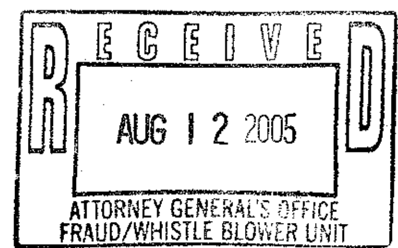
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ATTORNEY GENERAL'S OFFICE
FRAUD/WHISTLE BLOWER UNIT

NO. (X02) CV 03-0184346-S
TOWN OF WEST HARTFORD : STATE OF CONNECTICUT
SUPERIOR COURT

v. : COMPLEX LITIGATION DOCKET
AT WATERBURY

ROBERT WRIGHT, ET AL. :

NO. (X02) CV 04-0184932-S
TOWN OF NEW HARTFORD, ET AL. :

v. :

JOHN ROWLAND, ET AL.

NO. (X02) CV 04-0185580-S
TOWN OF NEW HARTFORD, ET AL. :

v. :

CONNECTICUT RESOURCES RECOVERY
AUTHORITY, ET AL. : AUGUST 10, 2005

Ruling on Motions to Dismiss

The Connecticut Resource Recovery Agency ("CRRA") is a public instrumentality dedicated to the important purpose of processing solid waste. See General Statutes §§ 22a-260 et seq. Various Connecticut towns have entered into contractual arrangements with CRRA whereby these towns deliver their solid waste to CRRA, CRRA processes the solid waste into

steam or electricity, sells the resulting energy, and then charges the towns a service payment or "tip fee" based on the difference between the energy revenues and its costs.

In 2000 and 2001, CRRA restructured a $280 million energy purchase agreement with Connecticut Light & Power ("CL&P"). Under the restructuring, CL&P would pay CRRA approximately $60 million, CL&P would pay Enron Power Marketing, a subsidiary of Enron Corporation (collectively, "Enron"), the remaining $220 million, and Enron would assume CL&P's long-term energy purchase obligation to CRRA. See West Hartford v. Murtha Cullina, LLP, 85 Conn. App. 15, 18-19, 857 A.2d 354, cert. denied, 272 Conn. 907, 863 A.2d 700 (2004) (hereinafter "West Hartford.") As is well-known, Enron defaulted on the obligation and filed for bankruptcy. CRRA now acknowledges that the transaction amounted to its making of an unsecured and illegal loan to Enron. (Memorandum in support of Defendant CRRA's motion to dismiss or, in the alternative, motion to stay, pp. 15-17.)

These three cases all concern efforts by three towns, purportedly on behalf of a class of seventy towns, to recover revenues and assets allegedly lost by the CRRA in making the unsecured loan of $220 million and in engaging in various other reportedly improper transactions, many with political overtones. Before the court are eight motions to dismiss. Several of the moving defendants comprise a group that the plaintiffs label the "Rowland defendants" or the "Rowland Group:" former Governor John G. Rowland; former chairman of CRRA Peter N. Ellef; former president of CRRA Robert E. Wright; Michael Martone, who is alleged to be a lobbyist for the law firm of Murtha, Cullina, LLP; and William Tomasso and the "Tomasso Group," who are alleged to be political allies and supporters of former Governor

Rowland. The other moving defendants are fifteen former directors of the CRRA and the Republican Governors Association.[1] The principal argument advanced by these defendants is that the towns lack standing under Ganim v. Smith & Wesson Corp., 258 Conn. 313, 780 A.2d 98 (2001), and West Hartford because their injuries were indirect and remote. Because standing is an aspect of subject matter jurisdiction, the plaintiffs bear the ultimate burden of proof on these motions. See Fink v. Golenbock, 238 Conn. 183, 199 & n.13, 680 A.2d 1243 (1996).[2]

I

A

In Ganim, our Supreme Court approved the dismissal for lack of standing of the City of Bridgeport's suit, filed against certain members of the firearms industry, alleging that the conduct of the defendants in designing, manufacturing, marketing, and distributing handguns had caused the city to sustain injury and damage. The court started with the proposition that, in order for the plaintiff to have standing, "there must be a colorable claim of a direct injury to the

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The defendants in West Hartford v. Wright, Docket No. (X02) CV 03-0184346-S, which the court will refer to as "Wright," are Robert Wright and Peter Ellef. These two individuals are also defendants in New Hartford v. Rowland, Docket No. (X02) CV 04-0184932-S, which the court will refer to as Rowland. (The court will refer to the third suit, New Hartford v. CRRA, Docket No. (X02) CV 04-0185580-S, as CRRA.) The plaintiffs have never adequately explained why there are two lawsuits suing the same defendants concerning the same subject matter. This duplication imposes an unnecessary burden on the defendants and the court. It may also cause unnecessary expense to the plaintiff towns.

