[* 1] SCANNED ON 3/13/2006

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

PRESENT: Hon. RICHARD B. LOWE, III PART 56
Justice

SIDNEY B. SILVERMAN,
Plaintiff,

-against-

GREGORY E. KELLER, et al.,
Defendants.

INDEX NO. 601913/04

MOTION DATE ______

MOTION SEQ. NO. ______

MOTION CAL. NO. ______

The following papers, numbered 1 to ____ were read on this motion to/for Summary Judgment

	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

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

FILED
MAR 13 2006
COUNTY CLERK'S OFFICE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE DATED: J.S.C.

Dated: 3/9/06

J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST

[* 2]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 56

---X

SIDNEY B. SILVERMAN,

Plaintiff,

-against-

Index No.: 601913/2004

GREGORY E. KELLER, JOHN F. HARNES, JOAN T. HARNES, and H. ADAM PRUSSIN,

Defendants.

---X

RICHARD B. LOWE, III, J.:

This case involves a dispute between former colleagues in the now defunct law firm of Silverman, Harnes, Harnes, Prussin & Keller (the Firm or SHHP&K) with respect to the proper allocation of legal fees awarded in two class actions, Provident and Plum Creek, which were initiated by the Firm prior to its dissolution at the end of 2000. Both fees were paid after the Firm was dissolved.

Plaintiff Sidney B. Silverman seeks to recover his share of a legal fee awarded in the Provident case to defendant Gregory E. Keller in 2004. Plaintiff bases his claim on an agreement that was confirmed in an February 4, 2002 e-mail exchange between plaintiff and defendant Keller.

In their answer, defendants allege, inter alia, that this agreement was procured by fraud, because, at the time plaintiff and Keller first negotiated a split of the Provident fee, plaintiff did not disclose, in violation of his fiduciary duty, that he intended to take all of the Plum Creek fee. Defendants also assert counterclaims for an accounting and a share of the Plum Creek fee plaintiff received in 2002. Defendants argue that, as partners of the Firm, they were entitled to a share of the Plum Creek fee, as well as any other profits earned in 1999 that plaintiff may have concealed.

Plaintiff moves, pursuant to CPLR 3212, for summary judgment dismissing the second, third, fourth and fifth counterclaims as to defendants Gregory E. Keller and John F. Harnes, and granting plaintiff's claim for damages and directing defendants to turn over the Provident fee, which is being held in escrow by defendants' counsel. Plaintiff has settled his claims against defendant H. Adam Prussin, and this motion is not addressed to the claims and counterclaims between plaintiff and defendant Joan T. Harnes.

Familiarity with this court's orders dated August 4, 2004, June 16, 2005 and August 1, 2005 is presumed.

FACTUAL ALLEGATIONS AND CLAIMS

I. The Firm

Plaintiff Sidney B. Silverman alleges that, in the early years of his law practice he worked alone, but as his practice grew, he hired lawyers to assist him. Among the lawyers he hired were the defendants Joan T. Harnes, her son, John F. Harnes, Gregory E. Keller and H. Adam Prussin. It is undisputed that John Harnes joined the Firm in 1991, and Keller joined in 1994. Although defendants' names were in the title of the Firm, plaintiff maintains that none were equity partners and all were treated, for tax and profit sharing purposes, as employees.

Plaintiff alleges that during their terms of employment, defendant John Harnes and Keller received annual salaries. In or about 1994, plaintiff claims he instituted a plan to award bonuses to his attorneys. If they did substantially all of the work on the case, they received a bonus up to 50% of the fee. In addition, plaintiff granted bonuses to attorneys who rendered exceptional services on cases retained by plaintiff. Plaintiff further alleges that, in 1998, he changed the bonus plan to give Joan Harnes, John Harnes, Keller and Prussin a share of the Firm's profits in lieu of a share of individual cases. The revised plan provided that the defendants would receive as bonuses, 50% of the Firm's profits in amounts determined by plaintiff. This plan was described in a memorandum regarding "Interim Bonuses" dated June 15, 1998 that plaintiff distributed to each of the defendants. This memorandum states, in pertinent part:

> Pursuant to this year's agreement, profits are to be divided 50% to you and 50% to me. I have discretion over the amount of each share provided only that, in the aggregate, your shares equal 50%. Fee awards in three cases, Dart, Maxxam and Tremont, made possible profit sharing. The bonuses awarded, subject to a final accounting, are as follows:
>
> ***
>
> If our arrangement is to continue, you will have to make a contribution to firm revenue at least equal to your share.

Complaint, Exh. C thereto. Plaintiff contends that, by its terms, this bonus plan applied only to 1998, and was not continued in 1999. In that year, plaintiff reinstated the original bonus plan. He further contends that almost all of the income for 1999 came from cases he brought to the Firm and for which he was lead attorney. In late 1999, defendants John Harnes and Keller formed their own firm, Harnes & Keller, LLP, and the Firm was dissolved as of year-end 2000.

II. Provident Fee

In 1997, plaintiff was retained to represent a policyholder of the Provident Mutual Insurance Company and to bring two separate class actions in the Pennsylvania Court of Common Pleas on behalf of all other policyholders similarly situated. The policyholder was a client of Lawson F. Bernstein, a New York lawyer. Bernstein and plaintiff agreed to share fees and responsibilities. Plaintiff alleges that he and Bernstein prepared the complaint, successfully resisted Provident's motion to stay the action in favor of prior commenced actions, and obtained a leadership position in the conduct of the litigation. Thereafter, defendant Keller assumed the day-to-day management of the case under the supervision of Bernstein and plaintiff. Bernstein became ill in 1998 and could no longer participate in the Provident case. Plaintiff alleges that he assured Bernstein that the fee agreement would be maintained, and gave him a memorandum to that effect. Bernstein died on January 25, 1999.

