

FACTS

9. Dr. Evans was employed by Southern Vermont College (Corporation of the College of Southern Vermont, Inc. d/b/a Southern Vermont College) (“the College”, “SVC”), as its President, from January 1, 2015 through May 24, 2019, pursuant to a written Employment Agreement.
10. As President, Dr. Evans held a seat on the SVC Board of Trustees.
11. A subgroup of Trustees, including defendants Ira Wagner, Susan Hunter, Deborah Wiley, and Carmen Lawrence, dominated the Board and sometimes took Board action without a Board meeting to further and protect their personal interests.
12. As discussed below, one such action was to engage defendant Charles Goldstein to act ostensibly as the College’s “Chief Restructuring Officer,” with the primary objective of acting as Defendants’ agent to protect the Defendants’ personal interests.
13. At all relevant times, all Defendants had actual knowledge of the existence and terms of the Employment Agreement), including the following:

e. Termination Due to Change in Control. In the event of a Change in Control Transaction (as defined below), if Dr. Evans and the acquiring or surviving entity do not reach agreement on the terms of a mutually acceptable employment agreement, or the acquiring or surviving entity does not assume the obligations under this Employment Agreement, Dr. Evans shall be entitled to a lump sum payment equal to twelve (12) months of salary, minus all withholdings and deductions required by law. For purposes of this Employment Agreement, a “Change in Control Transaction” means any of the following events: (i) the sale of all or substantially all of the College’s assets; (ii) the merger or consolidation of the College with or into another institution; or (iii) a change in the composition of the Board of Trustees whereby a majority of the members of the Board of Trustees is replaced during any 12-month period by directors who, prior to the date of joining the Board of Trustees of the College, constituted disqualified persons (within the meaning of IRC section 4958) with respect to the same nonprofit institution.

15. Indemnification. The College maintains, and Dr. Evans shall be a beneficiary of, a directors' and officers' liability insurance policy that provides, in

pertinent part, (i) coverage annually of not less than \$3,000,000 per claim and not less than \$3,000,000 in the aggregate, exclusive of and in addition to defense costs, and (ii) a retention of not more than \$1,000 per claim as a director, trustee, or officer. To the fullest extent permitted by applicable law, the College shall indemnify and hold Dr. Evans harmless from and against all losses, liabilities, damages, and expenses (including attorneys' fees and disbursements) arising in connection with or as a result of his employment by the College or his service as a member of the Board of Trustees.

16. Arbitration.

a. The parties agree that any controversy or dispute concerning any matter directly or indirectly related to Dr. Evans' recruitment, employment or termination of employment by the College or concerning the construction or application of any of the terms, provisions, or conditions of this Employment Agreement, including, but not limited to, claims involving laws against discrimination whether brought under federal and/or state law and/or claims involving co-employees but excluding Worker's Compensation Claims (hereinafter referred to as "any dispute covered by this arbitration agreement") shall be submitted to final and binding arbitration under the National Rules for the Resolution of Employment Disputes of the American Arbitration Association ("AAA"). The right to a trial, and to a trial by jury, to resolve any dispute is of value. Dr. Evans agrees to waive his right to a trial by jury and agrees that he will not make a demand, request or motion for a trial by jury.

b. The party requesting arbitration shall send written notice to the other party of his or its intention to arbitrate no later than one hundred eighty (180) calendar days after the party knew or should have known that the dispute existed. This written notice shall contain a statement setting forth the nature of the dispute, the amount involved, if any, and the remedy sought.

c. Each party shall select an arbitrator within thirty (30) calendar days after the written notice of intention to arbitrate is received, and the two arbitrators so selected shall select a third arbitrator within ten (10) calendar days thereafter, who shall serve as the chairperson of the Arbitration Panel. The Arbitration Panel shall by majority vote have the authority to resolve all issues in dispute, including the Arbitration Panel's own jurisdiction. The Arbitration Panel shall have no authority to alter, add to or modify the terms of this Employment Agreement.

d. Any claim by either party shall be time-barred unless (i) the time period outlined in Paragraph 16.b. is met, and (ii) an Arbitration Panel has been selected and a hearing has been scheduled within one hundred and twenty (120) calendar days after the written notice of intention to arbitrate required under Paragraph 16.b. has been provided.

e. The place of any arbitration shall be Bennington, Vermont or at such other place as agreed to by the Parties.

f. The Parties shall share equally the cost of the Arbitration Panel members' compensation (expenses and fees). Each party shall bear the full costs for his or its representation in the arbitration and all administrative fees of the AAA shall be divided equally between the Parties, unless the Arbitration Panel determines that applicable law requires otherwise. Should either party request a transcript of the proceedings, then that party will bear the full cost for that transcript.

g. The College and Dr. Evans agree that this agreement to arbitrate shall be governed by the Federal Arbitration Act, 9 U.S.C. § 1, et seq.

h. The College and Dr. Evans agree that it is impossible to measure in money alone the damages that will or may accrue to the parties bound by and entitled to the benefit of this Employment Agreement because of a failure of the parties to comply with this agreement to arbitrate. The College and Dr. Evans hereby declare that it is their intention that the provisions of this agreement to arbitrate may be required to be specifically performed. The non-prevailing party in any proceeding brought to specifically perform this agreement to arbitrate may be required to pay the prevailing party's costs incurred in such proceeding, including reasonable attorneys' fees.

i. This agreement to arbitrate shall be binding upon the heirs, successors and assigns and any trustee, receiver or executor of each party.

