STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS
Filed – June 25, 2010

PROVIDENCE, SC. **SUPERIOR COURT**

PATRICK J. MARSO	:	
	:	
V.	:	**C.A. No. PB 07-6054**
	:	
BRADFORD SOAP INTERNATIONAL, INC., THE ORIGINAL BRADFORD SOAP WORKS, INC., BRADFORD SOAP MEXICO, INC., AND HEWITT SOAP WORKS, INC.	:	

DECISION

SILVERSTEIN, J. This matter is before the Court for decision following a bench trial. The Plaintiff[1] Patrick J. Marso (Plaintiff or Marso) alleges that Defendants, Bradford Soap International, Inc., The Original Bradford Soap Works, Inc., Bradford Soap Mexico, Inc., and Hewitt Soap Works, Inc. (collectively, Defendants or Bradford) have failed to pay Plaintiff compensation due for services rendered to Defendants. Defendants admit owing Plaintiff deferred compensation in the amount of $300,176 but deny owing Plaintiff any other forms of compensation including but not limited to amounts accruing from a long-term investment plan and bonuses.

I
Facts and Travel

Bradford Soap International, Inc. (Bradford International) is a closely held Rhode Island corporation that specializes in the production of a broad range of soaps and cleansing products. The Original Bradford Soap Works, Inc., Bradford Soap Mexico, Inc., and Hewitt Soap Works,

[1] Although in their memoranda the parties have referred to themselves as "Petitioner" and "Respondents" based upon the judgment in the connected receivership proceedings, the terms Plaintiff and Defendants are used herein in accordance with the filing of an amended complaint by Patrick J. Marso.

Inc. are also Rhode Island corporations and each is a wholly owned subsidiary of Bradford International. John Howland (Howland) is the Chief Executive Officer, President, and Chairman of the Board of Directors of Bradford International. In 1999, Bradford International approached Argus Management Corporation (Argus), a turnaround management firm, regarding the possible turnaround of its subsidiary in the United Kingdom. Subsequently, Argus, under an agreement with Bradford International, engaged Mentor Partners, LLC (Mentor) to help restructure Bradford International's operation in the U. K. Steven LeGraw (LeGraw) and Marso were the principals of Mentor.

Pursuant to the Argus Mentor agreement, Marso relocated to the U.K. to begin the restructure and attempted turnaround of Bradford Soap Works UK, LLC. Under this agreement Bradford International paid Argus, which in turn paid Mentor, for Marso's services. While in the UK Marso reported to LeGraw. In 2001, Bradford International contracted directly with Mentor for Marso's services. See Ex. 1. Bradford International and Mentor executed an agreement (Bradford Mentor Agreement) that established Marso as an independent contractor and the Executive Vice President of The Original Bradford Soap Works, Inc. (Original Bradford). The Bradford Mentor Agreement outlined Marso's compensation which included salary, success fee, annual incentive, Long Term Incentive Plan (LTIP) participation, and completion bonus. (Ex. 1 ¶ 3.)

By the end of 2002 Marso was focusing on the U.S. side of Bradford business, including due diligence associated with Bradford International's acquisition of Hewitt Soap Works (Hewitt). As of January 1, 2003 Marso was no longer paid by Mentor for the services he rendered under the Bradford Mentor Agreement, but rather was paid directly by Original Bradford. Starting in August of 2004 Marso's focus was on Bradford International's tolling

arrangement with and subsequent acquisition of the Jean Charles Company (Jean Charles) by Bradford Soap Mexico (Bradford Mexico).

At the time of the execution of the Bradford Mentor Agreement, Bradford owed Mentor $127,345 of deferred compensation. According to a settlement between LeGraw and Marso, Marso is entitled to that compensation. (Ex. 2.) Marso chose to defer this compensation in addition to certain compensation due under the Bradford Mentor Agreement, including a portion of his salary from January 2003 through 2004, and bonuses for 2002 and 2003 under paragraph 3(c) of the Bradford Mentor Agreement. The parties agreed that the compensation would accrue at the rate of prime minus one percent.