After the dissolution of the Firm in 2000, defendant Keller assumed responsibility for the conduct of the Provident cases in exchange for 50% of the fees, as confirmed in a letter from Keller to plaintiff dated March 10, 2000. Under the revised fee arrangement, plaintiff contends that he and Bernstein's estate would each receive 25% and Keller would receive the 50% balance. In 2001, one of the Provident cases was settled and Keller received a fee of $1.8 million. Keller paid plaintiff $900,000, and he remitted $450,000 to Bernstein's estate. However, his heirs objected, contending they were entitled to $900,000, and commenced an action in the District Court for the Southern District of New York (Bernstein action) against plaintiff, John Harnes, Keller, SHHP&K and Harnes & Keller LLP, Case No. 01-CV-9292. The Bernstein action was settled in 2002, by paying the Bernstein heirs an additional $150,000 and increasing their share in the second Provident case from 25% to 33%. Plaintiff claims that in order to reach this settlement, he agreed to pay the $150,000 to the Bernstein heirs and reduce his share in the second Provident action to 16.7%. This agreement is memorialized in an e-mail exchange on February 4, 2002 between plaintiff and defendant Keller as follows:

> Dear Greg:
>
> Our deal is: 1. I pay $150,000 to Lawson's estate; 2. If there is not (sic) fee on the second case, that is the end of the matter and I am out $150,000; 3. If there is a fee on the second case, from your share, you remit to me $100,000; 4. On the second case, my share of the fee is 16.67%, yours is 50% and Lawson's estate is 33.33%.
>
> If you confirm via E-mail, our estates will be protected!

Warm regards

Sidney: Thanks, that is our deal. ...
greg.

Complaint, Exh. A thereto.

Plaintiff alleges that Keller subsequently reneged on this agreement, and failed to even disclose to plaintiff the amount of the fee on the second Provident case and the date of its receipt. Instead, plaintiff received a letter dated May 27, 2004 from defendants in which they indicated that although receipt of the Provident fee was "imminent," plaintiff's share would be held in escrow until such time as the plaintiff settled their claims of entitlement to a portion of a $4.5 million legal fee received by the plaintiff in 2002 for work on a case entitled Sonet v Plum Creek Timber Company, L.P., litigated in Delaware Chancery Court. It is undisputed that plaintiff's share of the Provident fee is $442,614, excluding the $100,000 payment as outlined in the February 4, 2002 e-mail.

III. Plum Creek Fees

Plaintiff alleges that the Firm commenced a class action lawsuit in 1998 (Plum Creek I) on behalf of Jerrold Sonet, a New York attorney, and the limited partners of Plum Creek Timber Company, L.P. The lawsuit claimed that a proposed reorganization of the limited partnership was going to unfairly benefit the general partner by paying it for uncertain future performance. After extensive discovery, that action was dismissed on the basis that a vote by the limited partners would determine who believed the reorganization plan to be fair or not, but that the proxy materials would be closely scrutinized by the Delaware Chancery Court. The Firm appealed that dismissal, and commenced a second action in 1999 (Plum Creek II), wherein it was successful in enjoining the use of a proxy statement which contained false and misleading information. The two actions were then

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settled in June 1999. The settlement provided that the general partner would hold $30 million in escrow, and if over the next five years Plum Creek met the financial targets that the general partner had forecast, the money would be returned to the general partner. If not, the money would be paid over to the limited partners. An independent accounting firm was to provide a certificate reflecting whether Plum Creek was meeting the financial targets.

In accordance with Delaware law, the settlement and request for legal fees were submitted to the court for approval. The Court approved the settlement in August 1999, and awarded the plaintiffs' attorneys a fee of $775,000 for the work performed in Plum Creek II in improving the disclosure to the limited partners in the proxy materials. For Plum Creek I, counsel for the plaintiff would be entitled to 25% of the proceeds of the escrow account, if any, paid to the limited partners. Sonet v Plum Creek Timber Co., 1999 WL 608849 (Del Ch Aug. 10, 1999). The Firm was paid its portion of the $775,000 in 2000 for the work done in Plum Creek II.

As a result of a merger of Plum Creek with Georgia Pacific in 2002, the time to measure whether the company had met its financial targets was reduced from five years to two years and three months. Plaintiff alleges that the accountants' reports he received reflected that Plum Creek had indeed not met the forecast's target. He claims that he, along with Jerrold Sonet and local counsel in Delaware, devoted hundreds of hours to analyzing and contesting the accountant's reports, and that, as a result of their efforts, the reports were revised and the limited partners were paid $18 million from the escrowed funds. In accordance with the Chancery Court's fee award, $4.5 million was deducted from the amount paid to the limited partners. Of that amount, local counsel in Delaware received 10%, Sonet received 30% and the 70% balance or $3,150,000 went to plaintiff. He received the Plum Creek I fee in 2002, two years after the Firm had dissolved.

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Plaintiff contends that since none of the defendants rendered any exceptional services in connection with the Plum Creek case, he did not award any part of the $775,000 he received in 2000, and none requested a share. He further contends that none of the defendants asked for a share of the contingent portion of the legal fee at the time it was awarded in 2002, and that, not only was it a matter of public record, plaintiff directly informed John Harnes about it. Defendants first claimed that they were entitled to 50% of the contingent fee in a letter penned by Prussin dated February 12, 2004. In this letter, defendants based their claim on the June 15, 1998 memorandum, asserting that "[o]f course, this arrangement continued in subsequent years." Complaint, Exh. D thereto.

Plaintiff replied, advising that the bonus arrangement agreed to in 1998 did not survive past that year, and that not one of the defendants had rendered services on the critical work performed in 2002. Plaintiff also noted that he had lost several cases, pending at the time the Firm dissolved, in which he had a huge investment of time and money and that defendants could not cherry pick the one winner and leave him with the losers.

IV. The Claims in This Lawsuit

Plaintiff's complaint seeks to compel defendants to pay forthwith the Provident fee, currently being held in escrow by defendants' counsel pursuant to the so-ordered Stipulation dated August 4, 2004. He also seeks an assessment of punitive damages against defendants for breach of their fiduciary duty, a declaration that defendants' claims with respect to the Plum Creek claim are without merit, and a declaration that defendants' have violated the Cannons of Professional Conduct and Disciplinary Rule 9-102(A).

In their answer to the complaint, defendants John Harnes and Keller contend that they were partners in the Firm "at all relevant times." Answer ¶ 17. Defendants' names were listed in the

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letterhead of the firm, and they were listed as partners in Martindale-Hubbell. They claim they were entitled to a share of partnership profits and were exposed to personal liability for partnership debts. Defendants John Harnes and Keller claim that they were sued in the Bernstein action for a share of the Provident fees "solely as a result of their status as partners of SHHP&K." Answer ¶ 14.

