COUNTER STATEMENT OF FACTS

The trial court found that defendant, Department of Public Works ("DPW"), agreed to settle a claim of plaintiff, Klewin Building Company ("KBC"), by payment of $1.2 million dollars for labor and materials provided to the State of Connecticut, and that the Governor subsequently authorized this settlement, and certified the payment. (MOD 9/20/06, pp.31-32). There is no dispute over these findings of the trial court as they were based on the undisputed evidence in the record; thus, KBC will not repeat the facts on which the trial court based these findings.[1]

I. FACTS RELATING TO DEFENDANTS' "CONDITION PRECEDENT" ARGUMENT

Defendants do challenge the finding that defendants failed to provide an evidentiary foundation for their claim that funding by the Bond Commission and execution of satisfactory releases were conditions precedent to the negotiated settlement. (Def.App.Br., pp.28-30; MOD 9/20/06, p.18.) Defendants argue that the affidavit of Mr. O'Hearn, deputy commissioner of the DPW, and the testimony of Mr. D'Amato, president of KBC, proved their claim. (Def.App.Br., pp.28-30).

In his affidavit, O'Hearn stated that, at a meeting between the parties in September 2004 in which the parties negotiated to settle KBC's claim against the DPW, he informed KBC that the DPW would need to obtain funding from the Bond Commission to

[1] While defendants implicitly challenge the trial court's finding that KBC and DPW entered a settlement agreement, by persisting in characterizing the agreement as "tentative," they fail to assert this finding by the trial court as a basis to reverse the trial court's decision, and thus it is unnecessary for KBC to respond to this mischaracterization of the parties' agreement.

consummate the settlement. (Def. A3-4, ¶¶ 13.)[2] O'Hearn did not testify that funding by the Bond Commission was a term of the settlement agreement nor a condition precedent to the agreement. (MOD 9/20/06, p.16 & Def. A3-4, ¶¶ 13). Moreover in the next paragraph, O'Hearn stated that, subsequent to the September 2004 meeting, KBC and DPW orally agreed to settle KBC's claims for $1.2 million dollars, subject to the Governor's approval but again failed to testify that KBC agreed, at this time, to condition the agreement on the DPW's receipt of funding from the Bond Commission. (MOD 9/20/06, p.16; Def. A4, ¶ 14.)[3] D'Amato's testimony indicated: a) he did not believe that funding by the Bond Commission was a condition precedent to the settlement agreement, and b) while he was aware that the DPW planned to seek funding from the Bond Commission, he was also aware that other sources of funding were available to the DPW, which he expected IT to pursue if the Bond Commission did not fund the compromise. (MOD 9/20/06, pp.17-18; Def. A-62, 65-66, 68-70, 72-74, 81-83 [D'Amato Dep., pp.25-26, 39-40, 42-44, 46-48, 55-57.])

There are no documents that mention funding by the Bond Commission as a term of the settlement, much less a condition precedent to KBC's rights under the agreement. (Def. A7-9; A11-14). To the contrary, the documents reveal that the only conceivable term of the agreement relating to the DPW's receipt of funding was for the benefit of KBC, not the DPW. In seeking approval from the Attorney General, DPW states that "this agreement has been reached based on," among other things, "that DPW would diligently pursue payment to Klewin of the negotiated settlement amount." (Def. A13).

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[2] At oral argument on the parties' cross motions for summary judgment, defendants conceded that, in fact, there is no requirement that the DPW fund the compromise through the Bond Commission, and that this is simply its preference. (MOD 9/20/06, pp.18-19.)

[3] Instead, O'Hearn states in a separate paragraph that it was his personal understanding that "the tentative settlement value orally agreed to was subject to . . . acquisition of funding by DPW from the Bond Commission." (Id., ¶ 15.)

The minutes of the parties' negotiation and the letter setting forth the terms of the negotiated settlement for the Governor's approval also fail to mention the execution of a release. (MOD 9/20/06, Def. A7-9; A11-14). Defendants submitted an affidavit of DPW Deputy Commissioner O'Hearn in support of this claim, who merely stated his belief that "the tentative settlement value orally agreed to was subject to . . . the execution of a satisfactory release." (Def. A-4, ¶ 15). O'Hearn's affidavit testimony fails to support a factual basis to claim that DPW communicated this expectation to KBC, or that the parties agreed that this was a condition precedent to DPW's obligation to pay KBC the agreed sum. (Id.)

II. FACT RELATING TO DEFENDANTS' "PUBLIC INTEREST" ARGUMENT

In its ruling on defendants' motion for summary judgment, the trial court rejected defendants' argument that it was against the public interest to order defendants to pay KBC in accordance with the Governor's certification because KBC had retained former Governor Rowland as a consultant after he resigned from office, and thereafter challenged subpoenas issued by the Government Administration and Election Committee ("GAEC") seeking information about the consulting agreement. The trial court found that "the record before this court makes it clear beyond question that Mr. Rowland had nothing whatever to do with the settlement negotiated between DPW and Klewin which is at issue in this case." (MOD 9/20/06, p.29.) The trial court also found that defendants had failed to present any evidence that KBC engaged in fraudulent or inequitable conduct in challenging the GAEC subpoenas. (Id., pp.26-27.) Defendants do not dispute these findings on appeal.

Instead, defendants assert that, because the "publicly elected and appointed officials" that comprise the Bond Commission have exercised their "considered" judgment

and discretion "not to consummate the compromise at this time," the trial court's refusal to deny the mandamus on equitable grounds was an abuse of discretion. (Def.App.Br., pp. 31, 32, 33, 35). There is nothing to which defendants can point to support this assertion. To the contrary:

1) After learning of KBC's retention of Mr. Rowland, Commissioner Fleming and Deputy Commissioner O'Hearn both stated they were not aware of any information that would undermine their conclusions that the settlement was in the state's best interest, and that they continued to believe the settlement was prudent and justified. (MOD 9/20/06, p.30, citing, Pl. Opp. to Def. Mot. for Extension of Time, Exhibit A, p.4 [Pl. A1-4]).
2) During the course of this litigation, and after the challenge to the GAE subpoena, Commissioner Fleming again requested that the Bond Commission vote to fund the compromise. (Def. A32-33 [Genuario Depo., p.19, 23]).
3) The Bond Commission has not ever considered whether to fund the compromise, much less concluded that funding would be inappropriate, because the Attorney General prevented the question of funding from being placed on the Bond Commission agenda. (Def. A37-43 [Genuario Depo., pp.32-38.])

