NO. UWY CV 04-0185580 S (X02) : SUPERIOR COURT

TOWNS OF NEW HARTFORD, BARKHAMSTED, individually and on behalf of all other similarly-situated municipalities	: JUDICIAL DISTRICT : OF WATERBURY
V.	: COMPLEX LITIGATION : DOCKET
CONNECTICUT RESOURCES RECOVERY AUTHORITY	: JUNE 19, 2007

MEMORANDUM OF DECISION
RE: TRIAL

I. BACKGROUND AND FINDINGS OF FACT

The above-entitled matter was tried to the Court for approximately two and one-half months. The matter has been extensively briefed by the parties. The Court recently granted the plaintiffs' motion to reopen the evidence for the purpose of additional testimony regarding the Fiscal Year (hereinafter referred to as "FY") 2008 budget. The additional hearing concluded on June 15, 2007, at which time the court retained continuing jurisdiction, if necessary, regarding the FY 08 budget. For the purposes of this decision, the following description in this section constitutes the Court's Finding of the

Facts in this case. The court has found some facts which may not be necessary for the ultimate decision. However, the court feels any extraneous facts provide a necessary framework to fully appreciate the arguments made by the parties.

On June 15, 2007, this court heard arguments regarding CRRA's motion, pursuant to C.G.S. section 53-304, to substitute assets of equal or greater value for the specific assets now under attachment. The court reserved decision on the matter. CRRA has also moved to substitute other property in the event the court enters judgment prior to ruling on its motion.

On June 15, 2007, this court retained continuing jurisdiction, if necessary, regarding CRRA's FY 08 budget. At that time the court took judicial notice of the Marshal's return on the original writ and took judicial notice of the court files in CRRA's cases against the law firms.

The plaintiffs comprise a class of seventy municipalities in the State of Connecticut who have entered into contracts with the defendant Connecticut Resources Recovery Authority (hereinafter referred to as "CRRA"). These seventy municipalities comprise CRRA's Mid-Connecticut Project (hereinafter referred to as "Mid-Conn Project").

CRRA was established by statute in 1973 to help Connecticut's municipalities manage, recycle and dispose of solid waste. It was also created by the State in order to carry out the State's solid waste management plan. The named plaintiffs have brought this action individually and on behalf of the seventy Connecticut municipalities that comprise CRRA's Mid-Conn Project. This action was certified as a class action on March 21, 2006.

The powers of CRRA are vested in the CRRA Board of

Directors (hereinafter referred to as the "Board"), headed by a Chairman appointed by the Governor. CRRA's daily operations are administered by a President appointed by the Chairman with the approval of the CRRA Board. The President's duty is to supervise the administrative and technical activities of the authority in accordance with the directives of the Board.

CRRA operates four separate solid waste disposal Projects comprised of and serving municipalities in specific geographic areas of the State, namely, the Bridgeport Project, the Mid-Connecticut Project, the Southeast Project, and the Wallingford Project. Each of CRRA's Projects is financially independent of the other Projects.

CRRA formed the Mid-Conn Project in the early 1980s to serve municipalities in the center and northwest portions of Connecticut. CRRA's plan was to convert an old coal plant located in the South Meadow property, in Hartford, which was owned by Connecticut Light and Power (hereinafter referred to as "CL&P"), into a trash-burning facility that would process and burn municipal solid waste (hereinafter referred to as "MSW"). The renovated facility would consist of a waste processing facility (hereinafter referred to as "WPF") to receive and sort the MSW and a power block facility (hereinafter referred to as "PBF") comprised of steam boilers to burn the MSW. Construction of this facility was to be financed through the issuance of $309 million of tax-exempt bonds.

The South Meadow property was owned by CL&P, which owned an operated an Electric Generating Facility (hereinafter referred to as "EGF") on the property. CRRA's proposed PBF would be adjacent to CL&P's EGF, and the steam generated by the PBF could be transferred to the EGF and converted into

electricity. CRRA's plan was to enter into a long-term agreement with CL&P requiring CL&P to purchase the steam generated by the PBF, thus providing the project with a planned source of revenue over the life of the project.

A successful bond issuance depended upon enlisting a sufficient number of municipalities to join the Project in order to (a) provide a guaranteed flow of MSW that would generate garbage disposal revenues and steam sale revenues sufficient to cover the bond obligation; and (b) provide security in the form of pledges by the municipalities of their full faith and credit to pay bond obligations. The municipalities were informed that the energy purchase agreement (hereinafter referred to as "EPA") would run through 2012, the anticipated life of the Project, and would provide a guaranteed source of revenue to defray a major portion of the Project's operating expenses.

CRRA was able to enlist 33 municipalities to join the Mid-Conn Project in or about early 1985, entering into long-term contracts with the municipalities at that time. Over time, an additional 37 municipalities have joined the Project and have entered into similar contracts with CRRA.

In February, 1985, CRRA entered into a long-term EPA with CL&P requiring CL&P to purchase all of the steam generated by the South Meadow PBF through 2012 at a rate of at least $.085/kilowatt hour (hereinafter referred to as "KWH"). The $.085/KWH rate was higher than the then-market price for steam and was subject to increase if CL&P's "avoided costs" (i.e., the price CL&P would have to pay for oil or other substitute sources of creating electricity) increased above $.085/KWH.

With these contracts, CRRA was able, in March, 1985, to

procure the issuance of $309,000,000 in tax-exempt rate bonds to finance the construction of the South Meadow facility. In 1996, CRRA defeased (a process in which bonds are purchased from the government in order to pay off existing bonds with the same maturity dates, discussed later in more detail)and refunded the then-remaining 1985 bonds, issuing a new series of tax-exempt bonds with a principal balance of $209 million (at a lower interest rate than the 1985 bonds). In connection with the issuance of the Mid-Conn bonds, the CRRA Board approved the Mid-Conn Project Bond Resolutions, which track the provisions of CRRA's bond indentures. Pursuant to the Resolutions (and the bond indentures), CRRA pledged the revenues it received from its long-term contracts with the Mid-Conn Project's participating municipalities and from the EPA, as security for repayment of the bonds.

The South Meadow facility renovation was completed in the late 1980s.

All of the municipalities in the Mid-Conn Project have entered into contracts with CRRA. The Project municipalities contracts, although differing in some respects, are not materially different as they relate to the plaintiffs' claims in this action. The material portions of the contracts read as follows:

a. The municipalities are obligated to process all of their MSW at Project facilities and guarantee delivery of certain minimum amounts of MSW each year.

b. The municipalities are required to pay the Project's "Net Cost of Operation"- i.e., that

portion of the Projects's annual operating expenses (including principal and interest on the Project's bonds) that is not covered by CRRA's sales of steam or electricity or other sources of revenue. CRRA is obligated to use all revenues received by the Project to defray the Project's expenses and must include those revenues in the calculation of the Project's Net Cost of Operation. The contracts define "revenues" as proceeds received from the sale or other disposition of Recovered Products and receipts from other than Municipalities. "Recovered Products" are defined as materials or substances including energy which result from the processing of Solid Waste in the System.

c. CRRA is required to establish an annual budget for the Project each year, based on anticipated expenses and revenues. CRRA is required to annually adjust the rate per ton of garbage processed (i.e. the tip fee) paid by the participating municipalities so that the municipalities aggregate payments -referred to in their contracts as "Service Payments"- will be sufficient to pay the Project's Net Cost of Operation.

d. CRRA is obligated to reconcile each year's projected budget against actual operating results and to credit any surplus (or debit any deficit) to succeeding years' budgets. The projected budgets must, under the contracts, be

announced for an upcoming fiscal year (beginning July 1) by March 1 of the prior fiscal year. Thus, any surplus/deficit reconciliation at fiscal year-end must, as a practical matter, be applied to the budget two-years out.

e. CRRA and the municipalities are required to comply with all applicable laws.

f. The municipalities pledge their full faith and credit to secure their payment obligations under the contract and are required to use their taxing power, if necessary, to make any payments owing under the contracts.

g. Both CRRA and each contracting municipality have the right to sue to enforce the contract. The contracts contain a provision prohibiting the municipalities' right to recover damages from CRRA, but do not otherwise limit the municipalities' right to legal and equitable remedies.

h. The Municipality shall not acquire any vested or ownership rights in the System by reason of this Contract; provided, however, that in the event of a disposition of public property, the Municipality shall receive a payment or payments as determined by the Authority consistent with the Municipality's interest therein, if any.

The municipalities' contracts with CRRA also contain a pledge and undertaking by the State of Connecticut that until the contracts are fully performed, the State will not limit or alter the rights vested in CRRA without adequate protection for the rights of the municipalities.

The Mid-Conn Project, which is financially and legally independent of any other part of CRRA, is in effect a coalition made up of the 70 towns, and the Mid-Conn Project's sole reason for existence is to provide waste disposal services for its 70 constituent towns. The 70 towns have contracted with CRRA to provide waste disposal services until 2012, and have pledged their full faith and credit to support financially the non-profit Mid-Conn Project. The Mid-Conn Project is scheduled to conclude in 2012, at which time the Mid-Conn Project affairs can be wound down, and remaining assets distributed back to the towns, to the extent the municipalities could claim an interest at that time. It has been represented to the court that the parties are currently negotiating contracts in order to extend the project past the year 2012.

CRRA performs an essential governmental function delegated to it by the State of Connecticut. It is the State's agent for disposing of municipal solid waste in an environmentally sound manner throughout the State. CRRA performs this function for 118 of the 169 municipalities in the state. CRRA's Mid-Conn Project performs this function for 70 municipalities in central Connecticut. The municipalities are responsible for 45% of the Project's "tipping fee" income (fee paid by the municipalities to CRRA for the processing and disposal of the MSW), while the remaining 55% is the responsibility of the

private haulers who are not parties to this lawsuit.

By the mid-1990s, as the result of capital improvements, and an improved Connecticut economy, the amount of tonnage of MSW processed at the South Meadow facility increased from 600,000 to 800,000 tons annually, increasing garbage disposal fees received from the municipalities and private haulers. There was a corresponding increase in the kilowatt hours of steam generated by the facility, increasing the Project's steam sales revenues from the EPA. In addition, the Project was saving over $1 million per year in decreased coal costs. All of these factors resulted in a decrease in the Project's annual tip fee in the years prior to FY 02 from $55.00/ton in FY 96 to $50.00/ton in FY 01. However, even with these reductions in annual tip fees, the Project generated substantial, multi-million operating surpluses in FY's 97-01, as follows:

FY 97	$ 11,191,886.00
FY 98	$ 7,604,061.00
FY 99	$ 5,112,264.00
FY 00	$ 5,208,606.00
FY 01	$ 3,487,349.00
Total	$ 32,604,166.00

Although CRRA was required by its contracts with the Project municipalities to apply these surpluses as credits in future years' budgets CRRA did not comply with this requirement. Applying the 45% municipality responsibility factor, if these surpluses had been credited, as the contract required, the municipalities would have saved $14,671,874.70

which represents 45% of $32,604,166.00. In FY 02, however, the Project ran a deficit of over $13 million which percentage portion was not passed on to the municipalities. CRRA would have been allowed to pass on any deficit in calculating the next year's budget, pursuant to the terms of the contract.

As of June 30, 2001, CRRA had accumulated $19,548,000 in unreserved Mid-Conn Project "retained earnings." In 1997, 1998, and 1999, CRRA rebated $3 million/year of these operating surpluses to the Project's member towns, but retained the remaining surplus funds as "retained earnings." In years after FY 99 (and prior to FY 07), CRRA did not rebate a portion of the Project's operating surpluses. Further, CRRA did not credit the surpluses to the succeeding years' operating budget.

The Project tip fee from FY 99 onward has been based on projected processing of approximately 850,000 tons of MSW annually. Accordingly, had CRRA properly credited these surpluses to succeeding years' annual budgets, as required by plaintiffs' contracts with CRRA, the annual tip fees for FY's 99-02 would have decreased as follows:

FY 99	$35/ton (instead of $48/ton);
FY 00	$41/ton (instead of $49/ton);
FY 01	$44/ton (instead of $50/ton);
FY 02	$45/ton (instead of $51/ton).

CRRA, through its current President, admitted that its current Board also did not credit Project surpluses for FY 04 and 05 to the Project's succeeding years' budgets and that this practice also was in breach of the municipalities' contracts.

(CRRA, through its current President, admitted that from FY 97 through FY 04, it improperly failed to credit approximately $25,600,000 in (un-rebated) Project operating surpluses to succeeding years' Project budgets, in breach of the municipalities' contracts).

As of the late 1990s, the PBF was generating approximately 450,000,000 KWH of steam annually. The market price for steam was approximately $.02/KWH-$.04/KWH. The EPA, which required CL&P to pay a price of at least $.085/kwh-was, thus, extremely lucrative, producing over $20 million/year in above-market rate revenues. The EPA was responsible for over 40% of the Project's revenues, and the above-market rate portion of the EPA was responsible for over 20% of the Project's annual revenues.

In 1998, the Connecticut General Assembly passed P.A. 98-28 (the "Deregulation Act"), legislation that required CL&P to divest itself of power generation facilities and to make good faith efforts to divest itself of above-market rate contracts to purchase power through buyouts, buy-downs or other restructuring of contractual obligations. The State offered to subsidize (through the issuance of rate reduction bonds) payments by CL&P to "buy-down" a contract's above-market rate to a market or below-market rate. The Mid-Conn Project's EPA was one of several above-market energy contracts that CL&P had with CRRA.

In January, 2000, the Department of Public Utility Control (hereinafter referred to as "DPUC") approved the buy-down price of $290 million (subsequently reduced to $280+ million to account for the delay in closing). The $280+ million buy down of the EPA was equal to the total combined value of the Mid-

Conn Project's assets and represented more than seven times the Project's equity as set forth in the Mid-Conn Project FY 01 year end balance sheet.

In May, 2000, the CRRA Board approved a series of licensing agreements relating to Northeastern Utilities's (hereinafter referred to as "NU") continued operations of the four jets on the South Meadow property, which produce electricity during peak hours of usage. Pursuant to the licensing agreements, the net operating revenues from the jets commencing June 1, 2000, were to be held in escrow pending the acquisition of the South Meadow property, at which time the funds held in escrow would be included in the acquisition. CRRA was to obtain title to the South Meadow property for the sum of $10 million dollars and assume the costs of remediation regarding the property.