2

On May 17, 2005, the court denied CRRA's motion to dismiss in CRRA on the ground that the claims of the towns against CRRA were "direct claims against a party with which the towns are in contractual privity or that allegedly owes the towns a fiduciary duty," and that the suit was "not one against a third party that indirectly caused them damage."

plaintiff, in an individual or representative capacity." Ganim, supra, 258 Conn. 346. Thus, the task of the court is to determine "whether the facts, as stated in the complaint and taken as true, demonstrate that the injuries, on the one hand, are direct or, on the other hand, are indirect, remote or derivative." Id., 348. To undertake this task, the court looked at several initial indicia, such as whether there are "numerous steps between the conduct of the various defendants and the harms suffered by the plaintiffs" and whether the "harms suffered by the plaintiffs are derivative of those suffered by the various actors in between the defendants and the plaintiffs." Id., 355. The court then identified and applied three additional policy factors to guide courts in determining directness:

> First, the more indirect an injury is, the more difficult it becomes to determine the amount of plaintiff's damages attributable to the wrongdoing as opposed to other, independent factors. Second, recognizing claims by the indirectly injured would require courts to adopt complicated rules apportioning damages among plaintiffs removed at different levels of injury from the violative acts, in order to avoid the risk of multiple recoveries. Third, struggling with the first two problems is unnecessary where there are directly injured parties who can remedy the harm without these attendant problems.

(Internal quotation marks omitted.) Id., 353, 356-59.[3]

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3 Contrary to the plaintiff's arguments, this test is used as a supplement to determine in the first instance whether the injury is indirect, rather than as a second layer test to administer after an initial finding of indirectness. The Ganim court described the test as one "to guide courts in their application of the general principle that plaintiffs with indirect injuries lack standing to sue. . . ." (Internal quotation marks omitted.) Ganim, supra, 258 Conn. 353. When the court applied the test to the facts before it, it stated: "the three part policy analysis . . . supports the conclusion that the plaintiffs here lack standing." Id., 356. The West Hartford court went further and stated clearly and succinctly: "Recently [in Ganim], our Supreme Court adopted a three part policy analysis *to determine whether a party has standing.*" (Emphasis added.) West Hartford, supra, 85 Conn. App. 21. See also Vacco v. Microsoft Corp., 260 Conn. 59, 90, 793 A.2d 1048 (2002) ("Applying the three part policy analysis to the facts of the present case, we are

In West Hartford, the Appellate Court employed this three part policy test to affirm the dismissal for lack of standing of a suit by West Hartford against two law firms that had advised CRRA concerning the same Enron transaction at issue here. The court relied solely on the third factor because it provides that "struggling with the first two problems is unnecessary where there are directly injured parties who can remedy the harm without these attendant problems." West Hartford I, supra, 85 Conn. App. 21-23. The court found:

> It is undisputed that the state's attorney general, as the authorized representative of CRRA, has initiated two lawsuits seeking to recover approximately $200 million owed to CRRA by Enron. The attorney general is pursuing this claim in a bankruptcy proceeding now pending in federal court. Additionally, the attorney general has filed a separate civil action against the defendants alleging the same claims that the plaintiff has asserted here. Accordingly, in light of the third policy factor of *Ganim*, regarding the propriety of denying standing when a party with a more direct interest has asserted the same claim against the defendants in a different action, we conclude that the plaintiff lacks standing to bring its negligence and third party beneficiary claims because there is a more directly injured party, CRRA, that can vindicate its rights.

Id., 22.

B

There are undeniable similarities between the Ganim and West Hartford cases and the present cases. First, like the status of the defendant law firms in West Hartford, the connection of the moving defendants here to the towns is at least somewhat indirect. Plaintiffs argue vigorously to the contrary, but they cannot refute several facts. Initially, there are no allegations in the complaints that any moving defendant personally or as a corporate entity had any dealings

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> convinced that the plaintiff's claimed injuries are too indirect and remote with respect to the defendant's allegedly anticompetitive conduct for the plaintiff to recover under CUTPA.")

with the towns. In contrast, the plaintiffs allege that it is CRRA - not the moving defendants - that entered into contracts with the towns. (See Wright amended complaint, ¶ 7; Rowland complaint, ¶ 6; CRRA revised complaint, ¶ 6.)

