ZARELLA, J., concurring in part and dissenting in part. I agree with the majority that the trial court properly determined that the plaintiffs, W. Frederick Ravetto and Raymond Bartko, were not entitled to double damages and attorney's fees and that Bartko was not entitled to damages for the failure of the named defendant, Triton Thalassic Technologies, Inc. (Triton),[1] to repay his loan to the company in a timely manner. I also agree with the majority that the plaintiffs did not preserve their claim that the trial court improperly had failed to award them prejudgment interest for unpaid wages. I disagree, however, with the majority's conclusion in part IV of its opinion that the trial court properly determined, without considering evidence of the parties' negotiations, that Triton was not entitled to recover advances to Ravetto in excess of earned commissions. Accordingly, I respectfully dissent in part.

The majority begins its analysis by acknowledging that "whether an employer is entitled to recover advances in excess of earned commissions generally is a question of contract interpretation." The majority then observes that "[a] contract must be construed to effectuate the intent of the parties, which is determined from the language used interpreted in the light of the situation of the parties and the circumstances connected with the transaction." (Internal quotation marks omitted.) Part IV of the majority opinion, quoting *Alstom Power, Inc.* v. *Balcke-Durr, Inc.*, 269 Conn. 599, 610, 849 A.2d 804 (2004). Instead of following these principles, however, the majority concludes that, although "the defendants claimed in the trial court that the employment agreement was clear and unambiguous . . . and relied on the use of the term 'advance' to establish the repayment obligation," the trial court properly determined that "the mere use of the term 'advance' is not sufficient to establish an express repayment obligation." I strongly disagree with this analysis because it fails to construe the term "advance" in the context of the parties' negotiations and other language in the employment agreement. Not only do long established principles of contract interpretation *require* consideration of "the situation of the parties and the circumstances connected with the transaction"; (internal quotation marks omitted) id.; but the defendants repeatedly requested in their posttrial brief that the trial court examine evidence outside the four corners of the contract that the parties did not intend for Ravetto to retain advances against unearned commissions. Consequently, the trial court should have considered the parties' negotiations and other language in the contract in construing the term "advance."

The following additional undisputed facts are necessary to a full discussion of this issue. In the latter part of the year 2000, an executive recruiter informed Ravetto that Triton was searching for a vice president of sales and arranged an interview with the company. At that time, Ravetto was working for Nash Engineering Company (Nash) and was earning an annual salary of $160,000, plus a bonus. Ravetto was interested in exploring the position at Triton because Nash was losing money, and his bonus had declined over the previous five years.

During his interview at Triton in early December, 2000, Ravetto met with several individuals, including Triton's chief executive officer, Barry Ressler, to discuss the sales executive position. Thereafter, Ravetto wrote a letter to Ressler in which he summarized his approach to the job. Ravetto acknowledged that the company was "[a] startup effort to introduce a new technology to mature industrial markets" and would require "an aggressive sales program . . . ." He also recognized that "[t]he sales ramp up can be 'lumpy' when a base business flow has not yet been established," that "[t]he major obstacle to overcome is the slowness of mature markets, such as those targeted [by Triton], to adapt to change" and that potential customers would "need to be *dislodged* from the risk averse patterns of the past." (Emphasis in original.) According to Ravetto, this would require an "aggressive and targeted" sales approach. Nevertheless, Ravetto declared that, despite these challenges, he was "keenly interested in pursuing the career opportunity at Triton."

In late December, 2000, Triton offered Ravetto the position of vice president of sales with an annual salary of $100,000, plus commissions. In an e-mail dated December 29, 2000, Ravetto rejected the offer, explaining that, although he felt that the "fit with Triton was excellent in terms of chemistry, culture, [his] respect for the management team, and also the product technology," and that the "long term potential upside was very attractive," he believed, after further reflection, that "the ramp up time for sales" would take about two years, which was longer than he originally had anticipated. Ravetto also observed that "[o]verall there is zero base business sales for Triton when the sales director walks in the door" and that he would earn only $10,000 in sales commissions during his first year of employment and $25,000 in commissions during his second year of employment, which, even when added to his base salary of $100,000, was too far below his present annual compensation of approximately $170,000 to make further negotiations worthwhile.