Marso's employment with Bradford was not extended beyond the April 2, 2006 termination date in the Bradford Mentor Agreement. Marso and Howland continued to have discussions regarding how Bradford was going to pay the various compensation amounts allegedly owed to Marso. Marso received fourteen payments as part of his deferred compensation totaling $480,000. An interim arrangement was established to make payments until Bradford International completed certain bank refinancing plans. On November 13, 2007 Marso filed a petition in this Court seeking the appointment of a liquidating receiver for the Defendants. On March 17, 2008 the Court denied Plaintiff's application for a liquidating receiver but permitted the Plaintiff to amend the receivership petition and file an amended complaint addressing his underlying contractual claims. Plaintiff filed the instant Amended Complaint seeking deferred compensation, a success fee,[2] a 2005 annual bonus, and LTIP compensation.

[2] During the trial no evidence was presented to the Court concerning Count II alleging compensation due and owing Plaintiff in the form of a success fee. Therefore, the Court will not discuss it in depth and finds that the Defendants do not owe Marso a success fee.

II
Standard of Review

The Court decides non-jury trials pursuant to its power under Rule 52, which provides that "[i]n all actions tried upon the facts without a jury . . . the court shall find the facts specially and state separately its conclusions of law thereon." Super. R. Civ. P. 52(a). Under Rule 52, "the trial justice sits as a trier of fact as well as law." Parella v. Montalbano, 899 A.2d 1226, 1239 (R.I. 2006) (quoting Hood v. Hawkins, 478 A.2d 181, 184 (R.I. 1984)). As a result, the trial justice "weighs and considers the evidence, passes upon credibility of the witnesses, and draws proper inferences." Id. Furthermore, an extensive analysis and discussion of the evidence and testimony is not required to comply with the mandates of Rule 52. "Even brief findings and conclusions are sufficient if they address and resolve the controlling and essential factual issues in the case." Hilley v. Lawrence, 972 A.2d 643, 651 (R.I. 2009) (quoting Donnelly v. Cowsill, 716 A.2d 742, 747 (R.I. 1998) (citation omitted)).

III
Discussion

In the instant matter the Plaintiff seeks payment of compensation allegedly due as a result of his provision of services to Defendants for the period February 16, 2001 through April 2, 2006. Defendants contend that upon termination of the Bradford Mentor Agreement, Bradford remained liable to pay Mentor only those obligations which accrued through the date of termination and therefore they are not liable for all of the allegedly due compensation. Further, Defendants argue that the Court should exclude from evidence certain exhibits admitted de bene esse[3] by the Court, which they believe fall within the coverage of Rule 408 of the Rhode Island Rules of Evidence.

[3] De bene esse is a Latin phrase meaning "of well-being." In the legal context, evidence admitted de bene esse is conditionally allowed for the present, in anticipation of a future need. Black's Law Dictionary 460 (9th ed. 2009).

A
Rule 408 Admissibility

As a preliminary matter, the Court must address whether Exhibits 5, 7, 8.1, 8.3, and 9, which were admitted by the Court de bene esse, shall be excluded from evidence under Rule 408.[4] Rule 408 states in pertinent part that:

> "Evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount. Evidence of conduct or statements made in compromise negotiations is likewise not admissible. This rule does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations. This rule also does not require exclusion when the evidence is offered for another purpose . . ." R.I. R. Evid. 408.

It is well-settled under Rhode Island law that offers to compromise and evidence of settlement negotiations generally are not admissible into evidence. Votolato v. Merandi, 747 A.2d 455, 461 (R.I. 2000) (citing Vingi v. Trillo, 77 R.I. 55, 59, 73 A.2d 43, 45 (1950); Salter v. Rhode Island Co., 27 R.I. 27, 30, 60 A. 588, 589 (1905)). The general purpose of the exclusion of such evidence is to facilitate compromise among parties and encourage alternatives to litigation. Id. (citing Salter, 27 R.I. at 30, 60 A. at 589). Therefore, the initial question to be answered by the Court is whether the exhibits in question are evidence of compromises and offers to compromise, or of "statements made in compromise negotiations." R.I. R. Evid. 408.