Similarly, the plaintiffs allege that it is CRRA, rather than the plaintiffs themselves, that suffered harm from the defendants directly. In their principal allegation, the plaintiffs claim that "Enron Power Marketing began making its monthly payments *to CRRA* pursuant to the Enron Transaction in April 2001. These payments continued until Enron and Enron Power Marketing filed for protection under the bankruptcy laws on December 2, 2001. No further payments have been made." (Emphasis added.) (Rowland complaint, ¶ 66; CRRA revised complaint, ¶ 71.) Similarly, the plaintiffs, who participated with CRRA in a regional solid waste removal venture called the "Mid-Conn Project," allege that the defendants diverted $60 million received from the Enron transaction to the ultimate detriment of CRRA: "To facilitate their future illegal dealings with Enron, the Rowland Defendants further caused such $60,000,000 of assets belonging to the Mid-Conn Project to be diverted to a separate "Non-Project Ventures Fund" at CRRA, which project they intended to utilize to enter into further lucrative financial dealings with Enron-related entities *at the expense of CRRA* and/or public sources of financing." (Emphasis added.) (Rowland complaint, ¶ 58; CRRA revised complaint, ¶ 56.) Finally, the plaintiffs allege that many of the defendants caused a variety of other improper diversions of assets from CRRA, rather than from the towns: "During this time period, defendants Ellef and Wright, acting in combination with defendant Rowland and the other Rowland Defendants, *caused CRRA* to provide monetary benefits to defendant Rowland's supporters and political

allies. . . ." (Emphasis added.) (Rowland complaint, ¶ 15; see nearly identical allegation in CRRA revised complaint, ¶ 15.)

It is these direct losses to CRRA that, according to the complaint, CRRA then passed on to the plaintiff towns through increased tip fees. Specifically, the plaintiffs allege as follows:

> *Defendant CRRA has in the past and is to date attempting to impose the financial losses it has suffered* as a result of the CRRA-Enron Transaction, the diversion of funds and assets from the Mid-Conn Project, and the improper expenditure of CRRA funds *on the plaintiff Town* and the other municipalities participating in the Mid-Conn project as part of the "Net Cost of Operation" of the Mid-Conn Project chargeable to the participating municipalities pursuant to their contracts with CRRA.

(CRRA revised complaint, first count, ¶ 79; see nearly identical allegations in ¶ 67 and in Rowland complaint, ¶ 72.)[4]

These allegations reveal that the losses allegedly incurred by the plaintiffs derive from CRRA's losses. In the language of the prior excerpt from the complaint, CRRA has attempted to "impose [these] financial losses" on the towns. The plaintiffs label their losses "direct," but "the labels placed on the allegations by the parties is not controlling." Ganim, supra, 258 Conn. 348. Rather, where, as here, "the harms asserted to have been suffered directly by a plaintiff are in reality derivative of injuries to a third party, the injuries are not direct but are indirect, and the plaintiff has no standing to assert them." Id., 347-48. See also Vacco v. Microsoft Corp., 260 Conn. 59, 90-91, 793 A.2d 1048 (2002) (standing denied under CUTPA to consumer who sued computer manufacturer because manufacturer allegedly overcharged retailer, who then "passed

4 As explained elsewhere in the complaint, the "net costs of operation" determine the towns' service payment or tip fee. (CRRA revised complaint, ¶ 9.)

on either the whole overcharge or a part thereof to the plaintiff and other consumers.")[5]

The plaintiffs attempt to distinguish Ganim and West Hartford on the ground that in the present case they have alleged that the CRRA director and officer defendants owed a direct duty to the plaintiffs, or that all moving defendants, except apparently the CRRA directors, were in a conspiracy that acted in intentional disregard of the rights of the plaintiffs. This point does not withstand analysis.[6] To begin with, the essence of the plaintiffs' breach of duty claims against

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This case may prove a stronger one for denying standing than Ganim and West Hartford in that the allegations here purport to establish not only that CRRA was the more directly injured party, but also that it may be more directly responsible for causing harm to the plaintiffs than are the other defendants. The plaintiffs, for example, allege that CRRA's attempt to impose its financial losses on the towns and its improper diversions and expenditures "[constitute] a breach of defendant CRRA's contracts with the plaintiff Town and the other municipalities participating in the Mid-Conn Project, including the covenant of good faith and fair dealing inherent in all of such contracts." (CRRA revised complaint, ¶ 81.) Based on these allegations of direct harm, the court has allowed the plaintiffs' suit against CRRA to go forward, thus giving the plaintiffs a possible equitable remedy against a party only one step away in the chain of transactions. In contrast, the moving defendants, and particularly the private defendants, are at least several steps away from causing harm to the plaintiffs. (Rowland complaint, ¶¶ 13-73.) As the Ganim court stated, "[t]hat fact alone is strongly suggestive of remoteness." Ganim, supra, 258 Conn. 355. In this situation, the proper solution appears to be to allow the plaintiffs to sue CRRA insofar as it was a participant and allow CRRA, as victim, to sue the other responsible parties. Allowing both the plaintiffs as well as CRRA to sue the third parties would implicate the second part of the Ganim test for dismissing indirect complaints, which cautions against requiring the court "to adopt complicated rules apportioning damages among plaintiffs removed at different levels of injury from the violative acts, in order to avoid the risk of multiple recoveries." Ganim, supra, 353.

