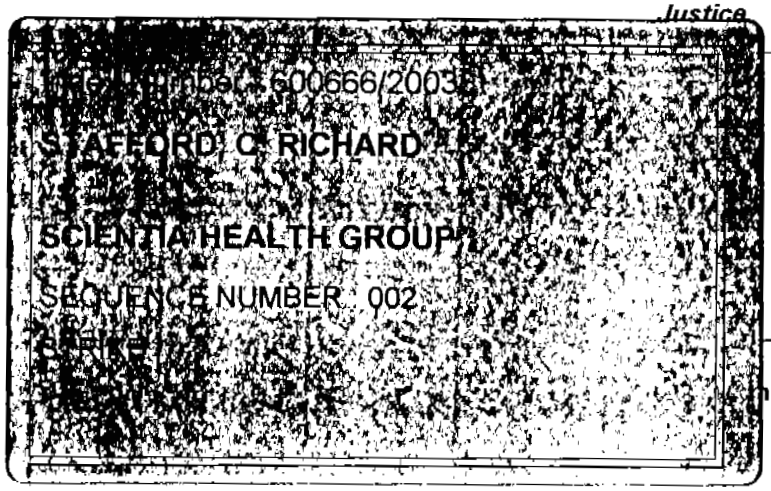
SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. BERNARD J. FRIED Justice

PART 60



INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

This motion is decided in accordance with the accompanying memorandum decision.

SO ORDERED

FILED
JUN 10 2008
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 6/9/08

HON. BERNARD J. FRIED J.S.C.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 60

----------X

C. RICHARD STAFFORD,

Plaintiff,

Index No. 600666/03

-against-

SCIENTIA HEALTH GROUP, INC. and
SCIENTIA HEALTH GROUP,

Defendants.

----------X

APPEARANCES:

For Plaintiff:

Satterlee Stephens
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For Defendants:

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Fried, J.:

In this breach of contract action, plaintiff C. Richard Stafford (Stafford) seeks compensation, pursuant to an employment contract he entered into with defendant Scientia Health Group, Inc. (Scientia). The three-count complaint asserts one cause of action for breach of contract against both defendants for payment of a bonus, one cause of action for specific performance against Scientia for severance payments and insurance benefits, and one cause of action against defendant Scientia Health Group Limited (Scientia Bermuda),

Scientia's direct parent company, for stock options. Defendants answered the complaint, asserting two affirmative defenses.

Stafford now moves (in motion sequence number 002) for summary judgment striking defendants' affirmative defenses and granting him summary judgment on the complaint in the amount of $380,900. Defendants move (in motion sequence number 003) for summary judgment dismissing the complaint.

Scientia was a start-up venture capital firm that identified business investments in the medical and biotechnology fields. In the spring of 2002, Dr. Samuel Waksal (Waksal), then Scientia's executive chairman, recruited Stafford to become president of Scientia.

On June 5, 2002, Stafford and Scientia entered into an Executive Employment Agreement, which provided the terms of Stafford's employment as president and chief operating officer of Scientia (Agreement). Under the Agreement, Stafford was to "report to the Chairman of the Company," and he had "primary authority for the day-to-day financial administration and operations of the Company." Agreement, Stafford Aff., Ex. A, § 1.2. Stafford also held the title of president and chief operating officer of Scientia Bermuda, and he was required to perform duties for Scientia and its affiliates as assigned to him by the board of directors of Scientia Bermuda. *Id.* Under the Agreement, Stafford was paid a "Base Salary" of $250,000, plus a "Minimum Bonus" of $75,000 annually, prorated for 2002. *Id.*, §§ 2.1, 2.2. The Agreement provided that Stafford's bonus was "payable reasonably promptly after the end of each fiscal year of the Company which shall be awarded by the Board or the Compensation Committee of the Board." *Id.*, § 2.2

The Agreement provided for Stafford's termination from employment for "Cause" (*id.*, § 4.1), and "Resignation for Good Reason; Termination by the Company Without Cause" (*id.*, § 4.4). Grounds for Stafford's for "Cause" termination at issue in this action, under section 4.1 of the Agreement, include Stafford's: "willful failure to perform his duties" under the Agreement; engaging in "gross misconduct that has caused injury to [Scientia]"; and "willful commission ... of acts that are dishonest and injurious to the Company ... ." *Id.*, § 10.