The Answer further alleges that:

> during most of the relevant period after 1991, each of the partners of SHHP&K was to receive a salary or draw, and a share of the profits. Silverman's draw was $500,000, Joan Harnes' $200,000, Prussin's $150,000, and John Harnes's and Keller's $125,000. John Harnes's base compensation was subsequently raised to $150,000. Income taxes were not withheld from the profits distributed above the base compensation.

Answer ¶ 19. Defendants contend that the 1998 memorandum outlining the splitting of profits between plaintiff and Joan Harnes, John Harnes, Prussin and Keller remained in place in 1998 and 1999. Id., ¶ 21. "However, in 1999, Silverman represented to his partner that there were no firm profits, so no money was distributed pursuant to this plan." Id.

Defendants assert five counterclaims. The first counterclaim asserts that Joan Harnes was a partner of the Firm from 1972 through 2000, and is entitled to an accounting for all these years. Likewise, the second counterclaim asserts that, from 1991 through 1999, John Harnes and/or Keller were partners of SHHP&K and as such they are entitled to an accounting for such years. The third counterclaim is premised on an alleged profit-sharing agreement from 1996 forward, that defendants assert did not cease upon the dissolution of Firm, but remained in place until all profits earned through that year were paid out. Defendants claim that they were primarily responsible for the successful prosecution of the Plum Creek litigations, and are entitled to their share of the fee received by plaintiff on alternative theories of breach of contract, quantum meruit and breach of fiduciary duty.

The fourth counterclaim is based on defendants' claim that, at the time that Keller and plaintiff negotiated the division of the fee in the Provident actions, which was in late 1999 when he and John Harnes had already decided to leave SHHP&K, plaintiff had determined to keep the entire Plum Creek fee to himself. Thereafter, and in breach of his fiduciary duty of candor and his contractual duty of good faith and fair dealing, plaintiff did not disclose to John Harnes or Keller that an additional $4.5 million had been awarded in the Plum Creek litigation in 2002 when Keller agreed to plaintiff's February 4, 2002 e-mail. Keller claims that he would never have agreed to give plaintiff any money from the Provident action had he known that plaintiff was planning on keeping $4.5 million in fees for which defendants were primarily responsible. Plaintiff's conduct allegedly amounts to fraud, breach of fiduciary duty, and breach of his contractual duty of good faith and fair dealing.

The fifth counterclaim alleges that, pursuant to the compensation arrangements in place at SHHP&K, defendants had the right receive 50% of the profits in 1998 and 1999, and thus they have a contractual right to their share of the Plum Creek fee.

DISCUSSION

I. PROCEDURAL IRREGULARITIES

There are a few rules that a litigant must follow in order to play the litigation game. One must show up for scheduled depositions, prepare timely answers to discovery demands, and comply with discovery orders. A litigant must also follow clear and simple directives from the court's legal staff, serve motion papers in accordance with the CPLR, local court rules and court-ordered deadlines, and, the motion papers served should be identical to the ones filed with the court.

Defendants and/or their counsel have managed to break every single one of these rules in this case.

By order dated June 16, 2005, the court ruled that defendants waived their right to take the deposition of plaintiff as a result of several willful violations of the court's discovery rulings and the Rules of the Commercial Division. The order notes that defendants were warned by this court several times that no further violations would be tolerated. As further discussed below, defendants will be deemed to have admitted to certain key facts as a result of ignoring a Notice to Admit, and the court has refused to consider those portions of their opposition papers on this motion that flagrantly violate the CPLR and/or Rules of the Commercial Division. Their cries of prejudice fall on deaf ears. Defendants John Harnes and Keller, in their own words, are experienced and highly successful litigators themselves and have called the shots in this case, so the blame cannot be wholly placed on their counsel.

A. Notice to Admit

On September 22, 2004, plaintiff's previous attorneys' served a Notice to Admit by regular mail. Pursuant to CPLR 3123(a) and 2103(b)(2), defendants' response, if any, was due on October 18, 2004. Defendants never served any response to this notice. They now admit the authenticity of the documents attached to the notice, but claim that they did not answer or object to this notice "in the belief that discovery was to be set forth in the scheduling order established at the first preliminary conference, pursuant to Rule 11 of the Commercial Part, and that only such discovery would proceed." Defs. Rule-19a Statement, at ¶ 2. Nothing in Rule 11 supports the position that the scheduling of a preliminary conference in any way postpones a litigant's responsibilities to timely respond to discovery demands or seek an extension of time.

Pursuant to CPLR 3123(a), "[e]ach of the matters of which an admission is requested shall

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be deemed admitted unless" a sworn response is timely received. See Marine Midland Bank, N.A. v Custer, 97 AD2d 974, 974-75 (4th Dept 1983), affd 62 NY2d 732 (1984); Marine Midland Bank v Bryce, 70 AD2d 754, 754-55 (3d Dept 1979). However, a notice to admit is intended to eliminate from trial those facts that are easily provable or not in dispute. Wolin v St. Vincent's Hosp. and Medical Center of New York, 304 AD2d 348, 349 (1st Dept 2003); Hodes v City of New York, 165 AD2d 168, 170 (1st Dept 1991). Plaintiff's Notice to Admit complies with the rule, since it merely requested that defendants admit the genuineness of five documents and the truth of certain key statements made in those documents by the defendants. Accordingly, the court finds that the following admissions have been made in this case:

John Harnes:

> -- admits that the following statement in an affidavit submitted to the New York City Tax Appeals Tribunal was true at the time it was made by him on October 7, 1999: "In the years 1995 and 1996, I was employed by Silverman Harnes & Harnes. I have, and had, no interest in the partnership or share in its profits; I have made no contribution to the firm's capital either by cash or otherwise and have had no control over the management of the firm." Elliot 6/15/05 Aff., Exh. 8 thereto: Notice to Admit at p. 2, ¶ 2.

John Harnes and Keller:

> -- admit the genuineness of a draft memorandum of law prepared in connection with the Bernstein action; that they both read the memorandum at the time it was prepared, and that the following statement in footnote 3 was true at the time it was made: "should Keller or [John] Harnes be required to answer in this action they would categorically deny that they were equity partners in the law firm of Silverman, Harnes, Harnes or [SHHP&K] or individual partners with Defendant Silverman." Id., at p. 4, ¶¶ 1-4.
>
> -- admit that the February 4, 2002 e-mail reflects the deal the parties reached as to the settlement of the Bernstein action. Id., at pp. 4-5, ¶¶ 5-7.