All of the revenues received pursuant to the EPA were pledged, in the first instance, to pay principal and interest on the Project's bonds. The buy-down proceeds represented an advance payment of future EPA revenues. CRRA was advised in November, 1998, by its counsel, Murtha Cullina, LLP (hereinafter referred to as "Murtha") that it was required to turn over the proceeds from a buy-down of the EPA to the Trustee for the Project's bonds or, under certain circumstances, deposit the buy-down proceeds in funds established pursuant to the Project's Bond Resolutions "but only for use in connection with the Mid-Conn Project". Murtha's advice governed a situation where the buy-down proceeds were received by CRRA itself. Murtha, however, also opined that paying $220 million to Enron and $60 million to CRRA of the total $280 million buy-down payment made by CL&P, all as set forth in the Mid-Conn

Project Termination, Assignment and Assumption Agreement dated as of December 22, 2000, was lawful, did not violate any provision of the Municipal Solid Waste Act, any other statute of the State of Connecticut, any rule or regulation applicable to CRRA, any CRRA by-law, or any indenture or agreement to which CRRA was a party. Similarly, Hawkins Delafield & Wood (hereinafter referred to as "Hawkins"), bond counsel to CRRA, opined that the agreements entered into by CRRA, including the Mid-Conn Project Termination, Assignment and Assumption Agreement dated as of December 22, 2000, were permitted by the bond resolution.

The Project's debt service (principal and interest on the Project's bonds) was approximately $26 million per year for the life of the Project (through 2012). Although the Project's bonds were not subject to call (i.e. prepayment) prior to November 2006, CRRA could have used the buy-down proceeds to defease all of the Project's bond obligations and thus eliminate $26 million in annual Project expense for the remainder of the Project.

Defeasance involves the purchase of government securities which mature on dates that coincide with the dates that the subject bonds mature or otherwise can be redeemed (paid) and that earn interest covering the payment obligations on the bonds until the maturity or call date. The federal government issues government securities, known as "State and Local Government Securities" or "SLGS," specifically designed for this purpose. SLGS can be purchased to match up with any future date on which state or local bonds mature or are subject to a call that allows them to be redeemed. The United States Treasury established the SLGS program in the 1970s as a risk-free

mechanism to enable state and local governmental entities to establish escrow portfolios to secure the payoff of bonds that are not yet redeemable. The practice of defeasance has been well-established in the field of public finance for years, and the public finance section of any major investment banking firm provides defeasance services. As of April 2, 2001, (when the Enron Transaction ultimately closed), it would have been possible to purchase sufficient SLGS to defease all of the Mid-Conn Project's outstanding bonds by using $202 million of buy-down proceeds (with the remainder of any funds necessary to complete full defeasance coming from the bond reserves and other available debt service funds). The Mid-Conn Project's bond indenture required creation of a debt service escrow equal to approximately one year of debt service ($26 million). That escrow, and other funds required to be held by the bond trustee or accrued in the Project's operating budget, would be available to help defray the cost of defeasing CRRA's bonds, since defeasance would eliminate the obligation to hold such funds. Robert Wright, the President of CRRA at the time of the buy-down, never recommended to the Board using the buy-down proceeds to defease debt.

CRRA has admitted, and the Court so finds, that "at all relevant times, CRRA's authority to enter into loan transactions was restricted by its enabling legislation. By statute, CRRA was only permitted to make loans (i) to finance the planning, design, acquisition, construction, reconstruction, improvement, equipping and furnishing of waste management projects; and (ii) to municipal or regional solid waste management authorities to establish waste management projects, disposal facilities, or volume reduction plants or disposal areas." CRRA had no

statutory authority to make loans other than the above-described limited-purpose loans.

CRRA has admitted, and the Court so finds, that at all relevant times, CRRA's investment authority was also limited by statute. CRRA was only permitted to make investment of funds not needed for immediate use "in obligations issued or guaranteed by the United States of America or the State of Connecticut and in obligations that are legal investments for savings banks in the state". Connecticut's savings banks may only invest in government obligations and in marketable securities, including stocks, bonds, and mutual funds. For investments other than governmental obligations, portfolio diversification requirements limit the amount that savings banks may invest in such securities or with any one company. CRRA had no statutory authority to make investments other than these safe and conservative investments.

CRRA has admitted, and the Court so finds, that at all relevant times, CRRA was statutorily required to adopt written procedures for awarding loans. CRRA's internal procedures regarding the issuance of loans provided that CRRA could make loans to private entities only as part of a comprehensive financial agreement related to solid waste facility financing arrangements.

CRRA has admitted, and the Court so finds, that in addition to these statutory limitations on CRRA's authority to make loans or investments, federal arbitrage laws prohibited CRRA from earning a return on a loan of the buy-down proceeds greater than the tax-free yield on Mid-Conn Project's bonds. Murtha advised CRRA that federal tax arbitrage restrictions prohibited CRRA from loaning the buy-down proceeds at a rate higher than

the yield on its tax-exempt bonds (approximately 5.6%). This advice was communicated in writing in a letter from Murtha to Wright.

The Enron Transaction comprised numerous documents. The transaction closed in March-April, 2001. The transaction was a loan disguised to be an energy transaction. In addition to monthly principal and interest payments, Enron agreed, on paper, to purchase electricity from CRRA for resale to CL&P. The energy component of the transaction was wholly illusory: CRRA generated electricity; sold the electricity to Enron at the buy-down rate, and Enron immediately re-sold it to CL&P at the same rate. For each right or obligation of Enron, there is an offsetting right of CL&P or CRRA such that Enron had no material participation or commodity risk in the energy aspects of the restructuring. Only CRRA and CL&P truly participated in and had commodity risk in the energy aspect of the restructuring.

The net effect of the Enron Transaction documents was that Enron Power Marketing (hereinafter referred to as EPMI) was to receive $220+ million of buy-down proceeds (from Cl&P), and agreed to make fixed monthly payments to CRRA totaling $2.3+ million/mo. for 11 ½ years ($ 2.2 million/mo. in a so-called steam capacity charge and $175,000.00+ for so-called Operating and Maintenance charges). These payments were required, on the first day of each month, irrespective of whether EPMI received any steam or electricity from CRRA. The amount of Enron's fixed payments was to be adjusted, based on the actual date of the buy-down proceeds being received by EPMI so that the payments provided CRRA with precisely a 7.38% return on the buy-down proceeds received by EPMI. EPMI's energy

obligations were illusory. Whatever steam EPMI purchased from CRRA was instantaneously returned to CRRA at no cost. Whatever electricity EPMI purchased from CRRA was instantaneously sold to CL&P at precisely the same price EPMI paid CRRA. CL&P was billed by CRRA for the electricity sold to EPMI, and CL&P's payments to EPMI were immediately paid over to CRRA. CL&P, in fact, purchased all of the electricity generated by the EGF and paid CRRA either directly or through EPMI, for the electricity at the reduced buy-down prices agreed to in March, 1999.

CRRA has admitted, and the Court so finds, that the energy pass-through aspects of the Enron Transaction were designed to conceal the illegal and commercially unreasonable nature of the loan transaction between CRRA and Enron and to enhance Enron's financial statements. Enron's payments were misleadingly labeled a capacity charge, even though the payments were required irrespective of whether EPMI actually purchased any steam.

CRRA has admitted, and the Court so finds, that although styled as the purchase and sale of energy, the Enron Transaction was, in fact, an unsecured loan transaction that entailed no material performance risks by Enron, other than the repayment of money.

At the November 16, 2000, Board meeting, Murtha and Hawkins supported the restructuring transactions, including the Enron Transaction, although bond counsel indicated in response to a question from a Board member about possible arbitrage concerns, that a transaction like the Enron Transaction had, to his knowledge, never been attempted. CRRA's Board approved the EPA restructuring transactions, including the Enron

Transaction, on November 16, 2000. The Board also authorized the use of a portion of Enron's payments for projects outside the Mid-Conn Project. Wright executed the EPA restructuring transaction documents, including the Enron Transaction documents, on December 28, 2000. At the February 22, 2001, special meeting of the Board of Directors, CRRA's Board voted to reimburse Enron for the cost of purchasing a thirty-day interest rate hedge, due to the closing delay, and authorized Wright to withdraw $750,000 from the jets revenues escrow fund established by CRRA and NU, which Wright subsequently did. Thereafter, the Board voted to reimburse Enron for the cost of purchasing an additional sixty-day interest rate hedge, and authorized Wright to withdraw $1,750,000 from escrow for such purpose. However, because the Enron Transaction closed in March, 2001, it was not necessary for CRRA to reimburse Enron for this amount.

On March 30, 2001, the proceeds of Rate Reduction Bonds became available to fund the EPA restructuring. The actual total amount paid by NU to buy-down the EPA above-market rates was adjusted (pursuant to a follow-up DPUC ruling to account for the delay in payment) to $ 280,151,508. On March 30, 2001, CRRA directed NU to wire transfer $220,179,887 of the buy-down proceeds to EPMI in accordance with the Enron Transaction documents described above. In March-April, 2001, CRRA acquired title to the South Meadow property, including the EGF and four jet turbines and an escrow account of $6,619,018 representing the net operating revenues of the jets over the prior nine months (less the $750,000 paid to Enron in February, 2001, in reimbursement of the cost of the interest rate hedge). CRRA used $10 million of the buy-down proceeds to

purchase this property and equipment. CRRA also paid approximately $26.7 million of the buy-down proceeds to purchase insurance to cover the costs of remediating the South Meadow property, pursuant to a contract with AIG Insurance Company. This payment netted a total of $29,721,783.00 to CRRA from the initial part of the transaction.

CRRA did not use any portion of the buy-down proceeds to defease Mid-Conn Project bonds, which could have been fully defeased as of April 2, 2001, with $202,724,437.21 of the buy-down proceeds.

The land and equipment purchased from CL&P (with buy-down proceeds) were placed in a newly formed "Non-Project Ventures" division in which CRRA had intended to form a separate subsidiary to pursue a fuel cell project and other entrepreneurial ventures. Further, the $23 million dollar balance of the buy-down proceeds was deposited in this account outside of the Mid-Conn Project. At the May 18, 2001, meeting, the Board approved the jets licensing agreement, finding that the jets would provide "backup support for Mid-Connecticut's energy program and facilities" and would require interconnection to the Mid-Conn Project grid. Both the current CRRA Chairman and its President testified, and the Court so finds, that the diversion of the buy-down proceeds and jet revenues and equipment into the Non-Project Ventures Account was improper, and that all items should have gone in the account of the Mid-Conn Project. In fact, in lawsuits filed by CRRA against both Murtha and Hawkins, CRRA contended that the law firms committed professional negligence by improperly advising CRRA to divert Mid-Conn Project assets into the Non-Project Ventures division to fund the fuel cell project to the

detriment of the Mid-Conn Project. Specifically, in those suits, CRRA alleged that "The $60 million retained by CRRA, and the property acquired by CRRA with that money, was to be diverted out of the Mid-Connecticut project pursuant to the structure developed by Murtha and Hawkins. . . . Under the agreed-upon new structure, the only property to be received by the Mid-Connecticut Project from the $280 million buy-down of the 1985 CL&P EPA was the unsecured promise of a $2.2 million monthly payment from Enron for 11-plus years until May 2012. . . . The plan developed by Murtha and Hawkins was designed to fund what for CRRA would be an unprecedented entrepreneurial enterprise using money derived from the Mid-Connecticut Project, but diverted out of the financially independent Mid-Connecticut Project and into CRRA's own accounts. As such, the structure developed by Murtha and Hawkins risked undermining the Mid-Connecticut Project's own financial stability, with potentially serious consequences to CRRA's Mid-Connecticut bondholders, as well as to the towns that were required to back the Mid-Connecticut Project. . . . The Enron Transaction put at risk the financial stability of CRRA and the Mid-Connecticut Project, and exposed the 70 municipalities to markedly increased costs in the form of tipping fees or other costs to the towns. . . . Under the structure drafted by Murtha and Hawkins, $175,000 of the monthly $2.375 million payments from Enron were to be diverted, and would not be booked as Mid-Connecticut Project proceeds potentially subject to being rebated to the federal government as the proceeds of improper tax arbitrage. The $175,000 sale payment coincides almost exactly with the monthly tax arbitrage exposure created by the effective 7 percent interest rate . . . ." These claims were

advanced in the lawsuits before the Towns instituted this action. During FY 03, CRRA's reconstituted Board determined that it had been improper to divert these assets out of the Mid-Conn Project and directed that the Non-Project Ventures division be consolidated with the assets of the Mid-Conn Project. The Board did not, however, direct that the Project be made whole for the effects on Project budgets in past (and future) years of the diversion.

Beginning in April, 2001, Enron began making payments pursuant to the terms of the Enron Transaction. For eight months, from April through November, 2001, Enron made eight "capacity charge" payments of $2.2 million/mo, total $17.6 million; eight "O&M" payments of $175,548/mo, totaling $1,405,984, and payments for electricity resold to CL&P totaling $6,525,906. CRRA credited Enron's capacity charge and electricity payments as Mid-Conn Project revenues. CRRA treated Enron's O&M payments as revenues of the Non-Project Ventures division and deposited those revenues in an account outside the Mid-Conn Project. Enron filed for bankruptcy in December, 2001, and ceased making any payments to CRRA pursuant to the Enron Transaction agreements.

CRRA has admitted, and the Court so finds that, although characterized as an energy transaction involving the purchase and sale of steam and electricity, the Enron Transaction was, in fact, an unsecured loan transaction that was illegal, *ultra vires,* and outside CRRA's statutory authority, and improperly wasted the assets of the Mid-Conn Project. CRRA alleged these facts in pleadings filed in its action against Hawkins and Murtha. In that lawsuit, CRRA contended that the law firms committed professional negligence by advising CRRA to enter into such

illegal transactions.

In February, 2002, The Attorney General of the State of Connecticut reviewed the Enron Transaction and concluded that it constituted an illegal unsecured loan of the buy-down proceeds disguised to appear to be an energy transaction, with no material commodity obligations or benefits actually imposed on Enron. Enron's role in the energy component was illusory. This opinion is supported by the expert testimony of Professor Gillette[1] in this matter. The Enron Transaction, although characterized as an energy transaction, was in fact and effect a financing transaction in which Enron received an unsecured payment of $220+ million and had no substantive obligation other than to pay CRRA a 7.38% annual return on the payment. All of the parties to the transaction viewed it as a financing transaction rather than an energy transaction. CRRA did not have statutory authority to enter into a transaction of the character of the Enron Transaction, either as a loan or investment transaction.

