interacted with the management company. Certain members of the North Hill Advisory Committee, named as defendants in this action namely Michael Doolin Anthony Floreano and Michael Marlborough were active with other board members in drafting a request for proposals which would control the award of the contract and the operation golf course from 2009 through 2013. Beginning in 2007 The N. Hill Advisory Committee initiated the process of drafting a new RFP for the North Hill golf course. The RFP which was made available to prospective operators in the fall of 2008 was drafted by town officials, town counsel and members of the North Hill Advisory Committee.

The chief procurement officer for the town of Duxbury in 2008 was the town manager Mr. Richard MacDonald. The 2008 RFP was issued pursuant to the Massachusetts General Laws Chapter 30 B section 6. In a departure from previous RFPs issued by the town of Duxbury at North Hill Golf Course, the 2008 RFP concluded a provision in which prospective operators were allowed to operate either a golf course management companies or "comparable business enterprises". In October of 2008 five entities submitted proposals to operate the North Hill golf course for the five-year period which would begin on January 1, 2009. Among the five proposers only one company was presently operating a municipal golf course as of October of 2008. That company was the plaintiff Johnson Golf Management. The expression "comparable business enterprise" was inserted by Town Counsel at the direction of other Duxbury officials.

CALM Golf submitted a proposal to the town of Duxbury in October of 2008. The proposal submitted by CALM Golf was signed and prepared by Mr. Charles Lanzetta. Mr. Lanzetta was a principal of CPN & L, Inc., a company which operated the Rockland Golf Course an 18-hole par three course in Rockland Massachusetts. Mr. Lanzetta did not utilize CPN & L to bid on the North Hill Golf Course contract due to the fact that CPN & L Inc. was in bankruptcy in October of 2008 and would not have qualified. The proposals submitted by CALM Golf was noncompliant with the request for proposals issued by the town of Duxbury in several meaningful categories for example, CALM Golf refused to provide the name of a proposed golf course superintendent secondly, CALM Golf did not have the requisite experience having total management experience of four months managing a golf course of any kind. CALM Golf also failed to submit a flat fee price proposal as required by the RFP. In spite of the many shortcomings in CALM's proposal, the evaluators overlooked the deficiencies and awarded significantly higher ratings than CALM's proposal deserved.

In contrast to the actions of the evaluators in not following the mandates of G.L. c.30B with regard to the non-price proposal of CALM Golf, a fair and unbiased evaluation of the relative proposals would have resulted in the award of the contract to Johnson Golf. This is predicated on the fact that Johnson Golf and CALM Golf were the only two companies who could arguably have been considered experienced in golf course management. The price proposal submitted by Johnson Golf was $140,000 higher than the price proposal submitted by CALM Golf.

After a delay of six weeks after the submission of proposals the chief procurement officer of Duxbury Mr. Richard McDonald issued a letter to the proposers stating that the town was rejecting all the bids. No reason was given why the town was taking this action in violation of G.L. c.30B §9. The decision of Mr. McDonald to reject all bids was done in bad faith. The only reason that Mr. McDonald chose to reject all bids was to complete a new process and deprive Johnson Golf of the contract that it had fairly earned with its proposal submitted in October of 2008.

The RFP in question was not drafted by an "outside consultant" hired by the town of Duxbury. The RFP was drafted by town officials including but not limited to Richard McDonald, Gordon Cushing, the North Hill Advisory Committee, Attorney Troy, the Board of Selectmen and the Town Accountant. Duxbury and its Town Counsel repeatedly asserted in this litigation that a "consultant" had drafted the RFP and that the "consultant" inserted the expression "comparable business experience."

Shortly after the town of Duxbury issued its decision that it was rejecting all bids a new RFP with a bid date of January 9, 2009 was prepared the only change in the RFP was that flat fee requirement was eliminated. The purpose of eliminating the flat fee requirement was an attempt to justify an award to CALM Golf based upon the fact that the town officials knew that CALM Golf in October had failed to comply with the flat fee provision of the RFP.

In January of 2009 the same five companies which had been in October bid once again Johnson Golf's bid was essentially the same as it had been in October and its price proposal was unchanged. CALM Golf on the other hand made significant changes to its proposal including misrepresentations of material fact as to its experience. In addition, during the worst economic crisis facing our country since the 1920's CALM Golf raised its bid by more than 85%. The principal of CALM Golf, Charles Lanzetta, has stated under oath that the reason that CALM Golf raised their financial bid by 85% was due to the advice of their newly retained attorney, Attorney John Geary, of Duxbury, a former member of the Duxbury North Hill Advisory Committee.

Before filing suit in this matter Johnson Golf attempted to review the public records of the Town of Duxbury pertaining to the Request for Proposals for operation and maintenance of the North Hill Country Club Golf Course. On Monday December 8, 2008, Johnson's representatives went to the Town Manager's Office at the Duxbury Town Hall to review the public records pertaining to the RFP process. The Town Manager advised Johnson Golf that all the records related to North Hill RFP were in Attorney Troy's office in Sandwich. The records were public records but Duxbury refused to allow any inspection of the records prior to the first hearing on a preliminary injunction of this matter on December 28, 2008.

CALM Golf having a total experience of managing one municipal golf course for a period of four months in 2003 could not be fairly graded at anything higher than "not advantageous" in this category. The superintendent proposed by CALM Golf, Ryan Anderson, does not have experience as a golf course superintendent with the exception of a three month period in 2005 when he was serving as an "interim superintendent in Brockton.

According to the RFP issued by Duxbury, no proposer could achieve a rating of "highly advantageous" in the area of Organizational Capability unless the onsite superintendent had three years' experience as a golf course superintendent. According to the RFP issued by Duxbury, no proposer could achieve a rating of "highly advantageous" in the area of Maintenance Equipment/Staff unless the proposer has demonstrated for three years or more a proven ability to maintain more than one golf course in top condition.

Charles Lanzetta executed the proposal submitted by CALM Golf and asserted under the pains and penalties of perjury as follows: "The undersigned certifies under the pains and penalties of perjury that his proposal has been made and submitted in good faith and without collusion or fraud with any other person. As used in this certification, the word "person" shall mean any natural person, business, partnership, corporation, committee, club or other organization, entity or group of individuals." Charles Lanzetta conspired with CALM Golf and others to provide false information to the Town of Duxbury in the hopes of securing the contract at North Hill Country Club for CALM Golf.

The evaluators utilized by the Town of Duxbury, in violation of G.L. Ch. 30B, improperly, arbitrarily, capriciously and in bad faith altered and amended the qualitative evaluation of the proposals in order to artificially substantiate an award to CALM Golf.

An evaluator identified as John Madden graded CALM Golf "highly advantageous" in the areas of Relevant Experience, Organizational Capability and Maintenance Equipment/Staff, despite the fact that CALM Golf's total experience managing a golf course amounted to a four month contract in 2003.

An evaluator, Steven Studley, graded CALM Golf "highly advantageous" in the areas of Relevant Experience, Organizational Capability, Maintenance Equipment/Staff and Financial Information despite the fact that CALM Golf's total experience managing a golf course amounted to a four month contract in 2003 and the financial material provided by CALM Golf was not audited.

An evaluator, John Britten, graded Johnson Golf "advantageous" in the areas of Financial Information despite the fact that Johnson Golf provided all of the audited financial statements as provided for in the RFP issued by Duxbury to earn a rating of "highly advantageous."

An evaluator, John Britten, graded Johnson Golf "advantageous" in the areas of Organizational Capability despite the fact that Johnson Golf provided all of the requisite information to earn a rating of "highly advantageous." Johnson Golf provided two Class A golf course superintendents on staff as well as an onsite superintendent with more than three years' experience.

An evaluator, John Britten, graded CALM Golf "highly advantageous" in the area of Organizational Capability despite the fact that CALM Golf proposed a superintendent with virtually no experience as a superintendent. An evaluator, John Britten, graded CALM Golf "highly advantageous" in the area of Maintenance Equipment/Staff despite the fact that CALM Golf's total experience managing a golf course amounted to a four month contract in 2003 and CALM Golf is not managing any golf course presently.

An evaluator, John Britten, graded CALM Golf "advantageous" in the area of Relevant Experience despite the fact that CALM Golf's total experience managing a golf course amounted to a four month contract in 2003 and CALM Golf is not managing any golf course presently.

The actions of Duxbury and The Committee were undertaken in bad faith with the intent to deprive Johnson Golf with a fair opportunity to bid for the contract to operate the North Hill Country Club Golf Course. The actions of the defendant, Duxbury, constitute a violation of G.L. Ch. 30B and as a result Johnson Golf was harmed and damaged. The actions of Duxbury and The Committee were undertaken in bad faith with the intent to deprive Johnson Golf with a fair opportunity to bid for the contract to operate the North Hill Country Club Golf Course.

The actions of the defendant, The Committee, constitute a violation of G.L. Ch. 30B and as a result Johnson Golf was harmed and damaged. The actions of Duxbury and The Committee were undertaken in bad faith with the intent to deprive Johnson Golf with a fair opportunity to bid for the contract to operate the North Hill Country Club Golf Course.

The actions of the defendant, Duxbury, constitute a breach of its implied contract with Johnson Golf to comply with G.L. c. 30B and award the contract in accordance with G.L. Ch. 30B and as a result Johnson Golf was irreparably harmed and damaged. The actions of the defendant, Duxbury, constitute a breach of the implied covenant of good faith and fair dealing.

The actions of Duxbury and The Committee were undertaken in bad faith with the intent to deprive Johnson Golf with a fair opportunity to bid for the contract to operate the North Hill Country Club Golf Course. The actions of the defendant, Duxbury, constitute a breach of its implied contract with Johnson Golf to comply with G.L. c. 30B and award the contract in accordance with G.L. c. 30B and as a result Johnson Golf was irreparably harmed and damaged.

The actions of the defendant, The Committee, constitute a breach of the implied covenant of good faith and fair dealing.

The evaluators and members of The Committee and the Chief Procurement Officer and others conspired to reject all the proposals as a pretext to deny award of the contract to Johnson Golf. The actions of Duxbury and The Committee were undertaken in bad faith with the intent to deprive Johnson Golf with a fair opportunity to bid for the contract to operate the North Hill Country Club Golf Course. The evaluations described in detail herein were not done in good faith and were done so as to artificially downgrade the proposal of Johnson Golf and artificially upgrade the proposal of CALM Golf.

As a result of the material misrepresentations of CALM Golf and Charles Lanzetta, the

Town of Duxbury issued an award of the contract for the operation and maintenance of the North Hill Golf Course to CALM Golf. According to the decision of the Chief Procurement officer of the Town of Duxbury, the only other duly qualified proposer for the North Hill Golf Course was and is Johnson Golf. As a result of the actions of CALM Golf and Charles Lanzetta, Johnson Golf has been refused an award of a contract which it would otherwise be entitled to by virtue of its proposal to the Town of Duxbury.

The lost profits and other damages sustained by Johnson Golf are articulated in Section 8 hereof.

B. Duxbury's Expected Evidence.

Duxbury expects that the evidence will show that none of its officials, staff, employees or volunteer board members materially violated G.L. Chapter 30B. Duxbury also expects the evidence to show that, even if they did, the Town acted in good faith in obtaining management services for North Hill. After depositions of nearly all the current and former Town officials involving in this bidding process, the Plaintiff has found no evidence of any conspiracy or bad faith by the Town.

After receiving the proposals in response to RFP #1, the Town assigned evaluators to review the non-price components of those proposals, as required under Chapter 30B. After review of the evaluations, the procurement officer, Town Manager Richard MacDonald, upon advice of Town Counsel Robert Troy and (according to Troy) the Inspector General determined that the process was fatally flawed. Accordingly, the Town rejected all of the proposals and began the bidding process again. Johnson Golf focuses on the fact that RFPs #1 and #2 invited proposals from companies with experience running a golf course or other "comparable business enterprise," a phrase provided by Town Counsel Troy. However, the Town's effort to broaden the field of eligible proposers not only does not violate Chapter 30B, it *promotes* the purposes of that statute to open up public bidding to all qualified companies.

The Town issued RFP #2 and received responsive bids in January 2009. It assigned different evaluators to review the non-price proposals and rank the bidders accordingly. Johnson Golf and CALM Golf received identical scores from the evaluators. Pursuant to Chapter 30B, the Town then opened the price proposals and found that CALM Golf offered significantly more money. In accordance with Chapter 30B and on the advice of Mr. Troy, the procurement officer awarded the contract to CALM Golf.

In February 2009, on a motion by Johnson Golf, the Court enjoined the award to CALM Golf and permitted Johnson Golf to remain in control of North Hill. The Court questioned some of the evaluators' ranking for RFP #2. In November 2010, with the Court's permission and after consultation with the Inspector General, and with the benefit of additional information about CALM Golf, the Town cancelled CALM Golf's award and re-bid the management contract. Johnson Golf did not submit a bid. It stopped operating North Hill in April 2011.