Exhibit 5 is an internal Bradford document which Howland testified he received from a company director. (Tr. February 9, 2009 525:19-20.) The document, which was prepared as a result of Bradford contemplating a mezzanine loan opportunity, provides a value for Marso's

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Here, the Court, also sitting as the trier of fact, admitted Exhibits 5, 7, 8.1, 8.3, and 9 conditionally, subject to the Court's analysis of their possible exclusion under Rule 408 of the Rhode Island Rules of Evidence.

[4] Although the Court originally excluded these exhibits under Rule 408 during the receivership hearings, that was without the full benefit of the instant trial.

LTIP compensation. (Tr. February 9, 2009 525:23-25; 526:1.) Exhibit 9 is an email sent by Howland to Marso. The content of the email received by Marso is actually another email that was sent by Howland to his attorneys and contains the "calculation of the amounts due to Pat Marso as of June 30, 2006." Similarly, Exhibit 8.1, an email sent by Howland to Marso, includes another email that was sent by Howland to his attorneys and details how Marso's 2005 bonus was calculated. Exhibit 8.3, which was an attachment on both the original email in Exhibit 8.1 sent by Howland to his attorneys and the subsequent email sent to Marso, is a calculation of Marso's 2005 bonus based on the EBITDA of Bradford Soap Mexico, Inc. Exhibit 8.3 was originally sent to Howland by the then Chief Financial Officer of Bradford International.

Exhibits 5, 8.1, 8.3, and 9 do not contain an offer or an acceptance of an offer of compromise to fall within the exclusion of Rule 408. However, Rule 408 also excludes "[e]vidence of conduct or statements made in compromise negotiations." R.I. R. Evid. 408. There is no bright-line rule governing whether evidence constitutes settlement material for purposes of Rule 408. ESPN, Inc. v. Office of Com'r of Baseball, 76 F.Supp.2d 383, 410 (S.D.N.Y. 1999). Often the communications constitute settlement negotiations when it is contemplated that litigation might be necessary, the parties retain counsel, and counsel for the parties indicate that litigation is possible. Pierce v. F.R. Tripler & Co., 955 F.2d 820, 827 (2nd Cir. 1992); see also 29 Am. Jur. 2d Evidence § 523 (citing Olin Corp. v. Insurance Co. of North America, 603 F. Supp. 445 (S.D.N.Y. 1985)); ESPN, Inc., 76 F.Supp.2d at 410 (court found that the introductory language of both letters evidence that defendant's proposed changes to the agreement arose in the context of settlement discussions with the plaintiff). When parties have not reached the point of threatened litigation then communications between the parties do not

constitute compromise negotiations. 29 Am. Jur. 2d Evidence § 523 (citing In re B.D. Intern. Discount Corp., 701 F.2d 1071 (2nd Cir. 1983); Crues v. KFC Corp., 768 F.2d 230 (8th Cir. 1985); Prudential Ins. Co. of America v. Curt Bullock Builders, Inc., 626 F. Supp. 159 (N.D. Ill. 1985)); see also Big O Tire Dealers v. Goodyear Tire & Rubber Co., 561 F.2d 1365, 1372-73 (10th Cir. 1977) (court found correspondence between parties prior to the filing of an action "business communications" rather than "offers to compromise" and thus outside scope of Rule 408).