Termination for cause relieved Scientia of any obligation to Stafford other than the payment of his "earned, but unpaid, Base Salary as of the Date of Termination," and also terminated Stafford's entitlement "to any bonus payment in respect of the year in which such termination for Cause shall have occurred." Agreement, § 4.1 (a). This provision also applied if Stafford terminated his employment "for reasons other than Good Reason" under the Agreement. *Id.*, § 4.1 (b).

Conversely, under section 4.4 of the Agreement, Stafford was entitled to "his Base Salary plus a pro-rated Minimum Bonus ('Severance Payments') for 12 months from the Date of Termination" in the event that he terminated "his employment for Good Reason or the Company terminates [his] employment without Cause." This provision also entitled Stafford "to continue to participate in all health, life and disability insurance plans in which he participated immediately prior to the Date of Termination," during the period that he was entitled to receive such Severance Payments. *Id.*, § 4.4. The Agreement defined "Good Reason" as any of the following, without Stafford's "express written consent":

> (i) [Stafford] shall not have the title or reporting relationship as set forth in Section 1.2 hereof;

> (ii) the assignment to [Stafford] of any duties that are materially inconsistent with, or a substantial alteration in the nature or status of, [Stafford's] position, authority or responsibilities or the conditions of his employment;
>
> (iii) the failure of the Company to pay [Stafford] any compensation or provide other benefits as specified in Section 2 or 5 of this Agreement ... .

Id., § 10.

In July 2002, Waksal resigned as chairman of Scientia. Scientia did not appoint a replacement for Waksal. Scientia claims that non-party Carl Icahn (Icahn), a member of Scientia Bermuda's board of directors, became "sort of de facto chairman" of the board, but Icahn admits that he was never "named chairman." Icahn Dep., Saurack Aff., Ex. B, at 21-22, 51. Stafford claims that, rather than appoint a replacement chairman, Scientia's board of directors began to consider liquidating the company. Stephen Grant (Grant), a member of Scientia's board of directors, testified that, by January 2003, Scientia had ceased making new investments, but that Scientia never liquidated. Saurack Aff., Ex. A, at 23. It is undisputed that Scientia never paid Stafford's 2002 bonus or any Severance Payments under the Agreement.

By letter dated February 28, 2003, Stafford tendered his resignation, purportedly for "Good Reason" under sections 4.4 and 10 (i)-(iii) of the Agreement (Resignation Letter). Defendants admit that Stafford was not terminated for cause under the Agreement, but claim that Scientia would have terminated Stafford for "Cause" if it had known, before Stafford resigned, of the conduct comprising defendants' affirmative defenses.

Specifically, defendants' first affirmative defense is based upon Scientia Bermuda's investment in non-party E&C Medical Intelligence Ltd. (E&C), pursuant to a Series D

Convertible Preferred Shares Subscription Agreement, dated August 27, 2002 (Subscription Agreement). Pursuant to this agreement, Scientia Bermuda invested $5 million in E&C in exchange for newly issued preferred D shares. The parties do not dispute that, pursuant to the Subscription Agreement, E&C was required to amend its Articles of Association to grant certain corporate governance rights to Scientia Bermuda, including the right to appoint a majority of E&C's board of directors (First Amended Articles). Defendants claim that the First Amended Articles also gave them the right to remove and replace its designated board members, and that E&C's board was restricted from taking actions that would dilute Scientia's interest in E&C or Scientia's rights as a preferred shareholder. Scientia Bermuda was also allegedly granted an option to purchase additional shares in E&C, exercisable prior to April 6, 2003. Scientia designated Stafford, Grant, and non-party Sonia Ben-Yehuda (Yehuda) as its designees to E&C's board of directors. Stafford became the chairman of E&C's board.