The failed Enron Transaction brought CRRA's Mid-Conn Project to the brink of financial ruin because of its impact on revenue. CRRA lost its monthly steam payment of $2.2 million and its monthly O&M payment of $175,748. In addition, CRRA lost its energy payment on the first 250 million KWH of electricity from December, 2002, until March, 2003, while CL&P withheld those payments totaling nearly $8 million. Enron received $220 million of buy-down proceeds and paid only $19 million to CRRA before it filed bankruptcy eight

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[1]Professor Gillette is a New York University professor who specializes in municipal bond law.

months later, leaving CRRA with an out-of-pocket loss of at least $201 million.

CRRA has sought to recover moneys lost as a result of the failure of the Enron Transaction through litigation against Enron and other parties. Subsequent to Enron's bankruptcy filing, CRRA filed claims in the United States Bankruptcy Court for the Southern District of New York for recovery of the moneys lost as a result of the Enron Transaction. CRRA also filed lawsuits against Hawkins and Murtha for recovery of the moneys lost as result of the Enron Transaction and for damages resulting from the improper diversion of Mid-Conn Project buy-down assets into the Non-Project Ventures division. CRRA also filed lawsuits against a number of financial institutions and law firms, that it alleged assisted Enron in defrauding CRRA into entering into the Enron Transaction, seeking recovery of the moneys lost as a result of the Enron Transaction. The costs of prosecuting all of these actions have been included in the Mid-Conn Project operating budgets and have increased the tip fees paid by the Project municipalities.

CRRA also sought to defray Project revenue shortfalls resulting from the failure of the Enron Transaction through moneys borrowed from the State of Connecticut. In April 2002, the General Assembly enacted legislation authorizing annual loans to CRRA of up to $20 million/year to cover Mid-Conn Project debt service. In FY 04, CRRA projected borrowing $18,421,399 from the State of Connecticut to help cover Project revenue shortfalls, but actually borrowed only $10,841,646. In FY 05, CRRA projected borrowing $16,349,000 from the State of Connecticut, but actually borrowed only $8,658,530. The cost of this borrowing was included in the Mid-Conn Project's

operating budgets for FY's 04 and 05 and increased the tip fees paid by the Project municipalities in those years.

In February, 2005, CRRA recovered $111.7 million from the sale of its bankruptcy court claim against Enron Corporation. The CRRA Board voted to use $91+ million of the funds to (partially) defease Project bonds and set aside $19+ million of the Enron claim funds to pay off the State loan as it became due. No portion of the $111.7 million was utilized to repay the Project municipalities for any of the increased tip fees paid by the municipalities as a result of the failure of the Enron Transaction or to restore any of the Project surpluses or over-funded reserves utilized by CRRA to pay Project revenue shortfalls in FY's 02 and 03 resulting from the failure of the Enron Transaction.

As a result of Enron's bankruptcy, the Mid-Conn Project sustained a loss of over $26.4 million in annual Project revenues (the total loss is actually $28.5 million including the $2.1 million in annual O&M payments diverted to the Non-Project Ventures division which was later consolidated into the Mid-Conn Project). CRRA has been able to offset some of this loss by increased sales of electricity at a market rate higher than the rate Enron-CL&P would have paid under the EPA restructuring agreements. Nonetheless, the Mid-Conn Project sustained tens of millions of dollars in losses as a result of the failure of the Enron Transaction. The Project's annual revenue shortfalls as a result of the failure of the Enron Transaction have been covered by increases in the Project's annual tip fees; use of Project surpluses and over-funded reserves; and moneys borrowed from the State of Connecticut. The expense of each of these measures has been included in the Project's annual operating budgets from

FY 02 to date and has been borne by the Project municipalities and by private trash haulers who used the Project's facilities, who pass their increased costs on to the residents of the Project municipalities. CRRA, itself, has not sustained a financial loss as a result of the failure of the Enron Transaction. CRRA has not borne any of the Project's losses. Tip fee increases to customers covered 46% of the lost revenue attributable to Enron's default.

The Project's tip fees have increased by over 35% from $51/ton in FY 02 to $69/ton in FY 07 as the result of the failure of the Enron Transaction. The actual tip fees are as follows:

FY 02	$51.00/ton
FY 03	$57.00/ton
FY 04	$63.75/ton
FY 05	$70.00/ton
FY 06	$70.00/ton
FY 07	$69.00/ton

Over this same period of time, the Project's annual expenses (not including the Jets/EGF expenses) decreased from over $90.7 million in FY 02 to $87.6 million in FY 07. The increased tip fees from FY 03-07 are directly attributable to the Project's revenue shortfalls as a result of the failure of the Enron Transaction. The increased charges resulting from the increased tip fees, based on the MSW tonnage processed each year, total over $65 million, as follows:

FY 03- 904,000 MSW tons processed x $6.00=$ 5.424 million
FY 04- 856,000 MSW tons processed x $12.75=10.914million

FY 05- 853,000 MSW tons processed x $19.00=16.207million
FY 06- 860,000 MSW tons processed x $19.00=16.340million
FY 07- 850,000 MSW tons processed x $18.00=15.300million

Total $64.185million

The Project municipalities directly pay 45% of the Project's tip fee charges. Thus, the municipalities will have paid, through FY 07 year-end, $28,883,250 (45% of $64,185,000, CRRA acknowledges, in its proposed finding of fact, that if plaintiffs' argument is accepted, this figure could not exceed $29 million) in extra tip fees as the result of the failure of the Enron Transaction. CRRA's Chairman, Michael Pace, admitted at trial, and the Court so finds, that CRRA probably owes the Project municipalities at least $20 million as a result of the increased tip fee charges resulting from the failure of the Enron Transaction.

In addition to the increased tip fees, the Project's revenue shortfalls in FY's 02 & 03 as a result of the failure of the Enron Transaction were defrayed through dissipation of over $38 million in Project surplus funds and over-funded reserves, as follows:

Revenue Account Surplus Funds	$ 14,100,000 (FY 02-03)
EGF Account Surplus Funds	5,753,590 (FY 02)
	9,780,815 (FY 03)
Rolling Stock Reserve	4,268,603 (FY 03)
Debt Service Reserve Fund	584,917 (FY 03)
O&M/R&R Funds	3,583,153 (FY 03)
1991 Bond Construction Fund	498,349 (FY 02)

Total	$ 38,569,427

Had it not been necessary to use these Project surpluses and over-funded reserves to defray Enron Transaction revenue shortfalls, the funds would have been available to reduce tip fee costs in FY 02 and FY 03. The Project municipalities' 45 % share of the resulting savings in those years would have equaled $17,356,242. These funds, which were accumulated before Enron's failure, were used to subsidize, mitigate, and offset tip fees charged to CRRA's customers after Enron's failure. If these funds had not been available to mitigate tip fee increases, CRRA would have had to increase tip fees an additional $38+ million in FY 02 and FY 03 before the state loan was available.

$8.4 million of the money came from formal reserves such as the Rolling Stock Reserve, the O&M Reserve (operations and maintenance) and the R&R Reserve (repair and replacement). The first was designated by the Board and the latter three were required by CRRA's Bond Indenture.

$14.1 million of this money came from the revenue account. This account represented surplus cash prior to Enron's failure. If these funds had not been available to mitigate tip fee increases, CRRA would have had to increase tip fees by the corresponding sum.

$15,534,405 million of this money was used to subsidize Mid-Conn tip fees pursuant to budget transfers from the Non Project Venture Account associated with the Mid-Conn Project. This Non Project Ventures Account was included as a claim against the law firms. During FY 03, CRRA consolidated the Non Project Ventures Account with the Mid-Conn Project.

CRRA incurred a deficit of $13.7 million in FY 02. Under the MSA, it could have recouped this deficit in the FY 04 budget through higher tip fees. CRRA did not charge the municipalities, in the form of an additional budget liability, their percentage portion of this deficit.

In the wake of the failure of the Enron Transaction, the Connecticut General Assembly completely restructured CRRA. It provided for extensive municipal representation on CRRA's Board of Directors and expanded CRRA's powers in order to enable it to cope with the impact of Enron's failure. Under the new Board's stewardship CRRA has been returned to financial and operational stability. Pursuant to the direction of the Attorney-General, CRRA has recovered over $151 million of the $201 million out-of-pocket loss through settlements as follows:

(a) $111 million received in February, 2005, by auctioning its allowed claim in bankruptcy against Enron;

(b) $21 million received in January, 2007, in settlement with bond counsel, Hawkins Delafield and Woods;

(c) $16.25 million received in April, 2007, in settlement with former general counsel, Murtha Cullina LLP

(d) $2.95 million received during 2006, in settlement with three law firms involved in representing Enron in various transactions.

The balance of $37,629,000 plus interest accrued to date, is currently being held by the State Treasurer pursuant to this Court's February 22, 2007, order. This balance represents the net proceeds of the settlements with the law firms mentioned above. CRRA is continuing to pursue its claims against other parties who aided and abetted Enron's fraud for its remaining out-of pocket loss and its additional damages.

When CRRA recovered $111 million by auctioning its Enron claim, it used all of the moneys to pay the state loan and defease bonds in March, 2005. Including interest earned on the funds, CRRA spent $111.9 million, thus reducing its debt which would otherwise have had to be paid from higher tip fees.

CRRA applied $19.4 million of the settlement to the state loan. Thus, CRRA eliminated this item of debt service from all future tip fee calculations beginning with the FY 06 budget and continuing through FY 12 which is the state loan maturity date. CRRA stopped paying this expense in March, 2005.

CRRA applied the balance of the $92.5 million of the settlement to defeasing debt. Thus, CRRA eliminated the need to include this debt service in future tip fee calculations beginning in FY 06 and began paying much lower debt service in March, 2005. By defeasing with $92.5 million, CRRA was able to free another $11.4 million held by the trustee and escrow a total of $103.1 million for defeasance. This action reduced CRRA's debt service for FY 06 through FY 12 from $194.8 Million to $93.1 million. Thus, by defeasing, CRRA eliminated $101.7 million of debt from its books.

CRRA collected $21 million in the Hawkins settlement in 2007 and $2.975 million from several of Enron's law firms in 2006. CRRA indicates, and has represented to the court, that

CRRA intends to defease its remaining debt with approximately $9 million of these proceeds and to rebate $14.8 million to the towns.

CRRA has collected $16.25 million in the Murtha settlement in 2007. It has not yet decided how to use these funds, it represents, in light of the court-ordered attachment, however, it maintains, that " there is no evidence that it will not use them to lower tip fees or make rebates just as it has used recovered funds to date."

CRRA's settlement with Enron freed it of any obligation to sell to Enron the first 250 million kilowatt hours of power produced annually. This power has been re-marketed at higher prices beginning July 1, 2003. Through the end of FY 07, pursuant to firm contracts, CRRA will have received $15 million more in revenue than it would have received from Enron for this power. Moreover, CRRA projects it will receive another $30.5 million more in revenue for this power during FY 08 through FY 12 than it would have received from Enron. These additional revenues, expected to total $45.5 million, further offset CRRA's losses. In fact, if the projections are correct, CRRA's remaining out-of-pocket loss will be $4.5 million from the failure of the Enron Transaction. CRRA has expended $6 million in legal expenses in collecting the above sums. It has also paid a $150,000 fine to the IRS regarding a federal arbitrage violation as the result of the Enron Transaction. The legal expenses and IRS fine were charged to the budgets of the Mid-Conn Project, along with the principal and interest of the state loan.

In FY 07, CRRA utilized over $19 million of Project surpluses and over-funded reserves to defease Project bonds, as

follows:

Revenue Account Surplus Funds	$ 4,000,000 (FY 07)
EGF Reserve Account	10,073,698 (FY 07)
MDC Settlement	5,153,889 (FY 07)
Total	$ 19,227,587

In FY's 01 & 02, the Project received (or budgeted) Enron Transaction payments from Enron that were used to reduce Project tip fees. In addition, subsequent to Enron's bankruptcy, the sale of the first 250 million KWH of electricity generated by the EGF at rates higher than the EPA buy-down rates that Enron/CL&P would have paid is a credit to the Project. These amounts total $47,960,778. The Project municipalities' 45% benefit from these amounts totals $21,582,350.

The monies which CRRA has recovered from the law firms for the financial losses resulting from the failure of the Enron Transaction which are currently held by the State Treasurer are directly traceable to the losses sustained by the Mid-Conn Project as the result of the failure of the Enron Transaction.

CRRA currently maintains a Jets/EGF Reserve that has a balance of over $11 million. This reserve has been funded with proceeds from the EPA buy-down and with net revenues from the operations of the jets from FY 03 to date. The monies in this account have not been included in the Mid-Conn Project accounts. CRRA also currently maintains an EGF Operating Account which it utilizes to hold net revenues from the operations of the jets and interest income received on the Jets/EGF Reserve. The monies in this account have not been

included in the Mid-Conn Project accounts, and CRRA has not included such proceeds in the determination of Mid-Conn Project budgets.

CRRA has established a Debt Service Stabilization Reserve which it has required the Project municipalities to help fund.

As of July 1, 2006, the Mid-Conn Project Revenue Account had a surplus balance of over $8.2 million. Over $6.9 million of this balance represented surplus funds from years prior to FY 05 that CRRA had not included in its calculation of Project budgets. The Project is projected to generate a multi-million dollar operating surplus in FY 07, with a projected year-end surplus of over $19 million dollars.

The Mid-Conn Project maintains a Risk Fund reserve, funded by the Project tip fees as a contingency against catastrophic loss, including litigation losses. In FY 07, the Board imposed a $3 million contribution to this reserve.

The South Meadow property, the EGF and the four jet engines were purchased by CRRA with buy-down proceeds.

II. LAW

A. Fiduciary Duty

Plaintiffs contend that CRRA breached its fiduciary duty to the Mid-Conn Project municipalities in that (1) it engaged in the unlawful and imprudent Enron Transaction; (2) it failed to make prudent use of the EPA buy-down proceeds to eliminate Project debt; (3) it diverted Project assets to the Non-Project Ventures division, for CRRA's own benefit, and to the detriment of the Mid-Conn Project municipalities; (4) it wasted Project assets by

improperly amending the PBF contract; and (5) it inflated expenses and reserve contributions to produce a tip fee based on market rates rather than the Net Cost of Operation of the Project.