ARGUMENT

I. THE TRIAL COURT CORRECTLY DENIED DEFENDANTS' MOTION TO DISMISS BECAUSE THE COMPLAINT ADEQUATELY ALLEGED THAT DEFENDANTS HAD FAILED TO FULFILL A MINISTERIAL DUTY

KBC's complaint alleged that defendants had failed to fulfill their mandatory statutory duty to pay KBC the $1.2 million that the Governor certified to be paid, pursuant to C.G.S. §§ 3-7 and 3-117.[4] (Complaint, ¶¶ 9, 15, Prayer) (R. __). In its ruling on defendants' motion to dismiss, the court applied the well-established law that sovereign immunity does not bar an action to compel performance of a statutory duty, to the allegations of the complaint, and concluded that sovereign immunity did not bar plaintiff's action. (MOD 4/18/06, pp.7-10).[5] Defendants contend, however, that the trial court should have disregarded KBC's allegations that defendants had failed to fulfill their mandatory, statutory duties, and concluded that KBC's "suit is, in reality, nothing more than a thinly disguised

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[4] Subsection (c) of C.G.S. § 3-7 provides that the "Governor may authorize the compromise of any disputed claim by or against the state or any department or agency thereof, and shall certify to the proper officer or department or agency of the state the amount to be received or paid under such compromise." Subsection (a) of C.G.S. § 3-117 states that "upon the settlement of any claim against the state, the Comptroller shall draw an order on the Treasurer for its payment."

[5] It is a matter of well-established law that "[w]here a public officer proposes to proceed in plain disregard of the rules of law established for his governance . . . his conduct is tantamount to a refusal to act at all and mandamus lies, not only to compel him to act but to direct that action along the prescribed way." State v. Erickson, 104 Conn. 542, 133 A.2d 683, 685 (1926); D'Eramo v. Smith, 273 Conn. 610, 614-615 & fn.7, 872 A.2d 408 (2005) (court had subject matter jurisdiction over mandamus action to compel compliance with statute), citing, Bloom v. Gershon, 271 Conn. 96, 856 A.2d 335 (2004) and Connecticut Pharmaceutical Assn. v. Milano, 191 Conn. 555, 559, 468 A.2d 1230 (1983) (A trial court that has competency to adjudicate what duties can be compelled by mandamus has subject-matter jurisdiction.); Moosup Trucking Co., Inc. v. John A. MacDonald State Highway Commissioner, 5 Conn. Sup. 114, 117 (1937) ("The rule that a state is immune from suit in its own courts does not apply to an action of mandamus brought to compel a public officer to perform public duties delegated to him…")

breach of contract claim for money damages," against which they enjoy sovereign immunity. (Def.App.Br., pp.9-10). This argument has no merit.

First, defendants' argument would have required the trial court to improperly rule on the merits of KBC's complaint in the context of a motion to dismiss. Defendants premised this motion on their assertion that C.G.S. § 3-7 does not create a statutory duty to pay plaintiff. In D'Eramo v. Smith, 273 Conn. 610, supra, this Court held that the question of whether a statute gives rise to a clear, mandatory, legal right relates to the merits of the plaintiff's claim and is thus not appropriately addressed on a motion to dismiss. D'Eramo, at 615. Following D'Eramo, the trial court correctly concluded that it would be improper for the court to accept defendants' invitation to rule on a motion to dismiss that KBC's action was a breach of contract action. (See MOD 4/18/06, p.8, fn.5, citing, D'Eramo, supra.)

Second, contrary to defendants' contention, and as the trial court explained more fully later in ruling on the motions for summary judgment, the fact that defendants' compliance with their statutory duty requires the payment of money does not transform the action into a claim for "money damages" to which sovereign immunity applies. (See MOD, 9/20/06, pp.22-23). The holdings of the United States Supreme Court and this Court, that "[t]he fact that a judicial remedy may require one party to pay money to another is not sufficient reason to characterize the relief as 'money damages'" fully support the trial court's conclusion. Bowen v. Massachusetts, 487 U.S. 879, 893-901, 108 S. Ct. 2722 (1988); Milford Ed. Ass'n v. Board of Ed. Of Town of Milford, 167 Conn. 513, 520-521 (1975) (writ of mandamus would be appropriate to compel a public official to perform her duty to compensate the plaintiff, if there was a statute that fixed the amount of compensation due.); Branard v. Staub, 61 Conn. 570 (1892) (Mandamus is proper remedy to compel the State Comptroller to pay the

plaintiff a sum claimed by him to be due as his salary as the Governor's executive secretary. Motion to quash, denied.)[6]

Indeed, defendants failed to refer the trial court, and again this Court, to any authority which held that sovereign immunity precludes an action to compel a state officer to comply with a statutory duty to pay the plaintiff money. Defendants' reliance on Alter & Assoc., LLC v. Lanz, 90 Conn.App. 15 (2005) (Def.App.Br., pp. 12-14) is quixotic because Alter made clear that sovereign immunity is not a bar to a mandamus action. In that case, the plaintiff sought an injunction to compel defendants to perform their duties under a contract, and sought a writ of mandamus to compel the defendants to perform their corresponding ministerial duties under the state bidding and purchasing statutes, C.G.S. 4-a-50 et seq. While the Alter Court upheld dismissal of the claim for injunctive relief on the ground that money damages were an adequate remedy for the claimed breach of contract, the Appellate Court stated that "we lack any basis" to determine whether the trial court correctly dismissed

[6] See also State v. Staub, 61 Conn. 553 (1892) (Where the law fixes the amount of claim, or if the account is liquidated, and manner of payment is agreed upon by the parties, the comptroller's duty is to draw his order in payment of it. This is a ministerial act. Whenever any public officers, however high, is commanded by any constitution or statute to perform a ministerial act, the performance may be compelled by mandamus.); Mossup Trucking Co., supra (mandamus is the proper remedy to require the State Highway Commissioner to certify the sum due to the State Comptroller so the latter may be enabled to issue his warrant or order upon the State Treasurer); Alcorn v. Dowe, 9 Conn. Sup. 440 (1941) (Mandamus is the proper remedy to require the comptroller to make payment to the plaintiff for any difference in pay between his state salary and his military salary in accordance with the applicable statute. Compliance with the statute is a ministerial act.); Alcorn v. Dowe, 10 Conn. 346 (same); State v. D' Aulisa, 133 Conn. 414 (1947) (Mandamus is a proper remedy to require a town comptroller to pay teachers' and superintendents' salaries. The duty is ministerial.); Brown v. Lawlor, 119 Conn. 155 (1934) (Mandamus is a proper remedy to compel payment of retirement pensions to fireman and policemen.) Indeed, in 1992, Attorney General Blumenthal himself issued an opinion that mandamus is a proper remedy to enforce the Comptroller's statutory duties. Op. Atty. Gen. No. 92-035. Defendants' current argument contradicts the Attorney Generals own prior statement and those of his predecessors,. e.g. Alcorn v. Dowe, 10 Conn. 346; Alcorn v. Dowe, 9 Conn. Sup. 440 (1941).

the mandamus action because the trial court "nowhere addressed the merits of the plaintiff's claim that, because of our state competitive bidding statutes, the defendants' contractual obligations were ministerial in nature." Id., at 26-27. Thus, just as in Milford Ed. Ass'n, supra, (cited by the defendants to the trial court), Alter recognized that where the plaintiff alleged the performance of a ministerial duty created by statute which implicates a contract, payment of money is not sufficient to preclude the remedy.