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B. Defendants' Brief In Opposition to This Motion

In connection with this motion, defendants served and filed two different versions of their brief in opposition. The document served on July 22, 2005 is a 22-page document, which has no page numbers and numerous formatting errors. Defense counsel requested permission to file a corrected brief and to make certain substantive changes. On August 10, 2005, the court's law clerk instructed defendants' counsel to file the papers that were served by the court-ordered July 22nd deadline. Accordingly, plaintiff's counsel tailored its reply papers to the document served on July 22, 2005. Defendants' counsel, however, proceeded to file a brief correcting the formatting errors and adding page numbers. While there does not appear to be any substantive changes, it demonstrates the defendants' complete disregard for the directives of this court.

C. Defendants' Rule 19-a Statement

As required by Commercial Division Rule 19-a, plaintiff's counsel submitted a statement of undisputed material facts numbering 81 in total, each supported by evidentiary citations. In defendants' counter-statement of disputed facts, 45 of these paragraphs are not supported by any citation to evidence, as required by Rule 19-a(d). Pursuant to Rule 19-(c), the corresponding allegations in plaintiff's statement are to be deemed admitted. Feinsod v Stiefel Laboratories, Inc., 1 Misc 3d 909(A), 781 NYS2d 623 (Sup Ct, Nass County 2004); see also Giannullo v City of New York, 322 F3d 139, 140 (2d Cir 2003) (construing analogous provision of local federal rule 56.1); Derienzo v Metropolitan Transp. Auth., 404 F Supp 2d 555, 557 (SD NY 2005) (same).

D. Defendants' Affirmations In Opposition To This Motion

The three remaining defendants in this case have submitted affirmations in opposition to plaintiff's motion. CPLR 2106 is very clear that an attorney may submit an affirmation in lieu of a sworn affidavit only when he or she is not a party to the action. An affirmation submitted by an attorney is procedurally erroneous if he is an active litigant on his own behalf. Slavenburg Corp. v Opus Apparel, Inc., 53 NY2d 799, 800 n (1981); Schutzer v Suss-Kolyer, 57 AD2d 613, 613-14 (2d Dept 1977).

To make matters worse, the affirmation of Joan Harnes is not "subscribed and affirmed by [her] to be true under penalties of perjury" as required by the statute. Grasso v Angerami, 79 NY2d 813, 814 (1991); Simms v APA Truck Leasing Corp., 14 AD3d 322 (1st Dept 2005). The John Harnes affirmation purports to have an electronic signature, although the document before the court was not electronically filed, and part of that signature includes a printed message that reads, in part, "validity unknown." Finally, all three affirmations are filled with irrelevant invective about plaintiff's lawyering skills and ethics.

For all these reasons, the court declines to consider these affirmations, and will only consider the deposition testimony of these parties and any other properly authenticated documentary evidence.

III. DEFENDANTS' RIGHT TO AN ACCOUNTING

The second counterclaim seeks an accounting for the years 1991 through 1999. However, only equity partners, as opposed to contract partners, are entitled to an accounting. Mazur v Greenberg, Cantor & Reiss, 110 AD2d 605, 605-06 (1st Dept), affd 66 NY2d 927 (1985); see also Bereck v Meyer, 222 AD2d 243, 244 (1st Dept 1995); Lynn v Corcoran, 1994 WL 123519, *1 (Sup Ct, Nassau County Feb. 14, 1994), affd 219 AD2d 698 (2d Dept 1995).

In Mazur v Greenberg, Cantor & Reiss, supra, a lawyer sought to compel his former law firm to account for the value of his partnership share, including assets and all fees earned but not collected as of the date of his withdrawal. The First Department reversed a judgment directing a partnership accounting. "Whether partnership status is enjoyed turns on various factors, including sharing of profits and losses, exercising joint control over the business, and making capital investment and possessing an ownership interest in the partnership." Id. at 605, citing M.I.F. Securities Co. v R.C. Stamm & Co., 94 AD2d 211, 214 (1st Dept), affd 60 NY2d 936 (1983). It was not enough that the plaintiff was given the right to share in the firm's annual profits at a fixed rate, exercised some control in the firm, and was allowed to call himself a partner and listed as such in Martindale-Hubbell, and on the firm's letterhead and tax returns. The plaintiff did not have the right to share in the firm's capital account, was not responsible for the firm's rent or losses, and was not a party to the original 1967 partnership agreement or any other written agreement. The First Department held that the customary indicia of a partnership were not all present, and that "the arrangement seems to be a precursor to today's law firm practice of two-tiered partnerships." 110 AD2d at 606 (citations omitted).

Muhlstock v Cole (245 AD2d 55 [1st Dept 1997]), also involved a claim for an accounting by former members of an accounting firm organized as a partnership. The First Department affirmed a Referee's finding that the former members "were not true partners, but more like glorified employees, who participated in profits but had no other rights and duties of partnership," on the ground that they had no real say in the management of the firm and did not agree to share losses. Id. at 58.

As more fully explained below, plaintiff has amply demonstrated that neither John Harnes nor Keller was an equity partner of the Firm, and the defendants have failed to raise a triable issue of fact to support their counterclaim for an accounting.

A. Defendants' Admissions

As stated above, by failing to respond to plaintiff's Notice to Admit, John Harnes and Keller have each admitted in this case that they were not equity partners of the Firm. Even if the court were to excuse this discovery failure, plaintiff would still be entitled to summary judgment against these defendants as they have failed to raise a triable issue of material fact as to whether they, unlike the plaintiff in Mazur, enjoyed a full equity partnership with the plaintiff.