It is well settled that, under Connecticut Law, "a fiduciary or confidential relationship is characterized by a unique degree of trust and confidence between the parties, one of whom has superior knowledge, skill or expertise and is under a duty to represent the interests of the other." Dunham v. Dunham, 204 Conn. 303, 322, 528 A. 2d 1123 (1987). "The superior position of the fiduciary or dominant party affords him great opportunity for abuse of the confidence reposed in him." Id. The Connecticut Supreme Court has "specifically refused to define 'a fiduciary relationship in precise detail and in such a manner as to exclude new situations,' choosing instead to leave 'the bars down for situations in which there is a justifiable trust confided on one side and a resulting superiority and influence on the other.'" Alaimo v. Royer, 188 Conn. 36, 41, 448 A.2d 207 (1982) quoting Harper v. Adametz, 142 Conn. 218, 225, 113 A.2d 136 (1955). The Connecticut Supreme Court has also recognized that not all business relationships implicate the duty of a fiduciary. Hemingway v. Coleman, 49 Conn. 390, 391 (1881). "In particular instances, certain relationships, as a matter of law, do not impose upon either party the duty of a fiduciary." Hi-Ho Tower, Inc. v. Com-Tronics, Inc., 255 Conn. 20, 38, 761 A.2d 1268 (2000).

" In the seminal cases in which this court has recognized the existence of a fiduciary relationship, the fiduciary was either in a dominant position, thereby creating a relationship of dependency, or was under a specific duty to act for the benefit of another." Id. Thus, in Dunham, *supra,* where an attorney had

given both legal and nonlegal advice to his younger brother, the Court held that an instruction to the jury on the basis of breach of fiduciary duty was appropriate because the defendant stood in a position of trust and confidence, and the plaintiff relied on him for both legal and nonlegal advice. Further, in Konover Development Corporation v. Zeller, 228 Conn. 206, 218, 653 A. 2d 798 (1994), the Court recognized that general and limited partners are "bound in a fiduciary relationship" and, as such, must act as trustees and represent the interests of each other.

In Hi-Ho Tower, Inc., the Court noted that in cases in which the Court had, as a matter of law, refused to recognize a fiduciary relationship, the parties were either dealing at arm's length, thereby lacking a relationship of dominance and dependence, or the parties were not engaged in a relationship of special trust and confidence. In Hemingway, the Court declined to find a fiduciary relationship where two friends had previously worked together and the defendant knowingly offered the plaintiff one-half of the value of the business. " [The defendant] had not by being a friend become the guardian of [the plaintiff's] interests in any such sense as to impose upon him a legal duty to sacrifice his own to theirs." Id. at 392.
" The law will imply [fiduciary responsibilities] only where one party to a relationship is unable to fully protect its interests [or where one party has a high degree of control over the property or subject matter of another] and the unprotected party has placed trust and confidence in the other." Hi-Ho Tower, Inc., *supra* at 41, quoting Ward v. Lange, 553 N. W. 2d 246, 250 (S. D. 1996). Thus, in Hi-Ho Tower, Inc., the court did not find a fiduciary relationship where the parties were business entities that engaged in arm's-length transaction, and there was no

evidence that the plaintiff was unable to protect its interests. "The fact that one business person trusts another and relies on [the person] to perform [its obligations] does not rise to the level of a confidential relationship for purposes of establishing a fiduciary duty." Hi-Ho Tower, Inc., *supra* at 41, quoting Garrison Contractors, Inc. v. Liberty Mutual Ins. Co., 927 S. W. 2d 296, 301 (Tex. App. 1996). "Superior skill and knowledge alone do not create a fiduciary duty among parties involved in a business transaction." Hi-Ho Tower, Inc., at 42, quoting High plains Genetics Research, Inc. v. J. K. Mill-Iron Ranch, 535 N. W. 2d 839, 842 (S. D. 1995).

Plaintiffs claim that fiduciary obligations arise from the totality of the relationship between CRRA and the Project municipalities. They enumerate a number of factors which they claim create a fiduciary relationship between the parties. These factors are listed as follows:

a. The long-term commitment by the municipalities. For over a twenty-five year period the municipalities have delivered all of their MSW to Mid-Conn Project facilities and are obligated to pay the Net Cost of Operation of the Project. CRRA has superior knowledge and expertise concerning virtually every aspect of running a waste-to-energy project.

b. CRRA's obligation to charge the municipalities no more than the Net Cost of Operation of the Project, its obligation to credit any actual operating surplus to future years' budgets; and the municipalities' contractual right to participate in the liquidation of

Project assets, to the extent they may have an interest.

c. CRRA's complete control over Project operations and expenditures.

d. The municipalities' pledge of their full faith and credit to support the Mid-Conn project bonds.

e. The unique relationship which the Project municipalities have to the Project and the Project's assets, in that, to the extent they have an interest, they may participate in a distribution of the assets, at the time at which the Project ends.

Plaintiffs also argue that both the current and past Presidents have described the relationship as that of a "fiduciary obligation" and this admission should be binding upon CRRA. The towns have also been described as "stakeholders", "shareholders" and "owners".

CRRA argues that it acts as an agent for the State of Connecticut. Fundamental to the law of fiduciary obligation, it argues, is the "incontrovertible principle that a fiduciary owes a duty of undivided loyalty to its principle." Murphy v. Wakelee, 247 Conn. 396, 404, 721 A.2d 1181 (1998). Thus, it maintains, with respect to the matter that is the subject of the fiduciary relationship, the fiduciary cannot -as a matter of law- also stand as to such third persons because the fiduciary is obligated to serve exclusively the interests of its principle. CRRA contends that the General Statutes of the State of Connecticut make it clear that CRRA operates the Mid-Conn Project as an agent of

the State of Connecticut. CRRA is charged, pursuant to C.G.S. Sec. 22a-258; 22a-259; and 22a-262 with carrying out the provisions of the state solid waste management plan and in establishing managing and operating solid waste disposal and resource recovery systems and their component waste-processing facilities and equipment. Because it is the agent of the State of Connecticut, it argues, it cannot be the agent for New Hartford or any of the other Mid-Conn. Project municipal customers. It cites Considine v. City of Waterbury, 279 Conn. 830, 841, 905 A.2d 70 (2006), for the proposition that " [A political subdivision] is the agent of the state in the exercise of certain governmental powers . . . [when] the [s]tate imposes upon a [political subdivision] the absolute duty of performing some act which the state may lawfully perform and pertaining to the administration of government. . . ." Therefore, it opines, that CRRA owes its undivided loyalty to the State of Connecticut and cannot -as a matter of law- also stand as a fiduciary to New Hartford and the rest of the plaintiff class.

Next, CRRA argues that the relationship between the parties was contractual, and was an arms-length transaction concerning the disposal of municipal solid waste. The relationship of the parties must be determined by the totality of the circumstances and cannot be based upon some statements made by current and past officers of CRRA.

It is clear to the court that the contracts negotiated between the parties were arms-length transactions between many experienced entities. On the one side we have a quasi agency of the State of Connecticut while on the other side we have seventy municipalities existing in the State. It may be true that CRRA possesses great skill and expertise, in the area of waste disposal,

which the municipalities do not possess. However, this fact alone does not create a fiduciary relationship. See Hi-Ho Tower, Inc., *supra*, at 41. It may also be true that several past and present officers have described the relationship as a fiduciary one, however, those statements are not binding on the court in making its determination. The court, while recognizing that some of the officers were attorneys, is not sure that the context of the statements was meant in the legal sense of a fiduciary relationship. The statements have been evaluated by the court as an indicia of the claimed fiduciary relationship. See World Wrestling Entertainment v. Bell et al, Superior Court, complex litigation docket at Stamford, Docket No. X05 CV03 0193994S (August 17, 2004, *Rogers, J.*) (wherein the court considered the admission by the defendant as one of the elements in finding a fiduciary relationship and the defendant had signed a code of conduct, as a vice-president of the company, in which he had acknowledged the fiduciary relationship). The court has also considered all of the factors cited by the plaintiffs in support of their argument that CRRA was in a fiduciary relationship with the plaintiffs.

Pursuant to the mandate of our Supreme Court, this court has considered the totality of the circumstances in its consideration of whether or not a fiduciary obligation existed in this case. There are three essential factors which the court finds persuasive and which militate against a finding of a fiduciary relationship. First, CRRA would certainly appear to be an agent of the State pursuant to the Connecticut General Statutes cited above. Its primary responsibility is to fulfill its mandate pursuant to the State Statutes. Second, the contracts represent arms-length transactions between knowledgeable parties. Third,

there is no evidence that the municipalities could not fully protect their interests in this matter. The actions, budgets, and financial statements of CRRA are a matter of public record. There are even representatives of the member municipalities who now sit on the Board of CRRA. The municipalities were certainly capable of protecting their interests at any time during the lifetime of the contracts. This is not a case wherein the existence of a contract gives rise to a fiduciary relationship as a matter of law (e.g. attorney-client, trustee-beneficiary). It is also not a case where there is a "special trust and confidence" on one side and "dominance and influence" on the other.

Therefore, the Court holds that the plaintiffs have failed to meet their burden of proof that a fiduciary relationship existed in this matter. The Court rules in favor of the defendant on this issue.

B. Breach of Contract

Plaintiffs contend that CRRA breached its contracts with the Project municipalities in the following respects: (1) CRRA entered into an illegal loan with Enron, in breach of its contractual obligation to comply with all applicable laws; (2) CRRA imposed the costs of an illegal transaction on the Project municipalities, in breach of its contractual obligation to calculate the Net Cost of Operation fairly; (3) CRRA improperly retained year-end Project surpluses, instead of crediting the surpluses to succeeding years' Project budgets, as required by the contract; (4) CRRA has failed to include net operating revenues from diverted assets in its calculation of the Project's Net Cost of Operation, as required by the contract; (5) CRRA has

improperly calculated the Project's Net Cost of Operation.

CRRA contends that the MSA is a fully-integrated agreement, and nothing therein prohibited CRRA from passing through a portion of the consequences of the failed Enron Transaction. CRRA argues that it acted to further -not violate- the express public policy of Connecticut as embodied in Public Act 02-46 and Public Act 03-05. Therefore, it maintains, plaintiffs' claims for breach of contract and breach of the implied covenant of good faith and fair dealing fail as a matter of law. Further, it argues, that any claims for breach of contract are time-barred.

1. Alleged Breaches of Contract

All of the municipalities in the Mid-Conn Project have entered into contracts with CRRA. The Project municipalities' contracts contain the following relevant provisions:

a. The municipalities are required to pay the Project's "Net Cost of Operation"-i.e., that portion of the Project's annual operating expenses (including payment of principal and interest on the Project's bonds, that is not covered by CRRA's sales of steam or electricity or other sources of Revenue). The contracts define "Revenues" to include all proceeds from the sale of energy (and other products) and all monies received other than from the municipalities.
b. CRRA is obligated to use all Revenues received by the Project to defray the Project's expenses and must include those revenues in the calculation of the

Project's Net Cost of Operation.

c. CRRA is required to establish an annual budget for the Project each year, based on the anticipated expenses and Revenue. CRRA is required to annually adjust the rate per ton of garbage processed (i.e., the tip fee) paid by the participating municipalities so that the municipalities aggregate payments-referred to in their contracts as "Service Payments" will be sufficient to pay the Project's annual Net Cost of Operation.

d. CRRA is obligated to reconcile each year's projected budget against actual operating results and to credit any surplus (or debit any deficit) to succeeding years' budgets. The projected budgets must, pursuant to the terms of the contracts, be announced for an upcoming fiscal year (beginning July 1) by March 1 of the prior fiscal year. Thus, any surplus/deficit reconciliation at fiscal year-end must, as a practical matter, be applied to the budget two-years out:

Section 401. Service Payments

(c) . . . Service Payments as so determined shall remain in effect for each Contract Year; provided, however, that if the annual Aggregate Service Payments are less than or greater than the Net Cost of Operation for such Contract Year, then the Authority shall determine such difference and include such difference in the Annual Budget for the

next succeeding Contract Year.

e. CRRA and the municipalities are required to comply with all applicable laws:

Section 612. Conformity with Laws.

> Each party hereto agrees to abide by and to conform to all applicable laws of the United States of America, the State or any political subdivision thereof having jurisdiction in the premises . . . .

f. Both CRRA and each contracting municipality have the right to sue to enforce the contract. The contracts contain a provision prohibiting the municipalities' right to recover damages from CRRA, but do not otherwise limit the municipalities' right to legal and equitable remedies.

The municipalities' contracts with CRRA also contain a pledge by the State of Connecticut that the State will not limit or alter the rights vested in CRRA under the contracts without adequate protection for the rights of the municipalities:

Section 507. Pledge of State

> In accordance with the Act the Authority hereby includes the following pledge and undertaking for the State of Connecticut:

> The State of Connecticut hereby pledges to and agrees with the Municipality and with any assignee of any right of the Authority under this Contract that the State will not limit or alter the the rights hereby vested in the Authority until this Contract is fully performed on the part of the Authority provided nothing contained in this Section shall preclude such limitation or alteration if and when adequate provision shall be made by law for the protection of the Municipality and any such assignee.

This contract provision is mandated by C.G.S Section 22a-274.

CRRA has admitted that, notwithstanding its contractual obligation to abide by applicable law, in entering into the Enron Transaction, it violated both Connecticut and Federal law. The Enron Transaction violated CRRA's authority under applicable Connecticut statutes and constituted an illegal arbitrage in violation of Federal arbitrage laws. CRRA contests plaintiffs' interpretation of its admissions. However, the evidence adduced at trial was overwhelming, and the Court so holds, that CRRA violated both State and Federal law in its conduct in the Enron Transaction. It was not allowed, pursuant to State Statutes, to make the kind of loan (disguised as an energy transaction) which it did. See C.G.S. Section 22a-265 (14). Further, Federal Arbitrage Laws prohibited this type of loan at the interest rate provided, since it was higher than the bond rate. These violations constituted a violation and breach of the contracts in that CRRA did not comply with the section providing that

CRRA would comply with the applicable laws of the United States of America, the State, or any political subdivision thereof.