Sometime after the Subscription Agreement was signed, Eyal Ephrat (Ephrat), E&C's president, discussed further amendments to E&C's articles of association. Ephrat sought to re-amend the First Amended Articles in order to enable further investment in E&C, which, according to defendants, would undo Scientia's bargained-for rights under the Subscription Agreement and the First Amended Articles. According to Stafford, E&C was having a fiscal crisis at the end of 2002 and the beginning of 2003, and it needed an infusion of capital in order to continue operations. Stafford claims that, without amending the First Amended Articles, E&C would not be able to get a new investor and Scientia Bermuda would lose its investment in E&C.

On December 20, 2002, E&C's board members, including Stafford, Grant and Yehuda, voted to approve resolutions recommending that E&C shareholders vote in favor of amendments to E&C's First Amended Articles. Defendants claim that the new amendments enlarged E&C's board of directors; gave the shareholders the right to appoint a director, thereby reducing the proportion of members on the board that were appointed by Scientia; and increased the authorized share capital of E&C, including an increase of 50 million series D preferred shares, which could have allowed E&C to sell additional shares and dilute Scientia's shares (Second Amended Articles). Also on December 20, 2002, Stafford executed a proxy, as president of Scientia Bermuda, appointing Ephrat to vote Scientia Bermuda's shares in E&C, at E&C's annual general meeting of shareholders on January 5, 2003 (Proxy). Ephrat exercised the Proxy vote in favor of the Second Amended Articles, and, as a result, the shareholders approved the amendments. Ephrat Dep., at 100-101.

Stafford admits that he did not inform Scientia's board of directors of his intention to execute the Proxy. Stafford Dep., at 79, 81. Defendants claim that Stafford knew that he would be fired if he disclosed the Proxy to Scientia's board. Grant testified that the Second Amended Articles enabled E&C to appoint to E&C's board of directors non-party David Jahns (Jahns), an individual purportedly well known in the industry and who eventually facilitated non-party Galen Partners' (Galen) $4 million investment in E&C. *Id.* at 35-38.

Defendants claim that they learned about the Proxy when Stafford sent his Resignation Letter. By memorandum dated March 30, 2003, Scientia notified E&C that it had not authorized the vote of its shares and demanded that the Second Amended Articles

be rescinded. Defendants concede that, subsequently, Scientia and E&C engaged in discussions, and that E&C's Second Amended Articles were in all material respects "resumed to the version which existed following Scientia's investment in October 2002," that is, to the First Amended Articles. Confoy Aff., Ex. 35; Ephrat Dep., at 107-110, 165-66. Defendants claim that, during the time that it was excluded from E&C's board, E&C was harmed, affecting its value and investment potential, and that E&C eventually sold its assets. In essence, defendants' claim is based upon Stafford's alleged failure to "use his best and diligent efforts to promote the interests of the Company" under section 1.2 of the Agreement.

Defendants' second affirmative defense claims that Stafford's Resignation Letter constituted a voluntary resignation under the Agreement, not a resignation for "Good Reason" under section 4.4. Stafford seeks summary judgment, arguing that Scientia breached its contractual obligations by diminishing his duties, failing to provide a clear reporting line to Stafford, and failing to pay Stafford's 2002 bonus. Stafford argues that each of these breaches triggered his right to terminate his position with "Good Reason" under the Agreement, which, in turn, triggered Scientia's obligation to make Severance Payments. Defendants counter that none of the purported grounds for a "Good Reason" to terminate existed under the Agreement at the time that Stafford submitted his Resignation Letter.

Stafford's claim that his duties were altered, diminished, or inconsistent with his employment is based upon his assertion that he was required to report to a receptionist to log his attendance, and because Scientia's board intended to cease making new investments and liquidate the company, making Stafford unable to perform his primary role of identifying and evaluating new investments. In support of his argument, Stafford relies upon *Rudman v*

Cowles Commun., Inc. (30 NY2d 1 [1972]).