In an affidavit he voluntarily submitted to the New York City Tax Appeals Tribunal on or about October 7, 1999 (the Tax Affidavit), John Harnes swore under oath that he had no interest in SHHP&K, no share in its profits, made no contribution to the firm's capital either by cash or otherwise, no control over the management of the firm, and was not an equity partner. At his deposition, John Harnes attempted to explain away the statements in the Tax Affidavit. He testified that the affidavit is limited to the years 1995 and 1996, and that it was accurate for those years because the Firm had no profits. John Harnes Tr. at 124-125, 134. The court rejects Mr. Harnes' attempt to make an utter mockery out of a sworn statement he freely gave to a taxing authority. As this court found in its August 1, 2005 decision, the Tax Affidavit clearly states that John Harnes was never a partner at the Firm. Decision, at p. 9. The plain language of the affidavit, i.e., "I have, and had, ...," does not limit his statements to 1995 and 1996.

In addition to the Tax Affidavit, both John Harnes and Keller represented to a federal judge that they "in fact were not equity partners" in SHHP&K, "nor were they individual partners with Defendant Silverman." Elliot 6/15/05 Aff., Exh. 7 thereto. This was not a legal position, as defendants now claim, but an admission of fact made in connection with settlement negotiations, and admissible in this proceeding. Central Petroleum Corp. v Kyriakoudes, 121 AD2d 165, 165 (1st

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Dept), appeal dismissed 68 NY2d 807 (1986).

B. No Written Partnership Agreement

It is undisputed that neither defendant signed a formal written partnership agreement. It was plaintiff's practice that, when he did have an equity partner, the partnership would be memorialized in writing. Silverman 6/13/05 Aff., at ¶ 11. For example, when Joan Harnes had an equity interest in the Firm, there was a written partnership agreement in place. Id., ¶ 11, Exh. A thereto. See Mazur, 110 AD2d at 605 (it was "especially worth noting" that equity partners had a written partnership agreement and plaintiff did not). The memorandum written by plaintiff in November 1993 is merely a proposal for the division of firm profits with John Harnes, not a formal partnership agreement. Likewise, the 1998 memorandum merely confirms that defendants were entitled to "Interim Bonuses" based on a percentage of firm profits.

C. Firm Management

The evidence in this case overwhelmingly supports plaintiff's claim that he had sole authority to manage the Firm. John Harnes testified that he had no control over the management of the firm (John Harnes Tr. at 135), and Keller testified that he did not participate in decisions regarding compensation to be paid to employees, that his involvement in "firm management" was limited to cases he was working on, "what types of electronic research we would use, things of that sort." Keller Tr. at 59-60. Joan Harnes testified: "Yes, I think [Plaintiff] had the final say on things. They were certainly discussed, and I think at times we argued about things, but I understood that he had the major interest and he made the final decision." Joan Harnes Tr. at 15-16. In addition, plaintiff offers an affidavit from H. Adam Prussin, in which he avers that "Plaintiff was the sole manager of the Firm, with ultimate authority in all areas of management of the Firm, including staffing, personnel, finances, and case management." Prussin 6/8/05 Aff., at ¶ 5.

The documentary evidence submitted by defendants actually supports the plaintiff's claim. The November 28, 1993 memorandum giving John Harnes 20% of the Firm's profits makes clear that plaintiff was in control of the Firm at that time, and would remain in control until such time as John Harnes' percentage of firm profits exceeded 50%, a scenario which, by John Harnes' own admission, never occurred. He testified that, in 1995 or 1996, their "arrangement died and a new arrangement came into being." John Harnes Tr. at 141. And the 1998 memorandum clearly indicates that plaintiff had the sole discretion to divide up the remaining 50% of the profits amongst Joan Harnes, John Harnes, Keller and Prussin.

D. Liability For Firm Losses

"An indispensable essential of a contract of partnership . . . is a mutual promise or undertaking of the parties to share in the profits of the business and submit to the burden of making good the losses (citation omitted)." Steinbeck v Gerosa, 4 NY2d 302, 317 (1958); see also Prince v O'Brien, 256 AD2d 208, 212 (1st Dept 1998) (no oral partnership agreement, absent, among other things, evidence that the parties agreed to share losses); Chanler v Roberts, 200 AD2d 489, 491 (1st Dept), lv dismissed 84 NY2d 903 (1994) (an essential element of a partnership is an agreement between the principals to share losses as well as profits).

Plaintiff contends that he alone was liable for Firm losses and liabilities, pledged personal assets to secure credit for the Firm, and guaranteed the Firm's sublease of office space at 750 Lexington Avenue. Silverman 6/13/05 Aff., ¶ 12. Abe Steinberg, who was the Firm's certified public accountant from 1975 through 2000, avers that the Firm's cash flow was less than its operating expenses in 1995, 1996 and 1997, and that, during those years, the Firm borrowed money from a bank secured by stocks owned by plaintiff. Steinberg 6/13/05 Aff., ¶ 6. In addition, as needed, plaintiff made direct capital contributions to the Firm. Mr. Steinberg avers that no other person loaned, directly or indirectly, any money to the Firm or contributed funds to support the Firm's operations. The loans to the Firm totaling $1,365,000 were repaid in 1998. He contends that plaintiff, as the sole equity partner, was charged with income in the amount of the repayment and paid taxes on such income even though he received no cash in connection with the repayment. Id., ¶¶ 6, 8. Joan Harnes confirmed that plaintiff pledged his own stock to secure a bank loan. Joan Harnes Tr. at 93.

John Harnes admitted at his deposition that he never had a discussion with plaintiff as to whether he would be personally responsible for any debts or liabilities of the Firm, but claimed that it was an "implicit understanding" on his part when he became a member of the firm. John Harnes Tr. at 117-118. Keller testified only that, in discussing the loans that plaintiff had taken out for the Firm, Keller "assumed" that, as a partner of the Firm, he was ultimately responsible for that debt. Keller Tr. at 56-57. However, a person cannot unilaterally assume an obligation to share losses.

John Harnes also testified that he never personally guaranteed any loans to the Firm, and that plaintiff's personal guarantee of the rent obligations of the Firm happened before he joined the Firm. John Harnes Tr. at 119. Keller testified that he understood that he would receive his full pay of $125,000, every two weeks, "regardless of the financial performance of the firm ..." Keller Tr. at 81-83.

Defendants argue that because the Firm covered its losses from prior years before determining its profits in 1998, defendants shared in Firm losses. This theory was rejected by the First Department in Vitale v Steinberg (307 AD2d 107, 108-09 [1st Dept 2003]), on the theory that such an expansive interpretation renders meaningless the distinction between sharing profits and sharing losses.