The other cases upon which defendants rely simply have no bearing on the question of whether defendants have sovereign immunity in this case. In Miller v. Eagan, 265 Conn. 311 (2003) and DPW v. ECAP, 250 Conn. 553 (1999), this Court did not even address a claim to enforce a statutory duty to pay money, and thus, this Court certainly did not characterize such an action as a claim for "money damages" that is barred by sovereign immunity, as defendants argue. In Miller, the plaintiff was seeking to recover "compensatory and punitive damages" for defendant official's defamatory statements, false imprisonment, conspiracy and violation of 42 U.S.C. § 1983, and claimed that the defendant did not have sovereign immunity because this conduct, which caused his damages, was in excess of defendants statutory authority. Miller, at 304-307. It is this type of claim for money damages caused by conduct in excess of authority, rather than a claim for mandatory injunction to compel compliance with statutory duties, which this Court held was subject to sovereign immunity. Id., at 322-323.[7] Thus, it is not surprising that defendants failed to cite Miller in support of their motion to dismiss.

[7] Indeed, this Court specifically distinguished the circumstances of that case from other cases in which the plaintiff sought an order to enforce statutory obligations, against which the State was not immune, even thought the remedy sought had financial implications to the State. Id., at 315, citing, Horton v. Meskill, 172 Conn. 615 (1977) and Savage v. Aronson, 214 Conn. 256 (1990).

Moreover, the rationale behind this Court's decision in Miller does not apply to this case. In Miller, this Court explained that recognizing sovereign immunity in actions for money damages "[i]n the absence of legislative authority" was necessary to protect the state from interference with control over its funds and property. Id., at 314-317. This Court further explained that, prior to the creation of the Claims Commissioner, parties seeking to sue the state for money damages were required to resort to the legislature either for a monetary award or permission to sue the state. Id., at 317. The legislature created the Claims Commission to ease the legislature's burden. Id. This Court held that the legislation surrounding the claims commissioner is "an indication of the legislative determination to preserve sovereign immunity as a defense to monetary claims against the state not sanctioned by the commissioner or other statutory provisions." Id.

By contrast, allowing an action to compel defendants to pay KBC the sums that the state's chief executive, with the express approval of the Attorney General, certified to be paid, pursuant to the authority that the legislature conferred in C.G.S. § 3-7, will not interfere with the state's control over its funds. Long ago, before it even created the Claims Commission, the legislature specifically vested the "Board of Control", and subsequently the Governor, with the authority to compromise disputed claims against the state, and to certify them to be paid. Conn. Joint Standing Committee Hearings, Finance, 1917 Sess., pp.97-98. Moreover, there is no evidence or basis to conclude that, when the legislature created the Claims Commission, it intended or anticipated that the Claims Commission would have any role with respect to claims that the Governor had compromised and certified to be paid pursuant to C.G.S. § 3-7; the legislature conferred this compromise authority specifically to avoid the need for parties to file lawsuits (Id.), as well as, the need

for the legislature to consider whether to pay the claims or authorize the suit (which is now vested in the Claims Commission).

Additionally, as this Court observed in Miller, in creating the Claims Commission, the legislature merely delegated its right to waive the sovereign immunity it already enjoyed. Defendants fail to present any evidence showing that the legislature intended to unilaterally expand its sovereign immunity to include claims to enforce statutory duties to pay money, for which this Court had previously held the state did not enjoy sovereign immunity. (Contra, Def.App.Br., pp.11-12, fn 8, attempting to distinguish these authorities upon which the trial court relied on the ground that they preceded the legislature's creation of the Claims Commission). Indeed, both the statute itself, and this Court's holdings, show that C.G.S. § 4-160 only applies to actions (a) for damages (Bloom, 271 Conn. at 107-112) and (b) for which the state would otherwise enjoy sovereign immunity. D'Eramo, 273 Conn. at 615-619. Accordingly, even after the creation of the Claims Commission, both this Court and the Attorney General recognized that the state's sovereign immunity does not preclude a mandamus action to compel the payment of money. Milford, supra; (Pl.A3 [Op. Atty. Gen. No. 92-035].)

In fact, contrary to defendants' contention (Def.App.Br., p.6), the legislative history of C.G.S. § 4-142 shows that the legislature did not intend the Claims Commission to alter the pre-existing right of party's to bring a direct action to enforce statutory duties that would result in the payment of money, even accepting defendants' characterization of such actions as claims for "money damages." In 1996, the legislature amended C.G.S. § 4-142 to clarify that the Claims Commission's jurisdiction did not include "claims upon which suit otherwise is authorized by law *including suits to recover similar relief* arising from the same

set of facts." The specific purpose of this amendment was to "clarify the original intent of the Claims Commissioner statute by specifying that a claimant who is seeking money damages from the state, and who is authorized to bring direct action in Superior Court, cannot bring a claim based on the same set of facts simultaneously through the Claims Commissioner." (Joint Favorable Report of Judiciary Committee, Pl.A5-6). Thus, when it created the Claims Commission, the legislature clearly did not intend to alter existing law, which provided that sovereign immunity is not a bar to an action to enforce a statutory right to payment of money, even if such a claim were properly characterized as a claim for "money damages."

Defendants' only other authority refers to a footnote in St. George v. Gordon, 264 Conn. 538 (2003). In that case, the state refused to pay a judgment rendered against a sheriff, and the judgment creditor and sheriff sought a declaration that the state was obligated to pay the judgment pursuant to C.G.S. § 5-141d, which sets forth that the state will indemnify state officers from damages incurred in lawsuits against the officers, *provided that* "the officer is found to have been acting in the discharge of his duties or within the scope of his employment and such act or omission is found not to have been wanton, reckless or malicious." The defendants seize upon this Court's footnote that the exception to sovereign immunity for actions to enforce mandatory statutory duties did not apply because Gordon asked the *court* to establish his right to payment under the statute, which was tantamount to an action for money damages. Id., at 550, fn.12. The trial court in this case correctly distinguished Gordon because the *Governor*, through her certification, has already established KBC's right to payment under the statute at issue, and the defendants'

obligation to pay the sum certified is ministerial. (Def. A28-29 [Ruling on Motion to Strike, pp.36-37]).