In *Rudman*, the plaintiff wrote and published a line of test preparation books. He sold the company to the defendant, contingent upon being hired as "editorial head of a proposed test book division," to be "a number one man" of the company who reported only to senior executives. *Id.* at 6. Subsequently, the plaintiff was "reduced to being only a productive writer who supervised no one and was subject to supervision by just about every other editor and junior executive." *Id.* at 12. Unlike in *Rudman,* Stafford claims to have reported to a Scientia receptionist only concerning his attendance. Stafford does not claim that this clerical matter had anything to do with his substantive job functions or his dealings with Scientia's board of directors. Moreover, the attendance reporting requirement was imposed upon all employees, not on Stafford alone, and Stafford fails to explain how this affected his work for Scientia.

Moreover, under the Agreement, Stafford was to "perform such duties and services for the Company ... as are assigned to him by the Board of [Scientia Bermuda]." Agreement, § 1.2. Stafford testified that, upon Waksal's resignation, he "was directly involved in evaluating the possible investment by Scientia in E&C" (Stafford Dep., Confoy Aff., Ex. 39, at 23), and he identified other potential investments for Scientia (*id.* at 25). Stafford also testified that the E&C investment was not his primary focus in 2002, but rather, that he "was monitoring and investigating the investment that Scientia had made" in four other companies. *Id.* at 39. Stafford also stated that he "generally was responsible for supervising Scientia's business and investments and setting its budgets, goals and objectives," and that he "eventually helped Scientia disengage from various investments." Plaintiff's Response

to Defendants' First Set of Interrogatories, Confoy Aff., Ex. 3, at 5.

Furthermore, while the evidence demonstrates that one Scientia board member suggested that the board consider liquidation (*id.*, Ex. 7), and that Stafford prepared a memorandum analyzing a liquidation distribution (*id.*, Ex. 24), Stafford testified that he did not "know if there was ever a formal plan" for Scientia's liquidation (Stafford Dep., at 60). In addition, Icahn testified that he recalled the board member's view that Scientia should consider liquidation, but stated that the board did not "want[] to liquidate at that time. I think as you see we made an investment in E&C. We were raising capital actually." Icahn Dep., Confoy Aff., Ex. 42, at 24. Moreover, Grant testified that, to date, Scientia has not liquidated. Grant Dep., Saurack Aff., Ex. A, at 23. For the foregoing reasons, Stafford has not shown that Scientia's board intended to cease making new investments and liquidate the company, rendering Stafford unable to perform the job for which he was hired. Therefore, Stafford's motion for summary judgment on this ground is denied.

Stafford's next argument is based upon his assertion that defendants failed to provide a clear reporting line to Stafford. Section 1.2 of the Agreement states that Stafford "shall report to the Chairman of the Company [Scientia]." Defendants do not dispute that, after Waksal's resignation, Stafford did not report to the chairman, and that no new chairperson was appointed. This fact falls squarely within the "Good Reason" basis for termination articulated in section 10 (i) of the Agreement; specifically, that Stafford is entitled to terminate the Agreement for "Good Reason" if he "shall not have the ... reporting relationship set forth in Section 1.2 hereof ... ." Therefore, Stafford has made a prima facie showing that he is entitled to summary judgment based upon this "Good Reason" ground for

his termination.

Defendants counter that, until his resignation, Stafford reported to the board of directors. However, "it is well established that when the meaning of [a] ... contract is plain and clear ... [it is] entitled to [be] enforced according to its terms ... [and] not to be subverted by straining to find an ambiguity which otherwise might not be thought to exist." *Uribe v Merchants Bank of New York*, 91 NY2d 336, 341 (1998) (citation and internal quotation marks omitted). Here, defendants' argument is not supported by the plain language of the Agreement, which requires Stafford to report to the chairman, not the board of directors.