Defendants' only other evidence on this point, other than their alleged unilateral assumptions, is the fact that they were sued in the Bernstein action as partners of the Firm. The fact that a third party -- not the plaintiff -- took a litigation position that defendants were partners of SHHK&P, and that litigation was settled, is simply not evidence that the defendants were, in fact, equity partners.

E. Capital Contributions

"[T]he failure of a party to contribute capital is strongly indicative that no partnership exists." Brodsky v Stadlen, 138 AD2d 662, 663 (2d Dept 1988); see also Kyle v Brenton, 184 AD2d 1036, 1037 (4th Dept 1992) ("The undisputed evidence that defendants never made a capital contribution to the business strongly suggests that no partnership existed [citations omitted].")

Plaintiff contends that he alone made capital contribution to the Firm (Silverman 6/13/05 Aff., ¶¶ 11-12), and the Steinberg affidavit confirms this (Steinberg 6/13/05 Aff., ¶ 6). In the Tax Affidavit, John Harnes denied that he made any capital contribution to the Firm, as of October 7, 1999. Elliot 6/15/05 Aff., Exh. 6. Defendants admit on this motion that they never made any capital contribution to the Firm, having failed to offer any evidentiary proof to rebut paragraph 18 of the plaintiff's Rule 19-a statement.

Even without these admissions, defendants have no proof that they made any capital contributions to the Firm. Defendants argue that Keller made a capital contribution in May 1999 of $50,000 to satisfy the Firm's obligation to a litigation fund in the Provident case. However, Keller's deposition testimony is that he decided to personally contribute the money to this fund in order to maintain the Firm's position as one of three co-lead counsel, after plaintiff expressly told Keller "we don't contribute to litigation funds" (Keller Tr. at 158-60), and was reimbursed the $50,000 in 2004 (id. at 162-63). Moreover, he never discussed with plaintiff that fronting this money would be a capital contribution to the Firm. Id. at 168-69. A voluntary payment that was expressly unauthorized by the Firm cannot be considered a capital contribution. Finally, defendants' counsel argues that "the deposition testimony of John Harnes and Keller [shows] that they worked at a reduced salary and forewent profits as a contribution to capital" (Defs. Mem. of Law, at 2), but, like the defendants' Rule 19-a statement, fails to provide any evidentiary citations to support this statement and fails to indicate that plaintiff agreed, either implicitly or explicitly, that this would suffice as their capital contribution.

F. Tax Treatment

The fact that a person has always been listed in a company's payroll books as an employee tends to establish that he is not a partner. Alleva v Alleva Dairy, 129 AD2d 663, 664 (2d Dept 1987); see also Prince v O'Brien, 256 AD2d at 213, supra (finding that plaintiff was designated and compensated as an employee contributed to the holding that the plaintiff was not a partner). In the August 1, 2005 Decision, it was noted that John Harnes and Keller had failed to rebut the plaintiff's showing that the Firm treated them as employees, not partners, for tax purposes.

On this motion, the Firm's accountant avers that he treated John Harnes and Keller every year as employees for tax purposes, and that every year from 1994 through 1999, defendants received an IRS Form W-2 (Wage and Tax Statement). Steinberg 6/13/05 Aff., ¶ 2 and Exh. A thereto. Both defendants acknowledged at their depositions that they received W-2's for all the years of their employment at the Firm. John Harnes Tr. 26-29; Keller Tr. at 32-35. Prussin likewise avers that he was treated as an employee for tax purposes. Prussin 6/8/05 Aff., ¶ 6. Defendants admit on this motion that "The Firms' accountant treated [John Harnes and Keller] as employees for tax purposes," by their failure to offer any evidentiary proof to rebut paragraph 19 of the plaintiff's Rule 19-a statement.

Defendants' claim that the income taxes were not withheld from the profits distributed above their base "salary or draw" (Answer, ¶ 19), is flatly contradicted by the W-2's. For example, John Harnes' wages for 1998 were reported as $650,614.50, and the sum of $101,898.00 was withheld for federal taxes and $34,060.50 were withheld for state and local taxes, hardly the correct amounts for a $150,000 salary. Steinberg 6/13/05 Aff., Exh. A thereto.

In an attempt to raise an issue of fact, defendants offer incomplete copies of the Firm's New York City Unincorporated Business Tax Returns for 1990,[1] 1994, 1995, and 1997. Compare Tannenbaum Affirm., Exh. J thereto, with Elliot Reply Aff., Exhs. 4-7 thereto. The complete 1994, 1995 and 1997 returns for the Firm, then Silverman, Harnes and Harnes, do list John Harnes as a "partner" of the Firm along with plaintiff and Joan Harnes, but significantly, plaintiff is listed as having a 100% interest in the partnership, John Harnes' interest is either left blank or listed as 0%. Keller is not listed as a partner.

The Firm issued Schedule K-1's to John Harnes from 1993 through1997. Tannenbaum Affirm., Exhs. J and L thereto. This schedule to the Form 1065 represents a "Partner's Share of Income, Credits and Deductions, Etc." for a partnership. While it is true that the "general partner" box is checked, the only other choices were limited partner or limited liability company member. More importantly, without exception, the Schedule K-1's list John Harnes' share of the Firm's capital account as "0" and his share of share of income or losses as "0".

[1]The relevance of the 1990 return to this motion is unclear.

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As discussed above, in or about 1999, the Firm was engaged in a dispute with New York City over John Harnes' status in 1995 and 1996, and the City had requested further information concerning a bonus of $47,657.49 paid to John Harnes. In addition to the Tax Affidavit, the Firm's accountant, Abe Steinberg, submitted an affidavit in which he explained that, in 1995 and 1996, the firm had profits of $183,760 and $55,790, respectively, which were distributed between plaintiff and Joan Harnes. In both years, John Harnes received a salary of $125,000, as reflected in W-2 forms. In 1995, he got a bonus of $47,657.49. Through an error on Steinberg's part, the bonus was not added to salary, but he was issued a Form 1099 (reflecting payment for services rendered to professionals or independent contractor).