The Court is satisfied that nothing in Exhibits 5, 8.1, 8.3, or 9 indicates that at the time of these communications the parties were engaging in any type of settlement negotiations. Exhibit 5 is an internal document that was prepared in connection with a possible mezzanine loan for Bradford International. (Tr. February 9, 2009 525:23-25; 526:1.) Testimony reveals that the document, which indicates that contracts with Legraw and Marso were contemplated when structuring the possible loan transaction, was first given to Marso as an indication of the value that would govern his LTIP and not as any sort of offer or compromise. (Tr. February 4, 2009 106:1-4.) In the same vein, Exhibits 8.1, 8.3, and 9 are emails or attachments to emails sent to Marso from Howland that have no language indicating the existence of a disputed claim or ongoing negotiations. The emails, which were also sent to Defendants' counsel, simply state "the calculation of amounts due to Pat Marso as of June 30, 2006" and the methods for reaching such calculated amounts. Without any language indicating an offer or an ongoing dispute with Marso, the Court declines to find that the parties had reached a point of threatened litigation. Therefore, the communications do not constitute compromise negotiations and Exhibits 5, 8.1, 8.3, and 9 are not excluded under Rule 408.

According to the Defendants, Exhibit 7 should also be excluded under the language and purpose of Rule 408. Exhibit 7 is a chain of emails concerning the "Pat Marso Interim Arrangement." Again, there is no indication from the emails that there is an ongoing dispute or that the parties had reached a point of "threatened litigation." Pierce, 955 F.2d at 827; see also ESPN, Inc., 76 F.Supp.2d at 410. Although the parties are discussing an "interim arrangement" regarding Marso's compensation payments, the communications only concern a payment schedule and never dispute the validity or amount of compensation. Further, courts have found that "[a] mere effort to buy time in which to pay an obligation, even though the validity of the obligation is later disputed, is not an attempt to compromise a disputed claim and so does not implicate Rule 408." Prudential Ins. Co. of America, 626 F. Supp. at 165 (citing In re B.D. International Discount Corp., 701 F.2d 1071, 1074 n. 5 (2nd Cir. 1983)). Accordingly, the communications in Exhibit 7, concerning attempts to establish an interim arrangement for payment to Marso, should not be excluded under Rule 408, particularly in light of language acknowledging Bradford International's financial obligations to Marso rather than disputing them.

B
Compensation

This Court must now determine the types and amount of compensation Defendants owe Plaintiff. Plaintiff contends that he is owed compensation based on services he rendered to Defendants, including deferred salary compensation, various bonuses, a success fee, and LTIP compensation. Defendants dispute the amount of compensation owed to Plaintiff as well as his entitlement to a 2005 bonus, a success fee, a completion bonus, and LTIP compensation.

It is undisputed that on February 16, 2001 Bradford International entered into an agreement with Mentor for Marso's services. (Ex. 1.) Under the Bradford Mentor Agreement,

Marso's compensation was composed of five basic components: a weekly salary, a success fee, an annual incentive, LTIP participation, and a completion bonus. (Ex. 3 ¶ 3.) Defendants argue that when Marso became a full time employee of Original Bradford on January 1, 2003 the Bradford Mentor Agreement terminated and Bradford International was only liable to pay Mentor "obligations accrued through the date of termination. . . ." (Ex. 1 ¶ 10(e)(i).)

The Court does recognize that as of January 1, 2003 Marso was no longer an independent contractor for Bradford International but rather became a full time employee of Original Bradford. Marso was no longer paid by Mentor but instead received payments directly from Original Bradford, from which appropriate tax deductions were withheld. (Tr. February 5, 2009 207:22-25; 208:1-3.) Defendants argue that Marso's commencement of full time employment constituted a tacit agreement to discharge the remaining performance under the Bradford Mentor Agreement. Defendants cite to F. A. Bartlett Tree Expert Co. v. Barrington, 233 N.E.2d 756, 758 (Mass 1968) for the proposition that far reaching changes in an employment agreement strongly suggest that the parties have abandoned their old arrangement and have entered into a new relationship. In F. A. Bartlett Tree Expert Co., the court found that substantial changes in the employee's salary, territorial duties, and position evidenced that a seventeen year old employment contract was abandoned and rescinded by mutual consent. Id. at 587.