The evidence will show that (1) Richard MacDonald had no intent to oust Johnson Golf from North Hill, nor would he have anything to gain personally or professionally by doing that; (2)

he asked Town Counsel to manage the procurement process, instructing only that it be done legally; (3) Town Counsel conducted the entire procurement process and never received any instruction from anyone in Town to steer the award away from Johnson Golf; (4) the Town rejected all the proposals in response to RFP #1 and awarded the contract to CALM Golf under RFP #2 in good faith reliance on advice of counsel as to the requirements of G.L. c. 30B and instructions from the Inspector General; (5) the evaluators did not receive any instruction to rig their evaluations in any way so as to avoid an award to Johnson Golf (indeed, Johnson Golf received generally high rankings); and (6) no member of the North Hill Advisory Committee ever instructed in any manner Town officials or evaluators to deny Johnson Golf the North Hill contract (nor did they have the authority to do so). There is no evidence of a conspiracy and no bad faith.

Even if the Court finds violations of G.L. c. 30B in the handling of RFP #1 or #2, such that the contract should have been awarded to Johnson Golf, any such violations caused Johnson Golf no damages. Johnson Golf obtained injunctive relief and continued to operate the golf course until April 2011. In early 2011, the Court permitted the Town to re-bid the North Hill contract, and Johnson Golf chose not to bid – twice.

Finally, in the unlikely event that Johnson Golf is able to prove bad faith; the evidence will show that its lost profits as a result of being denied the contract would have been no more than approximately $50,000 per year.

C. CALM Golf and Charles Lanzetta's Expected Evidence.

CALM Golf and Charles Lanzetta expect the evidence to show that CALM Golf made two competitive bids to run the North Hill Golf Course, that neither CALM Golf nor Charles Lanzetta played any role whatsoever in the drafting of either RFP, the decision to re-bid the project, or the selection process, and CALM Golf was properly awarded the contract to run the North Hill Golf Course. The Plaintiff has no evidence that the Defendants, CALM Golf, nor Charles Lanzetta were party to any conspiracy nor had any role in either the first or second RFP process, other than the submission of bids. The Plaintiff has no evidence that Charles Lanzetta made any misrepresentative statement in either of the bids submitted on behalf of CALM Golf. There are two specific allegations made by the Plaintiff claiming misrepresentations made by Mr. Lanzetta in the bid proposals. Those allegations involved claims regarding relevant experience and CALM Golf's proposed superintendent. Even the most cursory review of the Bid Proposal submitted on behalf of CALM Golf establish that Mr. Lanzetta's claims regarding relevant experience relate to the *principals* of CALM Golf, Inc. Furthermore, the resume of their proposed superintendent was attached to their Bid Proposal and is entirely accurate.

3. Description of Case to Be Read to Jury.

Johnson Golf Management, Inc. has sued the Town of Duxbury, a volunteer Town Board called the North Hill Advisory Committee, and a company called CALM Golf regarding the management contract for the North Hill Golf Course, a Town-owned course. Johnson Golf alleges that the Town and the Committee violated Chapter 30B, the Massachusetts public bidding statute, in awarding the management contract for North Hill to CALM Golf instead of Johnson Golf. The

other party in this case is a company called Pilgrim Golf, which is currently managing North Hill following a re-bidding of the contract by the Town.

4. Law

A. Agreed Law

This case arises under the provisions of G.L. c. 30B §6.

B. Disputed Law

1. Plaintiff's Position:

Plaintiff maintains that this case also arises under common law/case law relating to the public bidding process. Plaintiff maintains that the principles enunciated in the public bidding cases apply to this case.

Plaintiff maintains this case involves the following relevant legal theories:

a. Award of the Contract to Johnson.
b. Recovery of Lost Profits.

"Statutory bidding procedures are designed to prevent favoritism, to secure honest methods of letting contracts in the public interest, to obtain the most favorable price, and to treat all persons equally." Phipps Products v. Mass. Bay Transp. Auth., 387 Mass. 687, 443 N.E.2d 115 (1982). It is an implied condition of every invitation to bid that each bid submitted will be fairly considered in accordance with all applicable statutes, and that a failure to give such consideration is a breach of the implied contract formed by the submission of such a bid. Roblin Hope Industries, Inc. v. J.A. Sullivan Corp., 6 Mass.App.Ct. 481, 377 N.E.2d 962 (1978). "If a bidder has complied with all requirements but is deprived of the contract through some conduct of the awarding authority tantamount to bad faith, then the recovery of lost profits is the measure of damages." Peabody Construction Co., Inc. v. City of Boston, 28 Mass.App.Ct. 100, 546 N.E.2d 898 (1989) (citing Bradford & Bigelow, Inc. v. Commonwealth, 24 Mass.App.Ct. 349, 359, 509 N.E.2d 30 (1987); see also J.S. Luiz III, Inc. v. Town of Hanson, 41 Mass.App.Ct. 1104, 669 N.E.2d 232 (1996).

Applicability of G.L. Ch. 93A to Damage Award.

Plaintiff seeks to have any jury verdict awarded trebled pursuant of G.L. Ch. 93A. In addition, Plaintiff seeks an award of attorneys' fees under G.L. Ch. 93A. Municipalities are not immune from suit under G.L. Ch. 93A.[1] The defendants were engaged in conduct that involved trade or business and was undertaken for profit. Here, Duxbury clearly has a business purpose (raising money for the Town) as its primary motive and the undertaking was a commercial or business enterprise in which the Town of Duxbury wanted to maximize profits.

[1] Massachusetts courts have specifically avoided addressing the question of whether governmental entities are exempt from the statute, instead focusing on the type of transaction involved in determining whether it takes place in trade or commerce and whether the transaction is motivated business or personal reasons.

2. Duxbury's Position:

The Town is not subject to liability under G.L. c. 93A in this case for at least three legal reasons (even if the facts supported such liability).

First, the plaintiff admits that no court has found that municipalities are subject to such liability, but instead have simply avoided the issue. *See infra n. 1.* The United States District Court, however, addressed the issue head on, reviewed all applicable case law, and held that municipalities are not subject to G.L. c. 93A liability because they are not "persons" under the statutory definition, so there has been no waiver of sovereign immunity. *Max-Planck-Gesellschaft Zur Forderung Der Wissenschaften E.V., et al. v. Whitehead Institute for Biomedical Research, et al.*, 2011 WL 487828 *14 (D. Mass. Feb. 7, 2011) (Saris, J.). A copy of that decision is attached as Exhibit A.

Second, even if this Court disagrees with the federal court regarding the Town's sovereign immunity, the Town is not liable under Chapter 93A. It relied in good faith on the advice of Town Counsel at each step of this procurement process, and such reliance precludes Chapter 93A liability. *See Turnpike Motors Inc. v. Newbury Group Inc.*, 413 Mass. 119 (1992) (finding no c. 93A liability where "sellers refused to pay the broker commissions only after they were so directed by counsel on the ground that Hackett was an unlicensed broker and could not legally collect commissions"); *Coastal Oil New England, Inc. v. Citizens Fuels Corp.*, 38 Mass. App. Ct. 26 (1995) (motion to amend to add c.93A claim would have been futile where business seller did not comply with law based upon advice of counsel); *Quinn v. Rent Control Bd. of Peabody*, 45 Mass. App. Ct. 357, *review denied*, 428 Mass. 1109 (1998) (owners of mobile home parks did not violate c. 93A where they issued discontinuance notices to tenants in good faith and upon advice of counsel).

Third, the Town cannot be held liable for both bad faith under c. 30B and violations of c. 93A. Chapter 93A was not intended as an additional recovery mechanism for violations of the public bidding laws. None of the cases authorizing lost profits for bad faith violations of the bidding laws suggest that the bidder can also obtain relief under Chapter 93A, let alone multiple damages or attorneys' fees. *See Cabot Corp. v. Baddour*, 394 Mass. 720, 724-725 (1985) (securities law prohibiting fraud, which does not allow punitive damages or injunctive relief, and c. 93A, which does, "may overlap in their coverage, but in the case of a conflict, the provisions of the specific statute must govern.... To hold otherwise would be to overlook the careful limitation on private remedies" in the securities law) (citation omitted)). Nor can a plaintiff recover damages under two different legal theories alleging the same acts and the same injury. *Szalla v. Locke*, 421 Mass. 448 (1995).

3. CALM Golf's Position:

CALM Golf made two fair and competitive bids under the RFP process to run the North Hill Golf Course and was properly awarded the contract to manage the golf course by the Town of Duxbury. CALM Golf contends that the Plaintiff has no right under any statutory authority or common law to bring an action for damages against CALM Golf based on the Town's unilateral decision to award the contract to CALM Golf.

5. Witnesses.

The parties expect to call some or all of the following witnesses:

WITNESS	ADDRESS	PARTY CALLING
Keeper of Records, Town of Duxbury	Town of Duxbury Town Hall 878 Tremont Street Duxbury, MA 02332	Johnson Golf
Keeper of the Records, CALM Golf		Johnson Golf
Douglas W. Johnson	Johnson Golf Management 581 Hathaway Road New Bedford, MA 02740	Johnson Golf Town of Duxbury CALM Golf
Joseph Eckstrom	Johnson Golf Management 581 Hathaway Road New Bedford, MA 02740	Johnson Golf Town of Duxbury
Kelly Laramee	Johnson Golf Management 581 Hathaway Road New Bedford, MA 02740	Johnson Golf
Jason Laramee	Johnson Golf Management 581 Hathaway Road New Bedford, MA 02740	Johnson Golf Town of Duxbury
Brandee Viens	Johnson Golf Management 581 Hathaway Road New Bedford, MA 02740	Johnson Golf
Richard MacDonald Former Chief Procurement Officer	Town of Duxbury Town Hall 878 Tremont Street Duxbury, MA 02332	Johnson Golf Town of Duxbury
Gordon Cushing Recreation Director	Town of Duxbury Town Hall 878 Tremont Street Duxbury, MA 02332	Johnson Golf Town of Duxbury
William Dixon	Town of Duxbury Town Hall 878 Tremont Street Duxbury, MA 02332	Johnson Golf Town of Duxbury
Antony Floreano	Town of Duxbury Town Hall 878 Tremont Street Duxbury, MA 02332	Johnson Golf Town of Duxbury
Steven Studley Assistant Recreation Director	Town of Duxbury Town Hall 878 Tremont Street Duxbury, MA 02332	Johnson Golf Town of Duxbury
John Madden Finance Director	Town of Duxbury Town Hall 878 Tremont Street Duxbury, MA 02332	Johnson Golf Town of Duxbury
John Britton	Town of Duxbury Town Hall 878 Tremont Street Duxbury, MA 02332	Johnson Golf Town of Duxbury

WITNESS	ADDRESS	PARTY CALLING
Elizabeth Sullivan	Town of Duxbury Town Hall 878 Tremont Street Duxbury, MA 02332	Johnson Golf Town of Duxbury
Andre Martecchini	Town of Duxbury Town Hall 878 Tremont Street Duxbury, MA 02332	Johnson Golf Town of Duxbury
Michael Doolin	Town of Duxbury Town Hall 878 Tremont Street Duxbury, MA 02332	Johnson Golf Town of Duxbury
Michael Marlborough	Town of Duxbury Town Hall 878 Tremont Street Duxbury, MA 02332	Johnson Golf
Robert S. Troy, Esq.	[Add]	Johnson Golf Town of Duxbury
Robert Mustard	Town of Duxbury Town Hall 878 Tremont Street Duxbury, MA 02332	Johnson Golf
Scott Whitcomb	Town of Duxbury Town Hall 878 Tremont Street Duxbury, MA 02332	Johnson Golf
Thomas Garrity	Town of Duxbury Town Hall 878 Tremont Street Duxbury, MA 02332	Johnson Golf
Michael Rufo	Town of Duxbury Town Hall 878 Tremont Street Duxbury, MA 02332	Johnson Golf
Richard Manning	Town of Duxbury Town Hall 878 Tremont Street Duxbury, MA 02332	Johnson Golf
Charles Lanzetta CALM Golf	24 Fairways Edge Marshfield, MA 02050	Johnson Golf Town of Duxbury CALM Golf
Bryan Morrissey, CPA LMHS, P.C.	80 Washington Street, Building S Norwell, MA 02061	Johnson Golf
Shawn Dahlen	Town of Duxbury Town Hall 878 Tremont Street Duxbury, MA 02332	Johnson Golf Town of Duxbury
Emmett Sheehan Eagles Nest Landscaping	24 Standish Street Duxbury, MA 02332	Johnson Golf
Robert Gunnerson	Duxbury, MA	Johnson Golf
Scott Lambaise Procurement Specialist	Town of Duxbury Town Hall 878 Tremont Street	Johnson Golf

WITNESS	ADDRESS	PARTY CALLING
	Duxbury, MA 02332	
Anthony Morosco	61 Fisher Road Arlington, MA 02476	CALM Golf

The parties reserve the right to amend and/or supplement this list of witnesses.