14. Under the College's Bylaws, Dr. Evans, as President, was the Chief Executive Officer of the College" with "such power, authority, duties and privileges as customarily appertain to this office, including "supervision of the business operations; and all other matters incidental to the operations and affairs of the College."
15. Under the Bylaws, the Board of Trustees has "the authority and fiduciary duty to carry out all lawful functions prescribed and/or not prohibited by law, the Articles of Incorporation and these Bylaws," including the duty to "g. Contribute financially to the College's fundraising goals, actively participate in strategies to secure support of fundraising initiatives," and "i. Authorize the occurrence of debt other than in the ordinary course of business and approve the collateralization of loans." (Art. V, § 4).

16. Under the Bylaws, the College is required to “indemnify to the fullest extent allowed by law and pay and, if necessary advance, legal fees . . . and related reasonable expenses on behalf of any current or former Trustee and any current or former Officer of the College” in connection with any “actual, threatened, pending or completed action, suit or proceedings, whether civil or criminal, administrative or investigative . . . as to which any Trustee or Officer has been made a party by reason of said individual(s) serving in his/her capacity as a Trustee or Officer of the College.” (Art. I, § 4).
17. As set forth below, Defendants caused the College to breach its obligation to indemnify and hold Dr. Evans harmless from and against all losses, liabilities, damages, and expenses (including attorneys’ fees and disbursements) arising in connection with or as a result of his employment by the College or his service as a member of the Board of Trustees, to pay and, if necessary, advance, legal fees and reasonable expenses in connection with actual, threatened and pending suits or proceedings, and to pay him a lump sum payment equal to twelve (12) months of salary, in order to protect their own personal interests as creditors of the College, to shield themselves from accountability for a lack of necessary financial oversight during the tenure of Dr. Evans’ predecessor, and to retaliate against Dr. Evans for his efforts to assure that the College prioritized the payment of earned wages and benefits and full and accurate disclosure to all of its employees over the personal interests of the Defendants.
18. Dr. Evans sent written notice to the College and to the Defendants herein of his intent to arbitrate this dispute within 180 days after he knew or should have known that the dispute existed. The College has agreed to participate in arbitration under the Agreement, but Defendants have refused.

19. At all relevant times, the Defendants and Goldstein had actual knowledge of the existence and terms of the liability insurance policy obtained pursuant to the Agreement, ¶ 15.
20. On April 4, 2011, SVC executed a General Security Agreement, which granted Fred Poses a security interest in “all assets of [SVC]” whether owned by SVC as of that date or thereafter acquired (the “Poses Agreement”).
21. On or about November 30, 2017, SVC entered into a series of written agreements (the “Art Center Agreements”) whereby SVC acquired title to certain real estate and personal property, which SVC thereafter used in the operations of an Art Center. With the full knowledge and support of the Defendants, Dr. Evans participated in negotiating this acquisition and executed these written agreements on behalf of SVC.
22. In January of 2019, it became clear that SVC was experiencing a severe liquidity crisis. SVC’s accreditor, NECHE, scheduled a hearing for February 28, 2019 at which SVC would be required to show cause why its accreditation should not be revoked.
23. The Defendants were concerned that they might have personal liability for a failure of financial oversight during the tenure of Dr. Evans’ predecessor.
24. Defendant Lawrence, who had rarely, if ever attended meetings of the Board of Trustees throughout her term, began attending Board meetings.
25. SVC engaged Keith Lowey, CPA, and the consulting firm of Vertolino & Lowey (“V&L”) to provide general advising and consulting services to SVC in connection with the potential wind-down and cessation of SVCs business and its student and alumni affairs, pursuant to a written Engagement Agreement dated February 12, 2019.
26. SVC engaged attorneys with law firms of Holland & Knight (“HK”), and Dinse (“Dinse”) to provide legal guidance and assistance.