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The plaintiffs in Rowland do not emphasize their additional counts alleging violation of the Connecticut Unfair Trade Practices Act ("CUTPA"), General Statutes § 42-110a et seq., theft, unjust enrichment, and misrepresentation. Our appellate courts have held that the Ganim policy analysis applies to CUTPA claims, see Vacco v. Microsoft Corp., supra, 260 Conn. 90; West Hartford, supra, 85 Conn. App. 22, and there is no reason to believe that it does not apply to the other causes of action alleged here. Therefore, the

the officers and directors of CRRA is that they approved the Enron transaction and made or approved the improper expenditures to the detriment of CRRA or the Mid-Conn Project. The allegations of wrongdoing against these defendants do not specifically include a breach arising from any approval they provided for increased tip fees.[7] Instead, the plaintiffs allege that it is CRRA that raised tip fees. (CRRA revised complaint, ¶ 67, count one, ¶ 79, count two, ¶ 82; Wright amended complaint, ¶ 24.)[8]

The same is essentially true with regard to the allegations of conspiracy. The plaintiffs allege generally that the Rowland defendants and the Republican Governors Association conspired "with intentional disregard of the rights of the plaintiff Towns and the other

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analysis is the same for these counts.

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E.g. Rowland complaint, count one, ¶ 83 ("The actions of defendants Ellef and Wright in recommending, causing and approving the CRRA-Enron Transaction and the diversion of funds and assets from the Mid-Conn Project, and in causing and approving the improper expenditures of CRRA funds as aforesaid, breached their fiduciary duties to the plaintiff Towns and the other municipalities participating in the Mid-Conn project."); CRRA revised complaint, count four, ¶ 82 ("The actions of the CRRA Board Defendants in approving the CRRA-Enron Transaction, in approving the diversion of funds and assets from the Mid-Conn Project, and in causing and approving the improper expenditures of CRRA funds as aforesaid breached their fiduciary duties to the plaintiff Town and the other municipalities participating in the Mid-Conn project.") See also Wright amended complaint, ¶ 27 (a)-(y).

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Had the plaintiffs alleged that the officer and director defendants breached their duties in approving increased tip fees, a question might have arisen as to the applicability of General Statutes § 22a-261 (n). In pertinent part, the statute provides; "[N]or shall any director, member or officer of the authority be personally liable for damage or injury, not wanton or wilful, caused in the performance of such person's duties and within the scope of such person's employment or appointment as such director, member or officer." The defendants, in any event, do not raise this statute as a basis for dismissal.

municipalities participating in the Mid-Conn Project" (E.g. Rowland complaint, count five, ¶ 84.) However, the more specific allegations focus on the ultimate *effect* the defendants' actions had on the towns rather than any direct action that the defendants took against the towns.[9] Further, the allegations reveal that the object of the defendants' conspiracy was to plunder CRRA rather than harm the towns. Thus, the plaintiffs allege: "Beginning in or prior to February 1997 and continuing through at least the beginning of 2002, the Rowland Defendants entered into an unlawful scheme to take control *of CRRA* and use it (i) to obtain illegal financial benefits for themselves and their allies; and (ii) to provide multi-million dollar financial benefits to others in return for payments to defendant Rowland's political campaigns and to the defendant RGA." (Emphasis added.) (Rowland complaint, ¶ 13.) Hence, the allegations of conspiracy do not show a direct injury to the towns.