6. Experts.

Plaintiff expects to call as many as two experts to establish the lost profits it incurred in connection with this case. The experts are:

A. Bryan Morrissey, C.P.A.;
B. Douglas W. Johnson

Mr. Morrissey and Mr. Johnson are expected to testify to their analysis of the economic operations at North Hill, and other operations managed by Plaintiff. Based on their review of the available information, it is expected that they will testify that the potential profits lost by Plaintiff would exceed $1,000,000.00 prior to any award of attorneys' fees or multiple damages under G.L. c. 93A. The analysis of lost profits will be based on gross revenues (actual and anticipated) of a golf course such as North Hill, or other similar clubs, the costs to operate a golf course such as North Hill, or other similar clubs, all as adjusted for differences in the operation of the club. See attached Reports and CV of Bryan Morrissey dated October 19, 2011and August 24, 2012 as Exhibit B. Plaintiff reserves the right to amend its list of expert witnesses.

The defendants will object to Mr. Johnson's testifying as an expert witness based on his deposition testimony that he has no such expertise or testimony. The defendants have designated Kevin Hines C.P.A. as an expert to rebut the testimony of Mr. Morrissey. Mr. Hines' curriculum vitae is attached as Exhibit C.

7. Length of Trial.

Trial of this case should take approximately 6 to 10 on a 9:00 a.m. to 1:00 p.m. schedule.

8. Itemization of Expected Damages

Based upon what Plaintiff has calculated from Johnson Golf's accountants, the lost profits and related damages are as follows:

Lost Profits Claim 5 years @ North Hill As per contract advertised in 2008	$1,000,000.00
Use of Residence at North Hill as per 1999 contract (Residence demolished by Duxbury 2007) 60 months @ $3,000.00 per month	$180,000.00

Statutory Interest from December 16, 2008 @12% per annum $11,800.00 per month (48 months)	$566,400.00
Total	$1,746,400.00

9. Possibility of Settlement.

The parties were unable to agree on third-party mediation. However, the parties and counsel held a settlement meeting on September 10, 2012 (Pilgrim Golf's counsel was available by telephone if needed). No settlement was reached. Parties will continue to discuss settlement options.

10. Discovery Status.

Discovery is substantially complete. The Town is simultaneously filing a motion to compel further discovery from former Town Counsel Robert Troy, and certain follow-up depositions of Mr. Troy or his employees may be appropriate.

JOHNSON GOLF
By its attorney,

Stephen Follansbee (BBO#173820)
FOLLANSBEE & MCLEOD, LLP
536 Granite Street
Braintree, MA 02169
781.848.1500
steve.follansbee@gmail.com

TOWN OF DUXBURY
By its attorneys,

Leonard H. Kesten (BBO #542042)
BRODY, HARDOON, PERKINS & KESTEN, LLP
One Exeter Plaza
Boston, MA 02116
t: (617) 880-7100
f: (617) 880-7171
lkesten@bhpklaw.com

Arthur P. Kreiger (BBO #279870)
Nina Pickering Cook (BBO # 668030)
ANDERSON & KREIGER LLP
One Canal Park, Suite 200
Cambridge, MA 02141
t: 617-621-6540
f: 617-621-6640
www.andersonkreiger.com

Dated: September 12, 2012

Respectfully submitted,
CALM Golf, Inc., and Charles Lanzetta
By their attorneys,

John J. Geary (BBO #553879)
E. David Edge (BBO #655881)
Geary & Associates
161 Summer Street
Kingston, MA 02364
toplaw@tiac.net
davidedge@gearylegal.com
(781) 585-0008
(781) 585-0332

EXHIBIT A

2011 WL 487828
Only the Westlaw citation is currently available.
United States District Court,
D. Massachusetts.

MAX–PLANCK–GESELLSCHAFT ZUR FÖRDERUNG DER WISSENSCHAFTEN E.V., **Max**–Planck–Innovation GmbH, and Alnylam Pharmaceuticals, Inc., Plaintiffs,
v.
WHITEHEAD **INSTITUTE** FOR BIOMEDICAL RESEARCH, Massachusetts **Institute** of Technology, and Board of Trustees of the University of Massachusetts, Defendants.

Civil Action No. 09–CV–11116–PBS. | Feb. 7, 2011.

Synopsis

Background: Inventors brought action against patent applicants, alleging that applicants' patent applications relating to a process called "RNA interference" that could be used to "silence" genes and had potentially huge therapeutic value, contained their invention. Applicants counterclaimed for tortious interference. Cross-motions for summary judgment were filed.

Holdings: The District Court, Saris, J., held that:
[1] fact issues precluded summary judgment on applicants' breach of contract and breach of the covenant of good faith and fair dealing claims against inventors;
[2] university was not subject to inventors' claims under Massachusetts consumer protection statute; and
[3] university was not unjustly enriched as result of licensing agreement.

Plaintiffs' motion denied; Defendants' motion granted.

West Headnotes (14)

[1] **Patents**
Identity of Invention

In the context of prior art anticipation, it is a rule of thumb that species anticipates genus, but genus does not necessarily anticipate species.

[2] **Attorney and Client**
Disclosure, Waiver, or Consent

Implied consent to conflicted representation requires an informed client.

[3] **Federal Civil Procedure**
Patent Cases

Genuine issue of material fact existed regarding whether patent applicant agreed not to prosecute claims reciting overhangs, and whether all parties were honoring obligations under invention and marketing agreements, precluding summary judgment on patent applicants' breach of contract and breach of the covenant of good faith and fair dealing claims against inventors.

[4] **Federal Civil Procedure**
Patent Cases

Patent applicants' lack of measurable past damages from inventors' alleged violation of invention and marketing agreements did not entitle inventors to summary judgment on applicants' tortious interference claim under Massachusetts law, where applicants' prayers for relief, in addition to requesting damages, also requested remedy of specific performance.

[5] **Antitrust and Trade Regulation**
Privilege or Immunity
Colleges and Universities
Powers, Franchises, and Liabilities in General

State university was not subject to inventors' claims under Massachusetts consumer protection statute, although university was engaged in trade or commerce when it licensed rights in patent applications, where statute did not explicitly waive sovereign immunity. M.G.L.A. c. 93A, § 1.

1 Cases that cite this headnote

[6] **States**
⇨Liability and Consent of State to Be Sued in General
States
⇨Construction of Grant of Consent

Sovereign immunity is jurisdictional in nature; indeed, the terms of a state's consent to be sued in any court define that court's jurisdiction to entertain the suit.

[7] **States**
⇨Mode and Sufficiency of Consent

While subject matter jurisdiction is not usually gained by consent or waiver, sovereign immunity is waivable; such waiver will be given effect only where stated by the most express language or by such overwhelming implication from the text as will leave no room for any other reasonable construction.

[8] **States**
⇨Necessity of Consent

Under Massachusetts law, the state and its subdivisions are immune from suit absent legislative waiver of immunity.

[9] **Antitrust and Trade Regulation**
⇨Trade or Commerce; Business Activity

State university was engaged in trade or commerce, rather than acting pursuant to legislative mandate and performing a governmental function, when it licensed rights in patent applications, for purposes of inventors' claims against university under Massachusetts consumer protection statute. M.G.L.A. c. 93A, § 1.

[10] **Antitrust and Trade Regulation**
⇨Trade or Commerce; Business Activity

A party is not engaging in trade or commerce as defined by Massachusetts consumer protection statute when its actions are motivated by legislative mandate. M.G.L.A. c. 93A, § 1.

[11] **Statutes**
⇨Same or Different Language

The usual canon of construction is that words appearing in two places in a statute should be interpreted consistently.

[12] **Implied and Constructive Contracts**
⇨Unjust Enrichment

License agreement between state university and licensee did not license rights to patent estate to licensee, and thus university's retention of license fees was not unjust, as required for inventors' unjust enrichment claims against university under Massachusetts law; although licensee allegedly sublicensed patent estate, to which it had no rights, there was no evidence as

to income university derived specifically therefrom.

[13] **Implied and Constructive Contracts**
⚖Unjust Enrichment

Under Massachusetts law, an unjust enrichment claim does not necessarily require fault on the part of the defendant.

[14] **Implied and Constructive Contracts**
⚖Unjust Enrichment

The elements of an unjust enrichment claim under Massachusetts law are: first, a benefit or enrichment was conferred upon the defendant, second, the retention of that benefit or enrichment resulted in a detriment to the plaintiff, and, third, there are circumstances which make the retention of that benefit unjust.

Attorneys and Law Firms

Alan J. Heinrich, David I. Gindler, Jeremiah S. Helm, Lucy M. Stark, Michael Strub, Morgan Chu, Philip X. Wang, Sandra L. Haberny, Lina F. Somait, Irell & Manella LLP, Los Angeles, CA, Scott McConchie, Thomas F. Maffei, Griesinger, Tighe & Maffei, LLP, Boston, MA, for Plaintiffs.

Amer S. Ahmed, David C. Kiernan, Glenn Pfadenhauer, James L. Tuxbury, Sarah Campbell, Williams & Connolly LLP, Washington, DC, Christopher M. Morrison, Jones Day, Kristin D. Casavant, Murphy & King, PC, Boston, MA, for Defendants.

Opinion

MEMORANDUM AND ORDER

SARIS, District Judge.

*1 Plaintiffs **Max**–Planck–Gesellschaft Zur Forderung der Wissenschaften E.V. ("**Max** Planck") and Alnylam Pharmaceuticals, Inc. ("Alnylam") have sued defendants Whitehead **Institute** for Biomedical Research ("Whitehead"), Massachusetts **Institute** of Technology ("MIT"), and the Board of Trustees of the University of Massachusetts ("UMass") over the intellectual property rights to certain inventions in the field of "RNA interference." The parties have filed cross-motions for partial summary judgment.
The plaintiffs request that the Court find as a matter of law that the priority claim within U.S. Utility Patent Application No. 09/821,832 ("the Tuschl I application" or "the '832 application") to European Patent application 00126325.0 ("the '325 application"), is improper. Plaintiffs also request that this Court find that there is no genuine issue of material fact with respect to the defendants' counterclaims based on plaintiffs' *Goldstein* petitions and defendants' counterclaims for tortious interference against the plaintiffs, and that these counterclaims be dismissed.[1]

Defendant UMass moves for summary judgment on the grounds that there is no genuine issue of material fact to be determined with regards to Counts VII and XVII of plaintiffs' First Amended Complaint, asserting violations of Chapter 93A, Count XV, alleging unjust enrichment, and Count XVIII, seeking a declaratory judgment.

The plaintiffs' motion is ***DENIED.*** Defendants' motion is ***ALLOWED.***

I. Background

This case pertains to two patent applications in the field of "RNA interference." The underlying facts of this case have been explained in several prior opinions of this Court, and familiarity with those facts is presumed. *See* ***Max–Planck–Gesellschaft Zur Foerderung der Wissenschaften E.V. v. Whitehead Institute for Biomedical Research,*** 650 F.Supp.2d 114 (D.Mass.2009); ***Max–Planck–Gesellschaft Zur Foerderung der Wissenschaften E.V. v. Wolf Greenfield & Sacks, PC,*** 661 F.Supp.2d 125 (D.Mass.2009); ***Max–Planck–Gesellschaft Zur Foerderung der Wissenschaften E.V. v. Wolf Greenfield & Sacks, PC,*** 736 F.Supp.2d 353 (D.Mass.2010).

II. Legal Standard

Summary judgment is appropriate when " 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.' " *Barbour v. Dynamics Research Corp.*, 63 F.3d 32, 36–37 (1st Cir.1995) (quoting Fed.R.Civ.P. 56(c)). To succeed on a motion for summary judgment, "the moving party must show that there is an absence of evidence to support the nonmoving party's position." *Rogers v. Fair*, 902 F.2d 140, 143 (1st Cir.1990); see also *Celotex Corp. v. Catrett*, 477 U.S. 317, 325, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986).

Once the moving party has made such a showing, the burden shifts to the non-moving party, who " 'may not rest on mere allegations or denials of his pleading, but must set forth specific facts showing there is a genuine issue for trial.' " *Barbour*, 63 F.3d at 37 (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986)). The non-moving party must establish that there is "sufficient evidence favoring [its position] for a jury to return a verdict [in its favor]. If the evidence is merely colorable or is not significantly probative, summary judgment may be granted." *Anderson*, 477 U.S. at 249–50, 106 S.Ct. 2505, 91 L.Ed.2d 202 (internal citations omitted). The Court must "view the facts in the light most favorable to the non-moving party, drawing all reasonable inferences in that party's favor." *Barbour*, 63 F.3d at 36 (citation omitted).