Finally, contrary to defendants' contention, affirming the trial court's ruling in this case would not create a "gaping hole" that would "eviscerate" the obligation to seek permission from the Claims Commissioner prior to bringing an action for money damages (Def.App.Br., pp.13-14), because this case does not involve a claim for money damages.

II. THE TRIAL COURT CORRECTLY DENIED DEFENDANTS' MOTION TO STRIKE BECAUSE PLAINTIFF DOES NOT HAVE ADEQUATE ALTERNATIVE REMEDIES TO THE MANDAMUS ACTION

The trial court also correctly denied defendants' motion to strike, because C.G.S. §§ 4-160 and 4-61 are not adequate alternative remedies to KBC's action to compel defendants to fulfill their statutory duties.

> A remedy, to be adequate, must be one 'which will place the relator in status quo, that is, in the same position he would have been had the duty been performed. * * * Indeed, it must be more than this; it must be a remedy which itself enforces in some way the performance **of the particular duty**, and not merely a remedy which in the end saves the party to whom the duty is owed unharmed by its nonperformance.

Erickson, 133 A.2d 683 at 686 (emphasis added); Ruling on Motion to Strike, pp.33-37 (Def. A25-29). The trial court simply adopted the principles that this Court has repeatedly enunciated, *inter alia*, that a plaintiff does not have an "adequate alternative remedy" merely because plaintiff might conceivably achieve a similar end result (the payment of $1.2 million dollars), if it successfully pursued a different remedy (damages), based on a different theory of recovery (breach of a settlement agreement or of the underlying construction contract). For example, in Erickson, the defendant argued that mandamus was not appropriate because the plaintiff had the alternative remedy of appealing to the tax board, which had authority to equalize and adjust the valuations of property, and otherwise revise the list. Id., 133 A.2d

at 686, citing, C.G.S. § 1232. This Court rejected that argument explaining that, even though plaintiff could have achieved the end result it sought through an appeal to the tax board, such an appeal was not adequate to secure that to which the plaintiff was entitled "to wit, the honest judgment of the assessors as to the value of property in the first instance" and thus, the availability of an appeal to the tax board did not preclude plaintiff's right to seek a writ of mandamus. Id. (emphasis added); See also State v. Jenks, 150 Conn. 444, 451 (1963) (same).

Similarly, Vartuli v. Sotire, 192 Conn. 353, 366 (1984) rejected the defendant zoning enforcement officer's argument opposing a writ of mandamus ordering him to issue a building permit on the grounds that the plaintiff had an adequate remedy by an appeal of the zoning board's denial of the plaintiff's application for a building permit. This Court's explanation is quite telling as it applies to this case:

> This contention misconstrues what constitutes an adequate remedy for the purposes of mandamus. An adequate remedy is one that "enforces in some way the performance of the particular duty, and not merely a remedy which in the end saves the party to whom the duty is owed unharmed by its nonperformance." The trial court correctly held that the zoning appeal, which could do no more than secure approval of the coastal site plan, *which already had been approved by operation of law*, did not vindicate the plaintiffs' right to the immediate issuance of a building permit.

Id., at 366 (emphasis added), quoting, Erickson, supra, 104 Conn. at 549 and State ex rel. Golembeske v. White, 168 Conn. 278, 283 (1975). As in Vartuli, and Erickson, supra, in this case, a suit for breach of contract, which could do no more than secure a judgment that plaintiff is entitled to a specified sum of money *to which plaintiff is already entitled by virtue*

of the Governor's certification and applicable law, would not vindicate plaintiff's right to immediate payment by defendants of the sums certified by the Governor to be paid.[8]

Thus, the trial court properly concluded that, as in Erickson, Jenks, and Vartuli, none of the so-called remedies proposed by the defendants would vindicate the legal right that plaintiff seeks to enforce in this case, to wit, the right to immediate payment of the certified claim pursuant to C.G.S. §§ 3-7 and 3-112(3). Ruling, pp.33-36 (Def. A25-28).[9]

A. THE TRIAL COURT CORRECTLY CONCLUDED THAT THE C.G.S. § 4-160 IS NOT AN ADEQUATE ALTERNATIVE REMEDY

The trial court held that because KBC's claim was to enforce an immediate statutory right to payment, the delay and uncertainty inherent in requiring plaintiff to pursue a claim for breach of the settlement agreement before the Claim Commissioner rendered that remedy insufficient. Ruling, pp.34-37 (Def. A26-29). Defendants overlook this essential foundation for the trial court's ruling, and claim that the trial court simply ruled that C.G.S. § 4-160 was inadequate simply because it would involve delay, expense, and uncertainty of recovery. (Def.App.Br., p.17). This is because there is no authority to support that C.G.S.

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[8] Waterbury Equity Hotel, LLC v. City of Waterbury, 85 Conn.App. 480 (2004), upon which defendants rely, is consistent with the Supreme Court's holdings in Erickson, Jenks, and Vartuli. (Def.App.Br., p.20). In Waterbury Equity Hotel, the court held that mandamus was not appropriate because there where specific statutes (C.G.S. §§ 12-117a and 12-119) which provided a venue for the plaintiff to vindicate the specific right asserted, but specifically noted that mandamus would be appropriate in a case such as Jenks, where those same statutes were not suited to vindicate the particular right asserted. Id., at 500-502 & fn.10.

[9] In fact, defendants proposed "remedies" are even more inadequate than the alternatives available to the plaintiffs in Erickson, Jenks, and Vartuli. In those cases, the plaintiff at least had the opportunity to directly challenge the propriety of the officer's conduct in a venue where that officer's determination could be overruled, while the "remedies" that defendants in this case propose, preclude plaintiff from asserting any claim based on the violation of the duty imposed by C.G.S. § 3-7. Bloom v. Gershon, 271 Conn. 96, 106, 111 (2004) (holding Claims Commission only has jurisdiction under 4-160 over claims for money damages); Department of Public Works v. ECAP Construction Co., 250 Conn. 553 (1999) (§ 4-61 applies only to disputed claims under construction contracts and does not even extend to claimed breaches of a settlement of the disputed claims.)

§ 4-160 is an adequate alternative remedy to a writ of mandamus to compel state officials to perform their ministerial, statutory duties.

Not one case to which defendants point this Court even discussed the question of whether C.G.S. § 4-160 could provide an adequate alternative remedy to an application for a writ of mandamus to compel a defendant to perform a duty imposed by statute. All but one of defendants' cases involved claimed breaches of a contract in contrast to the violation of a statutory duty.[10] These cases do not support that C.G.S. § 4-160 is an adequate remedy for the performance of a statutory duty.