CRRA's illegal conduct caused losses to the Project municipalities. As the result of the failure of the Enron Transaction, CRRA was required to raise the "tip-fees" for the Project municipalities, dissipate Project surpluses and excess reserves, in order to recover annual operating shortfalls resulting from the loss of the EPA revenues. The operating expenses of the Mid-Conn project have been reduced in recent years. The increase in the "tip-fees" is a direct consequence of the failure of the Enron Transaction, and the resulting imposition of the costs of that debacle on the municipalities who were parties to the mid-Conn Project contracts.

Plaintiffs, as parties to cost-plus contracts, had a justified expectation that they would only be responsible for legal and proper costs. " In any cost-plus contract there is an implicit understanding between the parties that the cost must be reasonable and proper." 17A Am. Jur. 2d, Contracts, Section 495 (2004). " An agreement to do work on a cost-plus basis does not mean that one has the right to expend any amount of money he may see fit upon the work, regardless of the propriety, necessity, or honesty of the expenditure, and then compel repayment by the other party, who has [confided in] his integrity, ability, and industry." 17A Am. Jur. 2d, Contracts, Section 495 (2004). The transaction with Enron was illegal, *ultra vires,* and *void ab initio.* Therefore, the losses and costs resulting from the Enron transaction cannot possibly be reasonable or proper, and may not be imposed on the Project municipalities as part of the Project's reasonable operating costs. CRRA's imposition of these losses and costs on the Towns is

contrary to the Project municipalities' rights under their contracts. See Klewin Northeast, LLC v. City of Bridgeport, 282 Conn. 54, 68 & n. 15, 919 A.2d 1002 (2007).

CRRA has judicially admitted that from FY's 97-01, it failed to credit over $23 million in year-end Project surpluses to succeeding years' budgets, in breach of Section 401 (c). Again, CRRA contests the nature of its admission. However, the evidence adduced at trial and the testimony of its current President make it clear to the court, and the Court so holds, that CRRA breached the aforesaid section of the contract. CRRA discovered the nature of this breach during the course of this lawsuit and changed its procedures as a result thereof.

CRRA is required to include all "Revenues"- defined to include all proceeds from the sale of energy (and other products) and all monies received other than from the municipalities- in the annual calculation of the Project's " Net Cost of Operation" that must be paid by the municipalities. As CRRA Chairman Pace testified, the revenues from which the municipalities' service payments are determined under the contracts would include " any funds taken into the company through some deliverable, some services or some other contract relations."

As a result of the diversion of Mid-Conn Project assets to the Non Project Ventures division, CRRA failed to include the jets escrow, the jets revenues, Enron's O & M payments, the net buy-down proceeds, and the interest earnings on all of these monies in the Project's projected Revenues used to calculate the Project's Net Cost of Operation for FY's 01, 02 & 03. Both Chairman Pace and President Kirk admitted that the jets revenue and O&M payments fell within the definition of revenues under the municipalities' contracts and should properly have been

credited in the Mid-Conn Project budget in the calculation of the municipalities' tipping fees. CRRA's failure to so include the Revenues from the diverted assets in the calculation the Mid-Conn Project budgets constituted a breach of the municipalities' contracts.

CRRA contends that it is immunized by P. A. 02-46 from any liability to plaintiffs on any of plaintiffs' claims for relief. A plain reading of the statute requires CRRA to submit financial mitigation plans to the State Treasurer and Secretary of OPM as a pre-condition for receiving loans from the state. The Act allowed CRRA to utilize emergency stop-gap measures to enable the Mid-Conn Project's continued operations. CRRA's argument that this statute provides a panacea for its unwarranted actions is not justified.

Furthermore, if the court were to accept CRRA's arguments in this regard, it would effectively void the State's explicit pledge -in both the contracts and in General Statutes Section 22a-274- not to alter CRRA's rights without adequately protecting the interests of the municipalities. P. A. 02-46 must be construed in harmony with C.G.S. Section 22a-274. Wilson v. Cohen, 222 Conn. 591, 598, 610 A.2d 1177 (1992). The principles of statutory construction forbid an interpretation that construes the statute in derogation of plaintiffs' common law rights. Lynn v. Haybuster Manufacturing, Inc., 226 Conn. 282, 289, 627 A.2d 1288 (1993). Also, there is no indication that the statute was intended to suspend or otherwise negate existing contract obligations.

P.A.02-46 is wholly inapplicable to plaintiffs' claims of wrongdoing unrelated to the Enron Transaction or to plaintffs' claims that CRRA has continued to breach the MSAs. Public

Act 02-46 does not address -and plainly does not immunize- CRRA's diversion of Mid-Conn Project assets to the Non-Project Ventures division; its failure to credit those assets and revenues in the calculation of the Project tip fees in FY's 02 and 03 and its ongoing failure to properly credit the jets revenues in the Project budgets; and its failure to credit retained surpluses in subsequent years' budgets.

Section 506 of the MSAs -the limitation of liability provision- bars plaintiffs from recovering "damages" from CRRA, but expressly upholds plaintiffs' right to sue the Authority for "injunctive relief" and "equitable remedies". CRRA claims that this clause bars any action for "restitution". This court, in a prior ruling, has previously held that the provision would bar a simple breach of contract action for "damages." (See Summary Judgment ruling, September 8, 2006). CRRA claims that, under the principle of *ejusdem generis,* the contract must be interpreted to read that any equitable remedies must be limited to those of a non-monetary nature. The argument is that, since the contract authorizes the municipalities to sue for injunctive relief, mandamus, and specific performance, all non-monetary remedies, any other equitable remedies sought must be non-monetary.

A claim for restitution is not a claim for "damages". Leisure Resort Technology, Inc. v. Trading Cove Associates, 277 Conn. 21, 40, 889 A.2d 785 (2006). " A plaintiff may seek restitution if the defendant has committed a civil wrong, usually a tort or breach of contract, and the plaintiff prefers to recover the amount the defendant was enriched by her wrongful conduct as opposed to damages". Id. Plaintiffs' claim is for an equitable order of restitution, in the form of a constructive trust over

identifiable assets traceable to defendants' misconduct. The remedy of restitution in the form of a constructive trust is an equitable remedy. Great West Life & Annuity Insurance Co. v. Knudson, 534 U.S. 204, 213, 151 L. Ed.2d 635, 122 S. Ct. 708 (2002). " The recovery of restitution may take several forms, including the return of the specific property conveyed or the payment of the monetary value of the defendant's gain." Leisure Resort, *supra,* 40.

Neither Pereira v. Farace, 413 F. 3d 330 (2d Cir. N.Y. 2005), nor Gagne v. Vaccaro, 80 Conn. App. 436, 835 A.2d 491(2003) cited as authority by CRRA, supports the argument that the relief of restitution that the plaintiffs seek should be construed as a claim for money damages. In both of those cases, the plaintiff sought legal relief in the form of compensatory damages, not equitable relief in the form of a constructive trust. Indeed, in Gagne the Appellate Court expressly distinguished the proceedings before it from an equitable action noting that, whereas the plaintiff in that case sought money damages, a complaint seeking restitution through a decree establishing and enforcing a constructive trust of property constituted a proceeding in equity. Id. at 442 & n. 4.

The Connecticut Supreme Court's holding in Lakeview Associates v. Woodlake Master Condominium Assn., 239 Conn. 769, 687 A.2d 1270 (1997), is to the same effect. In Lakeview Associates, the trial court entered an injunction ordering the defendant to pay money to the plaintiff to be used solely to repair a road. The plaintiff sought an award of offer of judgment interest on the amount to be paid, contending that it constituted an award of "money damages" as provided in C.G.S. Section 52-192a. The Supreme court rejected plaintiff's

contention, holding that "although the judgment require[d] the defendant to pay money to the plaintiff", it was in the [form] of a mandatory injunction "and not an award of money damages." Id. at 784-85. The holding in Lakeview Associates answers CRRA's *ejusdem generis* argument. The plaintiffs herein are not seeking an award of money damages. Instead they are seeking both an injunction and the invocation of a constructive trust. They do not seek money damages. Therefore, the claim must be viewed as a non-monetary claim seeking equitable relief. This is, therefore, consistent with the principle of *ejusdem generis* and the wording of the contracts.

Plaintiffs in this case seek injunctive relief in the form of an order directing CRRA to make restitution. Plaintiffs' Complaint sounds strictly in equity and the relief of restitution sought, therefore, does not constitute a claim for "money damages" barred by the limitation of liability provision of the MSAs.

Plaintiffs' original Complaint is dated December 28, 2003. Said complaint was served on January 8, 2004. A Revised Complaint was filed on September 7, 2004. An Amended Complaint was filed on October 20, 2006. CRRA claims that the complaint filed on October 20, 2006, contains new allegations and does not relate back to the original or Revised Complaint. Therefore, it argues, all new claims are time barred as they may relate back beyond the contract six-year statute of limitations.

CRRA claims that, as part of its October 20, 2006, Amended Revised Complaint, Plaintiffs raised for the first time a claim that CRRA's pre-Public Act 02-46 Board of Directors breached the MSAs and the implied covenant of good faith and fair dealing contained therein through its accumulation of certain

reserves. This claim was pursued at trial at which time plaintiffs' claimed $13,105,132 in damages as a result thereof. CRRA claims that this claim is time-barred to the extent that it seeks relief for surpluses accumulated prior to, and not utilized in, the February, 2000, tip fee calculation for FY 01. It opines that this claim was not raised in the original or Revised Complaint.

Plaintiffs claim that all of the contract allegations which defendant attacks were sufficiently pled in the plaintiffs' original Complaint. Plaintiffs' original Complaint asserted broadly that the Enron Transaction and CRRA's other diversions of funds and assets " have resulted in the loss to the Mid-Conn Project of over $200 million . . . to the financial detriment of the plaintiff Town and the other municipalities participating in the Mid-Conn Project and that CRRA had in the past and would in the future seek to " impose these losses on the plaintiff Town and the other municipalities participating in the Mid-Conn Project". Indeed, the original Complaint expressly cited the budgeted expenditure of $18 million of cash reserves in FY 03, noting that, even with this cash reserve subsidy, the Project's municipalities would nevertheless sustain $4-5 million in losses through increased tipping fees in 2003 alone and an additional $20 million per year thereafter.

"The goal of the relation-back [doctrine] is to prevent parties against whom claims are made from taking unjust advantage of otherwise inconsequential pleading errors to sustain a limitations defense." Advanced Magnetics, Inc. v. Bayfront Partners, Inc., 106 F.3d 11, 19 (2d Cir. N.Y. 1997). The policy behind the relation-back rule is that a party, once notified of litigation based upon a particular transaction or

occurrence, has been provided with all the notice that statutes of limitations are intended to afford. Giglio v. Connecticut Light & Power Co., 180 Conn. 230, 240, 429 A.2d 486 (1980). Indeed, because the relation-back inquiry is focused on whether defendant has notice of the claim, not how it received notice, it is not necessary that notice of the claim come from the prior Complaint or other pleadings in the action. " It is sufficient if the opposing party was made aware of the matters to be raised by the amendment from sources other than the pleadings, a position that seems to be sound since it is unwise to place undue emphasis on the particular way in which notice is received." Wright, Miller & Kane, Federal Practice and Procedure: Civil 2.d Section 1497 (1971). Connecticut follows Federal Rule of Civil Procedure 15 (c) in determining whether an amendment be held to relate back to the date of the original complaint. See Giglio, *supra,* 240.

CRRA claims that the failure to use the surpluses introduces an entirely new and different factual situation that is wholly unrelated to any allegation in the original Complaint. It claims that its situation is more akin to Alswanger v. Smego, 257 Conn. 58, 66-67, 776 A.2d 444 (2001), in which the Connecticut Supreme Court held that the amended complaint did not relate back where the new allegation would have required the defendant "to gather different facts, evidence and witnesses to defend the amended claim".

Plaintiffs claim that the timeliness of the allegation concerning the wrongful dissipation of accumulated surpluses does not depend on the application of the relation-back doctrine. The surpluses accumulated prior to the Enron Transaction were not dissipated by CRRA until FY 03, the budget for which was

not adopted before February, 2002. Since plaintiffs' Amended Revised Complaint was filed on October 20, 2006, within six years after the adoption of the FY 03 budget, plaintiffs claim that their claims for wrongful dissipation of those surpluses in breach of the municipalities' contracts with CRRA are timely. In either event, they claim that CRRA's improper accumulation of the surpluses and dissipation of the surpluses to fund the Enron revenue shortfall was the subject of discovery at the June, 2005 depositions of CRRA officers Kirk and Bolduc as well as questioning at the June-July, 2005 hearings.

Plaintiffs further claim that the more specific allegations relating to CRRA's wrongful failure to credit Project surpluses clearly relate back to the original complaint since the defendant has been on notice of those claims based on the proceedings in this action. That very claim was raised at the hearings in this action in June-July, 2005 (conducted pursuant to the allegations of plaintiffs' Revised Complaint, dated September 7, 2004, which was unchanged in this regard from the original Complaint dated December 28, 2003). At that hearing, plaintiffs asserted that CRRA had failed to credit Project surpluses in subsequent Project budgets. CRRA management has expressly testified that they learned of CRRA's breach of contract at the hearing in 2005 and changed the treatment of Project surpluses as a result of that discovery. Plaintiffs cite a series of Superior Court cases which support the proposition that the central question in whether or not an amendment relates back to the original Complaint is whether the defendant has notice of the claim, in some manner, and, therefore, whether there is a bona fide claim of prejudice to the defendant as a result of the relation back of the amendment. See McGinnis v. Yale University, Superior

Court, Docket No. Cv94 0361530 (November 15, 1996, *McMahon, J.*); Durand v. TMC Mfg., Inc., Superior Court, judicial district of Hatrford/New Britian at Hartford, Docket No. CV91 0396077 (June 16, 1994, *Mulcahy,J.*);and Gersten v. JSB Consulting Engineers, Superior Court, judicial district of Hartford/New Britian at Hartford, Docket No. CV92 051554 (June 7, 1994, *Corrradino, J.*)

The court holds that the defendant had adequate general notice of the claim in the original Complaint, and specific notice of the claim at the 2005 hearing. Defendant, in fact, realized its mistake as the result of that hearing and subsequently changed its policy regarding surpluses. Therefore, the Court holds that the October 20, 2006, amendment does relate back to the original Complaint and the allegation with respect to the surpluses is not time barred.