Defendants further argue that Stafford waived his right to terminate the Agreement, because he never objected to the manner in which he reported his activities, and he failed to terminate his employment within a reasonable time. However, as a preliminary matter, section 9.3 of the Agreement provides that "[n]o failure to exercise, and no delay in exercising, any right, power or privilege hereunder shall operate as a waiver thereof." Therefore, defendants' argument is undermined by the express terms of the Agreement.

Moreover, the cases relied upon by defendants are distinguishable. In *Savasta v 470 Newport Assoc.* (82 NY2d 763 [1993]), the plaintiffs had a contractual right to terminate their agreement with the defendants upon the occurrence of certain trigger events, but the agreement did not specify the time after the trigger event occurred within which the notice of termination was to be given. The Court stated that, "[w]hen a contract does not specify time of performance, the law implies a reasonable time." *Id.* at 765. The Court determined that the plaintiffs failed to act within a reasonable time, because they attempted to terminate the agreement 22 months after their right to do so was triggered, and during and following

that time, the plaintiffs accepted full payment that the defendants owed them pursuant to the agreement. *Id.* Here, Stafford did not accept any such benefit, and he waited one-third the time of the plaintiffs in *Savasta*.

In *Boone Assoc., L.P. v Leibovitz* (13 AD3d 267 [1st Dept 2004]), the plaintiff brought an action to enforce an oral contract entered into in August 1990 for the defendant to take a series of photography portraits. All but one of the portraits was shot and delivered within one month of the contract. Thirteen years later, the plaintiff sought to compel the defendant to take the final portrait or recover damages for defendant's failure to do so. The First Department affirmed the determination that "defendant's performance of the contract should reasonably have been completed within a few months, or no later than the end of 1990" (approximately five months later). *Id.* at 267. Stafford's purported seven-month delay is hardly comparable to the 13-year delay in *Boone Assoc., L.P.*

Furthermore, while some of the evidence suggests that Stafford reported to the board of directors, it is not clear to whom, specifically, Stafford was to report once Waksal resigned. *See* Icahn Dep., at 51 (Icahn stating that he was not aware that Stafford was reporting to Grant); Icahn Dep., at 21 (Icahn admitting that he was not named chairman and that there was no formal documentation of a new chairman after Waksal left, but stating that he believed that he "was sort of de facto chairman" and that he did not know if the position of chairman was ever refilled after Waksal resigned). Stafford also received letters and memoranda from Keith Schaitkin (Schaitkin), in-house counsel for Icahn Associates Corp., one of Icahn's companies. In these letters, Schaitkin instructed Stafford to report to Scientia's board on certain business matters of Scientia. Stafford Aff., Exs. D-E. Based

upon the papers submitted, it appears that Schaitkin was not an employee, officer or director of defendants. Thus, to the extent that the reporting relationship set forth in paragraph 1.2 of the Agreement was designed to avoid the confusion created in the absence of a contractual chain of authority for Stafford to follow, defendants fail to explain why Stafford should not have waited for defendants to rectify their failure to provide the reporting relationship set forth in section 1.2 of the Agreement. Therefore, defendants have failed to rebut Stafford's prima facie showing.

Stafford's third ground for his "Good Reason" termination is that defendants failed to pay his 2002 bonus. Under section 2.2 of the Agreement, Stafford was "entitled to receive an annual bonus payable reasonably promptly after the end of [the] fiscal year" for 2002, and defendants do not dispute that they never paid Stafford's 2002 bonus. Thus, Stafford has made a prima facie showing that he is entitled to summary judgment on this "Good Reason" ground for his termination.

Defendants argue that the board never had the opportunity to deny Stafford's bonus, because Stafford never asked the board to authorize payment of the bonus. However, nothing contained in the Agreement required Stafford to request his bonus or give Scientia the opportunity to deny payment. Rather, the Agreement stated that Stafford's bonus "shall be awarded by the Board or the Compensation Committee of the Board," not upon Stafford's request. Agreement, § 2.2.