Absent such a showing of direct injury, claims of breach of duty or conspiracy do not confer standing. The Ganim plaintiffs also alleged that the defendants breached duties to the plaintiffs and conspired among themselves, but those allegations did not create standing. See Ganim, supra, 258 Conn. 340-42. The Ganim court recognized that duty and standing are related

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9 E.g. Rowland complaint, ¶ 59 ("Such diversion of the Mid-Conn Projects was illegal and *had the effect of* increasing the Net Cost of Operation of the Mid-Conn Project, to the financial detriment of participating municipalities.") (Emphasis added.); ¶ 66 ("As a result of the Rowland defendants' conduct, $60 million of assets of the financially independent Mid-Conn Project were diverted into CRRA's own accounts, undermining the Mid-Conn Project's financial stability, *with potentially serious consequences to the municipalities* required to back the Mid-Conn Project, as well as to Mid-Conn Project bondholders.") (Emphasis added.)

concepts, but refused to approve standing "where the connection is so palpably indirect that it would serve no useful purpose to transform what is essentially a question of standing into a question of the legal sufficiency of the complaint." Ganim, supra, 364. The court added that its "conclusion that the plaintiffs lack standing because the harms they claim are too remote from the defendants' misconduct, and are too derivative of the injuries of others, cuts across and applies to all of the plaintiffs' substantive claims as alleged in the various counts of the complaint." Id., 365.

Similarly, in West Hartford, the plaintiffs alleged negligence, which obviously includes duty, and breach of contracts of which they were third party beneficiaries. West Hartford, supra, 85 Conn. App. 15, 19. Further, the defendant law firms served as legal counsel for the CRRA, id., 18, and thus had a close, confidential agency relationship with the state entity that dealt directly with the plaintiff towns. This close relationship, however, was not enough to confer standing on the towns. Although the West Hartford court did not specifically address the import of the plaintiffs' chosen causes of action, it nonetheless dismissed on standing grounds because "there is a more directly injured party, CRRA, that can vindicate its rights through direct litigation." Id., 22-23.

Thus, the lesson from Ganim and West Hartford is that the controlling factors in deciding standing in this situation are the actual directness of the connection between the plaintiffs and the defendants, the degree of separation between them, and the presence of a more directly injured or responsible party, rather than the title of the legal theory drafted by the plaintiffs or the labels attached by them to their causes of action. That is, the standing inquiry focuses on injury, not

duty. In the present cases, despite the allegations of breach of duty and conspiracy, no moving defendant is any closer to the towns than were the law firms that the Appellate Court in West Hartford nonetheless found too far removed to justify suit. Similarly, no moving defendant had a contract with or otherwise dealt directly with the towns, as did defendant CRRA in the CRRA case. Here, according to the allegations, CRRA is both the party most directly injured by the defendants and the party most directly responsible for the plaintiffs' own injury. Under these circumstances, the harms allegedly caused by the other defendants are "remote, indirect, or derivative with respect to the defendants' conduct. . . ." Ganim, supra, 258 Conn. 347. The plaintiffs lack standing for this reason alone. See id.

C

A second similarity between West Hartford and the present cases is that in both cases CRRA, through the state attorney general under specific legislative authority as well as on its own, is pursuing a recovery of the funds at issue. See West Hartford, supra, 85 Conn. App. 22-23; General Statutes § 22a-268c.[10] Some relevant facts appear undisputed. First, as mentioned

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Section 22a-268c provides:
Notwithstanding any provision of the general statutes, the Attorney General shall have supervision over all legal matters and claims of the Connecticut Resources Recovery Authority arising from the Connecticut Resources Recovery Authority-Enron-Connecticut Light and Power Company transaction. The Attorney General may appear for the Connecticut Resources Recovery Authority in all civil suits and other civil proceedings arising from said transaction, and all such suits and proceedings shall be conducted by the Attorney General or under the direction of the Attorney General.
The court disagrees with the defendants' arguments that this statute gives the attorney general exclusive authority to file suit concerning the CRRA-Enron transaction. The statute does not say that. See Commission on Human Rights and Opportunities v. Board

earlier, the attorney general has initiated suit against the principal participants in the Enron loan transaction, including Enron Corporation, Enron's officers and directors, CL&P, certain banks and rating agencies involved, and the law firms that advised CRRA in this matter. See West Hartford, supra, 85 Conn. App. 22.[11] Second, the attorney general has recovered approximately $111 million of the approximately $200 million that Enron has failed to pay. Id., 19.[12]

The plaintiffs make no allegations in their complaints about this matter. Their brief admits that "CRRA has recovered some of the Mid-Conn Project's losses. . . ." but adds that CRRA "has not reimbursed the participating municipalities for any of the improper costs imposed to date, has not announced any plans to reverse the increases in the increased charges

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of Education, 270 Conn. 665, 719-22, 855 A.2d 212 (2004). Further, the statute does not address any of the improper diversions and transactions alleged by the plaintiffs to be unrelated to the Enron matter, and thus could not conceivably preclude suit by the towns concerning those matters. The statute may serve the purpose of clarifying the attorney general's authority, because CRRA "shall not be construed to be a department, institution or agency of the state. . . ," General Statutes § 22a-261 (a), and thus the attorney general otherwise might not have authority to represent it all. See General Statutes § 3-125. Moreover, the statute reveals the special importance that the legislature has given to the attorney general's efforts to recover resources on behalf of CRRA. Today's decision is consistent with that legislative initiative.