(C) Covenant of Good Faith and Fair Dealing

The covenant of good faith and fair dealing is a term implied by law into every contract, as if it had been agreed to by the parties. Collins v. Anthem Health Plans, Inc., 275 Conn. 309, 333, 880 A.2d 106 (2005). Rather than imposing extra-contractual duties, the implied covenant merely governs the manner and spirit of the parties' performance. Warner v. Konover, 210 Conn. 150, 154, 553 A.2d 1138 (1989). " The covenant of good faith and fair dealing presupposes that the terms and purpose of the contract are agreed upon by the parties and that what is in dispute is a party's discretionary application or interpretation of a contract item." Celentano v. Oaks Condominium Assn., 265 Conn. 579, 617, 830 A.2d 164 (2003).

To constitute a breach of the implied covenant of good faith and fair dealing, the acts by which a defendant allegedly impedes the plaintiff's right to receive benefits that he or she reasonably expected to receive under the contract must have been taken in bad faith. Gupta v. New Britain General Hospital, 239 Conn. 574, 598, 687 A. 2d 111 (1996). " Bad faith in general implies both actual or constructive fraud, or a design to mislead or deceive another, or a neglect or refusal to fulfill some duty or some contractual obligation, not prompted by an honest mistake as to one's rights or duties, but by some interested or sinister motive. . . . Bad faith means more than mere negligence; it involves a dishonest purpose. " Habetz v. Condon, 224 Conn. 231, 237, 618 A. 2d 501 (1992).

There is no credible evidence that CRRA acted in a fraudulent manner in this case. Further, there is no credible evidence that it acted with a dishonest purpose when it breached the contracts. Therefore, plaintiffs have failed to meet their burden of proof with regard to the claim that CRRA violated the covenant of good faith and fair dealing. The court holds in favor of the defendant on this issue.

(D) Unjust Enrichment

Plaintiffs have made a claim for unjust enrichment against CRRA on the grounds that CRRA has been unjustly benefitted by monies which rightfully belong to the municipalities. Under Connecticut Law, unjust enrichment is a "very broad and flexible equitable doctrine" Gagne v. Vaccaro, at 409,

> which has as its basis the principle that it is

> contrary to equity and good conscience for a defendant to retain a benefit that has come to him at the expense of the plaintiff . . . .The doctrine's three basic requirements are that (1) the defendants were benefitted, (2) that the defendants unjustly did not pay the plaintiff for the benefits, and (3) that the failure of payment was to the plaintiff's detriment.. All the facts . . . must be examined to determine whether the circumstances render it just or unjust, equitable or inequitable, conscionable or unconscionable, to apply the doctrine.

Bolmer v. Kocet, 6 Conn. App. 595, 612-13, 507 A.2d 129 (1986).

The Appellate Court has recently emphasized that a cause of action for unjust enrichment is deeply rooted in equity, and the test for relief is the broad equitable determination of what is "just or unjust, equitable or inequitable" under the circumstances:

> Unjust enrichment is a quintessentially equitable cause of action. It is based on the precept that 'in a given situation it is contrary to equity and good conscience for the defendant to retain a benefit which has come to him at the expense of the plaintiff. Schleicher v. Schleicher, 120 Conn. 528, 534, 182 A. 162 (1935). . . . With no other test than what, under a given set of circumstances, is just or unjust, equitable or inequitable,

> conscionable or unconscionable, it becomes necessary in any case where the benefit of the doctrine is claimed to examine the circumstances and the conduct of the parties and apply this standard. Cecio Bros., Inc. v. Greenwich, 156 Conn. 561, 564-65, 244 A. 2d 404 (1968).

Ramondetta v. Amenta, 97 Conn. App. 151, 166, 903 A.2d 232 (2006).

Our Supreme Court has expressly held that Connecticut law permits recovery in unjust enrichment against a political subdivision. Vertex, Inc. v. City of Waterbury, 278 Conn. 557, 576-77, 898 A.2d 178 (2006).

To date, CRRA has collected over $150 million in recoveries from claims and litigation arising from the Enron Transaction. CRRA allocated $91 (of the $111) million it received from its sale of its claim against the Enron bankruptcy estate to partial defeasance of Project bonds, which would have already been fully defeased but for the Enron Transaction. CRRA further set aside $19 million of that recovery to pay off the State loan necessitated by the failure of the Enron Transaction (and is still currently holding over $13 million of those proceeds). CRRA has further recovered and is currently holding approximately $37.6 million in net proceeds from the settlement of its lawsuits against Hawkins, Murtha and other law firms in connection with the Enron Transaction. In addition to CRRA's announced settlements of Enron-recovery related litigation against the law firms, CRRA has represented in this litigation that it expects to recover millions more in its pending claims against banks and other financial institutions that assisted

in Enron's fraud.

Both CRRA's settled claims and its pending claims arise from lawsuits which were instituted expressly to recover the Mid-Conn Project's Enron-related losses. CRRA has acknowledged that CRRA -as a corporate entity- has not sustained any loss as a result of the Enron Transaction. As CRRA President Kirk testified at trial, "CRRA itself has not suffered one penny of loss." Rather, all of the loss caused by the illegal Enron Transaction was passed through to the Mid-Conn Project members.

Plaintiffs claim that since it was CRRA as a corporate entity which committed the wrongdoing, CRRA should have borne the losses resulting from its improper and illegal conduct. " The most elementary conceptions of justice and public policy require that the wrongdoer shall bear the risk . . . which his own wrong has created." Rizutto v. Davidson Ladders, Inc., 280 Conn. 225, 245, 905 A.2d 1165 (2006). Public policy dictates that "(n)o one shall be permitted to profit by his own fraud, or to take advantage of his own wrong, or to found any claim upon his own inequity, or to acquire property by his own crime." Cotto v. Martinez, 26 Conn. Supp. 232, 237, 217 A.2d 416 (1965).

Plaintiffs submit that the only parties who have been injured as a result of the failure of the Enron Transaction are the Mid-Conn Project municipalities. CRRA has no losses and the municipalities served by CRRA's other Projects have not been affected. While the private haulers delivering waste to Mid-Conn Project facilities have been required to pay higher tip fees, those tip fees have been passed on to the haulers' customers, the residents of the Project's municipalities. Moreover, unlike the

Project municipalities, the private haulers have no contract right to tip fee charges based on Net Cost of Operation, nor any basis to claim a right to restitution of any of the fees they have paid.

The Mid-Conn Project bonds are substantially defeased, and CRRA is holding sufficient funds to complete the defeasance. Further, the Project recently completed a review of its reserves and determined that those reserves are adequately funded. Since, as CRRA has conceded, CRRA did not itself sustain any loss as a result of the Enron Transaction, Plaintiffs claim that CRRA would plainly be unjustly enriched were it permitted to retain the proceeds of the settlements, currently held by the State Treasurer, at the expense of the Project municipalities which actually sustained the Enron losses through increased tip fees and dissipated surpluses and reserves.

CRRA argues that plaintiffs' claims in unjust enrichment are barred, as a matter of law, because the parties relationship is governed by an enforceable contract, and are barred, as a matter of fact, because "every penny recovered by CRRA . . . has been used to benefit the plaintiff class or would have been so used but for the injunction of this Court." The $37.6 million is currently being held by the State Treasurer pursuant to an attachment previously issued by this Court.

"(P)arties who have entered into controlling express contracts are bound by such contracts to the exclusion of inconsistent implied contract obligations." Polverari v. Peatt, 29 Conn. App. 191, 199, 614 A.2d 484 (1992). The existence of an express contract does not bar recovery in unjust enrichment if the basis for the recovery is not inconsistent with term of the contract. Id. Thus, in Polverari, the Appellate Court held that "Because the trial court's award of damages for unjust

enrichment was not inconsistent with the preliminary agreement or the partnership agreement, the defendants cannot prevail on this claim." Id. at 200.

The cases cited by CRRA in support of its claims -Meany v. Connecticut Hospital Ass'n, 250 Conn. 500, 735 A.2d 813 (1999) and Rosick v. Equip. Maint &Serv., Inc., 33 Conn. App. 25, 632 A.2d 1134 (1993)- support the legal standard cited in Polverari. In both cases, the courts held that extra compensation would not be allowed because the compensation was specifically recited in the contracts. Thus, any additional compensation would be inconsistent with the terms of the contract. The case of Berman &Sable v. Nat'l Loan Investors, Superior Court, complex litigation docket at Waterbury, Docket No. X06 CV00 0167145 S (January 17, 2002, *McWeeney, J.*) does not stand for the proposition, as suggested by CRRA, that the mere allegations in a claim for unjust enrichment of the existence of an express contract are enough to render the claim for unjust enrichment legally insufficient. Rather, the case supports the principle that such an allegation must be brought in a separate count from the breach of contract count.

CRRA claims that all of its alleged wrongdoing relates to the question of how much CRRA should have charged the plaintiffs in tip fees in a given year in light of the revenues available to CRRA from other sources. This issue, it submits, is squarely within the four corners of the MSA's provisions concerning the process by which Net Costs of Operation are calculated. Further, it argues that the question of the plaintiffs' rights, should CRRA fail to properly perform this calculation, is expressly set forth in the limitation of remedies provision.

Plaintiffs respond to this argument by stating that the basis

for plaintiffs' unjust enrichment claims is CRRA's receipt of recoveries for Enron-related losses that CRRA has not borne and its possession of buy-down proceeds and other assets that should, in good conscience, belong to the plaintiffs. Plaintiffs submit that " Whether or not defendant has imposed illegal tip fees or failed to credit Project revenues in breach of the parties' contracts is immaterial to the Court's consideration of whether defendant may properly retain a recovery of a loss it has not borne or a benefit to which it is not entitled."

The Court holds that there is nothing inconsistent with the unjust enrichment claim pursued by the plaintffs *viz-a-viz* the contracts between the parties. The contracts specifically allow the municipalities to pursue equitable remedies, which certainly applies to unjust enrichment. The claim for unjust enrichment, contrary to CRRA's contention, is not specifically about the proper tip fees which should have been charged. That argument views the case from the plaintiffs' perspective as if this were a case for money damages. This particular count, however, must be viewed from the perspective of CRRA in order to determine if they are holding any monies which, in good conscience, should be returned to the plaintiffs. The claim is not barred as a matter of law.

CRRA further contends that there was nothing unjust about CRRA's conduct with respect to its Mid-Conn Municipal customers. All funds, it contends, were used by CRRA to reduce debt and fund operations for the benefit of Mid-Conn's municipal customers who would otherwise have paid higher tip fees to cover what would otherwise have been a higher Net Cost of Operation. Therefore, it is suggested that plaintiffs have not proven that CRRA obtained some benefit from the plaintiff class

for which it did not pay. Hartford Whalers Hockey Club v. Uniroyal Goodrich Tire Co., 231 Conn. 276, 284-85, 649 A.2d 518 (1994).

CRRA's assertion that all funds have been used for the benefit of the municipalities strains credulity. CRRA did not pass on the benefit of the March, 2005 or July, 2006 defeasance to Project members; it ignores the testimony of President Kirk and Chairman Pace who both refused to commit the full amount of the proceeds received, from the lawsuits against the law firms, to be returned to the municipalities; it further ignores the testimony of President Kirk that, although the private haulers have no legal right to reimbursement of the inflated tip fees they paid after Enron's default (which loss they passed on to their customers) CRRA believes it should use the Enron recoveries to benefit the private haulers; it also ignores the testimony of Chairman Pace and Officer Bolduc about their intended use of the Hawkins recoveries to help fund a post 2012 landfill development. An audit has already determined that all reserves are adequately funded. In fact, when the 2006 fiscal year is over on June 30, 2007, it is anticipated that there will be more money than is needed to fully defease all bonds in the debt stabilization reserve. This defeasement will release monies which are required to be held by CRRA at the direction of the Bond Trustee. It is curious to the court that CRRA represented that it wished to spend approximately $9 million dollars of the Hawkins settlement in order to defease the bonds, when it had already established a debt stabilization fund, which will have more than enough money at the end of June, 2007, in order to accomplish that very purpose. CRRA's intention in this regard would leave millions of dollars to be used for some other

purpose, while not affording the municipalities restitution for their losses. Such a proposal leads the court to view CRRA's statement that "there is no evidence that it will not use them (funds from the Murtha settlement) to lower tip fees or make rebates just as it has used recovered funds to date", with a jaundiced eye. There is indeed a basis in fact for plaintiffs to claim that CRRA has been unjustly enriched.

The Court rules in favor of the plaintiffs on their claim for unjust enrichment. In the courts view, it would be both unjust and inequitable to allow CRRA to retain the monies which were recently recovered from the law firms. The plaintiffs have met their burden of proof to the effect that (1) CRRA was benefitted in that it is now holding monies from lawsuits which sought recovery for the increased costs and losses as the result of the Enron failure; (2) CRRA did not pay the plaintiff for the benefits, in that these monies currently being held represent compensation for losses already incurred and not repaid to the municipalities; and (3) the failure of payment was to the plaintiffs' detriment, in that the plaintiffs have not been repaid for the monies previously paid in the form of excess tipping fees and monies diverted from the Mid-Conn Project to the Non-Project Ventures Account which were the subject of the lawsuits against the law firms.

III. REMEDIES

A. Restitution

It is axiomatic that restitution can be equitable in nature.

Gagne, at 443 n. 4. Relying on the Restatement, First of Restitution, the court in Gagne stated:

> A person entitled to restitution is entitled, in an appropriate case, to a remedy by a proceeding in equity, and not merely to a remedy by a proceeding at law. . . . The available remedies by a proceeding in equity include: (1) a decree establishing and enforcing a constructive trust of property; (2) a decree establishing and enforcing an equitable lien upon property . . . .

Id., quoting Restatement (First), Restitution, Equitable Remedies at 640 (1937). As the court has previously ruled, since Section 506 of the contracts only precludes liability for damages, there is no contractual bar to the restitution remedy plaintiffs seek.

The particular form of restitution that plaintiffs seek - imposition of a constructive trust over identifiable assets traceable to CRRA's actions- is a traditional equitable remedy that is not barred by the limitation of liability clause of the contract. See Great-West Life & Annuity Insurance Co. *Supra* at 203.