Ressler responded by e-mail on December 31, 2000, conceding that Triton was "a developing, emerging company" with "[l]imited resources and a lot of groundbreaking challenges . . . ." With respect to

Ravetto's compensation, he stated: "[Y]our overall reasoning makes sense and *there is no way that we can guarantee the outcome*." (Emphasis added.) Although he disagreed with Ravetto's projected sales numbers, he acknowledged that the product involved "new territory and it will require a significant effort on the part of the sales manager candidate and *I repeat, no guarantees*." (Emphasis added.)

The parties reached an agreement that was formalized in a written offer from Ressler to Ravetto dated January 10, 2001. The offer provided that Ravetto would be paid an annual salary "of $110,000 in semi-monthly installments," plus a commission on sales to the automobile, paper and food industries. In an addendum to the agreement, the commission was calculated at 0.5 percent on the first $5 million of sales, 0.75 percent on the next $5 million of sales and 1 percent on sales between $10 million and $20 million for the first eighteen months of employment, starting February 1, 2001. The addendum also set forth (1) three levels of sales and the percentage commission that Ravetto would earn at each level, (2) the actual commission he would earn if sales reached the maximum within each level, (3) a hypothetical commission to be paid as an advance or as a commission earned based on sales, and (4) how much the projected advances would exceed earned commissions in the various hypothetical scenarios. The agreement further provided that Ravetto could choose to "take a 'draw' " on his sales commissions of "up to $2710 per pay period, up to a maximum advance of $65,000." This "bonus plan" would "remain in effect until sales force growth require[d] a reorganization." Changes to his compensation or the calculation thereof would be by mutual agreement. The offer also included a "10,000 share stock option" and a standard benefits package. Ravetto subsequently signed the offer, thereby accepting its terms and conditions.

On January 18, 2001, Ravetto signed a personnel form acknowledging receipt of Triton's personnel policies and procedures manual. In signing the form, Ravetto also acknowledged: "No promises regarding employment or inducements to take employment have been made or offered to me other than in Triton's offer letter of employment and I understand and agree that no promises are binding upon Triton unless made in writing by [Ressler] . . . ." On January 23, 2001, Ravetto signed another personnel form entitled "personal employee profile," which described his position as "[s]alaried," with semi-monthly payments of $4583.33. After joining Triton, Ravetto elected to take the maximum advance on commissions permitted under the agreement.

Following a hearing in which the foregoing evidence was considered, the parties submitted posttrial briefs. In their briefs, each party referred to Ravetto's situation

and the contract negotiations in support of their respective positions. The defendants specifically argued that the agreement's language should be interpreted in light of the parties' situation and the circumstances surrounding the transaction, and that the court should consider evidence "outside the four corners of the contract . . . ." (Internal quotation marks omitted.) *Alstom Power, Inc.* v. *Balcke-Durr, Inc.*, supra, 269 Conn. 609. On the basis of these basic legal principles, the defendants contended that, because the dictionary definition of "advance" is "[t]o supply or *lend*, especially on credit"; (emphasis added) American Heritage Dictionary of the English Language (3d Ed. 1992); the advances were merely loans, and that there was no other language in the agreement to suggest that the parties considered advances in excess of earned commissions as guaranteed additional compensation. The defendants thus contended that all parties "understood" that the advances did not constitute additional, guaranteed, risk-free compensation to Ravetto.

Thereafter, the trial court declared in its November 4, 2005 memorandum of decision that "Connecticut has adopted the majority rule that, where advances made to a salesman are charged against commissions earned, he is not required to pay any excess of advances over commissions unless it is expressly or impliedly agreed that he do so." (Internal quotation marks omitted.) The court then determined, without considering any other contract provisions regarding the compensation package, or any other evidence of the parties' intent, including their negotiations, that, because the agreement contained no "express language on reimbursement of unearned commissions, Ravetto never agreed to repay advances in excess of earned commissions." Consequently, he was entitled to retain such advances when he ceased working for the company.