27. Dr. Evans communicated regularly with the HK and Dinse Attorneys, and with CPA Lowey, and other V&L, and gained considerable confidence in their judgment, advice and capabilities.
28. The Board of Trustees met on February 22, 2019. Dr. Evans and Defendant Wagner were present in person, and Defendants Hunter and Lawrence and Wiley participated by phone. Also present were attorneys from HK and Dinse, and the SVC Cabinet: Jennifer Macksey, Executive VP Administration and Finance; Nina Moser, VP Advancement; and Dan Summers, VP Enrollment Management.
29. Trustee Wagner began the meeting by suggesting that the discussion be organized around a “Plan A” (survival), and “Plan B” (what to do if NECHE puts SVC on probation or withdraws accreditation after the February 28 show-cause hearing.”
30. The HK attorney encouraged the Board to abandon consideration of Plan A, since time not spent on Plan B would impact time and money. He advised repeatedly that the best that could be hoped for would be that the College would be placed on probation, but that it was likely that the College would lose its accreditation.
31. Trustee Wagner moved to take the Board into Executive Session, with minutes to be taken.
32. In executive session, there was a general consensus that further efforts toward the College’s survival would likely be not only futile, but fraught with additional risk.
33. The HK attorney recommended taking no action until after the NECHE meeting on February 28, and scheduling a Board meeting for Friday, March 1. In the interim, he recommended that Dr. Evans and his staff “explore teach-out plans, so that everyone is aware that the Board’s primary concern is that the administration takes steps to take care of the students. We know that the Board has looked at the college’s economic realities and determined that it is

financially unviable, understanding that the negative publicity from NECHE has added to the declining student enrollment and will limit sufficient donor support going forward.”

34. The HK attorney further “reminded the Board that SVC needs to raise \$500,000 to get through graduation or \$1 million to get through summer.
35. Trustee Wagner stated that he would work on negotiating the termination of Dr. Evans’ contract, which Wagner believed “guarantees a six-month notice.”
36. The Board then came out of executive session, and Wagner made the following motion, which passed with the affirmative vote of eight Trustees present and Dr. Evans’ abstention:

The Board directs David and his staff to further explore as many teach-out opportunities as possible keeping in mind the protection of SVC students and its mission. The Board further directs that David and his staff prepare a presentation to the Board on how a financial closure of SVC would look like and how the professionals already engaged by the college would be employed and to include a communications plan that informs students, faculty, lenders, and media outlets. David and his staff are expected to report back to the Board of Trustees on Friday, March 1.

37. On February 25, 2019, in order to induce Dr. Evans to continue serving the College, Defendant Wagner called Dr. Evans and confirmed his entitlement to severance and accrued vacation pay upon the termination of his employment prior to the expiration of the term of the Employment Agreement.
38. Wagner asked Dr. Evans whether he would be willing to accept something less than the full amount of severance owed to him under the Employment Agreement. In an exchange of emails, Dr. Evans tentatively agreed to accept four months’ salary (\$70,000), plus accrued vacation pay (to be reduced by using vacation days prior to conclusion of employment effective June 30), and continued COBRA payments through December 31, 2019 or until Dr. Evans obtained health insurance through another employer. Wagner advised that he would ask the Dinse attorney to “write it up and we’ll take it to the BOT on Friday.”

39. The Board met on Friday, March 1, 2019. Present were Dr. Evans (in person) and the Defendants (by phone). Also present were HK and Dinse attorneys, and the SVC Cabinet, Macksey, Summers and Moser.
40. At the meeting, the Dinse Attorney asked Dr. Evans to determine whether the College's liability insurance covered directors and officers for wage-related issues. The Board went into executive session with the attorneys.
41. In executive session, Wagner advised that he was willing to loan the College some money to cover shortfalls through the anticipated closing, but wanted to be repaid "ahead of the bank and ahead of Fred [Poses]"
42. The HK Attorney advised that "Trustees will hear from the AG if you had knowledge of this projection in Fall 2018 and took money for Spring 2019. There is nothing to offer you on the legal side."
43. The Dinse Attorney advised that "certain money needed to be paid within 72 hours of termination – wages, vacation pay, otherwise you face a lawsuit of double the amount owed plus attorney fees. Severance could be paid down the road after sale."
44. Wagner accused the Cabinet of just wanting "the board to write checks so they didn't look bad," and suggested bringing in "an outsider to evaluate the situation." Wagner indicated his desire to hire another "independent third party" to "advise the trustees."
45. The HK Attorney advised that V&L Consultant Keith Lowey winds down businesses," and would be in town the next week. Dr. Evans suggested that Lowey could help Ms. Macksey, and two Trustees wanted "to make sure the board gave Keith ethically responsible guidelines." Attorney Monaghan advised that SVC had already engaged Lowey, and "just needed to expand his engagement and add a title of Chief Restructuring Officer."

46. Wagner also summarized his discussions with Dr. Evans “about his leave including severance, vacation time and health insurance.”