Defendants' own authorities acknowledge that C.G.S. § 4-160 is not applicable. For example, in Milford Ed. Ass'n, (Def.App.Br., pp.19-20) this Court specifically found that a breach of contract action was an adequate alternative remedy because the plaintiffs were not seeking to enforce the performance of a statutory duty to which they had a complete and immediate legal right but were, instead, seeking a judicial interpretation of a contract, the terms of which were subject to dispute (which the plaintiff in this case is not asking the court to do). Id., at 520-521. Similarly, in Alter, supra (Def.App.Br., p.19), the Appellate Court held that, even though the plaintiff was required to obtain consent of the Claim Commission to bring an action to enforce a contract with the state, "we lack any basis" to determine whether the trial court correctly dismissed the mandamus action because the trial court "nowhere addressed the merits of the plaintiff's claim that, because of our state

[10] Indeed, the plaintiffs did not seek a writ of mandamus in ECAP Construction Co., supra, 250 Conn. 553 (1999) or 184 Windsor Ave., LLC v. State, 274 Conn. 302 (2005), upon which defendants rely (Def.App.Br., pp.18-19).

competitive bidding statutes, the defendants' contractual obligations were ministerial in nature."[11]

Thus, following directions in Milford Ed. Ass'n, the Alter court recognized that the mere fact that a contract was involved could not be sufficient to preclude a mandamus action where the plaintiff alleged the violation of a ministerial duty created by statute. The Court clearly did not hold that plaintiff's claim for damages for breach of contract was an adequate alternative remedy that could justify precluding the plaintiff's mandamus action, as defendants misleadingly imply. (Def.App.Br., p.19). To the extent that Alter has any bearing on this case, it demonstrates that the possibility of obtaining money damages for a breach of the underlying contract is not a basis to preclude plaintiff's application for a writ of mandamus seeking performance of statutory duties. [12]

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[11] The fact that Alter did not affirm the trial court's dismissal of the writ of mandamus on the ground that the plaintiff could pursue a claim for damages after obtaining a waiver of the state's sovereign immunity, is not surprising. It is well-established that, as the trial court concluded, sovereign immunity does not apply to a mandamus action (See MOD, 5/11/06) and thus, that C.G.S. § 4-160 does not require a plaintiff to seek permission from the claims commissioner prior to filing a mandamus action. D'Eramo, 273 Conn. at 615-619; See also Mossup Trucking, supra ("The rule that a State is immune from suit in its own courts does not apply to an action of mandamus brought to compel a public officer to perform public duties delegated to him, since the State, as well as individuals is interested in the fulfillment of the purposes of the office which he holds.")

[12] Although defendants improperly assert facts outside of the complaint to reverse an order on a motion to strike, i.e. that plaintiff initially filed a claim with the Claims Commissioner (Def.App.Br., p.16), plaintiff's earlier filing is irrelevant as to whether C.G.S. § 4-160 provides an adequate alternative remedy to the present application for a writ of mandamus to vindicate plaintiff's rights under C.G.S. §§ 3-7 and 3-112(3). See D'Eramo, 273 Conn. at 613-614, 616-618 (noting that plaintiff filed a claim with the Claims Commissioner, but filed mandamus action before the date scheduled for the hearing before the Claims Commissioner and holding that plaintiff was not required to proceed with the hearing before the Claims Commissioner prior to filing the mandamus action.).

B. THE TRIAL COURT CORRECTLY CONCLUDED THAT ARBITRATION OF THE UNDERLYING CONTRACT DISPUTE IS NOT AN ADEQUATE ALTERNATIVE REMEDY

The trial court also correctly concluded that arbitration of the underlying contract dispute was not an adequate alternative remedy for the same reason as the Claims Commission did not provide an adequate alternative remedy: this venue would not permit KBC to enforce its immediate right to payment of $1.2 million dollars as certified by the Governor pursuant to C.G.S. § 3-7. Ruling, p.37 (Def. A29).

III. THE TRIAL COURT PROPERLY GRANTED SUMMARY JUDGMENT IN KBC'S FAVOR BECAUSE, PURSUANT TO C.G.S. §§ 3-7 AND 3-117, THE GOVERNOR'S AUTHORIZATION GAVE KBC A CLEAR LEGAL RIGHT TO BE PAID $1.2 MILLION DOLLARS, AND DEFENDANTS FAILED TO MEET THEIR BURDEN TO PROVE THAT THERE WERE UNMET CONDITIONS PRECEDENT TO THAT RIGHT

A. STANDARD OF REVIEW

Defendants appeal the trial court conclusion that the Governor's authorization and certification gave KBC a clear, legal right to be paid $1.2 million dollars. (MOD 9/20/06, pp.9-13.) The trial court's interpretation of the meaning and effect of C.G.S. §§ 3-7 and 3-117 is a question of law, subject to plenary review. Morrison v. Parker, 262 Conn. 545, 548 (2002).

Defendants also appeal the trial court's finding that (1) "defendants have failed to provide an evidentiary foundation to support their claim" that KBC was not entitled to summary judgment, and that they were entitled to summary judgment, on the ground that the execution of a release and funding by the Bond Commission were conditions precedent to KBC's right to payment and their "submissions have failed even to raise a genuine issue as to that material fact" that would justify denying KBC's motion for summary judgment (Id., p.15, fn.11 & p.18) and (2) the defendants failed to present, and the trial court was unable

to locate, any authority to support that either of these alleged conditions, could excuse a party from performing its obligations, while there is authority that funding is not a condition precedent to a binding obligation. (Id., p.15, fn.11 & pp.20-21).