However, in the instant matter the conduct of the parties from January 1, 2003 until at least May 9, 2006, over a month after Marso's employment terminated, is consistent with the intention that the compensation and termination terms of the Bradford Mentor Agreement be continued in effect. In a memo from Howland on April 24, 2004, Howland states that "[u]nder Section 3(c) of Pat Marso's Employment Agreement date February 16, 2001, he is entitled to receive Annual Incentive Compensation based on BSI's consolidated EBITDA." (Ex. 13.) In an

email dated January 18, 2005, Howland again discusses "Pat's February 16, 2001 Employment Agreement," refers to its termination date, LTIP, and success fee provisions, and acknowledges that a new employment agreement was never signed. (Ex. 14.) Moreover, in an email dated May 9, 2006 Howland details the compensation amounts due Marso as of June 30, 2006, which included amounts for the LTIP, a 2005 bonus, and a completion bonus, all of which are aspects of compensation due under the Bradford Mentor Agreement. (Ex. 9.) Therefore, the Court is satisfied that the Bradford Mentor Agreement continued in effect as to the terms of compensation for Marso.

1. Deferred Compensation

Under the Bradford Mentor Agreement, Mentor decided to defer some of the payments due for Marso's services in the years 2001 and 2002. (Tr. February 5, 2009 217:1-11.) Marso requested that a certain portion of his compensation also be deferred. (Tr. February 5, 2009 217:12-25.) The parties agreed that such deferred compensation would accrue interest at the rate equal to prime minus 1 percent. (Tr. February 5, 2009 198:12-16.) The parties are also in agreement as to the amount of compensation that was deferred and owed to the Plaintiff. However, the parties disagree as to whether such compensation was due on demand and what is the appropriate interest rate now accruing on such compensation.

The Plaintiff claims that the deferred compensation was payable on demand and that he made a demand for it on December 31, 2005. (Tr. February 5, 2009 91:9-14.) Other than the testimony of the Plaintiff there is no evidence before the Court that the deferred compensation was payable on demand or that it was demanded in December of 2005. In the absence of a contract regarding it, "interest on a note is due only from the date of demand or default" and the "commencement of suit is the equivalent of a judicial demand." Corning Glass Works v.

Seaboard Sur. Co., 112 R.I. 241, 251, 308 A.2d 813, 819 (R.I. 1973) (citing Corrigan v. O'Reilly, 82 R.I. 286, 107 A.2d 322 (1954). Therefore, without sufficient evidence of an early demand or of express written demands for the deferred compensation, the Court, by analogy to a demand note, will treat November 13, 2007, the date of the filing of the receivership, as the date of demand. When Marso's employment terminated on March 31, 2006, Marso had deferred $696,900 of his cash compensation and accrued interest. Bradford has also made fourteen separate payments to Marso totaling $480,000. Therefore, the Court finds that Bradford owes Marso such deferred compensation with interest accruing at prime minus 1 percent through November 13, 2007 and at the statutory rate of 12 percent per annum subsequent to that date.

2. 2005 Bonus

As a part of Marso's compensation under the Bradford Mentor Agreement, Marso was "entitled to receive annual incentive compensation based on BSI's consolidated operating EBITDA. . ." (Ex. 1 ¶ 3(c).) However, the evidence reveals that for the fiscal year 2005 Marso's annual bonus was to be based on the EBITDA of Bradford Mexico. (Tr. February 4, 2009 76:2-19; Tr. February 5, 2009 264:20-24.) At the end of 2005, when closing the books for the auditors, Bradford's CFO calculated Marso's bonus for 2005 at $200,461. (Tr. February 5, 2009 268:19-22.) Further, in May of 2006, Howland acknowledged that Marso's bonus was based on the EBITDA of Bradford Mexico and stated that according to the calculations of Bradford's CFO, Marso's 2005 bonus was $200,461. (Ex. 8.1, 8.3, 9.) Defendants argue that after factoring in administrative overhead and Marso's alleged "channel stuffing,"[5] Bradford determined that Marso was not eligible for a 2005 bonus. However, the Court is not so persuaded. There is not ample evidence before the Court of the alleged "channel stuffing"; and