Defendants' attempt to create an issue of fact regarding John Harnes' status at the Firm by claiming that plaintiff's statements to Joan Harnes in an e-mail dated November 8, 1998 about the tax dispute show plaintiff's "proclivity towards deception." Defs. Mem. of Law, at 9. In truth, however, the e-mail merely confirms that Steinberg "made a mistake taking a deduction that would indicate that John is a partner" due to the Firm's change of name (Tannenbaum 7/22/05 Affirm., Exh. G thereto) , and is further evidence that plaintiff treated John Harnes as an non-equity partner.

G. Share in the Firm's Profits

There is no dispute that in 1998, plaintiff had an agreement with defendants to give them a share of the Firm's profits, although the parties dispute whether that agreement continued in 1999. However, a profit sharing agreement, without more, does not create a partnership. Blaustein v Lazar Borck & Mensch, 161 AD2d 507, 508 (1st Dept 1990). Significantly, the 1998 memorandum does not provide for an equal split of profits amongst all five attorneys, but that 50% of the profits would be retained by plaintiff with the remaining 50% to be paid out as "interim bonuses" to the defendants, with plaintiff the sole arbiter of the amount of each person's share.

H. Conclusion

The undisputed evidence in this case is that no written partnership agreement existed between plaintiff and John Harnes and Keller. Nor is there any evidence that John Harnes or Keller exercised joint control over the business, made any capital contributions, had any agreement with plaintiff to share losses, or did, in fact share losses or contribute funds to support the Firm's operations. Both were treated as employees for tax purposes. Against this evidence is the fact that their names were added to the Firm's name, and they were listed as partners in Martindale-Hubbell, that John Harnes was listed as a partner and issued a Schedule K-1 from 1994 through 1997, and that they were entitled to share in 50% of the Firm's profits in 1998 and possibility 1999. As in Mazur, the totality of the evidence supports a finding that neither John Harnes, and particularly Keller, were equity partners of the Firm, and thus not entitled to an accounting. 110 AD2d at 606.

III. DEFENDANTS' REMAINING COUNTERCLAIMS

A. Profit Sharing Agreement

The third and fifth counterclaims are premised on an alleged profit-sharing agreement in 1998 and 1999. Defendants contend that the 50-50 profit sharing arrangement outlined in the 1998 memorandum did not cease upon their withdrawal from the Firm in late 1999 or the dissolution of the Firm in 2000, but remained in place until all profits earned in those years were paid out. Plaintiff contends that defendants were not parties to any profit-sharing arrangement after 1998, that the contingent portion of the Plum Creek fee was not earned until 2002, and thus defendants are not entitled to any portion of that fee.

Summary judgment dismissing this claim is warranted for several reasons. First, the opening

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words of the memorandum, i.e., "[p]ursuant to this year's agreement, ..." limits the term of the parties' agreement to 1998. There is no evidence that plaintiff's suggestion for continuing the profit-sharing arrangement into 1999 in the last line of the memorandum was ever agreed to by either of the defendants. John Harnes testified that he never discussed it with plaintiff, Keller or Prussin. John Harnes Tr. at 195, 199-200.

Second, there is no evidence that the parties intended this agreement, assuming it was not limited to 1998, to continue past the time defendants left the Firm or its dissolution in 2000. Again, the memorandum makes clear that any future profit sharing by the defendants was contingent on their continued contribution to Firm revenue, which would be impossible if they no longer worked for the Firm or the Firm no longer existed. Again, John Harnes admitted at his deposition that he never discussed this with plaintiff (John Harnes Tr. at 203); and testified that the 1998 memorandum "ceased to exist at the time I was leaving with respect to future income" (id., at 204). Keller testified that he left the Firm in late 1999, after the Plum Creek fee was structured, without so much as mentioning the fee to plaintiff.

Third, and most importantly, the undisputed evidence is that the contingent portion of the Plum Creek fee was not received until 2002, and cannot be considered a "profit" of the Firm in 1999 for purposes of an employee profit-sharing plan. In May 1999, when the plaintiffs' fee application was approved by the Chancery Court, the fee was wholly contingent and could have been worth anywhere from $0 to $7.5 million. See Sonet v Plum Creek Timber Co., 1999 WL 608849, *2, supra ("[I]t was impossible to quantify the precise fee that plaintiff's counsel would be receiving in *Sonet I*. That would be knowable only five years down the road."). The Firm's accountant avers that, in 1999, a possible fee from the settlement could not have been calculated as Firm income for tax or

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financial accounting purposes, as the amount of the fee, depended on the financial results of Plum Creek over a five-year period in the future. There is also no dispute that the original financial reports for Plum Creek met the general partner's forecasts, and that a substantial amount of additional legal work was performed by plaintiff and local counsel in 2002 in analyzing and challenging those reports. Thus, it cannot even be said that the fee was earned in 1999, but not collected until 2002.

Defendants also claim that plaintiff breached his implied duty of good faith and fair dealing not to structure a legal fee to deprive defendants of their rightfully earned share. "Most of the work performed in Plum Creek I was completed in 1998; the remainder, in early 1999. The obligation to pay the fee at issue was established in 1999. Although SHIP&K could have received its fee in cash in 1999, Silverman elected to receive it five years from that date." See Answer ¶¶ 36, 44; see also Answer, ¶ 36 ("Upon information and belief, Silverman planned, at the time he structured the Plum Creek I fee, to obtain the entire fee without telling his partners and to retain the entire fee for himself.")

"For a complaint to state a cause of action alleging breach of an implied covenant of good faith and fair dealing, the plaintiff must allege facts which tend to show that the defendant sought to prevent performance of the contract or to withhold its benefits from the plaintiff." Aventine Inv. Mgt. v Canadian Imperial Bank of Commerce, 265 AD2d 513, 514 (2d Dept 1999); see also Holmes Protection of New York, Inc. v Provident Loan Soc. of New York, 179 AD2d 400 (1st Dept 1992).

There is no evidence whatsoever that plaintiff structured the Plum Creek legal fee in order to somehow cheat the defendants. To the contrary, defendants contend that John Harnes devised the structure of the Plum Creek I settlement (Answer, ¶ 32), and he testified at his deposition that he personally came up with the concept of placing funds in escrow for five years to see if the general

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partner was able to meet its forecasts. John Harnes Tr. at 228-230. The fee structure was approved by the Delaware Chancery Court in a publicly-reported decision. John Harnes testified that he discussed the issue with plaintiff, recognized that the fee was contingent, and "didn't object to it." Id., at 278-81. Thus, even assuming that defendants were entitled to a share of the Firm's profits in 1999, there is simply no evidence to support the claim that plaintiff deliberately sought to avoid any contractual obligation to split firm profits by the Plum Creek fee structure.