As the remedy for their claims, which the Court holds have been proven by a fair preponderance of the evidence, sounding in breach of contract and unjust enrichment, plaintiffs seek imposition of a constructive trust over assets and revenues held by (or to be held by) CRRA that are directly traceable to (a) monies recovered by CRRA in reimbursement of the Mid-Conn Project's losses related to the Enron Transaction; (b) the

improper diversion of Mid-Conn Project assets to the Non-Project Ventures Division; and (c) the CRRA's Board's improper retention of Mid-Conn Project operating surpluses and failure to credit those surpluses against the calculation of the tip fee in subsequent budget years.

The remedy of a constructive trust is a broad equitable remedy available where the defendant, by its wrongdoing, would, in the absence of a constructive trust, otherwise be unjustly enriched. Wendell Corp. Trustee v. Thurston, 239 Conn. 109, 113-14, 680 A.2d 1314 (1996); Restatement (First), Restitution, Constructive Trust Section 160, comment (d), p. 643-44 (1937). A constructive trust is also available when property "has been wrongfully appropriated and converted into a different form;" Cadle Co v. Gabel, 69 Conn. App. 279, 288, 794 A.2d 1029 (2002); or where funds have been converted or commingled. Spector v. Konover, 57 Conn. App. 121, 133, 747 A.2d 39 (2000).

Plaintiffs claim a constructive trust in an amount of $104,497,441 over the following items:

a. CRRA's recoveries to date in its lawsuits against Hawkins, Murtha and others for reimbursement of Enron-related losses;

b. Any other funds recovered by CRRA in its litigation which represents reimbursement of, and are directly traceable to, the financial losses sustained by the Mid-Conn Project as a result of failure of the Enron Transaction.

c. The funds in the Jets/Reserve which came from the EPA buy-down and from net revenues from the operations of the jets from FY03 to date;

d. The funds in the EGF Operating Account;

e. The funds in the Debt Service Stabilization Reserve;

f. Surplus funds in the Mid-Conn Project Revenue Account;

g. The funds in the Risk Fund Reserve;

h. $13.379 million from moneys recovered from CRRA's sale of its Enron claim;

i. The South Meadow property. The EGF and the Jet engines, or in the alternative, liquidation of the property and jets at the Project end in 2012

In addition, plaintiffs request that the court conduct an additional hearing in order to determine an appropriate amount of attorneys fees.

CRRA claims that plaintiffs are not entitled to a constructive trust over any of the assets it seeks to so attach. It argues that the assets over which plaintiffs seek to impose a trust are assets in which plaintiffs can claim no interest and are assets which are not traceable to any specific corpus in which plaintiffs could claim an interest. It further contends that nothing in

either the CL&P EPA or the MSAs gives the plaintiffs any interest in the EPA or its proceeds. It contends that the plain language of the CL&P EPA was quite clear that the only parties thereto -and the only beneficiaries thereof- were CRRA and CL&P. Similarly, plaintiffs' MSAs provide that as long as the Project is not disposed or liquidated, CRRA is the owner of the system. Thus, plaintiffs' claim to a constructive trust over the South Meadows property, the EGF, the jet engines, and all the revenues derived therefrom, as well as any Enron-related recoveries, it opines, fails as a matter of law. It further argues that, to the extent that plaintiffs seek the imposition of a constructive trust against Enron-related litigation recoveries, that claim also fails because those monies are general damages recovered by CRRA, not some specific corpus in which plaintiffs have an identifiable interest. Further, it suggests, the monies obtained by CRRA from CL&P through the resale of the energy that was the subject of the Enron Transaction represents CRRA's mitigation of its damages through favorable commercial exchange with a third party, not restitution of the CL&P EPA buy-down proceeds.

CRRA states that to the extent that plaintiffs seek the imposition of a constructive trust against the monies in the Debt Service Stabilization Reserve, the Risk Fund Reserve, and other "Surplus Funds in the (Mid-Conn) Project Account" plaintiffs' claim would still fail, even if it could establish an interest in the property it seeks to attach. Specifically, CRRA receives all payments through its lock box operation and maintains a single account for retention of all funds. CRRA allocates these funds among various internal accounts on a monthly basis in accordance with Board directives, contractual arrangements and

any legal obligations. The balance is retained in the operating accounts. Regardless of where these monies are sub-allocated, they all reside on the Mid-Conn Project balance sheet. As such, CRRA argues that plaintiffs cannot prove their entitlement to a constructive trust to any of these monies because it cannot trace to a specific corpus of funds in which they might be able to establish an interest.

In order for the plaintiffs to be entitled to either a constructive trust or an equitable lien they must establish that they have a legal or equitable right that could "clearly be traced to particular funds or property in the defendant's possession." Grest-West Life & Annuity Ins., at 213. The essential element of a constructive trust action is the existence of specific identifiable property to serve as *res* which can be clearly traced in assets of the defendant. 76 Am. Jur. 2d, Trusts, Section 175 (2005). "The common law equitable lien is a right . . . to have specific property applied in whole or in part to payment of a particular debt or class of debts." Columbia Fed. Sav. Bank v. Int'l Site consultants, Inc., 40 Conn. App. 64, 68 *cert. denied,* 236 Conn. 910, 669 A.2d 594 (1996). CRRA contends that the evidence before this Court is that the surpluses and reserves to which plaintiffs claim an entitlement were long ago spent to cover the cost of operations and/or mitigate the impact of the losses in revenues caused by the failure of the Enron Transaction. As such, it claims, the relief which plaintiffs actually seek is the recovery of damages to compensate for the loss of these funds, not the restitution of the funds themselves.

A plaintiff can seek restitution through an equitable constructive trust "where money or property identified as belonging in good conscience to the plaintiff could clearly be

traced to particular funds or property in the defendant's possession." Scholastic Corp. v. Najah Kassem &Casper &DeToledo, 389 F. Supp. 2d 402, 407 (D. Conn. 2005), quoting Great-West Life & Annuity Ins. Co., *supra,* at 213. It is not necessary that the assets have been physically owned by the plaintiff; rather, a constructive trust may be imposed if the assets are identifiable and can be said to "belong in good conscience" to the plaintiff. Id. at 408.

As the court noted in Scholastic Corp., courts applying the doctrine of constructive trust to claims by ERISA plans for recovery in subrogation for medical expenses disbursed to a plan participant following the participant's settlement against a third party tort-feasor apply the following three-part test: "Does the Plan seek to recover funds (1) that are specifically identifiable, (2) that belong in good conscience to the Plan, and (3) that are within the possession and control of the defendant beneficiary?" Scholastic Corp., at 408. Indeed, in light of recent Appellate and Supreme Court decisions there is some question whether, under Connecticut Law, plaintiffs are even required to demonstrate that the assets over which they seek to impose a constructive trust are separately identifiable and directly traceable to the defendant's wrongdoing. See Macomber v. Travelers Prop. and Cas. Corp., 261 Conn. 620, 634, 804 A.2d 180 (2002) (noting the possibility that the trial court could impose a constructive trust on general funds of insurer for reduced value of the plaintiffs' annuities) and Spector v. Konover, *supra* at 132 (finding plaintiff entitled to constructive trust over commingled funds including profits defendants received through improper use of partnership funds).

Plaintiffs claim that the evidence at trial establishes that the

following funds and property in the possession of CRRA are traceable to CRRA's wrongdoing and/or its recovery of Enron-related losses and, in good conscience, should be used to provide restitution to plaintiff:

1. Enron-related Litigation Recoveries

CRRA has pursued litigation to recover for the financial losses resulting from the failure of the Enron Transaction (i) against Enron; (ii) against Hawkins and Murtha; and (iii) against a number of financial institutions and law firms that CRRA claims assisted Enron in defrauding CRRA. CRRA has included in the Mid-Conn Project budgets all of the costs of all of the litigation it has pursued to recover for its losses from the failure of the Enron Transaction.

CRRA has recovered approximately $37.6 million (net of attorneys' fee and costs) from Hawkins, Murtha and several parties in the federal lawsuit. CRRA is also still holding approximately $13.379 million of the monies recovered from the sale of its Enron claim in a reserve account designated to repay the loan it took out in FY's 04 & 05.

These and any other funds recovered by CRRA in its litigation represent a direct partial reimbursement of (and are directly traceable to), plaintiffs contend, the financial losses sustained by the Mid-Conn Project as a result of the failure of the Enron Transaction.

2. The Jets/EGF Reserve

CRRA currently maintains a Jets/EGF Reserve that has a

balance of over $11 million. This Reserve has been funded with proceeds from the EPA buy-down and with net revenues from operations of the jets from FY 03 to date. The monies in this account, plaintiffs claim, have wrongly been diverted from the Mid-Conn Project accounts and are directly traceable to CRRA's misconduct.

3. The EGF Operating Account

CRRA also currently maintains an EGF Operating Account which it utilizes to hold net revenues from the operations of the jets and interest income received on the Jets/EGF Reserve. Plaintiffs argue that the monies in this account represent Project "Revenues" that have wrongly been diverted from the Mid-Conn Project accounts, and CRRA has wrongly failed to include such proceeds in the determination of Mid-Conn Project budgets.

4. The Debt Service Stabilization Reserve

CRRA has established a "Debt Service Stabilization Reserve" which it has required the Project municipalities to help fund. This reserve, plaintiffs claim, was devised to avoid passing on tip fee reductions resulting from the March, 2005 defeasance to the Project municipalities.

5. Surplus Funds in the Mid-Conn Project Revenue Account

As of July 1, 2006, the Mid-Conn Project Revenue Account had a surplus balance of over $8.2 million. Over $6.9 million of

this balance represented surplus funds from years prior to FY 05 that CRRA, plaintiffs claim, failed to properly include in its calculation of Project budgets. CRRA has admitted that it has no right to hold onto 'retained earnings". Moreover, the Project is projected to generate a multi-million dollar operating surplus in FY 07, with a projected year-end surplus balance of over $19.4 million. This surplus is being funded with tip fee charges in excess of the true Net Cost of Operation of the Project for FY 07 set by CRRA to maintain a "stable" tip fee.

6. The Risk Fund Reserve

The Mid-Conn Project maintains a Risk Fund Reserve, funded by the Project tip fees as a contingency against "catastrophic loss," including litigation losses. In FY 07, the Board imposed a $3 million dollar contribution to this reserve. The purpose of the monies in the Risk Fund Reserve, plaintiffs argue, is to reimburse the Project municipalities for their losses as a result of the failure of the Enron Transaction.

7. The South Meadow Property, the EGF and the Jet Engines

The South Meadow property, the EGF and the four jet engines were purchased by CRRA with buy-down proceeds and are, plaintiffs contend, directly traceable to CRRA's failure to use the buy-down proceeds for the benefit of the Mid-Conn Project.

It is interesting to note that during the course of the trial CRRA President Kirk testified that all of the attempts to recover

money from the law firms, the bank, and the global cases are all traceable to the Mid-Conn Project deal with Enron. The lawsuit against the law firms specifically references the increase in tip fees to the municipalities and the Non Project Ventures Account. The court holds that the law suits against the law firms and the recoveries therefrom ($37.629 million plus interest is already being held by CRRA in an account with the State Treasurer) represent an identifiable res which can be directly traceable to the failed Enron Transaction. The major portion of these monies, in good conscience, should be used as restitution to the Mid-Conn Project municipalities for the years of increased tipping fees which they paid as a result of the failed Enron Transaction and for the municipalities' portion of the diversion of funds into the Non Project Ventures Account which were subsequently used to help pay for the deficit. Therefore, the Court orders that a constructive trust shall issue as to the major portion of the monies held by CRRA as the result of the lawsuits which have been settled as a result of the failed Enron Transaction. The Court holds that good conscience dictates the imposition of a constructive trust in this matter because, according to the evidence adduced at trial, all bonds should be fully defeased, with prudent management decisions, by the end of this year, and, according to a recent audit, all reserves are adequately funded. It is clear from both the testimony and the exhibits, that CRRA did not incur any losses, *per se,* as the result of the Enron Transaction. It made up any losses through the use of reserves, surpluses and increased tipping fees. The increased costs to CRRA as the result of the failed Enron Transaction were borne by the municipalities (and the private haulers who passed the costs to their customers and are not

parties to this lawsuit). It is time, now that CRRA's financial situation has stabilized, for the municipalities to receive restitution for their increased payments regarding the tipping fees over the years, and the use of the municipalities' proportionate share of funds in the Non Project Ventures Account used to pay toward the deficit. CRRA specifically recovered the monies on the basis of these allegations of loses, when, in fact, the municipalities and all participants in the Mid-Conn Project paid for the loses. The Court, therefore, orders a constructive trust on the monies currently held by CRRA from the lawsuits in the amount of $28,883,250.00 representing the amount of increased tipping fees charged to the municipalities as a result of the failed Enron Transaction to date, and the sum of $6,990,482.25 for the municipalities' portion of monies in the Non Project Ventures Account used to pay the deficit (45% of $15,534,405 used in transfer from Non Project Ventures Account). These monies should have been in the Mid-Conn Project at all times, and should have been used to benefit the project. If these funds were properly used, the original tip fees for the years in question would have been lower. This fact was acknowledged by CRRA when it consolidated the Non Project Ventures Account with the Mid Conn Project in FY 03. Both the increased tipping fees and the Non Project Ventures Account were specifically alleged as claims in CRRA's lawsuits against the law firms. Therefore, the total constructive trust is in the amount of $35,873,732.25 of the funds currently held by the State Treasurer from lawsuits against the law firms.

In addition, a budget has been passed for FY 08. The court re-opened the case so that additional testimony could be presented regarding the FY 08 budget. The budget is scheduled

to be put into effect on July 1, 2007. When the parties were informed that the Court's decision was imminent, they requested that the court retain jurisdiction for an additional hearing, if necessary, regarding the FY 08 budget. The Court agreed to the request.