Defendants erroneously frame the question on appeal to be "whether the Plaintiff sufficiently demonstrated that there were no genuine issues of material fact concerning whether conditions precedent to DPW's performance under the tentative compromise had been satisfied" and claim that this question presents a "question of law." (Def.App.Br., p.22). Defendants bore the burden to prove their defense that the parties' compromise included conditions precedent that precluded KBC's right to payment. Serrano v. Burns, 248 Conn. 419, 424-425 (1998); Sanborn v. Greenwald, 39 Conn.App. 289, 292-293, cert. denied, 235 Conn. 925 (1995). The trial court found that defendants did not present any evidence from which a jury could reasonably conclude that the compromise contained unsatisfied conditions precedent, and, even if they had, it is a matter of law that the alleged unsatisfied conditions cannot relieve defendants of their obligation to pay plaintiff. (MOD 9/20/06, pp.15-21). Thus, trial court's rejection of defendants' 'condition precedent' defense was proper because KBC would be entitled to a directed verdict on the facts presented. Serrano, at 424. See e.g Beale v. Yale New Haven Hosp., 89 Conn.App. 556, 565-566 (2005) (setting forth standard for granting directed verdict).[13]

[13] Defendants cite Niehaus v. Cowles Business Media, Inc., 263 Conn. 178, 188 (2003) in support of their claim that KBC bore the burden to prove it had satisfied the alleged conditions precedent, and that this is a question of law. There is nothing in Niehaus, which supports this contention. First, the Court in Niehaus did not address the parties' respective burdens of proof on the issue of claimed conditions precedent. Second, this Court stated that the determination of what the parties intended by their contractual commitments only becomes a question of law "[w]here there is definitive contract language." Id., at 188. This standard has no application in this case, because, as the trial court held, there was no

B. PURSUANT TO C.G.S. §§ 3-7 AND 3-117, THE GOVERNOR'S AUTHORIZATION GAVE KBC A CLEAR LEGAL RIGHT TO BE PAID

Section 3-7 of the Connecticut General Statutes gives the Governor the power to "authorize the compromise of any disputed claim," and requires the Governor, upon such authorization, to "certify to the proper officer or department or agency of the state the amount to be . . . paid under such compromise." C.G.S. § 3-7. The statute further provides that "[s]uch certificate shall constitute sufficient authority to such officer or department or agency to pay . . . the amount therein specified," and that "the record of any compromise effected pursuant to the provisions of this section shall be open to public inspection . . ." Id. Moreover, C.G.S. § 3-117 states that "upon the settlement of any claim against the state, the Comptroller shall draw an order on the Treasurer for its payment." Contrary to defendants' contention, the trial court correctly construed the plain language of C.G.S. § 3-7, read as a whole, along with the legislative history, the context in which the Governor certified the compromise in this case, in conjunction with C.G.S. § 3-117, to establish a clear legal right to payment upon the Governor's certification pursuant to C.G.S. § 3-7. (MOD 9/20/06, pp.9-18, 21-22.).

While defendants argue that the phrase "authorize the compromise" really means "authorize the officer to enter a compromise" (Def.App.Br., pp.23-27), the statute's words, the context of those words within the statute, and the legislative history all refute this interpretation. First, as the trial court observed, the plain meaning of the word "authorize," when it modifies an object, such as an agreement, is to formally approve or sanction. (MOD 9/20/06, p.9, citing, Black's Law Dictionary, 7th Ed. 1999). Second, as the trial court

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language in the record to support the existence of the claimed conditions precedent. (MOD, 9/20/06, p.15, fn.11 & p.18)

also noted, defendants' proposed construction of the phrase "authorize the compromise" to mean authorize an officer or agency to enter a compromise, cannot be reconciled with the second part of that same sentence, which requires the Governor to then "certify" (verify in writing) the amount "to be paid," which presupposes that the amount of the compromise is established, and also connotes a mandatory duty to pay that specific sum. (MOD 9/20/06, pp.9-10). Third, in the last sentence of C.G.S. § 3-7, the legislature clearly states that a compromise is "effected pursuant to the provisions of this section." Finally, if there were any remaining doubt, the legislative history, which states that the purpose of C.G.S. § 3-7 was to grant the Board of Control, now the Governor, "this power to compromise claims," makes clear that the Governor's authorization establishes the compromise. (Id., p.12, citing, Conn. Joint Standing Committee Hearings, Finance, 1917 Sess., pp.97-98.)

Defendants argue that, nevertheless, the sentence C.G.S. § 3-7 which provides that "[s]uch certificate shall constitute sufficient authority . . . to pay . . . the amount therein specified," indicates that the certificate gives the defendants the power, but not the duty, to pay the certified amount. (Def.App.Br., pp.24-25). This construction of the statute completely contravenes the legislature's stated intent to vest the Governor with the power (but only after obtaining approval of the Attorney General) to compromise claims. Pursuant to defendants' interpretation, the Governor has no power to compromise a claim – she only has the power to give state agencies the power to compromise claims. Moreover, defendants' argument overlooks that the legislature has established the state official's duty to pay in the immediately preceding sentence, wherein it provides that the Governor will "certify" to the appropriate officer the amount "to be paid." Having established the duty to pay, the legislature then ensures that the officer also has the power to do so, by specifically

providing that the certificate constitutes "sufficient authority" for the officer to pay the amount certified by the Governor to be paid, unimpeded by any limitation otherwise imposed upon the officer or agency prior to disbursing funds.[14]

In sum, defendants' argument that, in C.G.S. § 3-7, the phrase 'certify the amount to be paid,' really means to 'authorize the maximum amount that may be paid' and that the phrase 'shall constitute sufficient authority to pay the amount therein specified' really means 'shall constitute sufficient authority to enter into negotiations to pay up to the amount specified,' (Def. App.Br., pp.23-27) would require the judiciary to amend the statute by adding language that the legislature has omitted, omit words that the legislature included, interpret two different words in the statute (authorize and certify) to have the same meaning, and render the phrase "compromise effected pursuant to the provisions of this section" meaningless; this court has rejected this kind of statutory construction . See Doe v. Norwich Roman Catholic Diocesan Corp., 279 Conn. 207, 216-17, 901 A.2d 673 (2006).[15]

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[14] Defendants also mistakenly assert that the statement that "Such certificate shall constitute sufficient authority . . . to pay," "explicitly describes the legal effect of the Governor's authorization." (Def.App.Br., pp.24-25 & fn.13.) By its plain terms, this statement applies solely and specifically to the effect of the Governor's certification of the amount to be paid, it does not address the Governor's authorization of the compromise, which, under the statute is a distinct act. It is, however, significant to note in this regard that the legislature could have, but did not, provide that, as with the certification of payment, the Governor's authorization of the compromise "shall constitute sufficient authority for the officer to enter a compromise."