11

The suit against the law firms, Connecticut Resources Recovery Authority v. Murtha, Cullina, LLP, Docket No. (X02) CV 02-0174569, is assigned to the court's docket. In addition to the named defendant, the defendants are Hawkins, Delafield & Wood, and LeBoeuf, Lamb, Greene & MacRae, LLP.

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At the evidentiary hearing discussed infra, the evidence revealed that, prior to its bankruptcy, Enron made eight monthly payments of $2.2 million on the $220 million loan, for a total of $17.6 million. Enron also made eight additional monthly payments of approximately $175,000, for a total of $1.4 million, although these payments did not go into the Mid-Conn account until 2003. The balance is approximately $200 million.

going forward and, indeed, has publicly announced that it will not devote any part of any recovery that it does obtain to reimbursing the municipalities for their [increased] expenditures." (Plaintiff New Hartford's consolidated memorandum of law, pp. 14-15.)

Because of the evidentiary dispute about the sufficiency of CRRA's efforts, the fact that this dispute exists outside of the pleadings, and the request in the plaintiffs' brief for an evidentiary hearing based on their dispute of many of the factual assertions in affidavits supplied by the defendants, the court allowed the plaintiffs to conduct discovery on this issue and then conducted a three day evidentiary hearing. See Standard Tallow Corp. v. Jowdy, 190 Conn. 48, 55-60, 459 A.2d 503 (1983). Based on this evidentiary hearing, the court makes the following factual findings. First, the attorney general has aggressively pursued recovery of the approximately $200 million lost in the Enron transaction. The $111 million recovered has not directly reduced the tip fees paid by the towns but, in accordance with an agreement with its bond trustee, CRRA has used the recovery to defease its debt to the state and other investors. The net effect of this approach has been to reduce costs, keep the project secure, mitigate the need for future tip fee increases, and at least preserve the possibility of rebates to the towns.

Second, contrary to the plaintiffs' allegations, there was ultimately no significant diversion of monies out of the Mid-Conn project as a result of the $60 million payment that CL&P made to CRRA in the Enron transaction.[13] CRRA used most of these funds to acquire

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While the court must initially presume the truth of the plaintiffs' allegations, see Ganim, supra, 258 Conn. 326, that principle does not apply when, as here, the parties dispute factual allegations that go to jurisdiction and an evidentiary hearing takes place. See Knipple v. Viking Communications, Ltd., 236 Conn. 602, 608 & n.10, 674 A.2d 426

land and electric generating equipment from CL&P, to purchase environmental remediation insurance, and to set up a reserve account. CRRA initially accounted for these assets in a "Non-Project Ventures Fund," which CRRA described as an account for a "yet to be formed entity" separate from the Mid-Conn Project. (CRRA Annual Financial Report, June 30, 2001, pp. 5-6 (Plaintiff's Exhibit 301.)) By fiscal year 2003, however, CRRA had eliminated the Non-Project Ventures Fund and transferred these assets to the Mid-Conn account. Thus, whatever the motivation for the initial creation of the Non-Project Ventures Fund, in the long run there was no significant diversion of these monies and no concomitant need for CRRA or the attorney general to initiate litigation to pursue a recovery of this sum.

It is true, as the plaintiffs emphasize, that CRRA has not credited revenues from jet turbines that it purchased to the Mid-Conn account. But there are also some new expenses, stemming from the turbines and the operation of other electric generating facility equipment, that CRRA has not charged against the account. This accounting approach has not harmed the towns financially but instead has helped maintain the opportunity for lower tip fees in the future. In any event, the treatment of these items stems from CRRA's interpretation of its obligations under its bond indenture rather than any improper attempt to divert revenues from the Mid-Conn project.