Defendants also argue that Stafford waived his 2002 bonus at Scientia Bermuda's December 2, 2002 board meeting. In support of this argument, defendants submit the minutes of that board meeting, which state that Scientia Bermuda "will seek to document an

agreement whereby Mr. Stafford's existing employment agreement will be amended to provide (a) that it will be terminated as of September 30, 2003 and (b) that he will not be entitled to any mandatory bonus." Confoy Aff., Ex. 14, at 3-4. In the margin next to this sentence, in a handwritten notation dated February 4, 2003, Stafford wrote: "WRONG! ... Robt Fischer agreed to correct [this sentence], as indicated in the final draft to be submitted to the S. Bd. for their approval .... He was also told that S. is in breach for failure to pay my '02 bonus." 1/31/08 Stafford Aff., ¶ 10 and Ex. 1.

The Agreement states that it "may not be amended, supplemented, canceled or discharged, except by a written instrument executed by the party against whom enforcement is sought." *Id.*, § 9.3. Defendants submit no evidence of a written instrument signed by Stafford, nor do they contend that one exists, notwithstanding the board's purported attempt to "seek" such documentation and Stafford's handwritten notes on the minutes. Confoy Aff., Ex. 14, at 3-4. "Since the agreement is in plain and unambiguous language, there is no need to resort to consideration of the subsequent course of dealings of the parties." *Matter of Hirschfeld, Stern, Moyer & Ross*, 286 AD2d 611, 612 (1st Dept 2001).

Defendants claim that the parties orally modified the Agreement to eliminate Stafford's bonus, and that Stafford partially performed under that modified agreement. In essence, defendants argue that Stafford's failure to seek payment of the 2002 bonus, after the December 2, 2002 board meeting, evidenced Stafford's agreement to the modification and his waiver of payment of the bonus.

"Partial performance of an oral agreement to modify a written contract, if unequivocally referable to the modification, avoids the statutory requirement of a writing."

Rose v Spa Realty Assoc., 42 NY2d 338, 341 (1977). Here, defendants' partial performance argument is based upon Stafford waiting to see whether defendants would pay his bonus, but this conduct is equally referable to the Agreement itself, which calls for payment "reasonably promptly after the end of [the] fiscal year ... by the Board ... ." Agreement, § 2.2. Therefore, Stafford's conduct is not "unequivocally referable" to the alleged modification. *Rose*, 42 NY2d at 341; *see also Anostario v Vicinanzo*, 59 NY2d 662, 664 (1983) ("the actions alone must be 'unintelligible or at least extraordinary', explainable only with reference to the oral agreement" [citation omitted]); *Merrill Lynch Interfunding, Inc. v Argenti*, 155 F3d 113, 122 (2d Cir 1998) ("an action does not amount to partial performance sufficient to overcome the statute where that action confers no benefit on the party against whom enforcement is sought").[1] Defendants thus have not rebutted Stafford's prima facie showing.

Defendants' first affirmative defense is based upon their assertion that Stafford resigned only to avoid being terminated for cause, based upon his voting record as a board member of E&C and because he executed the Proxy. Stafford moves for summary judgment dismissing this defense, arguing that the board vote, and the votes cast by proxy, were

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[1] There is no need to resort to extrinsic evidence of the parties' conduct. However, even if there was, Stafford's handwritten notation dated February 4, 2003, if anything, supports the conclusion that he did not consent to waive his bonus. Moreover, by letter dated February 13, 2003 (after the December 2, 2002 board meeting but prior to his Resignation Letter), Stafford notified Schaitkin and Scientia's board of directors that he "expressly reserve[d] all of [his] rights under [the Agreement], including [his] 'Minimum Bonus,' pro-rated for 2002, as provided for in Section 2.2, and [his] contractual right to resign for 'Good Reason' as provided for in Sections 4.4 and 10 of [the Agreement]." Stafford Aff., Ex. J. This conduct evidences neither agreement to a purported modification nor waiver of payment of the 2002 bonus. If anything, the board minutes demonstrate that defendants knew, as early as December 2, 2002, of their obligation to pay Stafford's bonus, but sought not to pay it and, indeed, failed to do so.

indisputably in Scientia's best interest, were within Stafford's discretion under the business judgment rule, and were required by Stafford's fiduciary duty as a member of E&C's board.