[15] In light of the record in this case, defendants' most specious argument is that, if this Court holds that state agencies must actually pay the sums that they have agreed to pay, that the Attorney General approves, and that the Governor certifies to be paid, this Court will discourage state agencies from effecting compromises pursuant to C.G.S. § 3-7 and thereby undermine that statute's purpose to reduce litigation (Def.App.Br., pp.27-28, fn.15.) This argument requires acceptance of the unfounded assumption that state agencies enter, and seek approval from elected executive officials of compromises that they have no intent to fulfill. It is defendants' proposed holding, that when a public official refuses to pay the amount that the Governor certified to be paid to that party, pursuant to a negotiated settlement with the state, the party's only recourse is to seek permission from the Claims

Defendants' challenge to the trial court's interpretation of the statute is somewhat academic in any event because, even if there are circumstances in which the Governor's certification pursuant to C.G.S. § 3-7 would not result in a binding compromise, as the trial court found, in this case, the evidence shows that it did. (MOD 9/20/06, pp.13-14, 18). The DWP, itself, clearly manifested its understanding that, at least in this case, the Governor's authorization of the compromise pursuant to C.G.S. § 3-7 was the final step, and not simply a first step, to creating a binding obligation. The DPW did not submit a request for authority to enter a settlement agreement for an amount not to exceed $1.2 million dollars; it specifically "request[ed] the Office of the Attorney General to approve the negotiated settlement of the claim in the amount of one million, two hundred thousand dollars," and to "expedite acceptance of the negotiated settlement" by the Governor. (Def. A11, 14). Indeed, the DPW has since admitted that "the compromise was reached." (Pl.A1). Accordingly, pursuant to C.G.S. § 3-117, the Comptroller has a mandatory duty to draw an order on the Treasurer for the payment of this settled claim.

C. DEFENDANTS FAILED TO PROVE THAT THERE WERE UNMET CONDITIONS PRECEDENT THAT COULD PRECLUDE PLAINTIFF'S RIGHT TO PAYMENT

Defendants argued to the trial court that plaintiff did not have a clear right to be paid because there were two unsatisfied conditions precedent to KBC's right to payment: the execution of a release, and funding from the Bond Commission. (Def.App.Br. p.28.) According to defendants' argument, KBC agreed to refrain from exercising its immediate right under C.G.S. § 4-61(a) to pursue a legal action in which, as the DPW acknowledged, KBC "almost certainly" would have received a damage award that exceeded the $1.2

Commissioner to pursue a breach of contract litigation, which would undermine the purpose of C.G.S. § 3-7 to allow the Governor to compromise claims to avoid litigation.

million dollar compromise, in addition to an award of more than $600,000 in accrued interest (Def. A-14, ¶¶ 4, 6), the right to payment of which would not be contingent on funding approval by any entity including the Bond Commission, in exchange for an illusory promise that, at an indefinite time in the future, the DPW *might consider* exercising its *discretion* to paying KBC $1.2 million dollars (a) *if* the Governor authorized it to *negotiate* a compromise for a sum *not to exceed* $1.2 million dollars and (b) *if* the DPW's *preferred* source of funding, the Bond Commission, approved funding, which it may or may not do at some undefined time in the future.[16] The trial court correctly concluded that defendants' argument had no basis in law or fact.

First, the trial court correctly concluded that, even if the alleged conditions did exist, as a matter of law, they could not prevent the agreement from being legally enforceable. (MOD 9/20/06, p.15, fn.11, citing, Dills v. Enfield, 210 Conn. 705, 720 (1989)); See also e.g. Albert Mendel & Sons, Inc. v. Krogh, 4 Conn.App. 117, 121-122, 492 A.2d 536 (1985) ("When informal settlements are achieved [by state agencies] they are considered binding; and are strictly interpreted by the courts."). Defendants do not cite any authority to refute this holding.

Second, the trial court did not "ignore" any evidence that defendants presented to support their argument that funding by the Bond Commission and execution of releases were conditions precedent to the settlement. (Def.App.Br., p.30.) The court carefully reviewed both Mr. O'Hearn's affidavit and Mr. D'Amato's deposition testimony and correctly concluded that, at most, this evidence showed that the DPW agreed to pay KBC $1.2

[16] According to the defendants, the DPW could avoid paying KBC even if the Bond Commission agreed to fund the compromise by simply failing to present KBC with a release to sign, and thereby preventing what it claims to be a necessary condition precedent to its obligation, from occurring. (Def.App.Br., pp.28-29, 33.)

million dollars, which the DPW hoped to obtain from the Bond Commission; this is not sufficient to support a jury finding that the parties had agreed that the DPW would not need to pay KBC the promised sum if the Bond Commission declined to fund the compromise. (MOD 9/20/06, pp.17-18.)

Accordingly, defendants' additional contention, that the trial court based its decision on the fact that DPW had alternative sources of funding, is misguided. (Contra, Def.App.Br., p.7, fn.4 & p.30). Indeed, the trial court only discussed the DPW's alternative sources of funding after it found that "defendants have failed to provide an evidentiary foundation for their claim." (MOD 9/20/06, p.18). After the court concluded that defendants had failed to meet their burden to establish the alleged condition precedent, the court went on to address "the defendants' argument that bond commission action is required by law to fund any such agreement." (Id., p.19.) The trial court rejected this argument because defendants failed to present any supporting evidence and, moreover, "at oral argument on these motions they [defendants] conceded that there is no such requirement, that it is simply their *preference* to obtain funding from the bond commission." (Id.)[17]

While the court subsequently noted that "it is not as if no other source of funding was or is available", the trial court's decision did not depend on this "fact" (MOD 9/20/06, p.19.) However, the trial court's conclusion was correct and further supports that KBC had

[17] In light of this concession, defendants' reliance upon any purported representation by Mr. O'Hearn to KBC in September 2004 that funding by the Bond Commission was a necessary prerequisite to the DPW's ability to consummate the compromise, was inexplicable.

no reason to believe that its right to payment depended entirely on funding by the Bond Commission.[18]

Finally, the trial court's ruling was correct even if defendants had shown that execution of a release and funding by the Bond Commission were conditions precedent to its duty to pay KBC. "Where a debt has arisen, liability will not be excused because, without fault of the creditor and due to happenings beyond his control, the time for payment, as fixed by the contract, can never arrive ..." DeCarlo and Doll, Inc. v. Dilozir, 45 Conn.App. 633, 641-642, 698 A.2d 318 (1997), citing *Restatement, Contracts,* § 301; *Williston Contracts,* § 799. In this case, approval of funding by the Bond Commission, and presentation of a release by the DPW are both outside of plaintiff's control.