*2 "Where, as here, a district court rules simultaneously on cross-motions for summary judgment, it must view each motion, separately, through this prism." *Estate of Hevia v. Portrio Corp.*, 602 F.3d 34, 40 (1st Cir.2010) (citing *Blackie v. Maine*, 75 F.3d 716, 721 (1st Cir.1996) ("Barring special circumstances, the nisi prius court must consider each motion separately, drawing inferences against each movant in turn.")).

III. Max Planck's Motion for Summary Judgment

A. The Priority Claim

The first legal issue raised by the plaintiffs is the propriety of the priority claim, in the Tuschl I '832 application, filed in March 2001, to the Tuschl II '325 European application, which was abandoned in 2001, two years before the Umass–Sirna Agreement in 2003. Alternatively, as defendants would state it, the issue is whether Whitehead acted in bad faith in refusing to remove that priority claim from Tuschl I when Max Planck demanded that it do so. Plaintiffs make two separate arguments with regard to the priority claim. They first argue that the Tuschl I application cannot properly claim priority to the '325 application, and that even Dr. Tuschl's original agreement to that priority claim does not make it proper. In the alternative, they argue that even if the original priority claim was valid, it can no longer be considered valid because Dr. Tuschl has withdrawn his consent. The contention is that because none of the Tuschl I inventors still pressing the priority claim are also Tuschl II inventors, Tuschl I no longer has a valid basis upon which to claim the priority date of the '325 application.

The first issue, whether the initial claim of priority was valid, turns on the proper interpretation of the law governing priority claims to foreign patent applications. Specifically, the statute states:

> (a) An application for patent for an invention filed in this country by any person who has, or whose legal representatives or assigns have, previously regularly filed an application for a patent for the same invention in a foreign country which affords similar privileges in the case of applications filed in the United States or to citizens of the United States, or in a WTO member country, shall have the same effect as the same application would have if filed in this country on the date on which the application for patent for the same invention was first filed in such foreign country, if the application in this country is filed within twelve months from the earliest date on which such foreign application was filed; but no patent shall be granted on any application for patent for an invention which had been patented or described in a printed publication in any country more than one year before the date of the actual filing of the application in this country, or which had been in public use or on sale in this country more than one year prior to such filing.

35 U.S.C. § 119(a). Plaintiffs argue that, under this statutory language, any claim of priority that Tuschl I makes to the '325 application is improper.

*3 Defendants, for their part, contend that the validity of the original priority claim is a matter not before this Court because it was not raised in the First Amended Complaint,

and that the real question is whether Whitehead acted in bad faith, under the 2001 and 2003 Agreements, in refusing to remove the priority claim from the Tuschl I application at **Max** Planck's request in 2004. They argue that Whitehead's refusal to remove the priority claim from Tuschl I did not exhibit bad faith because Dr. Tuschl had assigned his rights to the Tuschl I invention partially to Whitehead, and under the 2001 and 2003 Joint Invention and Joint Marketing Agreements, Whitehead bore the responsibility of unilaterally managing the Tuschl I prosecution. Defendants argue that Whitehead therefore had no responsibility to remove the priority claim at **Max** Planck's request, and did not do so because UMass had already licensed its rights in Tuschl I to Sirna Therapeutics, which had relied on the existence of the priority claim in that licensing agreement.

In support of their argument that § 119(a) does not support the validity of the priority claim, plaintiffs cite *Boston Scientific Scimed, Inc. v. Medtronic Vascular, Inc.*, 497 F.3d 1293 (Fed.Cir.2007). In that case, an organization filed a European patent application for an invention, and then later became affiliated with an American inventor. That inventor tried to claim priority to the European application, but the Federal Circuit ruled that, because the organization had not been acting on the American's behalf at the time the application was filed, the priority claim was improper under § 119(a). Specifically, the court held that "a foreign application may only form the basis for priority under section 119(a) if that application was filed by either the U.S. applicant himself, or by someone acting on his behalf at the time the foreign application was filed." *Id.* at 1297–98.

Here, plaintiffs argue, **Max** Planck filed the '325 application prior to its agreement with the Tuschl I inventors Drs. Zamore, Bartel and Sharp; **Max** Planck therefore could not have done so on behalf of those inventors, who thus have no claim of priority to the '325 application under *Scimed,* which states that "§ 119 gives rise to a right of priority that is personal to the United States applicant." *Id.* at 1297 (quoting *Vogel v. Jones,* 486 F.2d 1068, 1072 (CCPA 1973)). Defendants counter that *Scimed* held that § 119(a) "requires that a nexus exist between the inventor and the foreign applicant at the time the foreign application was filed," *id.* at 1297, and that such a nexus clearly existed in this case, given that **Max** Planck filed the '325 application on Dr. Tuschl's behalf, and Dr. Tuschl was a Tuschl I inventor. This argument is persuasive.

The next issue is whether § 119(a) requires the European applicant to file its application on behalf of *all* the inventors who attempt to claim priority to that application, or merely one of them. *Scimed* does not address this question. Both parties cite *Reitz v. Inoue,* 39 U.S.P.Q.2d 1838 (Bd.Pat.App. & Interf., 1995) in favor of their positions. In *Reitz,* the issue was whether an inventor was entitled to the benefit of the filing date of a Japanese patent when the inventive entities on the two applications were different. Specifically, in that case, Reitz argued that Inoue was not entitled to the benefit of the Japanese patent because only Inoue was listed in the foreign application, whereas Inoue and another inventor were named on the domestic application. The court found that Inoue was entitled to claim priority to the foreign application, because

> *4 the proposition that the inventive entity must be the same in both the foreign and the corresponding U.S. application in order to obtain benefit [under Section 119] can no longer be accepted, if it ever was, as a hard and fast rule in view of the liberalization of the requirements for filing a U.S. application as joint inventors wrought by the 1984 amendment of 35 U.S.C. Section 116.

Reitz, 39 U.S.P.Q.2d at 1840.2 Because § 119(a) cannot be treated as having a same inventive entity requirement as a "hard and fast rule," the defendants again have the better argument as to how that section should apply to the facts of this case.

The parties have also argued over the question of whether Dr. Tuschl's personal withdrawal of his priority claim vitiates the nexus and renders the Tuschl I priority claim invalid. However, whether Dr. Tuschl can unilaterally withdraw his claim to priority without violating the parties' agreements is a question of fact, implicating the coassignment of Dr. Tuschl's right to Whitehead, the 2001 and 2003 Agreements, and the original agreement to cross-claim for priority. Dr. Tuschl claims that he withdrew the priority claim in 2006 because of concerns about allegations of inequitable conduct that could be triggered by his claim of priority, because the inventive entity of the Tuschl I applications does not include the entire inventive entity of the '325 application. However, this about-face is not backed up by any caselaw regarding inventive entities, and a jury could find that this is a pretext. As discussed in my prior opinion, the undisputed facts in the record show that the priority claim resulted from negotiations between Whitehead and **Max** Planck regarding the management of the Tuschl I and Tuschl II applications. "Whitehead and Max–Planck ultimately agreed to prosecute them separately, but claim priority to each other's applications." ***Max–Planck,*** 650 F.Supp.2d at 119. This agreement was confirmed in writing. *See* Ex. 8

to Granahan Aff. [Docket No. 36]. Dr. Tuschl's unilateral withdrawal of the priority claim is arguably a breach of this agreement. It also potentially violates the 2001 and 2003 Joint Invention Agreements, because withdrawing the priority claim would affect the prosecution of Tuschl I (a task assigned to Whitehead under those Agreements). The propriety of Dr. Tuschl's withdrawing the priority claim therefore implicates several factual issues, because personally withdrawing his priority claim may result in breach of various contractual obligations by **Max** Planck, and because that breach could itself have been justified by a material breach by Whitehead.

The parties have also raised the question of whether Tuschl I and Tuschl II are the "same invention" for purposes of the "same invention" requirement in 35 U.S.C. § 119(a). This dispute is curious, because until recently the parties have been insisting to the PTO that Tuschl I and Tuschl II actually embody two different inventions. Therefore the fact that both claim priority to the same European application is problematic in light of § 119(a)'s requirement that an application can claim priority to a foreign patent application "for the same invention."

***5** With regard to this requirement, the Federal Circuit has stated, "Under section 119, the claims set forth in a United States application are entitled to the benefit of a foreign priority date if the corresponding foreign application supports the claims in the manner required by section 112, ¶ 1."[3] *In re Gosteli,* 872 F.2d 1008, 1010 (Fed.Cir.1989). The court further stated that the "reference to 'invention' in section 119 clearly refers to what the claims define, not what is disclosed in the foreign application." *Id.*

[1] As the prior opinion in this case pointed out, "Whitehead, MIT, and **Max** Planck appear to agree that Tuschl II is a 'species' claim that is allowable after the issuance of the 'genus' claim." ***Max–Planck,*** 650 F.Supp.2d at 122. A genus claim is a claim to a general category of invention, in this case the process of RNA interference and its components; a species claim is a more specific iteration of or improvement on the "genus" invention. Tuschl I, here the genus invention, claims, among other things: "1. Isolated RNA of from about 21 to 23 nucleotides that mediates RNA interference of an mRNA to which it corresponds. 2. Isolated RNA of claim 1 that comprises a terminal 3′ hydroxyl group." '832 Application, Ex. 6 to Granahan Aff. The Tuschl II '325 species application claims, among other things:

> 1. Isolated double-stranded RNA molecule, wherein each RNA strand has a length from 19–23 nucleotides, wherein said RNA molecule is capable of target-specific nucleic acid modifications. 2. The RNA molecule of claim 1 wherein at least one strand has a 3′-overhang from 1–5 nucleotides.... 5. The RNA molecule of any one of claims 2–4, wherein the 3′-overhang is from 1–3 nucleotides. 6. The RNA molecule of any one of claims 2–5, wherein the 3′-overhang is stabilized against degradation.

'325 Application, Ex. 7 to Granahan Aff. In the context of prior art anticipation, it is a rule of thumb that "species anticipates genus, but genus does not necessarily anticipate species." Janice M. Mueller, *An Introduction to Patent Law* 126 (2d ed. 2006).

It bears noting that the parties appear to be trying to have their patent cake and eat it too, by arguing the invention is the same for purposes of Section 119(a) but different for purposes of avoiding double patenting. Without a *Markman*-type hearing and better briefing, the Court does not undertake to determine based on this record whether at least one of the claimed inventions in Tuschl I and Tuschl II is "the same" for purposes of section 119(a). In any event, the PTO's ruling cannot be challenged in this action.

B. Defendants' Counterclaims Based on Max Planck's *Goldstein* Petition

Whitehead has asserted counterclaims against **Max** Planck and Alnylam relating to **Max** Planck's alleged violation of the 2001 Research Use Agreement and the 2003 Therapeutic Use Agreement. Specifically, Whitehead accuses **Max** Planck of breach of contract and breach of the covenant of good faith and fair dealing, and Alnylam of interference with advantageous business relations, all arising from **Max** Planck's *Goldstein* petition before the USPTO to revoke its power of attorney from Wolf Greenfield, the law firm hired by Whitehead to manage the Tuschl I application. **Max** Planck now moves for summary judgment in its favor on these counterclaims.

6** The analysis of this issue is complicated by the fact that this Court recently issued an opinion in the related case ***Max–Planck–Gesellschaft Zur Foerderung der Wissenschaften E.V. v. Wolf Greenfield & Sacks, P.C., 736 F.Supp.2d 353 (D.Mass., 2010). In that case, **Max** Planck sued Wolf Greenfield for legal malpractice based on the proposition that, in light of the divergent interests of **Max** Planck and the defendants in this action, Wolf Greenfield's continued representation of **Max** Planck in

the Tuschl I prosecution presented an improper conflict of interest. In the resulting opinion, this Court found that an attorney-client relationship existed between **Max** Planck and Wolf Greenfield, but that **Max** Planck was time-barred from any recovery. **Max** Planck now argues that because of the Court's holding that Wolf Greenfield's representation of **Max** Planck involved an attorney-client relationship, **Max** Planck is entitled to summary judgment on defendants' claims that **Max** Planck's *Goldstein* petition constituted a violation of the 2001 and 2003 Agreements.