A third category of losses that allegedly harmed the towns involves various other CRRA

(1996). In any event, the purpose of finding whether the alleged diversion took place is to determine whether there was any failure of CRRA or the attorney general to recover diverted monies which, under Ganim, clearly is a disputed jurisdictional issue outside of the pleadings.

transactions, consisting of the gratuitous transfer of garbage trucks to a private firm, a donation to the National Geographic Society, the payment of certain bonuses, and the reimbursement of excessive travel, meal, and personal expenses, that the plaintiffs allege CRRA to have undertaken for largely political reasons and with no valid business purpose. CRRA, at times with the assistance of the attorney general, has recovered much of the loss associated with the trucks and the donation, and at least some of the expense money. Efforts to recover additional monies continue. In some cases, the expected cost of recovering small amounts of money improperly spent is greater than the potential benefit, and CRRA has essentially made a business decision not to pursue such recoveries.[14]

14

In Wright, the towns also allege that, at all relevant times, they "owned the Mid-Connecticut project and all its assets." (Wright amended complaint, ¶ 9.) They then allege in slightly different terms that, as a result of the Enron transaction, "the land and property assets transferred to CRRA were not held for the sole and exclusive benefit of the municipalities participating in the Mid-Connecticut project. . . ." (Wright complaint, ¶ 22.) In CRRA and Rowland, the towns, while not alleging that they "own" the Mid-Conn assets, claim that the $60 million transfer and the improper expenditures amounted to a "diversion of funds and assets from the Mid-Conn Project." (CRRA revised complaint, e.g., first count, ¶ 81; Rowland complaint, ¶¶ 79, 81.) Section 615 of the contract between CRRA and the towns is entitled "No Vested Rights" and provides as follows: 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 or liquidation of the System, as provided by law for the 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 plain language of this provision makes clear that the towns do not own or have any vested rights in the "System" (defined in § 101 to include "the Facility (in turn defined in § 101 to mean the "Authority's resources recovery facilities constituting part of the System and located in Hartford, Connecticut"), transfer stations, disposal site or sites and such alternative site or sites, for processing or disposal of Solid Waste"). Because, then, the plaintiffs do not have vested or ownership rights in Mid-Conn project assets, there is no need in these cases to determine whether the attorney general and CRRA have recovered every specific

CRRA's efforts to recover its lost monies, and other CRRA efforts to increase revenues and reduce costs, are part of a financial mitigation plan mandated by the General Assembly in the wake of the Enron transaction. General Statutes § 22a-268d (a) provides that CRRA shall create a plan "to minimize tipping fees for municipalities that have entered into solid waste disposal services contracts with the authority." The plan shall "[detail] the efforts that the authority [CRRA] has made to reduce the amount necessary to borrow from the state, including, but not limited to, the reduction of general administration and costs, renegotiation of vendor contracts, efforts to increase the price paid for the sale of steam and electricity, efforts to assess the viability of the sale of hard assets of the project and an analysis of the staffing levels, performance and qualifications of staff and members of the board of directors." General Statutes § 22a-268d (a). Similarly, in General Statutes § 22a-268c, the legislature required CRRA to include in its annual report "a description of the efforts of the authority to mitigate the effects of the loss of revenue from the Connecticut Resources Recovery Authority-Enron-Connecticut Light and Power Company transaction."

Thus, CRRA and the attorney general, at least partly as a result of legislative mandate, have made substantial and fruitful efforts to mitigate the impact of the Enron transaction and the

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Mid-Conn fund or asset allegedly diverted. Rather, to the extent that these recovery efforts are relevant to the underlying question of standing, the main focus should be on whether these efforts will likely reduce or stabilize tip fees, which clearly do have an impact on the towns. Although the contract also provides that, upon disposition or liquidation of the System, the towns "shall receive a payment or payments as determined by the Authority consistent with the Municipality's interest therein, if any," this provision is simply too vague and contingent to affect the standing inquiry. The evidence established, moreover, that CRRA has no present plans to dispose of or liquidate the Mid-Conn project.

other alleged improprieties on the towns. To a large extent, then, CRRA is a "directly injured [party] who can remedy the harm without [the] attendant problems" of determining responsibility in suits by more indirectly injured parties such as the plaintiffs here. Ganim, supra, 258 Conn. 353.

It is true that CRRA, as represented by the attorney general, has not adopted the identical legal strategy of the towns, and instead has sued different entities. Further, while CRRA and the attorney general have recovered a high percentage of the lost or diverted assets, and efforts to recover more continue, it is unlikely that they will recover the exact amount lost to the CRRA and, indirectly, the towns.[15] Finally, it is true that, despite the recovery efforts of the attorney general and CRRA, the tip fees charged to the towns have risen from $51 per ton in fiscal year 2002 to a current rate of $70 per ton.