Moreover, "[i]n matters of contract, where the party to whom or for whose benefit a condition precedent is to be performed prevents its performance, he is not, as a rule, permitted to avail himself of his wrong in so doing . . . It is a well-settled and salutary rule that a party cannot insist upon a condition precedent when its nonperformance has been caused by himself." Seeley v. Hincks, 65 Conn. 1, 31 A. 533, 537 (1894). Here, the undisputed evidence showed that, the Attorney General, prevented the Bond Commission from entertaining and considering the request to fund the compromise, and the DPW has failed to offer KBC the opportunity to be paid in exchange for KBC signing a release. (Def.A35-42 [Genuario Depo., pp.28-37]). Where, as here, a party prevents the actions that *could have* resulted in fulfillment of the alleged condition precedent (e.g. placing the funding

[18] Defendants' claim that the trial court's view of the budgeting process was improper and "simplistic" is belied by the fact that they significantly do not dispute that the DPW could have included funding of the compromise in the budget they submitted to the Office of Policy and Management, or sought payment from the Comptroller out of the General Assembly's appropriations for the payment of claims, as the trial court noted. (MOD 9/20/06, pp.19-20; Def.App.Br., p.7, fn.4.)

on the Bond Commission agenda for a vote), the condition precedent is deemed to have been fulfilled. Seeley, supra (where a will directed annuity payments to a grandson out of the testator's share of a partnership, if the grandson devoted sufficient attention to the interests of the partnership to satisfy a named committee that he was entitled to the payments, but the committee refused to allow the grandson to perform any services for the partnership, which resulted in the committee being unable to conclude that the grandson had performed sufficient services, which was the condition precedent to his receiving the payments, the court would deem the grandson to have performed sufficient services, entitling him to the annuity.)

IV. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN FINDING THAT DEFENDANTS FAILED TO JUSTIFY DENYING THE REQUESTED MANDAMUS ON EQUITABLE GROUNDS

A. STANDARD OF REVIEW

"In deciding the propriety of a writ of mandamus, the trial court exercises discretion rooted in the principles of equity.... In determining whether the trial court abused its discretion, this court must make every reasonable presumption in favor of its action." Jalowiec Realty Assoc., L.P. v. Planning & Zoning Comm'n, 278 Conn. 408, 412 (2006). This court will only overturn a lower court's judgment if it has committed a clear error or if it has misconceived the law. Id.

B. THE TRIAL COURT CORRECTLY HELD THAT DEFENDANTS FAILED TO MEET THEIR BURDEN TO JUSTIFY DENYING THE MANDAMUS ON EQUITABLE GROUNDS

The trial court held that defendants failed to present sufficient evidence to justify denying the requested mandamus on "public interest" grounds. Specifically, the trial court found that (1) "it is clear beyond question that Mr. Rowland had nothing whatever to do with

the settlement negotiated between DPW and Klewin which is at issue in this case"; (2) defendants' argument, that a writ of mandamus would be against the public interest, was based exclusively on the fact that a KBC entity challenged certain subpoenas issued by the GAEC; and (3) this legal challenge does not constitute "fraudulent or inequitable conduct" that justified the court in exercising its discretion to find that it is against the public interest to compel the DPW to pay KBC the $1.2 million dollars that the Governor certified to be paid for the work KBC performed for the state. (MOD 9/20/06, pp.26-30 & fn.15, citing, Jalowiec Realty Assoc., L.P. v. Planning & Zoning Comm'n, 278 Conn. 420; Office of the Governor v. Select Committee of Inquiry, 271 Conn. 540 (2004). Defendants do not challenge any of these findings.

Instead, defendants assert a new argument they did not previously raise in the trial court: that, by issuing the mandamus, the trial court improperly "overruled the sound judgment of public officials assigned the discretion to either settle or dispute claims." (Def.App.Br., pp.31, 32, 33, 35). This Court should disregard this argument because defendants not only failed to present this argument to the trial court, they have failed to refer to any evidence in the record to support that any public official has, in fact, announced that it is in the public interest not to fund the compromise which the Governor, with approval of the Attorney General, authorized and certified for payment.[19] Parenthetically, there appears no authority to support that the Bond Commission has the discretion to prevent funding of the compromise certified by the Governor to be paid, based either on plaintiff's challenge to the GAE subpoenas or on information that might have been obtained at the

[19] As set forth in KBC's counter statement of facts, the evidence in the record shows that both Commissioners Fleming and O'Hearn believe it is in the public interest to consummate the settlement, and the Bond Commission has not even considered the issue because the Attorney General has blocked this item from being placed the Bond Commission agenda.

legislative hearings, particularly given the Comptroller's mandatory duty set forth in C.G.S. § 3-117(a).

Defendants' only other argument, that the trial court erroneously concluded that it would be inappropriate to deny an order compelling the performance of a clear legal right based on alleged inequitable conduct that is unrelated to that right, is equally without merit. (MOD 8/8/06, pp.3-6, MOD 9/20/06, pp.27-29 & fn.17). The trial court properly relied on Jalowiec Realty Assoc., supra, and the complete absence of any case in which a court conducted a "roving inquiry" into unrelated activities of a plaintiff seeking an order of mandamus, to reject defendants' argument. (Id.) [20]

Nevertheless, defendants' lengthy argument challenging this finding (Def.App.Br., pp.33-35), is puzzling. Even if it would be appropriate to consider unrelated misconduct by a plaintiff seeking an order of mandamus, defendants have not cited any authority to support that a trial court's failure to consider such conduct is a reversible, abuse of discretion. More importantly, even if the failure to do so was an abuse of discretion, that would not justify reversing the trial court's decision in this case, because, notwithstanding its holding, the trial court did consider the evidence that D'Amato challenged the GAE

[20] In the sole case that defendants claim supports their argument, People ex rel. H.J. Mullen Contracting Co. v. Craig, 187 N.Y.S. 123, 127 (1921) (Def.App.Br., p.34, fn.18), the trial court denied a construction company's petition for mandamus on the ground that the company's president refused to cooperate with an investigation into the propriety of the specific contract for which the company sought payment in the mandamus action. Id., at 126. There can be no claim that KBC's principals refused to cooperate with an investigation into the settlement agreement at issue in this case: the Governor's office did not request any information from KBC in its investigation of the negotiation of the agreement (Pl. A1-3); the Bond Commission has never requested KBC to appear before it; and the GAEC adamantly asserted in opposition to the challenge to its subpoenas that is currently on appeal before this Court that the scope of its investigation was limited to determining whether the "revolving door" laws needed to be revised to prevent elected officials from entering consulting agreements such as the one between KBC and Rowland, within one year of leaving office.

subpoenas, which is the conduct outside of the dispute at issue that defendants contended justified the court in denying the mandamus, and found that this was not "fraudulent or inequitable conduct," (MOD 9/20/06, pp.27, 31), which is a finding that defendants have not challenged.

Accordingly, even if it were appropriate for a trial court to deny a requested order of mandamus based on conduct outside the context of the dispute in some "imagine[d]" other circumstance (Def.App.Br., p.34), defendants have failed to meet their burden to show that it was clearly erroneous for the trial court to decline to do so in this case.

CONCLUSION

For the foregoing reasons, Plaintiff respectfully requests that the Court affirm the judgment of the trial court.

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CERTIFICATION

I hereby certify that in accordance with Practice Book §62-7, a true and correct copy of the foregoing Motion was mailed, first class postage prepaid, this 21 day of February, 2006 to:

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