Defendants argue that, pursuant to principles of due process, the findings in the *Wolf Greenfield* case should not be binding on defendants because they were not parties to that case. The due process issue is a red herring, however, because the *Wolf Greenfield* opinion is not dispositive of the contract claims at issue in this case. The *Wolf Greenfield* opinion dealt solely with the question of whether an attorney-client relationship existed for purposes of the legal malpractice suit at issue in that action. It did not make any findings about the propriety of the *Goldstein* petition under the Agreements, nor did it make findings with regard to waiver of conflict of interest or the scope of any such waiver. Indeed, the issue of waiver was not pressed in the *Wolf Greenfield* action. Similarly, **Max** Planck's arguments about Massachusetts Rule of Professional Conduct 1.7 are inapposite; regardless of what Wolf Greenfield's ethical duties may have been under the Rule, those duties do not bear on **Max** Planck's contractual obligations to Whitehead and UMass. The issues of attorney-client relationship adjudicated in *Wolf Greenfield* and the contract law claims at issue here, while related, require independent analysis.

As such, the essential questions here are whether a party can contractually waive its right to non-conflicted representation, whether **Max** Planck did so in the 2001 and 2003 Agreements, and whether the filing of the *Goldstein* petition constituted a violation of those Agreements. It is not uncommon for parties, especially sophisticated ones, to prospectively waive legal conflicts of interest by agreement. *See, e.g., Acushnet Co. v. Coaters, Inc.*, 972 F.Supp. 41, 70 (D.Mass.1997) (finding that liable parties in a CERCLA action "were free to forego pressing for judicial resolution of their conflicting interests and to agree that their common interest in presenting a unified position ... so far outweighs their conflicting interests among themselves that they are better served by foregoing pursuit of conflicts and acting together").

*7 [2] The issue, more specifically, is whether **Max** Planck's agreement to allow Whitehead to prosecute the Tuschl I patent, with **Max** Planck retaining only the "reasonable opportunity to comment and advise on patent attorneys to be used," was an implicit, prospective waiver of any conflict of interest between **Max** Planck and Whitehead's choice of prosecution counsel. "Implied consent [to conflicted representation] requires an informed client. A court can say that a client's actions can support solely the conclusion that the client has consented, but only in the limited circumstance that it is indisputably clear that the client was aware of the conflict." *CenTra, Inc. v. Estrin,* 538 F.3d 402, 419 (6th Cir.2008).

[3] Here, **Max** Planck was aware of the potential for conflict when it entered into the 2001 and 2003 Agreements. More importantly, it was aware of an existing conflict at the time that it exercised its Power of Attorney in favor of Wolf Greenfield on March 31, 2004. **Max** Planck did so even in light of the existing disagreement between itself and Whitehead about the inclusion of the Tuschl II data in the Tuschl I specification, a disagreement that came to a head in light of UMass' licensing of its rights to Tuschl I to Sirna in September of 2003. As Chief Magistrate Judge Dein put it in her May 11, 2010 decision, "by late 2003, the defendants shared a common legal interest relating to the contents of the Tuschl I applications that was adverse to the interests of **Max** Planck and Alnylum." Mem. of Decision and Order 15 [Docket No. 355]. The undisputed evidence is that **Max** Planck was aware of the conflict when it consented to representation by Wolf Greenfield, and entering into the 2001 and 2003 Agreements may have further constituted waiver of certain conflict of interest claims.

However, there are disputed facts about the representations made by Whitehead as to its commitment not to prosecute claims reciting 3′ overhangs, representations that it emphasized in the so-called Nelson/Pratt letter in 2004. The presence of the 3′ information in the Tuschl I claims significantly complicates this issue. Any waiver of conflicts by **Max** Planck likely was predicated on the understanding that the Tuschl I applications would not claim the 3′ overhang, and the scope of any such waiver is therefore an unresolved question of fact. Consequently, I make no finding here with regard to waiver.

It is also unclear as a factual matter whether **Max** Planck's filing of the *Goldstein* petition constitutes a breach of the covenant of good faith and fair dealing under the 2001 and 2003 Agreements. Specifically, defendants have presented communications by **Max** Planck and its attorneys that suggest that the legal ethics complaints at the heart of the *Wolf Greenfield* case were

merely pretextual, and part of a broader litigation strategy to impede the prosecution of Tuschl I. This evidence creates a genuine issue of material fact as to whether all parties were honoring their obligations under the 2001 and 2003 Agreements. As such, summary judgment on defendants' counterclaims based on the *Goldstein* petition is inappropriate.

C. Defendants' Tortious Interference Claims

*8 [4] Next, Max Planck argues that it should be granted summary judgment on defendants' tortious interference claims in light of defendants' admissions that they have not, as yet, suffered actual or measurable pecuniary damages. There is ample language in the case law to the effect that pecuniary harm is a necessary element of a tortious interference claim. *See, e.g., Ayash v. Dana–Farber Cancer Institute,* 443 Mass. 367, 822 N.E.2d 667, 690 (Mass.2005) (listing as one element of an intentional interference claim "that the plaintiff suffered economic harm as a result of the defendant's conduct"). The more specific question presented by this case, however, and not resolved by such language, is whether *anticipated* pecuniary harm is sufficient to make out a claim. *Cf. Adams v. Watson,* 10 F.3d 915, 921 (1st Cir.1993) ("Our review of the pertinent authorities satisfies us that the proposed second amended complaint alleges particularized future economic injury sufficient to support Article III standing.").

In several of the cases Max Planck cites, no economic harm had been alleged at all. *See, e.g., Tech Plus, Inc. v. Ansel,* 59 Mass.App.Ct. 12, 18–19, 793 N.E.2d 1256, 1262–63 (Mass.App.Ct.2003) (finding that plaintiffs, while they did potentially suffer reputational damage as a result of defendants' activities, could not recover on intentional interference claims because they had received all the commissions they were due and conceded that no pecuniary loss was at stake); *Valdez v. Domeniconi,* 6 Mass. L. Rep. 501 (Mass.Super.Ct.1997) (granting summary judgment against plaintiff on tortious interference claim where plaintiff claimed only that he had suffered severe emotional distress, not economic damages); *Ratner v. Noble,* 35 Mass.App.Ct. 137, 138–39, 617 N.E.2d 649, 650 (1993) (holding that where plaintiff alleged only reputational harm and no pecuniary damage, she could not recover for tortious interference claim). These cases do not address the question of whether a plaintiff's allegations that he *will* suffer pecuniary harm, but has not yet, are sufficient to make out the claim.

Defendants cite to the more archaic, but nonetheless instructive, case of *Beekman v. Marsters,* 195 Mass. 205, 80 N.E. 817 (Mass.1907). *Beekman* states that if "the plaintiff proves that the defendant unlawfully interferes or threatens to interfere with his business or his rights under a contract, and further makes out in proof that damages will not afford an adequate remedy, equity will issue an injunction." *Beekman,* 80 N.E. at 821; *cf. M. Steinert & Sons Co. v. Tagen,* 207 Mass. 394, 93 N.E. 584 (Mass.1911).

The concept that future particularized economic damages can be adequate for purposes of obtaining equitable relief is applicable here. The defendants note that, due to the delay in issuing Tuschl I applications, payments under UMass' licensing agreement with Sirna Therapeutics, Inc., have been postponed. Further, Defendants point out a number of cases in which Massachusetts courts have treated tortious interference claims under the banner of equity. *See, e.g., Davis Bros. Fisheries Co. v. Pimentel,* 322 Mass. 499, 78 N.E.2d 93 (Mass.1948). Defendants' prayers for relief in their counterclaims, in addition to requesting damages, also request the remedy of specific performance, "an equitable remedy that requires some attention to the relative benefits and burdens that the parties may enjoy or suffer as compared with a legal remedy in damages." *Texas v. New Mexico,* 482 U.S. 124, 131, 107 S.Ct. 2279, 96 L.Ed.2d 105 (1987). Given that the case law suggests that the tort of tortious interference may implicate an equitable remedy, the defendants' lack of measurable past damages does not entitle plaintiffs to summary judgment.

IV. UMass' Motion for Summary Judgment

*9 [5] UMass' motion for summary judgment addresses several claims made by Max Planck dealing with UMass' licensing of its Tuschl I rights to Sirna Therapeutics in September 2003. Specifically, at issue in this motion are Max Planck's claims in Count XVII that UMass wrongfully licensed rights in the EP ' 325 Application to Sirna in the 2003 License Agreement and thereby violated M.G.L. c. 93A, Massachusetts' consumer protection statute, and that the License Agreement unjustly enriched UMass. Max Planck also argues that UMass and Whitehead violated Chapter 93A by wrongfully harming the Tuschl II applications through the prosecution of the Tuschl I applications (Count VII). UMass argues that summary judgment should be awarded in its favor on the Chapter 93A claims because it is not subject to suit under that law, and that it should be awarded summary judgment on the merits in any event because the License Agreement did not purport to license rights in the '325 patent application to Sirna.

A. Applicability of Chapter 93A

[6] [7] UMass argues that it is not subject to suit under Chapter 93A because the statute does not waive sovereign immunity explicitly, nor do its terms necessarily imply waiver. The question of sovereign immunity must be resolved as a threshold matter. "Sovereign immunity is jurisdictional in nature. Indeed, the 'terms of [a state's] consent to be sued in any court define that court's jurisdiction to entertain the suit.' " *F.D.I.C. v. Meyer,* 510 U.S. 471, 475, 114 S.Ct. 996, 127 L.Ed.2d 308 (1994) (quoting *United States v. Sherwood,* 312 U.S. 584, 586, 61 S.Ct. 767, 85 L.Ed. 1058 (1941)); *see also Seminole Tribe of Florida v. Florida,* 517 U.S. 44, 72–72, 116 S.Ct. 1114, 134 L.Ed.2d 252 (1996) ("The Eleventh Amendment restricts the judicial power under Article III[.]"). While subject matter jurisdiction is not usually gained by consent or waiver, sovereign immunity is waivable. *See Port Authority Trans–Hudson Corp. v. Feeney,* 495 U.S. 299, 305, 110 S.Ct. 1868, 109 L.Ed.2d 264 (1990). Such waiver will be given effect "only where stated by the most express language or by such overwhelming implication from the text as [will] leave no room for any other reasonable construction." *Id.* (internal quotation marks and citations omitted).

[8] Under Massachusetts law, the state and its subdivisions are immune from suit absent legislative waiver of immunity; since the passage of the Massachusetts Tort Claims Act in 1978, the SJC has held that "immunity is in still in effect unless consent to suit has been 'expressed by the terms of a statute, or appears by necessary implication from them.' " *Bain v. City of Springfield,* 424 Mass. 758, 762–63, 678 N.E.2d 155, 159 (1997) (quoting *C & M Constr. Co. v. Commonwealth,* 396 Mass. 390, 392, 486 N.E.2d 54, 56 (1985)); *see also DeRoche v. Massachusetts Com'n Against Discrimination,* 447 Mass. 1, 12–13, 848 N.E.2d 1197, 1206 (2006) ("Absent statutory language that indicates by express terms a waiver of sovereign immunity, the Legislature's intent to subject the Commonwealth to liability may be found only when such an intent is clear by necessary implication from the statute's terms.").

***10** "Whether a governmental entity is ever amenable to suit under c. 93A remains an open issue" under Massachusetts law. *M. O'Connor Contracting, Inc. v. City of Brockton,* 61 Mass.App.Ct. 278, 284 n. 8, 809 N.E.2d 1062, 1067 n. 8 (2004). As the *O'Connor* court explained,

> The question is controversial because c. 93A contains no explicit indication that governmental entities are to be liable under its provisions. Both § 11 and § 9 of c. 93A require that the defendant be a "person" engaged in trade or commerce. "Person" is defined in the statute as including "natural persons, corporations, trusts, partnerships, incorporated or unincorporated associations, and any other legal entity." Although the term "person" ordinarily is not construed as including the State or its political subdivisions, uncertainty exists because only a "person" may bring suit under c. 93A and governmental entities have been considered to have standing to do so.

Id. (citations omitted). UMass' argument that the Massachusetts Supreme Judicial Court had resolved this "uncertainty" in an earlier case is not well taken. The Court stated: "Cases ... in which the public entity may act as a plaintiff in a c. 93A action are not apposite. One who deals with a public entity, as for instance in providing it with goods or services, may very well be engaged in trade or commerce without the entity being so engaged as well." *Lafayette Place Associates v. Boston Redevelopment Authority,* 427 Mass. 509, 536 n. 29, 694 N.E.2d 820, 836 n. 29 (1998). This line of reasoning relates to the issue of whether a government entity is engaged in trade or commerce, not whether it is a "person" under the law and therefore subject to suit.