As the majority has observed, Connecticut law provides that "[a] contract must be construed to effectuate the intent of the parties, which is determined from the language used *interpreted in the light of the situation of the parties and the circumstances connected with the transaction.* . . . [T]he intent of the parties is to be ascertained by a fair and reasonable construction of the written words and . . . the language used must be accorded its common, natural, and ordinary meaning and usage where it can be sensibly applied to the subject matter of the contract." (Emphasis added; internal quotation marks omitted.) *Alstom Power, Inc.* v. *Balcke-Durr, Inc.*, supra, 269 Conn. 610.[2]

The majority appears to agree with these principles when it notes that, among those jurisdictions that have considered the question, the greater number have concluded that, "if no express or implied contract for repayment is established, the employee is not liable to the employer for repayment of advances that exceed earned

commissions." (Emphasis added.) Part IV of the majority opinion, citing *Kennesaw Life & Accident Ins. Co.* v. *Hendricks*, 108 Ga. App. 148, 150, 132 S.E.2d 152 (1963) (employer may not recover advances that exceed commissions earned "in the absence of an express or implied agreement, or promise to repay any excess of advances" [internal quotation marks omitted]). The majority also recognizes that other jurisdictions have concluded that an employee may be liable for the repayment of advances "in the absence of an express written agreement where *other evidence* establishes the parties' understanding or implied agreement that the employee was obligated to repay the excess advances." (Emphasis added.) Footnote 10 of the majority opinion. The majority concludes, however, that the mere use of the word "advance" in the parties' employment agreement is insufficient to establish a repayment obligation. I disagree with the majority's reasoning and submit that the trial court was obligated to consider the language of the contract as a whole in light of the parties' negotiations, which indicated that Ravetto would not be allowed to retain advances against unearned commissions. See *Alstom Power, Inc.* v. *Balcke-Durr, Inc.*, supra, 269 Conn. 610–11.

The agreement specifically provided: "You may take a 'draw' on your sales commission of up to $2710 per pay period, up to a maximum advance of $65,000. This bonus plan . . . will remain in effect until sales force growth requires a reorganization. Changes to your compensation or the calculation thereof will be by mutual agreement." To ascertain the commonly approved usage of a term, we look to its definition in the dictionary. E.g., *Hummel* v. *Marten Transportation, Ltd.*, 282 Conn. 477, 498, 923 A.2d 657 (2007). According to Webster's Third New International Dictionary, the common and ordinary meaning of the term "draw" is "to gain as a recompense or one's due . . . as for services," or "to pay out money held to the credit of the drawer . . . ." The ordinary meaning of the term "advance" is "to supply (as money or other value) beforehand in expectation of repayment or other future adjustment . . . ." Webster's Third New International Dictionary. These definitions indicate that when the term "advance" is used in a contract, it implies a future accounting to reconcile money paid in expectation of work to be performed with money owed if expectations are not fulfilled. That Ravetto might not earn the sales commissions necessary to justify the advances he drew was reflected in column four of the addendum to the employment agreement, captioned "[e]xcess of earnings," which provided examples of situations in which advances might exceed earned commissions and thus require repayment.

Furthermore, the language of the employment agreement was permissive in nature, specifically providing that "[y]ou may take a 'draw' on your sales com-

mission," and placed a cap of $65,000 on advances that Ravetto could obtain during his initial eighteen months with the company. These provisions indicate that the advances were not regarded by the parties as guaranteed income. Indeed, common sense dictates that giving Ravetto the *option* of drawing advances against unearned commissions meant that they were not intended as guaranteed income and would require repayment should Ravetto fail to produce the necessary sales.

Correspondence during the negotiations confirmed that the parties did not view the advances as guaranteed income. Ravetto admitted that, because the company was "[a] startup effort to introduce a new technology to mature industrial markets" with no established "business flow," and because there might be substantial resistance to change among the targeted customers, his ability to generate sales during his first two years with the company would be limited. In explaining to Triton his decision to decline its initial offer, he estimated that he would earn only $10,000 in sales commissions during his first year of employment and only $25,000 in commissions during his second year of employment because there would be "zero base business sales for Triton when the sales director walk[ed] in the door . . . ." Ressler generally agreed with Ravetto's assessment of the company and affirmed that "there is no way that we can guarantee the outcome. . . . I repeat, no guarantees." Although there may have been undocumented conversations between the parties and the executive recruiter on salary and commissions following this exchange, the only tangible result was Triton's offer to increase Ravetto's annual salary to $110,000 and to give him the option of taking regular advances on unearned commissions should he wish to do so. In addition, Ravetto indicated, by signing the personnel form, that any promises Triton might have made, other than those included in the written offer, would not be binding. The parties' negotiations thus suggest an understanding that any advances would be repaid or require other financial adjustments in Ravetto's compensation if they were to exceed commissions earned. Accordingly, the trial court should have considered this evidence in construing the terms "advance" and "draw."