Defendants do not claim that Stafford breached his fiduciary duties or that his conduct violated the business judgment rule, and defendants do not dispute that Stafford was not terminated for cause. Defendants also do not dispute that Galen's investment allowed Scientia to recoup almost its entire investment in E&C without Scientia having to make any additional investment of its own money, as would otherwise have been necessary to prevent E&C from failing. Def Resp, ¶¶ 40-42; Grant Dep., at 35-38; Ephrat Dep., at 59-60, 145. Thus, section 10 (i), providing for Stafford's "willful failure to perform his duties hereunder," is the primary basis that defendants appear to invoke in support of their argument that Stafford *would have been* terminated for "Cause" under the Agreement had they known of his conduct. Through section 10 (i), defendants invoke section 1.2 of the Agreement, claiming that Stafford failed to "use his best and diligent efforts to promote the interests of [Scientia]."

Stafford's responsibilities included identifying, evaluating and managing Scientia's investments. Stafford Aff., ¶ 4; Grant Dep., at 15; Icahn Dep., at 20-21. As discussed above, Grant was a board member of both Scientia Bermuda and E&C. Grant testified that attracting new investors to E&C was necessary, because "Scientia had decided not to put more money into the company," and that Scientia would have failed if more money was not put into it. Grant Dep., Saurack Aff., Ex. A, at 35-36. Defendants do not dispute that Grant and Ephrat believed that E&C would have failed without additional investments (Def Resp, ¶ 39), and defendants concede that, once Scientia made its initial investment, it "had no

obligation to make any further investment in E&C" (Defendants' Opp. Mem. of Law, at 14).

While defendants assert that Galen did not consider investing in E&C until September 2003, Grant testified that the Second Amended Articles enabled E&C to appoint Jahns to E&C's board, and that Jahns eventually facilitated Galen's investment in E&C. Grant Dep., at 35-39. Ephrat testified that Jahns was influential in the field and that his appointment to E&C's board "would be a strong improvement of the board ... for the company's sake" (Ephrat Dep., at 49), and that Jahns' presence on the board enabled him to become familiar with E&C and its board members and led to Galen Partners' and non-party Trident's investment of a total of $25 million in E&C (*id.* at 142-46).

Moreover, defendants do not allege any self-dealing, and do not claim that Stafford obtained any personal benefit from E&C's vote (by the Proxy or otherwise) to approve the Second Amended Articles. Nor do defendants seriously dispute that, as a practical matter, the interests of Scientia were aligned with the interests of E&C. In other words, while Stafford's obligations to E&C were distinct from his obligations to Scientia, it is undisputed that if E&C failed, Scientia would lose its investment; conversely, if E&C succeeded, Scientia stood to make a profit.

Furthermore, defendants' argument that the Second Amended Articles were not in Scientia's best interests is speculative. Because the articles were returned in all material respects to the form of the First Amended Articles, it is not clear how defendants could ever prove that Stafford's actions were not in Scientia's best interests. In other words, defendants cannot establish now, after the fact, whether or not Stafford agreeing to relinquish some of Scientia's control would have attracted greater (or less) investment to E&C than it actually

did, because Stafford's actions were subsequently undone by defendants insisting that the Second Amended Articles be returned, in all material respects, to the form of the First Amended Articles.