1. *Trade or Commerce v. Legislative Purpose*

[9] [10] There is one circumstance in which it is clear that Chapter 93A does not apply; the Massachusetts Supreme Judicial Court has stated that "a municipality is *not* liable under G.L. c. 93A when it is not acting in a business context, that is, when it is not engaged in trade or commerce." *Park Drive Towing, Inc. v. City of Revere,* 442 Mass. 80, 86, 809 N.E.2d 1045, 1050–51 (2004) (internal quotation marks omitted; emphasis added). The "trade or commerce" inquiry, in turn, involves "the nature of the transaction, the character of the parties involved and [their] activities ... and whether the transaction was motivated by business ... reasons." *Id.* (quoting *Boston Hous. Auth. v. Howard,* 427 Mass. 537, 538–39, 695 N.E.2d 192 (1998)) (alterations in original). It is established that "a party is not engaging in 'trade or commerce' as defined by G.L. c. 93A when its actions are motivated by legislative mandate." *Park Drive Towing,* 442 Mass. at 86, 809 N.E.2d at 1051; *see also O'Connor,* 61 Mass.App.Ct. at 284, 809 N.E.2d at 1067 ("Putting aside the broader question whether c. 93A may be read as waiving governmental immunity in *any* circumstances, at a minimum it is well established that governmental entities are not amenable to suit under c. 93A when they have engaged in governmental activity rather than trade or commerce.").

*11 In this case, UMass argues that it was acting pursuant to legislative mandate and performing a governmental function. Specifically, UMass cites Mass. Gen. Laws ch. 75, § 14A (1996), which states:

> Notwithstanding any provision of law to the contrary, the trustees shall prescribe and enforce such regulations as they may deem necessary, may enter into contracts with corporations, foundations, other entities, and individuals concerning inventions, discoveries, research, or other work product, including patents, trademarks, copyrights, trade secrets, and any other intellectual property, developed under the terms of a sponsored agreement entered into by the university or involving the use of university funds ... including the transfer of rights involving such work product, the amount of the respective shares in the proceeds therefrom, and provision for the resolution of any and all disagreements involving the same.

The statutory language belies UMass' position. The use of the terms "shall" and "may" in such close proximity suggests that entering into contracts is permissive rather than mandatory; if the legislature had intended for that power to be obligatory, it would have used the word shall, as it did earlier in the same sentence.

Furthermore, the entering of contracts solely for profit does not fit the traditional mold of "government activity." The cases UMass cites only underscore this distinction. One relates to a housing authority's contract to develop land. *See Lafayette Place Assocs. v. Boston Redevelopment Auth.*, 427 Mass. 509, 535–36, 694 N.E.2d 820, 836 (1998). Another deals with a town's contract to supply water. *See T. Bedrosian, LLC v. Town of Mendon*, 24 Mass. L. Rptr. 344, 2008 WL 3315861, at *4 (Mass.Super.2008). In both cases, and in others UMass cites, government entities entered into contracts to facilitate a specific service provision.

If accumulating wealth that *could* be used for some unspecified public purpose (such as paying professors, maintaining campus buildings, or reducing the cost of tuition) were enough to qualify an action as "governmental activity" outside the realm of trade or commerce, then no governmental entity would ever be engaged in trade or commerce for purposes of Chapter 93A. This would render the state courts' distinction between trade and commerce and government activity meaningless.

2. Sovereign Immunity Under Chapter 93A

Having established that UMass was engaged in trade or commerce, the application of Chapter 93A is still uncertain. One federal court has found that Chapter 93A applies when a governmental entity is engaged in trade or commerce. *See City of Revere v. Boston/Logan Airport Associates, LLC.* 443 F.Supp.2d 121, 129 (D.Mass.2006) ("A municipality is subject to liability under Chapter 93A where it is 'acting in a business context[.]' ") (quoting *Park Drive Towing, Inc. v. City of Revere*, 442 Mass. 80, 86, 809 N.E.2d 1045, 1051 (2004)). However, in that case the sovereign immunity waiver question was not dispositive, because the Court found the City not liable under Chapter 93A for other reasons. The parties have cited no case, and the Court could not find one, where the state or a subdivision thereof was held liable under Chapter 93A.[4] To date, the Massachusetts courts have only specified that Chapter 93A does *not* apply when governmental entities are *not* engaged in trade or commerce.

*12 As such, I turn now to the question of whether UMass qualifies as a "person" under Chapter 93A and whether Massachusetts' sovereign immunity exempts it from suit in federal court in the event that UMass is engaged in trade or commerce. The two questions are really flip sides of the same coin, because the underlying issue is whether Chapter 93A serves as a waiver of sovereign immunity.

Again, to be found to have waived sovereign immunity, state legislation must either be explicit on the point, or waiver must be found by "necessary implication from [the terms of a statute]." *Bain*, 424 Mass. at 763, 678 N.E.2d at 159. Chapter 93A contains no explicit waiver of sovereign immunity. *See Bretton v. State Lottery Com'n*, 41 Mass.App.Ct. 736, 738, 673 N.E.2d 76, 78 (1996) ("Chapter 93A contains no explicit indication that governmental entities are to be liable under its provisions.") (quoting *United States Leasing Corp. v. Chicopee*, 402 Mass. 228, 232, 521 N.E.2d 741, 744 (1988)). Massachusetts courts have not ruled on the question of whether Chapter 93A constitutes an implicit waiver of sovereign immunity.

It is certainly plausible, based on a facial reading of the definitions section of the statute, that the term "person" could include the Commonwealth and its subdivisions; indeed, "person" is defined to include "any other legal entity," which seems notably broad in its reach. Mass.

Gen. Laws ch. 93A, § 1(a). However, because an implied waiver of sovereign immunity must be very clear, a facial reading of the statute cannot end the inquiry.

Generally, in Massachusetts legislation, the term "person" does not include governmental entities. *See* Mass. Gen. Laws c. 4, § 7 ("In construing statutes the following words shall have the meanings herein given, unless a contrary intention clearly appears: ... 'Person' or 'whoever' shall include corporations, societies, associations and partnerships."); *Woods Hole v. Town of Falmouth,* 74 Mass.App.Ct. 444, 447, 907 N.E.2d 1124, 1126 (2009) ("As has been many times observed, this definition does not encompass governmental agencies, municipalities, or municipal corporations.") (internal quotation marks and citation omitted). In some chapters of the Massachusetts General Laws, the Legislature has explicitly defined "person" to include the Commonwealth. *See, e.g.,* Mass. Gen. Laws c. 151B, § 1 ("The term 'person' includes one or more individuals, partnerships, associations, corporations, legal representatives, trustees, trustees in bankruptcy, receivers, and the commonwealth and all political subdivisions, boards, and commissions thereof.").

In Chapter 93A, however, while the Legislature did write a unique definitions section (meaning the Chapter 1, § 7 definition of "person" does not apply), and thus implied an intention to broaden the definition of "person," the use of the phrase "any other legal entity" leaves the scope of that broadening unclear. Mass. Gen. Laws c. 93A, § 1(a). The fact that the Legislature went out of its way to define "person" more broadly than usual is some evidence in favor of the argument that Chapter 93A constitutes waiver of sovereign immunity, but that it did not go so far as to expressly include the Commonwealth in the definition (which it has done elsewhere in the Massachusetts General Laws) is equally weighty evidence against that conclusion.

***13** Given the requirement that waiver be found by "*necessary* implication," *Bain,* 424 Mass. at 763, 678 N.E.2d at 159 (emphasis added), the use of the phrase "any other legal entity" in the definition of "person" is not a sufficient basis on which to find that the Legislature intended to waive sovereign immunity in Chapter 93A. As the SJC has noted, in the absence of express waiver, "we consider whether governmental liability is necessary to effectuate the legislative purpose." *Todino v. Town of Wellfleet,* 448 Mass. 234, 238, 860 N.E.2d 1, 5 (2007).

In *Todino,* the court found implied waiver of sovereign immunity with regard to a government employer's obligation to pay interest on payments to incapacitated employees where the statute at issue "provides expressly that payments shall be made by a municipality or district," and the court further noted that "recovery of interest is necessarily implied by the potent language of [GL c. 41,] § 111F that requires timely payments and prohibits any reduction of pay." *Id.; see also Bates v. Director of Office of Campaign and Political Finance,* 436 Mass. 144, 174, 763 N.E.2d 6, 27 (2002) (finding implied waiver of sovereign immunity in clean elections law and stating that the "power to bind the Commonwealth to payments of public funds by the process of certification is required 'by necessary implication' from the clean elections law; the certification process, and the director's role in it, has no meaningful function without the obligation for payment") (citation omitted).

Here, by contrast to these cases, Chapter 93A is not rendered "ineffective" by excluding the Commonwealth from liability. *Bates,* 436 Mass. at 174, 763 N.E.2d at 27. To be sure, the Legislature's purpose of protecting consumers is broadly stated in the law's basic proscription of "unfair methods of competition and unfair or deceptive acts or practices in the conduct of *any* trade or commerce." Mass. Gen. Laws c. 93A, § 2(a) (emphasis added). But unlike the statutes at issue in *Todino* and *Bates,* Chapter 93A is not premised on governmental entities' obligations to make payments, and this difference is a critical one. The use of the phrase "any other legal entity" does not require an implication of government liability, and as such this Court will not imply a waiver of sovereign immunity. *Cf. Hannigan v. New Gamma–Delta Chapter of Kappa Sigma Fraternity, Inc.,* 367 Mass. 658, 659, 327 N.E.2d 882, 883 (1975) (stating that while judicial abrogation of sovereign immunity is possible in the state courts, "it is preferable that the Legislature should have a reasonable opportunity to accomplish by statute this change in the law").

[11] The *O'Connor* court was apt to note the problems raised by the fact that governmental entities have been found to be "persons" when acting as plaintiffs, but not defendants. The usual canon of construction is that words appearing in two places in a statute should be interpreted consistently. *See Lantner v. Carson,* 374 Mass. 606, 611, 373 N.E.2d 973, 976 (1978) (applying this rule to the phrase "in the conduct of any trade or commerce" in Chapter 93A). However, the cases finding governmental entities to have standing to sue under Chapter 93A have not discussed the sovereign immunity issue as applicable to the state; often the debate has turned on questions of standing of a municipality, and have dealt with the standing question somewhat cursorily. *See, e.g., City of Boston v. Aetna Life Ins. Co.,* 399 Mass. 569, 574–75, 506 N.E.2d 106, 109–110 (1987) ("If there is a standing requirement involved in § 11, it is that the plaintiff must be a 'person who engages in the conduct of any trade or

commerce.' Surely, the City meets this test."). It is not ideal for the term "person" to have two different implications within the statute; nonetheless, it is preferable to finding a waiver of sovereign immunity based largely on judicial resolution of a different question. Sovereign immunity is too important of a right to be waived in any way but directly (if not explicitly) by the statute's terms, and as already noted, Chapter 93A does not require a "necessary implication" of waiver.

*14 In light of the above conclusions, **Max** Planck's Chapter 93A claims must fail as a matter of law, since UMass is not subject to suit under that statute.

B. Unjust Enrichment5

[12] UMass also moves for summary judgment on **Max** Planck's unjust enrichment claim, arguing that UMass was not unjustly enriched and that **Max** Planck suffered no unjust detriment as a result of the 2003 License Agreement between UMass and Sirna Therapeutics. The merits of this dispute turn largely on the question of whether the License Agreement is properly understood as having licensed the rights to Tuschl II to Sirna. Specifically, UMass granted Sirna a license "to use and practice the Patent Rights in the Field," where "Patent Rights" was defined in the definitions portion of the Agreement as

> the United States patent applications listed on Exhibit A and any priority documents ... to the extent the claims are directed to subject matter specifically described therein, as well as any patents issued on these patent applications and any reissues or reexaminations of those patents, and any foreign counterparts to those patents and patent applications.

License Agreement ¶¶ 2.1, 1.9, Ex. O to Declaration of Barbara Fiacco in Support of University of Massachusetts's Motion for Summary Judgment. Exhibit A to the License Agreement does not list the '325 Application as a separate item in the list of patent rights; however, it does list the Tuschl I Patent Cooperation Treaty International Patent Application No. PCT/US01/10188 ("PCT Application"), and states that the PCT application is "based on priority of United States Patent Application Nos. 60/193,594 and 60/265,232 and European Patent Application No. 00126325.0." In other words, it simply, and accurately, lists the two American provisional applications (the '594 and '232 applications) and the European '325 application as priority documents for the Tuschl I PCT application.

The issue boils down to whether "priority" under 35 U.S.C. § 119(a) constitutes ownership of the substantive invention, or whether it merely allows the holder of the priority claim to utilize the date of filing of the foreign patent application as the constructive filing date of his own American application for purposes of prior art determinations. A 1972 Senate Report on Section 119(a) explains, "The right of priority enables a party first filing an application for a patent in any of the convention countries to file applications within 1 year in other convention countries and have the later applications treated as if they were filed on the same date as the first application." S.Rep. No. 92–954, at 2 (1972), U.S. Code Cong. & Admin.News 1972, pp. 2873, 2875.