15

Of particular note in the category of unrecovered losses are some glaringly exorbitant travel expenses that CRRA paid for matters that did not relate to legitimate CRRA business. For example, on June 14, 2001, CRRA reimbursed The Kowalski Group, L.L.C., $5,607.02 for "lobbying and consulting services" that consisted of the attendance of Linda Kowalski at the Republican Leadership Conference in San Juan, Puerto Rico. Kowalski billed one meal at a restaurant for $355.15. On her hotel bill are four entries for "in room" breakfast costing at least $22 each, one entry for in-room lunch at $44.28, one for in-room dinner at $19.88, two entries for "honor bar" at $8.50 each, and five entries for "the spa/salon" costing at least $100 each. (Plaintiffs' Exhibit 25.) While the evidence revealed that, at most, the total amount of various types of illegitimate expenditures was approximately $100,000, and that the loss of this money over seven years may have resulted in an increase in tip fees paid by the towns of only several cents per ton of solid waste per year, even this loss represents a blatant and callous misuse of CRRA's resources and, ultimately, those of the towns and their taxpayers. CRRA has made some efforts to recover this money but, regardless of the outcome of this case, CRRA and all other state agencies should pursue full reimbursement with vigilance to redress these violations of the public trust.

As the Ganim court stated, however: "[t]he fact . . . that the suits of those other, primary victims may not duplicate the relief sought by these plaintiffs does not automatically confer standing on these plaintiffs to bring their otherwise remote and derivative claims." Ganim, supra, 258 Conn. 361-62. Indeed, as long as the more directly injured parties are "free to seek redress," even if they have not done so, the Ganim analysis applies. Connecticut State Medical Society v. Oxford Health Plans, Inc., 272 Conn. 469, 474, 863 A.2d 645 (2005); See also Ganim, supra, 258 Conn. 359 ("the *availability* of such other remedies by other parties who are directly harmed greatly reduces the need for confronting the enormous difficulties in sorting out the questions of causation and damages demonstrated by the first two factors.") (Emphasis added.) Further, as noted, the plaintiffs have filed a direct action against CRRA, the court has denied CRRA's motion to dismiss, and the plaintiffs are now free to go forward and attempt to obtain equitable relief from the party that they allege is the most directly connected to them. For all these reasons, as well as for the reasons stated in § I.B. above, the plaintiffs lack standing to sue the moving defendants.

II

Defendant Rowland raises several additional subject matter jurisdiction claims. First, he claims that the towns lack authority to sue under the Home Rule Act, General Statutes § 7-148. That act, however, provides that a town has authority to "sue and be sued, and institute, prosecute, maintain and defend any action or proceeding in any court of competent jurisdiction." General Statutes § 7-148 (c) (1) (A). While Rowland suggests that this authority applies only to matters of local concern, this case, involving alleged losses of several hundred million dollars of

CRRA assets that could affect the rates that towns pay for removal of their solid waste, unquestionably has an impact on both local as well as statewide concerns. See also Ganim, supra, 258 Conn. 365-68 (lack of standing, not Home Rule Act in itself, bars municipal suit against gun manufacturers).

Second, Rowland argues that sovereign immunity bars this suit. The plaintiffs might have avoided the necessity of having to address this issue altogether had they specified in their complaint that they were suing the former Governor in his individual capacity rather than his official capacity. Nonetheless, it is clear from the fact that they seek relief from Rowland personally rather than from the state treasury that the plaintiffs sue Rowland in his individual capacity. See Spring v. Constantino, 168 Conn. 563, 568, 362 A.2d 871 (1975). That being the case, Rowland is not entitled to sovereign immunity. See Miller v. Egan, 265 Conn. 301, 307, 828 A.2d 549 (2003). Although he would have been entitled to statutory immunity under General Statutes § 4-165 if his acts were not wanton and wilful,[16] Rowland specifically disclaims this defense. See Tuchman v. State, 89 Conn. App. 745, 763-65, ___ A.2d ___ (2005) (Rowland's reply memorandum, page 10).[17]

16

General Statutes § 4-165 states in pertinent part:
No state officer or employee shall be personally liable for damage or injury, not wanton, reckless or malicious, caused in the discharge of his duties or within the scope of his employment.

17

In view of the disposition of the case, the court does not address Rowland's additional argument that, in a suit against a government official, the complaint must establish that the defendant violated a duty owed to the plaintiff and that the complaint fails to do so here. The court notes only that the appellate authority cited by Rowland is limited to zoning cases. See, e.g., Lewis v. Swan, 49 Conn. App. 669, 677, 716 A.2d 127 (1998).

III

Accordingly, the court grants the motions to dismiss. In view of the court's ruling, there is no need to reach the in personam jurisdiction claims raised by several of the defendants.

It is so ordered.

Carl J. Schuman
Judge, Superior Court