[5] There was substantial testimony before the Court attempting to establish deficiencies in Marso's job performance, particularly with respect to his provision of services to Hewitt and Bradford Mexico. The Court does not deem this testimony to be persuasive nor to address the relevant issues in the case.

in fact, testimony reveals that the Mexico revenue for 2005 was not reduced for any other purpose than to recalculate Marso's 2005 Bonus. (Tr. February 5, 2009 275:12-22.) Therefore, the Court finds that Bradford International owes Marso compensation in the amount of $200,461 for his 2005 bonus.

3. Completion Bonus

Under the Bradford Mentor Agreement Marso was also entitled to a completion bonus of $250,000 if he "performed his duties to the reasonable satisfaction of the Board of Directors of BSI on a continuous basis since February 16, 2001." (Ex. 1 ¶ 3(h).) The award of the completion bonus is discretionary with Bradford International's Board of Directors (Board), which has not taken action to award Plaintiff a completion bonus. (Ex. 23.) Defendants argue that since it is undisputed that the Board never made a finding or took a vote as to Marso's completion bonus, he has no valid claim for such compensation. Plaintiff contends that by failing to exercise its discretion and take a vote on the completion bonus, Bradford International breached its obligations and Plaintiff is entitled to the bonus as a result of that breach.

According to the Defendants, the contractual duty of providing a completion bonus to Marso was subject to a condition precedent, a finding by the Board that Marso performed his duties to their satisfaction. When reviewing a contract, terms that are clear and unambiguous must be applied as written. A.F. Lusi Construction, Inc. v. Peerless Insurance Co., 847 A.2d 254, 258 (R.I. 2004) (citing W.P. Associates v. Forcier, Inc., 637 A.2d 353, 356 (R.I. 1994)). Under the Bradford Mentor Agreement, a vote granting or denying the completion bonus is not a condition precedent. All that is required is that Marso's performance be "to the reasonable satisfaction of the Board." (Ex. 1 ¶ 3(h).) The Court does note that a vote granting or denying the completion bonus would be the most likely way in which the Board would express its

satisfaction or dissatisfaction. However, the Board could also have discussed its view of Marso's job performance. Although here there is not a specific vote by the Board, there is not ample evidence before the Court that the Board was dissatisfied with Marso's job performance. On the contrary, the evidence before the Court shows that at a Board meeting in May of 2006, while the Board was discussing the compensation owed to Marso there were no negative comments made in regard to his job performance. Further, Howland, the Chairman of the Board of Directors of Bradford International, acknowledged on more than one occasion that Marso was entitled to receive a completion bonus. In emails dated December 20, 2005 and May 9, 2006, when detailing the compensation that was owed to Marso, Howland included a $250,000 completion bonus. (Ex. 9; 22.) Moreover, the loan and security agreement executed between Bradford International and TD Banknorth on June 20, 2006, specifically provides for a payment to Marso of "a one-time bonus payment for the satisfactory completion of the recipient's employment contract." (Ex. 19.)

Further, even if a vote by the Board was a condition precedent to the awarding of Marso's completion, the Board was required to act in good faith to bring about such a vote. Under Rhode Island law, there is an "implied covenant of good faith and fair dealing between parties to a contract so that contractual objectives may be achieved." Ide Farm & Stable, Inc. v. Cardi, 110 R.I. 735, 739, 297 A.2d 643, 645 (1972). Accordingly, "parties to a contract have an implied obligation to deal fairly with one another." A. A. A. Pool Service & Supply, Inc. v. Aetna Cas. & Sur. Co., 395 A.2d 724, 725 (R.I. 1978) (citing Ide Farm & Stable, Inc., 110 R.I. at 739, 297 A.2d at 645). Therefore, Bradford International could not avoid its obligation to Marso simply by failing to take a vote on his completion bonus. Given such evidence and case law, the Court is satisfied that Marso is entitled to receive a completion bonus in the amount of $250,000.