Other sources confirm this understanding that the priority right is not a grant of a substantive right, but is rather just the right to utilize the earlier filing date for the "same invention." *See* Herbert F. Schwartz & Robert J. Goldman, *Patent Law and Practice* § 2.III.D.9 (6th ed. 2008) ("An applicant can claim the benefit of the filing date of an application filed abroad.... [T]he benefit of the filing date (referred to as 'priority') from the first application for an invention filed in any member country can be claimed in a U.S. application as long as it is filed within one year of the first application."); Janice M. Mueller, *An Introduction to Patent Law* 423 (2d ed. 2006) ("Obtaining this benefit means that, in the words of the statute, the U.S. application 'shall have the same effect' as the same application would have if actually filed in the United States on the foreign filing date. In practice, this means that the USPTO will treat the application as if filed on the foreign priority date for purposes of examining it against the prior art."); *In re Gosteli,* 872 F.2d 1008, 1010 (Fed.Cir.1989).

*15 In this case, then, the claims in the Tuschl I "genus" application can claim priority to the '325 application,6 if the claims from Tuschl I are found therein, but that priority right does not grant substantive rights in the Tuschl II '325 application to the extent that the two inventions are different-meaning it would not include any right to any claims in Tuschl II that are not in Tuschl I. Therefore, the 2003 License Agreement did not purport to license rights in the Tuschl II invention to Sirna, only its priority date to the extent the claimed inventions were the same.

Max Planck alleges that Sirna's purported ownership of rights to the Tuschl II invention, and specifically its sublicensing of those rights to Protiva and Allergan, nonetheless caused harm to **Max** Planck and Alnylam in the form of lost business opportunities. Sirna may be a proper defendant if its advertised ownership of the Tuschl II invention is false. However, there is no evidence that

UMass purported to convey ownership of Tuschl II to Sirna or participated in Sirna's alleged misrepresentations about any such ownership.

[13] [14] That said, an unjust enrichment claim does not necessarily require fault on the part of the defendant. *See Brandt v. Wand Partners,* 242 F.3d 6, 16 (1st Cir.2001) ("Brandt appears to be right that under Massachusetts law unjust enrichment does not always require a finding of wrongdoing by the defendant. There are cases, albeit addressed to a somewhat different problem (mutual mistake), that hold that wrongdoing is not required so long as retention of the benefit would be unjust.") (citing *White v. White,* 346 Mass. 76, 190 N.E.2d 102, 104 (1963); *National Shawmut Bank of Boston v. Fidelity Mut. Life Ins. Co.,* 318 Mass. 142, 61 N.E.2d 18, 22 (1945); *Keller v. O'Brien,* 425 Mass. 774, 683 N.E.2d 1026, 1029–33 (1997)). Instead, the elements of an unjust enrichment claim are: "First, a benefit or enrichment was conferred upon the defendant ...; second, the retention of that benefit or enrichment resulted in a detriment to [the plaintiff]; and, third, there are circumstances which make the retention of that benefit ... unjust." *Brandt,* 242 F.3d at 16.

Having decided that UMass did not purport to license rights in the Tuschl II patent estate to Sirna, the Court must determine whether it would be unjust for UMass to retain the license fees that Sirna paid. There was nothing improper or inherently unjust in the 2003 License Agreement. The impropriety (and accompanying potential injustice) arose with Sirna's alleged sublicensing the Tuschl II patent estate, to which it had no rights, to Protiva and Allergan. While it would be arguably unjust for UMass to retain any supplemental income it receives as a result of those sublicenses, there is no evidence as to what income UMass has derived or stands to derive specifically therefrom.

C. Declaratory Judgment

With regard to **Max** Planck's request for declaratory judgment on the ownership of the Tuschl II '325 application, there is no evidence that UMass licensed the '325 application to Sirna (as opposed to solely the priority date of that application), and UMass agrees that it does not own the Tuschl II '325 application. The point is uncontested by UMass and thus a declaratory judgment is unwarranted.

ORDER

*16 Plaintiffs' Motion for Partial Summary Judgment against Whitehead and Umass (Docket No. 443) is ***DENIED.***

UMass' motion for summary judgment (Docket No. 400) is ***ALLOWED.***

1 Specifically, **Max** Planck requests summary judgment on the following counterclaims:

> — With regard to the *Goldstein* petitions: Defendant Whitehead's Answer & Counterclaims to the First Amended Complaint, First Counterclaim, ¶ 38(a), (b) (breach of contract against **Max** Planck), Second Counterclaim, ¶ 46(a), (b) (breach of the implied covenant of good faith and fair dealing against **Max** Planck) and Third Counterclaim (interference with advantageous business relations against Alnylam) and Answer to First Amended Complaint and Counterclaim of the University of Massachusetts, Count I, ¶ 29(b), (c) (breach of contract against **Max** Planck), Count II (breach of the implied covenant of good faith and fair dealing against **Max** Planck) and Count III (tortious interference with contractual and advantageous relations against Alnylam).
>
> — With regard to tortious interference: Defendant Whitehead's Answer & Counterclaims to the First Amended Complaint, Third Counterclaim (interference with advantageous business relations against Alnylam) and Answer to First Amended Complaint and Counterclaim of the University of Massachusetts, Count III (tortious interference with contractual and advantageous relations against Alnylam), and Count IV (tortious interference with advantageous relations against Alnylam and **Max** Planck).

2 The 1984 amendment referenced here "allow[ed] inventors to apply for a patent jointly even though (I) they did not physically work together or at the same time, (II) each did not make the same type or amount of contribution, or (III) each did not make a contribution to the subject matter of every claim of the patent." 35 U.S.C. § 116; *see also* 130 Cong. Rec. H10525 (daily ed. Oct. 1, 1984), *reprinted in* 1984 U.S.C.C.A.N. 5827, 5834.

3 The requirements of 35 U.S.C. § 112, ¶ 1 are as follows: "The specification shall contain a written description of the invention, and of the manner and process of making and using it, in such full, clear, concise, and exact terms as to enable any person skilled in the art to which it pertains, or with which it is most

nearly connected, to make and use the same, and shall set forth the best mode contemplated by the inventor of carrying out his invention."

4 *T. Bedrosian, LLC v. Costanza,* 10 Mass. L. Rptr. 459, 1999 WL 792215 (Mass.Super.), upon which plaintiffs rely, stated only that the question was undecided and declined to dismiss a Chapter 93A claim against a municipality on sovereign immunity grounds. *See id.* at *1 ("A complaint should not be dismissed merely because it asserts a new theory of liability.").

5 As I ruled in my last opinion, this claim may be time barred:

> "To the extent Max Planck's claims of unjust enrichment rest even in part on the breach of contract allegations, they are not time-barred. To the extent the claims against Whitehead are conversion-based, however, they are barred by the three years limitation period.
>
> All of the claims against UMass are governed by a three year statute of limitations. Mass. Gen. L. Ch. 258, § 94; *Wong v. Univ. of Mass.,* 438 Mass. 29, 36, 777 N.E.2d 161, 167 (2002). Therefore regardless of the nature of the claim in Count VI, it is time-barred."

The parties have not raised the statute of limitations issue here, so I have addressed the merits of the unjust enrichment issue. The actual agreement occurred in 2003, but part of the claim may still be viable if UMass is still collecting royalties from Sirna under the License Agreement.

6 This application has long since been abandoned.

End of Document

© 2012 Thomson Reuters. No claim to original U.S. Government Works.

EXHIBIT B

LMHS, P.C.
Certified Public Accountants and Advisors

August 23, 2012

Attorney Steve Follansbee
Follansbee and McLeod, LLP
536 Granite Street, 3rd Floor
Braintree, MA 02184

RE: Johnson Golf Management, Inc. Pro Forma Gross Profit Calculations

Dear Attorney Follansbee,

On behalf of Johnson Golf Management, Inc. (the Company) and as requested by you, we have assembled pro forma gross profit calculations for North Hill Country Club, located in Duxbury, Massachusetts, for the years ending December 31, 2009 through 2013. We originally issued a letter on October 19, 2011. However, since that time, more information has become available to us which allows for a more accurate presentation. Therefore, this letter supersedes our letter of October 19, 2011.

Johnson Golf Management, Inc. was under contract with the Town of Duxbury to manage this golf course through 2008. Accordingly, these pro forma gross profit calculations were based in part on the Company's historical data. The revenue projections included here were assembled utilizing historical revenue and revenue changes as called for in the Request for Proposal (RFP) from the Town of Duxbury. Cost of revenue information, with the exception of depreciation and lease expense, was calculated based on the Company's historical information for the year ended September 30, 2008, and include an inflationary increase of 3% annually. Depreciation expense was excluded from the calculations and lease expense was adjusted in accordance with the information provided by you. You have represented to us that this lease expense information was included in your golf course management proposal for the years ended December 31, 2009 through 2013. Lease expense was recorded at $78,000 for 2009 and 2010, $84,000 for 2011, and $90,000 for 2012 and 2013.

Based upon the information above, we have calculated pro forma gross profit for years ending December 31, 2009 through 2013 as follows:

2009	$ 278,452
2010	294,259
2011	304,837
2012	315,772
2013	332,825
	$ 1,526,145

Our worksheets detailing these pro forma gross profit calculations are attached. We hope you find this information helpful. If we can be of any further service to you please let us know.

Sincerely,

Bryan J. Morrissey, CPA CVA
LMHS, P.C.

JOHNSON GOLF MANAGEMENT, INC.
NORTH HILL COUNTRY CLUB - DUXBURY, MA
BASED ON 2008 REVENUE PER AUDITED FINANCIAL STATEMENTS

	Actual 2008	Proforma 2009	Proforma 2010	Proforma 2011	Proforma 2012	Proforma 2013
REVENUES:						
Fees and Dues	$ 549,135	$ 641,615	$ 665,977	$ 691,366	$ 717,377	$ 743,778
Pro Shop Sales	25,186	25,942	26,720	27,521	28,347	29,197
Food and Beverage	54,819	56,464	58,157	59,902	61,699	63,550
	629,140	724,020	750,854	778,790	807,423	836,526
COST OF REVENUES:						
Direct Payroll	141,959	146,218	150,604	155,122	159,776	164,569
Payroll Taxes	19,321	19,901	20,498	21,113	21,746	22,398
Contract Services	992	1,022	1,052	1,084	1,117	1,150
Gas, Oil and Grease	22,289	22,958	23,646	24,356	25,086	25,839
Insurance	25,742	26,514	27,310	28,129	28,973	29,842
Lease Expense	110,000	78,000	78,000	84,000	90,000	90,000
Operating Supplies	63,466	65,370	67,331	69,351	71,432	73,574
Other Direct Costs	1,674	1,724	1,776	1,829	1,884	1,941
Pro Shop Purchases	7,669	7,899	8,136	8,380	8,632	8,890
Repairs and Maintenance	17,255	17,773	18,306	18,855	19,421	20,003
Restaurant Purchases	21,507	22,152	22,817	23,501	24,206	24,933
Telephone	6,494	6,689	6,889	7,096	7,309	7,528
Utilities	28,494	29,349	30,229	31,136	32,070	33,032
	466,862	445,568	456,595	473,953	491,651	503,701
GROSS PROFIT	162,278	278,452	294,259	304,837	315,772	332,825
	25.8%	38.5%	39.2%	39.1%	39.1%	39.8%

	2009	2010	2011	2012	2013
Junior Membership - 150	47,250	49,500	52,500	55,050	57,750
Individual - Resident - 20	18,700	19,600	19,980	21,000	22,040
Individual - Non Resident - 8	11,600	12,000	12,400	13,016	13,664
Individual - Senior Resident - 9	7,650	8,010	8,010	8,415	8,838
Individual - Senior Non Resident - 10	12,500	13,000	14,000	14,700	15,430
Senior - Weekday Resident - 21	15,015	15,750	16,485	17,325	18,186
Senior - Weekday Non Resident - 13	14,300	14,950	16,250	17,056	17,901
Senior - Husband/Wife Weekday Resident - 4	4,400	4,620	4,848	5,092	5,348
Family - Resident -15	18,750	19,500	20,250	21,255	22,305
Family - Non Resident - 6	9,960	10,260	10,560	11,088	11,640
Membership Revenue Based Upon New Rates	160,125	167,190	175,283	183,997	193,102
Proforma Membership Revenue	160,125	167,190	175,283	183,997	193,102
2008 Membership Revenue	(131,045)	(131,045)	(131,045)	(131,045)	(131,045)
Increase in Membership Revenue	29,080	36,145	44,238	52,952	62,057