The majority concludes that the trial court's determination that "Ravetto never agreed to repay advances in excess of earned commissions" suggests that the court considered the negotiations when rejecting Triton's claim. I disagree. The trial court's conclusion that Ravetto never agreed to repay the advances directly followed its observation that the agreement was silent on the issue of repayment. The majority's inference that the trial court considered evidence outside the four corners is, therefore, entirely unsupported.

Moreover, Triton's failure to seek an articulation from the trial court as to whether it considered such evidence

is not fatal, as the majority insists. "[A]n articulation is appropriate [when] the trial court's decision contains some ambiguity or deficiency reasonably susceptible of clarification. . . . [P]roper utilization of the motion for articulation serves to dispel any . . . ambiguity by clarifying the factual and legal basis [on] which the trial court rendered its decision, thereby sharpening the issues on appeal." (Internal quotation marks omitted.) *Orcutt* v. *Commissioner of Correction*, 284 Conn. 724, 738, 937 A.2d 656 (2007). In the present case, the trial court did not fail to address the issue of whether the parties agreed that Ravetto would be required to repay excess advances. The court expressly found that "[t]he written employment agreement in this case is silent as to whether an employee is required to pay back excess advances. It does not contain any express language on reimbursement of unearned commissions." Accordingly, the factual and legal basis for the trial court's decision is clear. To the extent that the court's decision may be considered incomplete because it did not make findings concerning *all* of the evidence presented, "[i]t was the province of the court, as the finder of fact, to assess the evidence and to determine which factual grounds supported its decision." *State* v. *Bennett*, 101 Conn. App. 76, 82, 920 A.2d 312 (2007). These grounds were stated in its ruling. Consequently, there is no ambiguity in the trial court's decision, and Triton had no responsibility to seek an articulation in appealing from that court's judgment.

Additionally, I disagree with the majority's decision to promulgate a rule that, in the absence of an explicit provision in the employment agreement holding an employee personally liable for advances, an employer must show by the employee's conduct that he or she intended to be held personally liable for the repayment of advances that exceeded earned commissions. In my view, such a rule is unnecessary because traditional contract principles require the employer to prove by a fair preponderance of the evidence that the parties contemplated repayment. See *Coelho* v. *Posi-Seal International, Inc.*, 208 Conn. 106, 112, 544 A.2d 170 (1988) (party alleging implied agreement by words, action or conduct has burden to prove by fair preponderance of evidence that agreement existed). If the employer fails to satisfy its burden, the employee is not liable for the repayment, and an additional rule serves no purpose. Moreover, the rule that the majority adopts does not permit examination of other language in the employment agreement that, when read together with the provisions in question, may provide a more complete understanding of the parties' intent.

Finally, I do not agree with some of the theoretical justifications on which the majority relies in adopting such a rule. For example, a potential employer does not always possess superior bargaining power in an employment relationship. When Ravetto interviewed

with Triton, he was employed by Nash and was earning annual compensation of approximately $170,000. Triton, on the other hand, was a start-up company with limited resources and repeatedly told Ravetto that it could not guarantee the company's future success. It is therefore clear that Ravetto, rather than Triton, had superior bargaining power in discussing the terms of his potential employment with the company.

With respect to the majority's theory that when an employee works for an employer on a commission basis, the employee and employer are engaged in a joint venture in which they share the risk, the majority fails to acknowledge that, in the present case, the analogy does not apply because Ravetto was not compensated solely on a commission basis; rather, he received a substantial salary of $110,000 before commissions. Thus, even if Ravetto earned no commissions, it would be disingenuous to suggest that a salary of this magnitude placed Ravetto in the precarious position of assuming a major share of the risk associated with Triton's business.

For all of the foregoing reasons, I respectfully dissent in part.

[1] Barry Ressler, Triton's chief executive officer, also was named as a defendant. We refer to Triton and Ressler collectively as the defendants and individually by name.

[2] We agree with the majority that, because the defendants claim that the trial court incorrectly construed and applied Connecticut law, our review is plenary. See, e.g., *Kelly* v. *Stop & Shop, Inc.*, 281 Conn. 768, 776, 918 A.2d 249 (2007).