The Court declines to impose a constructive trust on any additional monies in the control of CRRA. There are numerous reasons for the court's decision in this regard. First, although the court held that CRRA had breached its' contracts by failing to credit prior surpluses, all surpluses were eventually used in an effort to save CRRA. In effect, they were used for the benefit of the municipalities to keep the tip fees at a minimum. Any identifiable *res* for these funds has been dissipated. The court does not feel, in good conscience, that a trust should issue on these funds. Further, any claims for a trust on monies currently held as a surplus by CRRA would impede the every day operations of the company. The accounts are held for legitimate business purposes to benefit the Mid-Conn Project. Further, the court does not feel that CRRA has been unjustly enriched with these funds. The court does not feel, in good conscience, that a trust should be imposed with regard to these accounts. The court notes that, pursuant to the contracts between the parties, if these surpluses existed at the end of the project, the municipalities would be entitled to those sums, in which each of the municipalities had an interest, upon liquidation. This issue only occurs if the Project is liquidated. Similarly, the South Meadow Property Issue, the EGF, and the jet engines issues are matters to be determined at the time of the liquidation, if ever, of the Project. At that time, the phrase "to the extent they (the municipalities) have an interest" will have to be interpreted.

Unless, of course, some accord is reached and the contract language is changed as the result of extending the Project beyond 2012. In either event, the Court holds that these matters are not justiciable at this time. The court should not interfere with the day-to-day operations of the defendant. Therefore, the court will not, in the exercise of its equity powers and in the exercise of good conscience, impose a constructive trust on any other funds in this matter, other than the recoveries from the lawsuits against the law firms, currently held by the State Treasurer, to the extent ordered by the Court. The distinguishing characteristic between the Non Project Venture Account funds and the surpluses, which were used to mitigate the losses, is that CRRA sued the law firms claiming the losses of both the Non Project Ventures Account and the increased tipping fees to the municipalities. The lawsuit itself constituted the identifiable res with which any proceeds therefrom are subject to the imposition of a constructive trust to the sum indicated. The other claims of the plaintiffs, including the claim that CRRA has "manipulated" the tip fee, at this point, would be in the nature of a suit for damages which is not allowed by the contracts. It must be remembered that the test for the court with regard to restitution is not what the plaintiffs may have recovered if they had been able to sue for damages, but rather the amount that the defendant was enriched by its' wrongful conduct. See Leisure Resort, *supra*, at 40. With the current status of CRRA and the claims made in the lawsuits, the Court finds that CRRA would be unjustly enriched if it kept the proceeds of the lawsuits against the law firms currently held by the State Treasurer up to the sum indicated.

B. Injunction

In its brief CRRA claims that, "as the result of its efforts to stabilize the company, it will not be necessary to impose upon the plaintiffs any additional costs of the Enron Transaction." Therefore, the court's decision should not affect its future plans. In light of the court's prior holding with regard to the constructive trust, the court issues an injunction against CRRA prohibiting it from imposing any of the costs of the Enron Transaction on the municipalities, commencing with the FY 08 budget and relating to all budget years through the contract year of 2012 between CRRA and the municipalities. The issuance of the injunction will prevent further unjust enrichment on the part of CRRA at the expense of the municipalities.

C. Interest

Plaintiffs have made a claim for prejudgment interest pursuant to Connecticut General Statutes Section 37-3a. They claim interest at the rate of 10% per annum and cite the case of West Haven Sound Development Corp. v. City of New Haven, 207 Conn. 308, 320-22, 541 A.2d 858 (1988) for the proposition that prejudgment interest is allowable against a political subdivision from the date of the breach until the date of the verdict. However, West Haven Sound was a suit for damages for breach of contract. C.G.S. Section 37-3a refers to "interest . . . may be recovered and allowed . . . as damages . . .". This is not a Judgment for damages. Such a result would be barred by the contracts. This is a Judgment for Restitution, in the form of the imposition of a constructive trust, and for injunction. The

prejudgment interest statute applies only to claims involving wrongful detention of money after it has become due and payable and does not apply to claims that seek to restore the plaintiff to its stature prior to an alleged wrongful act of the defendant. Foley v. Huntington Co., 42 Conn. App. 712, 739-40, 682 A.2d 1026, cert. denied 239 Conn 931, 683 A.2d 397 (1996). Therefore, the court holds that C.G.S. 37-3a does not apply and there will not be an award of interest in this matter.

D. Attorneys Fees

Plaintiffs request that, in the event of a successful conclusion, the court should conduct a hearing regarding attorneys fees. They cite Mangiante v. Niemec, 98 Conn. App. 567, 570-72, 910 A.2d 235 (2006) for the proposition that, when a court finds a breach of fiduciary duty in an unjust enrichment case attorneys' fees is to be considered, as an element of restitution. In view of the fact that the court has held that a fiduciary relationship did not exist between the parties in this matter, the claim for attorneys' fees must fail in this regard.

Plaintiffs further cite Federal Authority for support of their claim for attorneys fees. Pursuant to Fed. R. Civ. P. 23(h)(3) a Federal Court has the responsibility for determining the attorneys' fees to be awarded in a class action. Unfortunately for the plaintiffs, neither the Connecticut State Statutes nor the Connecticut Practice Book contain similar authority. In the absence of express authority from the Legislature, this Court declines to award attorneys' fees in this matter. See ACMAT Corp. v. Greater New York Mutual Insurance Company, 282 Conn 576 (2007).

IV. Special Defenses

Although raised, in part, in separate sections, the Court wishes to address the numerous special defenses raises by CRRA, *in seriatum.*

1. P.A. 02-46

CRRA asserts that its imposition of increased tip fees and use of project surpluses and excess reserves to respond to the losses caused by the Enron Transaction were measures taken pursuant to -and required by- P.A. 02-04 passed in the wake of the failure of the Enron Transaction. CRRA asserts this defense " as to all counts" of the plaintiffs' Amended Revised Complaint.

It is true that the Act, codified in parts of C.G.S. 22a-261-285, allowed CRRA to take necessary steps to attempt to recoup its losses from the failure of the Enron Transaction. However, there is no indication that the Act was intended to allow CRRA to avoid its existing contract obligations. To the contrary, C.G.S. Section 22a-274 reads as follows:

> The State of Connecticut does hereby pledge to and agree with the holders of any bonds and notes issued under this chapter and with those parties who may enter into contracts with the Connecticut Solid Waste Authority or its successor agency pursuant to the provisions of this chapter that the state will not limit or alter the rights hereby vested in the authority

> until such obligations, together with the interest thereon, are fully met and discharged and such contracts are fully performed on the part of the authority, provided nothing contained herein shall preclude such limitation or alteration if and when adequate provision shall be made by law for the protection of the holders of such bonds and notes of authority or those entering into such contracts with the authority. The authority is authorized to include this pledge and undertaking for the state in such bonds and notes or contracts.

CRRA's contracts with the Project municipalities incorporate the statutory pledge and address its protections directly to the contracting municipalities, permitting alteration of CRRA's rights only " if and when adequate provision shall be made by law for the protection of the Municipality." There is nothing contained in P.A. 02-46 which would indicate to the court that the General Assembly intended to repeal its statutory pledge through the passage of this legislation. The court would have to conclude that the General Assembly had repealed the pledge *sub silentio.* However, such an "implied repeal of a statute is not favored and will not be presumed where, as here, the old and new statutes can co-exist peaceably." Miller's Pond Co., LLC v. City of New London, 273 Conn. 786, 813, 873 A.2d 965 (2005). The legislature is presumed to be aware of its prior enactments and to have created a harmonious and consistent body of law. Pollio v. Planning Commission of the Town of Somers, 232 Conn. 44, 53, 652 A.2d 1026 (1995). Proper construction of P.A. 02-46 must therefore, "take into account the

mandates of related statutes governing the same general subject matter," Id., and, in particular, the State's explicit pledge not to alter CRRA's rights and powers without guaranteeing appropriate protection to the contracting municipalities.

The concept that implied repeal of a statute is disfavored is a "well-established principle of statutory construction" under Connecticut law. Wilson v. Cohen, 222 Conn. 591, 598, 610 A.2d 1177 (1992). "The legislature is presumed to have acted with the intent to create a consistent body of law. . . . If two statutes appear to be in conflict [with each other,] but can be construed as consistent with each other, then the court should give effect to both. Dugas v. Lumbermens Mutual Casualty Co., 217 Conn. 631, 641, 587 A.2d 415 (1991).

P.A. 02-46 provided legislative approval of loans to permit CRRA to recover from the immediate short-term impact of the Enron failure. The statute does not contain any reference to immunity or anything that could remotely suggest that immunity from suit was an intended consequence of the act.
This Court declines to interpret the act in the imaginative manner suggested by CRRA. It simply cannot be construed to immunize CRRA from liability to its contracting partners for the losses that they sustained as a result of CRRA's actions. CRRA has failed to meet its burden of proof with regard to its First Special Defense.

2. Limitation of Liability

This court has previously held that the contract language precluded causes of action sounding in contract and negligence for damages. The court further held that the clause did not bar

suits for bad faith, reckless or intentional conduct. In view of the fact that the contract did not bar suits seeking equitable remedies, and the court has held that this suit seeks the equitable remedy of restitution, CRRA has not met its burden of proof as to the Second Special Defense.

3. Governmental Immunity

CRRA asserts as its Third Special Defense governmental immunity "from liability for intentional misconduct." CRRA relies on C.G.S. 52-577n(a)(2)(A) which provides that a political subdivision shall not be liable "for damages to person or property caused by : (A) Acts or omissions of any employee, officer or agent which constitute criminal conduct, fraud, actual malice or willful misconduct." CRRA further asserts, without specification, that 52-577n also shields CRRA from liability for certain acts of negligence."

Although CRRA has asserted the Third Special Defense as to all counts, it is clear that it does not apply to the two counts upon which the court has found liability in this case, namely, breach of contract and unjust enrichment. As to the remaining counts the court has already ruled in favor of CRRA and it is, therefore, unnecessary to discuss this issue.

Under common law, principles of governmental immunity do not bar claims for breach of contract against political subdivisions of Connecticut. Saccardi v. Board of Education, 45 Conn. App. 712, 697 A.2d 716 (1997). Likewise, governmental immunity does not bar plaintiffs' claims for unjust enrichment. Vertex v. Waterbury, 278 Conn. 557, 898 A.2d 178 (2006). Thus, with regard to the issues of breach of contract and unjust

enrichment, CRRA has not met its burden of proof on the Third Special Defense.

4. Statute of Limitations

The court has previously ruled that plaintiffs' amended claims related-back to the original complaint. Therefore, with regard to the relevant counts in which the court ruled in favor of the plaintiffs, the claims of breach of contract were not time barred.

5. Statute of Limitations as to Tort Claims

It is not necessary for the court to discuss this matter in view of its decision regarding the tort claims of the plaintiffs.

6. Statute of Limitations as to Unjust Enrichment

As its Sixth Special Defense, CRRA contends that plaintiffs' unjust enrichment claims are barred by either the three-year tort statute of limitations, C.G.S. Section 52-577, or the six-year contract statute of limitations, C.G.S. Section 52-576. A cause of action for unjust enrichment is generally viewed as sounding in quasi-contract, and the statute of limitations for unjust enrichment is generally held to be six years, Gianetti v. Greater Bridgeport Individual Practice Association, Superior Court, complex litigation docket at Waterbury, Docket No. X02 CV02 4001686 (July 21, 2005, *Schuman, J.*), although some courts have held that under a court's equitable powers, "a court may provide a remedy (in unjust enrichment) even though the governing statute of

limitations has expired." Vizza v. Pagano, Superior Court, Docket No. CV98 0168124 (May 1, 2000, *Karazin, J.*)

CRRA obtained recoveries for the Project's Enron related losses in 2005 (recovery from the sale of the Enron Bankruptcy claim) and 2006-2007 (litigation recoveries). Plaintiffs filed their Amended Revised Complaint contending that CRRA was unjustly enriched as a result of such recoveries in October, 2006, well within any applicable statute of limitations. Plaintiffs unjust enrichment claims are, thus, plainly timely.

7. Laches

As its final Special Defense, CRRA asserts the defense of laches. " Laches consists of two elements. First, there must have been a delay that was inexcusable, and second, that delay must have prejudiced the defendant." Burrier v. Burrier, 59 Conn. App. 593, 596, 758 A.2d 373 (2000). CRRA has failed to present any evidence regarding either component of the defense of laches. Therefore, it has failed to meet its burden of proof with regard to this special defense.

V. CONCLUSION

Based upon the foregoing reasons, the Court rules in favor of the plaintiffs on the Breach of Contract and Unjust Enrichment Counts. The Court rules in favor of the defendant on the Breach of Fiduciary Duty and Bad Faith Counts. The Court orders that a constructive trust be imposed on the monies currently held by CRRA, up to the amount indicated by the

Court, which represent the recoveries received from the law firms. The trust is to forward the sum of $35,873,732.25 to the municipalities immediately, in care of their trial attorneys, as restitution for the increased tipping fees which they have incurred as the result of the failed Enron Transaction and their portion of the improper allocation of the monies from the Non Project Ventures Account. This sum also represents an amount by which CRRA would be unjustly enriched if it was allowed to retain the subject monies. Effective for the budget on FY 08 and each budget year thereafter, CRRA is enjoined from passing any of the costs of the failed Enron Transaction to the Municipalities.

In view of the Court's judgment in this matter, CRRA's motion to substitute assets pursuant to C.G.S. section 52-304 is denied. Further, CRRA's motion to discharge judgment lien on substitution of lien on other property, pursuant to C.G.S. section 52-380e, is denied.

The Court denies these motions for the following reasons: First, the property under attachment, which would be the subject of a judgment lien, represents specific assets to which the plaintiffs are entitled in the form of a constructive trust. They are assets in CRRA's possesion as to which plaintiffs have a demonsrtated equitable interest, "which [CRRA] ought not, in equity and good conscience, hold and enjoy" Wendell Corp. v. Thurston, 239 Conn. 109, 113-14, 620 A.2d 1314 (1996), and which in good conscience belong to and should be restored to the plaintiffs. Cadle Co. v. Gabel, 69 Conn. App. 279, 289, 794 A.2d 1029 (2002); Second, the substitution of a general asset (South Meadow facility) for the specific monies attached would effectively destroy the plaintiffs' basis for recovery in

constructive trust since the identifiable res (monies from the lawsuits) would be dissipated; Third, the Court does not accept CRRA's evaluation of the property as providing an asset of equal or greater value. The appraiser did not consider environmental issues on the property from 2001 forward. Further, the appraiser did not include an actual assessment of the physical quality of the South Meadow Plant. Also, the appraiser did not consider the changes in technology and how those changes effect the plant. Fourth, plaintiffs may, in 2012, have an interest in the South Meadow facility, if the Project is liquidated.

Judgment shall enter accordingly.

THE COURT

Dennis G. Eveleigh, Judge