	2008
Junior Membership - 150	32,250
Individual - Resident - 20	16,200
Individual - Non Resident - 8	9,920
Individual - Senior Resident - 9	6,615
Individual - Senior Non Resident - 10	11,100
Senior - Weekday Resident - 21	12,180
Senior - Weekday Non Resident - 13	12,610
Senior - Husband/Wife Weekday Resident - 4	3,860
Family - Resident -15	16,950
Family - Non Resident - 6	9,360
2008 Actual Membership Revenue	131,045

Annual Revenue Increase

9 Hole Rounds

	Per Round	Annual Increase
2009	$ 4.00	$ 57,044
2010	$ 5.00	$ 71,305
2011	$ 6.00	$ 85,566
2012	$ 7.00	$ 99,827
2013	$ 8.00	$ 114,088

18 Hole Rounds

	Per Round	Annual Increase
2009	$ 3.00	$ 855
2010	$ 4.00	$ 1,140
2011	$ 5.00	$ 1,425
2012	$ 6.00	$ 1,710
2013	$ 7.00	$ 1,995

9 Hole Cart

	Per Round	Annual Increase
2009	$ 1.00	$ 5,501
2010	$ 1.50	$ 8,252
2011	$ 2.00	$ 11,002
2012	$ 2.50	$ 13,753
2013	$ 3.00	$ 16,503

LMHS, P.C.
Certified Public Accountants and Advisors

October 19, 2011

Attorney Steve Follansbee
Follansbee and McLeod, LLP
536 Granite Street, 3rd Floor
Braintree, MA 02184

RE: Johnson Golf Management, Inc. Pro Forma Gross Profit Calculations

Dear Attorney Follansbee,

On behalf of Johnson Golf Management, Inc. (the Company) and as requested by you, we have assembled pro forma gross profit calculations for North Hill Country Club, located in Duxbury, Massachusetts, for the years ending December 31, 2009 through 2013. These pro forma gross profit calculations were assembled based on historical revenue and costs of revenue information provided by the Company for the years ended December 31, 2006 through 2008, during which time the Company was under contract with the Town of Duxbury to manage this golf course.

From this historical information we calculated a 3-year and a 2-year average gross profit; in addition we calculated an average of the 3-year and 2-year averages. Revenue remained constant in the pro forma period. The calculations of costs of revenue were based upon historical performance as well, with two exceptions: 1) depreciation expense was excluded from the calculation, and 2) lease expense, which was adjusted in accordance with the information provided by you. You have represented to us that this lease expense information was included in your golf course management proposal for the years ended December 31, 2009 through 2013. Lease expense was recorded at $78,000 for 2009 and 2010, $84,000 for 2011, and $90,000 for 2012 and 2013.

Based upon the information above, we have calculated pro forma gross profit for years ending December 31, 2009 through 2013 as follows:

	3-Year Ave	2-Year Ave	Average of 3 and 2 Year
2009	$ 151,702	$ 157,160	$ 154,431
2010	151,702	157,160	154,431
2011	145,702	151,160	148,431
2012	139,702	145,160	142,431
2013	139,702	145,160	142,431
	$ 728,510	$ 755,800	$ 742,155

We hope you find this information helpful. If we can be of any further service to you please let us know.

Sincerely,

Bryan J. Morrissey, CPA CVA
LMHS, P.C.

80 Washington Street, Building S, Norwell, Massachusetts 02061 (781) 878-9111 FX (781) 878-3666 www.lmhspc.com

JOHNSON GOLF MANAGEMENT, INC.
NORTH HILL COUNTRY CLUB (DUXBURY)
PRO FORMA GROSS PROFIT CALCULATIONS
SEPTEMBER 30, 2006-2008

	2009 PROFORMA BASED ON HISTORICAL:			2010 PROFORMA BASED ON HISTORICAL:			2011 PROFORMA BASED ON HISTORICAL:			2012 PROFORMA BASED ON HISTORICAL:			2013 PROFORMA BASED ON HISTORICAL:		
	3-YEAR AVERAGE	2-YEAR AVERAGE	AVERAGE OF 2 AND 3 YR	3-YEAR AVERAGE	2-YEAR AVERAGE	AVERAGE OF 2 AND 3 YR	3-YEAR AVERAGE	2-YEAR AVERAGE	AVERAGE OF 2 AND 3 YR	3-YEAR AVERAGE	2-YEAR AVERAGE	AVERAGE OF 2 AND 3 YR	3-YEAR AVERAGE	2-YEAR AVERAGE	AVERAGE OF 2 AND 3 YR
REVENUES:															
Fees and Dues	475,619	$ 512,131	$ 493,875	$ 475,619	$ 512,131	$ 493,875	$ 475,619	$ 512,131	$ 493,875	$ 475,619	$ 512,131	$ 493,875	$ 475,619	$ 512,131	$ 493,875
Pro Shop Sales	25,302	25,313	25,308	25,302	25,313	25,308	25,302	25,313	25,308	25,302	25,313	25,308	25,302	25,313	25,308
Food and Beverage	61,638	63,841	62,739	61,638	63,841	62,739	61,638	63,841	62,739	61,638	63,841	62,739	61,638	63,841	62,739
	562,559	601,284	581,922	562,559	601,284	581,922	562,559	601,284	581,922	562,559	601,284	581,922	562,559	601,284	581,922
COST OF REVENUES:							-								
Direct Payroll	158,026	155,492	156,759	158,026	155,492	156,759	158,026	155,492	156,759	158,026	155,492	156,759	158,026	155,492	156,759
Payroll Taxes	20,920	20,901	20,910	20,920	20,901	20,910	20,920	20,901	20,910	20,920	20,901	20,910	20,920	20,901	20,910
Contract Services	926	1,177	1,051	926	1,177	1,051	926	1,177	1,051	926	1,177	1,051	926	1,177	1,051
Equipment Purchases	1,444	-	722	1,444	-	722	1,444	-	722	1,444	-	722	1,444	-	722
Gas, Oil and Grease	11,710	17,048	14,379	11,710	17,048	14,379	11,710	17,048	14,379	11,710	17,048	14,379	11,710	17,048	14,379
Insurance	16,918	24,276	20,597	16,918	24,276	20,597	16,918	24,276	20,597	16,918	24,276	20,597	16,918	24,276	20,597
Lease Expense	78,000	78,000	78,000	78,000	78,000	78,000	84,000	84,000	84,000	90,000	90,000	90,000	90,000	90,000	90,000
Operating Supplies	41,580	59,620	50,600	41,580	59,620	50,600	41,580	59,620	50,600	41,580	59,620	50,600	41,580	59,620	50,600
Other Direct Costs	1,272	1,857	1,564	1,272	1,857	1,564	1,272	1,857	1,564	1,272	1,857	1,564	1,272	1,857	1,564
Pro Shop Purchases	24,358	11,751	18,055	24,358	11,751	18,055	24,358	11,751	18,055	24,358	11,751	18,055	24,358	11,751	18,055
Repairs and Maintenance	10,434	14,974	12,704	10,434	14,974	12,704	10,434	14,974	12,704	10,434	14,974	12,704	10,434	14,974	12,704
Restaurant Purchases	20,140	22,464	21,302	20,140	22,464	21,302	20,140	22,464	21,302	20,140	22,464	21,302	20,140	22,464	21,302
Telephone	3,923	5,754	4,839	3,923	5,754	4,839	3,923	5,754	4,839	3,923	5,754	4,839	3,923	5,754	4,839
Utilities	21,205	30,813	26,009	21,205	30,813	26,009	21,205	30,813	26,009	21,205	30,813	26,009	21,205	30,813	26,009
	410,857	444,125	427,491	410,857	444,125	427,491	416,857	450,125	433,491	422,857	456,125	439,491	422,857	456,125	439,491
GROSS PROFIT	151,702	157,160	154,431	151,702	157,160	154,431	145,702	151,160	148,431	139,702	145,160	142,431	139,702	145,160	142,431
	27.0%	26.1%	26.5%	27.0%	26.1%	26.5%	25.9%	25.1%	25.5%	24.8%	24.1%	24.5%	24.8%	24.1%	24.5%

JOHNSON GOLF MANAGEMENT, INC.
NORTH HILL COUNTRY CLUB (DUXBURY)
HISTORICAL AVERAGE GROSS PROFIT
SEPTEMBER 30, 2006-2008

	2006	2007	2008	3-YEAR AVERAGE	2-YEAR AVERAGE
REVENUES:					
Fees and Dues	$ 402,595	$ 475,126	$ 549,135	$ 475,619	$ 512,131
Pro Shop Sales	25,280	25,440	25,186	25,302	25,313
Food and Beverage	57,234	72,862	54,819	61,638	63,841
	485,109	573,428	629,140	562,559	601,284
COST OF REVENUES:					
Direct Payroll	163,094	169,025	141,959	158,026	155,492
Payroll Taxes	20,958	22,480	19,321	20,920	20,901
Contract Services	425	1,361	992	926	1,177
Equipment Purchases	4,332	-	-	1,444	-
Gas, Oil and Grease	1,035	11,807	22,289	11,710	17,048
Insurance	2,203	22,810	25,742	16,918	24,276
Lease Expense	107,500	110,000	110,000	109,167	110,000
Operating Supplies	5,502	55,773	63,466	41,580	59,620
Other Direct Costs	103	2,039	1,674	1,272	1,857
Pro Shop Purchases	49,573	15,833	7,669	24,358	11,751
Repairs and Maintenance	1,353	12,693	17,255	10,434	14,974
Restaurant Purchases	15,493	23,420	21,507	20,140	22,464
Telephone	262	5,014	6,494	3,923	5,754
Utilities	1,988	33,132	28,494	21,205	30,813
	373,821	485,387	466,862	442,023	476,125
GROSS PROFIT	111,288	88,041	162,278	120,536	125,160
	22.9%	15.4%	25.8%	21.4%	20.8%

BRYAN J. MORRISSEY, CPA CVA

80 WASHINGTON STREET, BUILDING S
NORWELL, MASSACHUSETTS 02061
TELEPHONE: (781) 878-9111
FACSIMILE: (781) 878-3666
EMAIL: BMORRISSEY@LMHSPC.COM

CURRICULUM VITAE

Education: Nichols College, Dudley, MA, BSBA 1981

Experience: LMHS, P.C.–Founding/Managing Partner, 1987-present
BDO Seidman– Tax Manager, 1984 - 1987

Current Professional Position:

LMHS, P.C. is a professional accounting service firm with sixteen full time professionals, providing assurance, accounting, tax , consulting , advisory and valuation services to over 400 corporations throughout New England.

Professional Registrations and Affiliations:

Certified Public Accountant, Massachusetts
Certified Valuation Analyst, NACVA

Areas of Concentration:

Business Advisory
Business Valuation
Buy/Sell Agreements
Assurance and Review Services
Corporate Income Tax and Business Strategy
IRS Representation
Tax Compliance
Estate Planning

EXHIBIT C

Kevin E. Hines, CPA, MST, CSEP, CVA
PARTNER
MEYERS BROTHERS KALICKA, P.C.
CERTIFIED PUBLIC ACCOUNTANTS
330 Whitney Ave, Suite 800
Holyoke, MA 01040
Phone: (413) 536-8510 ext. 232
Fax: (413) 533-8399

Range of Experience:

Kevin Hines, a partner at the public accounting firm Meyers Brothers Kalicka, P.C. of Longmeadow, Massachusetts, applies his experience and education to assisting numerous closely-held businesses in a variety of management advisory, business planning and tax planning situations. Mr. Hines has assisted many clients in the role of business valuation analyst, mergers and acquisitions as well as contract dispute resolution.

Mr. Hines has over 25 years experience providing clients with a variety of tax and management advisory services. His experience has been concentrated in the area of closely held businesses in many industries including construction, manufacturing, real estate and insurance companies. Mr. Hines specializes in the areas of taxation, business valuations, lost profits analysis, succession planning and estate planning.

Professional and Firm History:

Bachelor of Science from University of Massachusetts, North Dartmouth, MA 1982
Master of Science in Taxation from Bentley College, Waltham, MA 1989

Certified Public Accountant, 1985
Certified Specialist in Estate Planning, 2002
Certified Valuation Analyst, 2003

Staff Accountant at several small public firms 1982-1989
Tax Manager at Fisk, Bilton, Smith & Co., P.C. 1990-1997
Joined Meyers Brothers, PC as Senior Tax Manager in June 1997
Admitted to Partnership in 2002
Merger with Joseph Kalicka, P.C. into Meyers Brothers Kalicka, P.C. 2003

Professional Organizations:

Member, American Institute of Certified Public Accountants
Member, Massachusetts Society of Certified Public Accountants
Member, Connecticut Society of Certified Public Accountants
Member of the Estate Planning Council of Hampden County, Inc.
Member of the National Association of Certified Valuation Analysts