4. LTIP

During the term of the Bradford Mentor Agreement, Mentor was entitled to participate in the LTIP and receive compensation based on Marso's "contributions to enhancing the longer-term strategic position and value of BSI." (Ex. 1 ¶ 3(d).) In July of 2003, Marso and Bradford International executed an LTIP Participation Agreement granting Marso 8,410 LTIP units with a grant date of June 30, 2000, a grant price of $43.03, and a maturity date of March 31, 2006. (Ex. 4.) The maturity date means the date as of which the LTIP units becomes payable. (Ex. 3 § I(2)(s).) Under the LTIP Marso was entitled to the difference between $43.03 and the fair market value of his units determined by the average of unit values on the valuation dates immediately prior to his maturity date and immediately after his maturity date "[u]nless otherwise specified by the Committee." (Ex. 3 § II(2).) The valuation date immediately prior to his maturity date was December 31, 2005, and the valuation date immediately subsequent to his maturity date was December 31, 2006. (Ex. 3.)

Defendants contend that according to calculations prepared by the Bradford International CFO, Marso is not entitled to compensation for his LTIP units because their averaged value was less than the original grant price. Plaintiff argues that Bradford International elected a valuation method other than the averaging methodology specified in the LTIP. (Ex. 3 § II(2).) The evidence before the Court suggests that Bradford International used an alternative valuation methodology.

According to the maturity date in the LTIP Participation Agreement, Marso's units were to be determined by averaging the fair market values of the units on December 31, 2005 and December 31, 2006. However, Howland presented Marso with a value of $377,272 for his LTIP units in February of 2006. (Tr. February 4, 2009 103:2-9; Ex. 5.) He again acknowledged this

valuation in an email to Marso and counsel in May of 2006, explaining that the amount was "based on 50 % of the proposed LeGraw settlement amount since Marso had one-half the number of LTIP Units that LeGraw had." (Ex. 9.) Further, testimony reveals that the calculations done by the CFO, which resulted in a negative value, were not prepared until 2007 in preparation for the receivership hearings. (Tr. February 5, 2009 284:8-12.) The Court is aware that the LTIP Plan requires the averaging methodology unless otherwise specified by the Compensation Committee of the Board. However, there is testimony that the Board of Directors never formally elected a compensation committee, but rather designated three people, one of whom is Howland, to serve as a compensation committee in 2002. (Tr. February 9, 2009 401:1-10.) Further, the $377,272 LTIP value not only was communicated to Marso by the Chairman of the Board of Directors and apparently a member of the compensation committee, but also was used by the CFO for the purposes of closing the 2005 financial records. As discussed supra, Bradford International could not avoid its obligation to Marso simply by failing to take a vote on his compensation. Therefore, the Court finds that Marso is entitled to LTIP compensation in the amount of $377,272.

IV
Conclusion

After due consideration of all the evidence, together with the arguments advanced by counsel at trial and in their memoranda, the Court finds that Exhibits 5, 7, 8.1, 8.3, and 9 do not constitute compromise negotiations and should not be excluded under Rhode Island Rule of Evidence 408. Further, the Court finds that Defendants owe Marso deferred compensation with interest accruing at prime minus 1 percent through November 13, 2007 and at the statutory rate of 12 percent per annum subsequent to that date. Moreover, the conduct of the parties from January 1, 2003 until at least May 9, 2006 is consistent with the intention that the compensation

terms of the Bradford Mentor Agreement be continued in effect. Therefore, under the Bradford Mentor Agreement, Marso is entitled to compensation in the amount of $200,461 for his 2005 bonus, $377,272 for his LTIP participation, and $250,000 for his completion bonus. However, the Court also finds that due to a lack of evidence, Marso is not entitled to compensation for a success fee.

Prevailing counsel may present an order consistent herewith which shall be settled after due notice to counsel of record.