Additionally, even assuming that Stafford acted antithetically to Scientia's interests, it would have been a breach of Stafford's fiduciary duty to E&C if he had put Scientia's interests before E&C's. *Foley v D'Agostino*, 21 AD2d 60, 66-67 (1st Dept 1964) ("'[o]fficers and directors of a corporation owe it ... their undivided and unqualified loyalty.... They should never be permitted to profit personally at the expense of the corporation. Nor must they allow their private interests to conflict with the corporate interests'"). Defendants cite no legal authority in support of their argument that Stafford failed to act in Scientia's best interests, thereby breaching the Agreement, by merely exercising the fiduciary duties that he owed to E&C. In fact, defendants, who placed Stafford on E&C's board, appear to be complaining that Stafford was a disinterested director, acting on behalf of E&C. In other words, Scientia's argument places Stafford in the dicey position of either breaching the Agreement by observing fiduciary duties owed to E&C, or exposing him to liability for breach of fiduciary duties if he had put Scientia's interests before E&C's (which, arguably, would also have constituted self-dealing in favor of Scientia). For the foregoing reasons, defendants' argument that Stafford's delivery of the Proxy to Ephrat was antithetical to Scientia's interests, and, therefore, was a ground for his for "Cause" termination under section 10 of the Agreement, is unpersuasive.

Defendants also argue that Stafford's conduct was dishonest, that he concealed the vote and Proxy from Scientia's board, that this constituted grounds for his termination for

"Cause," and that Scientia would have terminated Stafford if they had learned about this conduct before he resigned. However, as a preliminary matter, defendants fail to offer any evidence showing that Stafford needed board approval for the Proxy. To the contrary, it is undisputed that Stafford, as president of Scientia, had "primary authority for the day-to-day financial administration and operations of the Company." Agreement, § 1.2.

In any event, Stafford and Grant were designated specifically as Scientia-appointed E&C directors. Defendants do not dispute that Grant also approved the Second Amended Articles. Grant testified that he approved these new articles because they were necessary to attract investors to E&C, and that, without additional funds, E&C would have failed. Grant Dep., at 35. Thus, Grant was aware of the Second Amended Articles and voted in favor of them (*id.* at 32-36), and this knowledge is imputed to Scientia. *Center v Hampton Affiliates, Inc.*, 66 NY2d 782, 784 (1985) ("general rule is that knowledge acquired by an agent acting within the scope of his agency is imputed to his principal and the latter is bound by such knowledge although the information is never actually communicated to it"); *see also* 3 Fletcher, Cyclopedia of Corporations § 808 (2007) ("[n]otice to or knowledge possessed by an individual director is notice to the corporation when it relates to a matter as to which the director is acting as its authorized agent"). Therefore, Stafford's conduct was not concealed prior to his resignation, as is alleged by defendants, and despite this knowledge, Scientia never terminated Stafford. For the foregoing reasons, defendants did not have grounds to terminate Stafford for "Cause" under section 10 (I), (ii) or (iii) of the Agreement. This warrants dismissal of the defendants' first affirmative defense.

Defendants' second affirmative defense is based upon their assertion that Stafford's

Resignation Letter constituted merely a voluntary resignation under the Agreement. However, as discussed above, this defense is undermined by Stafford's showing that his termination was for "Good Reason" under the Agreement. Therefore, defendants' second affirmative defense is dismissed.

For the foregoing reasons, Stafford is entitled to "Severance Payments" under section 4.4 of the Agreement. This provision entitles Stafford to $380,900 in compensation, as follows: his Base Salary of $250,000, plus a Minimum Bonus of $75,000; a pro-rated Minimum Bonus of $43,400 from June 5, 2002 through December 31, 2002; and a pro-rated Minimum Bonus of $12,500 from January 1, 2003 until his resignation on February 28, 2003.

Accordingly, it is hereby

ORDERED that plaintiff's motion (motion sequence number 002) is granted and defendants' affirmative defenses are dismissed, and the Clerk of the Court is directed to enter judgment in favor of plaintiff and against defendants in the amount of $380,900, together with interest as prayed for allowable by law, from the date of February 28, 2003 until the date of entry of judgment, as calculated by the Clerk, together with costs and disbursements to be taxed by the Clerk upon submission of an appropriate bill of costs; and it is further

ORDERED that defendants' motion (motion sequence number 003) is denied.

Dated: 6/9/08

ENTER:

FILED
JUN 10 2008
COUNTY CLERK'S OFFICE
NEW YORK

J.S.C.
HON. BERNARD J. FRIED