B. Quantum Meruit

In their answer, respondents pled that "Joan Harnes ... was primarily responsible for the successful prosecution of Plum Creek I and the resulting fee in that action." Answer, ¶ 33. Keller admitted at his deposition that his role was limited to "brainstorming with Joan and John about certain issues. As I said before, I did not have much of a role in this case." Keller Tr. at 121-22. According to the Firm's Plum Creek fee applications, Keller did not bill any time on this matter. Elliot 6/15/05 Aff., Exhs. 12 and 13 thereto. Thus, assuming Keller has any legal basis for asserting a claim to the Plum Creek contingent fee on a quasi-contract theory, the undisputed evidence reflects he performed little work on the case for the Firm.

John Harnes, on the other hand, indisputably worked on the Plum Creek I matter, although the importance of his contribution to the case is disputed. Of the five attorneys and one paralegal who worked on the matter, John Harnes billed 75 of the total 1542 hours or less than 5%. Elliot 6/15/05 Aff., Exh. 13 thereto. However, the undisputed evidence also shows that John Harnes was paid a salary and a bonus for his work for the Firm in both 1998 and 1999. Steinberg 6/13/05 Aff., Exh A. thereto. Salaried employees may not seek additional compensation in quantum meruit for services performed in conjunction with their employment unless "the allegedly uncompensated duties (performed) were distinct in character from those duties for which the plaintiff was compensated." LaJaunie v DaGrossa, 159 AD2d 349, 350 (1st Dept. 1990); see also Robinson v Munn, 238 NY 40, 43 (1924); Brodsky v Stadlen, 138 AD2d at 663-64; Mance v Mance, 128 AD2d 448, 449 (1st Dept 1987).

C. Breach of Fiduciary Duty Or Implied Duty of Good Faith and Fair Dealing

Defendants proffer no evidence that they shared a fiduciary relationship with the plaintiff that was breached by his failure to pay them a portion of the Plum Creek contingent fee. "An employer-employee relationship providing for the division of profits will not give rise to a fiduciary obligation on the part of the employer absent an agreement to also share losses." Vitale v Steinberg, 307 AD2d at 108. The fact that the defendants were dependent upon the plaintiff to calculate profits does not transform the relationship from one of employment into a fiduciary one. Id. at 109.

D. Fraud

Finally, defendants' fourth counterclaim purports to state a claim for fraud in connection with plaintiff's retention of the Plum Creek I fee in 2002. Defendants pled, on information and belief, that plaintiff defrauded them in late 1999 or early 2000 by not informing Keller that plaintiff "intended to keep the entire Plum Creek I fee to himself," and then, in 2002, years after they left the Firm, by not informing them that he had been paid the Plum Creek fee. Answer, ¶ 35.

Fraud consists of a misrepresentation of a material existing fact, made with an intent to deceive, upon which the other party reasonably relies, and as a result of which he sustains damages. Friedman v Anderson, 23 AD3d 163, 166 (1st Dept 2005); Megaris Furs, Inc. v Gimbel Bros., Inc., 172 AD2d 209 (1st Dept 1991). Fraud cannot be premised on alleged misrepresentations of future intent (Eastman Kodak Co. v Roopak Enterprises, Ltd. 202 AD2d 220, 222 [1st Dept 1994]), and, absent a duty to speak, non-disclosure does not ordinarily constitute fraud (Oppenheimer & Co. v Oppenheim, Appel, Dixon & Co., 173 AD2d 203, 204 [1st Dept 1991]).

Defendants do not allege that plaintiff made any material misrepresentations of fact to them in connection with the settlement of the Bernstein action. Nor have they presented any evidence of a fiduciary relationship with plaintiff from which the law imposed on him a duty to speak about his intentions with respect to a possible fee to be awarded in the future, a topic that defendants admit they never raised with plaintiff prior to leaving the Firm and prior to the settlement of the Bernstein action. Thus, the fourth counterclaim fails to state a claim for relief.

IV. PLAINTIFF'S CLAIM TO THE PROVIDENT FEE

Plaintiff's prima facie claim for his share of the Provident fee is not disputed. The parties agree that plaintiff permitted Keller to take the Provident case with him when Keller left the Firm in 1999, and that in March 2000, Keller agreed in return to deliver half of any fee for the second Provident case. Elliot Aff., Exh. 10 thereto; Keller Tr. at 132-33. It is also undisputed that plaintiff and Keller amended their agreement concerning the Provident fee in February 2002, to provide that Keller would pay plaintiff $100,000 plus 16.67% of the fee, if any. Elliot 6/15/05 Aff., Exh 2 thereo; Keller Tr. at 141-43, 153. Finally, defendants do not dispute that Keller received a fee in the Provident case, and that plaintiff's share is $542,614. Defs. Rule 19-a Statement, ¶ 80.[2]

Defendants' Answer pleads failure to state a claim, unclean hands, fraud, breach of fiduciary duty, estoppel and set-off as affirmative defenses to plaintiff's claim. Since defendants have failed to raise a triable issue of fact as to any of these defenses, summary judgment awarding plaintiff the

[2]The defendants admit that defendant Joan T. Harnes had no right or interest in any portion of the Provident fee. Defs. Rule 19-a Statement, at ¶ 79.

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sum of $542,614 is warranted on this record.

CONCLUSION AND ORDER

For the foregoing reasons, it is hereby

ORDERED that plaintiff's motion is granted to the extent of dismissing the Second, Third, Fourth and Fifth Counterclaims as prosecuted by defendants John F. Harnes and Gregory E. Keller, and granting plaintiff's claim for damages in the amount of $542,614; and it is further

ORDERED that defendants' counsel turn over the sum of $542,614 being held in escrow pursuant to the Court's August 4, 2004 Order within ten (10) of service of a copy of this order with notice of entry; and it is further

ORDERED that the remaining claims and counterclaims are severed and continued.

Dated: March 9, 2006

ENTER:

RICHARD B. LOWE III, J.S.C.

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