47. The Board then came out of executive session and Wagner proposed two motions:

1. Due[] to financial exigency, SVC will close at the end of the semester.
2. Hire Keith Lowey as the Chief Recruiting (sic) Officer to work closely with SVC administrators to determine cost-cutting strategies, including a possible acceleration of the graduation date and possible cancellation of spring athletic season, and report back to the Board by March 15.

48. The motions passed with all Defendants voting in favor.

49. Dr. Evans voted against the motions due to his concerns that the Board was planning to close the college at the end of the semester without sufficient funds to cover operations and pay earned wages and benefits to employees and without providing full and accurate disclosure to employees and students so that they might protect their interests, because he had reservations about the Dinse attorney’s assessment that “severance could be paid down the road after sale,” and because he was concerned about his own potential personal liability, as well as that of other members of the Board, for the actions the Board was contemplating.

50. HK provided the College with a Memorandum dated March 14, 2019, re: “Litigation Risks” (the “HK Risk Memo”) which discussed various theories of liability which might form the basis of legal claims arising out of the anticipated closure, and assessed the nature and extent of potential legal exposure by the College, its officers and directors, and the potential for insurance coverage.

- a. **Civil Investigation.** The HK Risk Memo advised that the College was at risk of a Civil Investigation by the Vermont Attorney General, which would not result in any damages award but “may identify individuals by name and assert misconduct by the identified individuals” and could result in litigation by the Attorney General based on the following legal theories:

- b. Breach of Contract.** The HK Risk Memo advised that the College could have contractual liability to “former faculty and staff of SVC who will assert the failure to pay contractual severance or other employment benefits, vendors to the college whose long term contracts were not honored and donors to the College whose gift restrictions were violated,” as well as to students, who were likely to commence a class action lawsuit. The HK Risk Memo advised that contractual damages could approach \$7.3 million, but that there “should not be personal liability on a contract claim,” and defense costs would likely be covered by the College’s liability insurance.
- c. Consumer Protection.** Citing a separate legal analysis provided by the Dinse Attorney Nolan (Mr. Nolan has subsequently joined Holland & Knight), the HK Risk Memo advised that the “most dangerous potential claim” would be a claim for violation of Consumer Protection Laws, which could come in the form of a class action lawsuit filed by students or an enforcement action brought by the Vermont Attorney General. The HK Risk Memo advised that such claims could result in \$2 million in civil penalties and \$22 million in damages. The HK Risk Memo advised that “[s]ubject to Dinse’s view, there appears to be at least an arguable basis for assessment of personal liability” against both trustees and paid employees, although volunteer trustees who “do not have an economic interest in soliciting students to attend or remain at SVC” may have less exposure than “paid employees of SVC.” With respect to insurance coverage, the HK Risk Memo advised that “while defense costs are likely covered, there is some question as to whether and the extent to which liability on a consumer protection theory will be covered.”
- d. Breach of Fiduciary Duty.** The HK Risk Memo advised that the individual officers and Trustees could have liability for breach of fiduciary duty, for which the Trustees might have some limited statutory defenses unavailable to paid officers. The HK Risk Memo advised that the College’s liability insurance would provide coverage for such claims “up to \$5 million plus defense costs.”
- e. Fraud.** The HK Risk Memo advised that the College, and its trustees and officers, could be liable for fraud claims asserting that “a knowingly misleading statement was reasonably relied upon by a plaintiff and as a result the plaintiff was damaged.” The HK Risk Memo advised that “if the current semester is not completed, damages will most likely be equal to the amount paid by students for the semester, which approaches \$7.3 million,” and that “if the semester is completed, the damage calculation methodology is unclear.”
- f. Breach of Trust.** The HK Risk Memo advised that the College and its officers and trustees could have liability for using restricted endowment funds for unauthorized purposes, which would not be covered by insurance.

g. Employment Related Obligations – Salary, PTO and Severance. The HK Risk Memo recounted that “[o]ne of the options under consideration by SVC is to close the College immediately after graduation and not provide for payment of employee wages or severance that would otherwise come due. According to the Projected Weekly Cash Flow document provided by the College, that would leave \$373,038 in amounts due to faculty who receive payment for ten months’ service over twelve months, employee severance of \$165,579 and severance due to SVC’s president of \$145,883 unpaid. The projection also suggests that following that tact would leave approximately \$98,000 of earned wages that would otherwise be paid two weeks after graduation unpaid.”

The HK Risk Memo advised that “[t]he College’s liability for those obligations constituting ‘wages’ is clear. Under Vermont statutory provisions, ‘wages’ constitute ‘all remuneration payable for services rendered by an employee, including salary, commissions and incentive pay.’” If those ‘wages’ are not paid, the employee has both a private right of action and a right to invoke the enforcement rights of the Vermont Department of Labor. Both the employee and the Department of Labor can recover unpaid wages plus a civil penalty of up to \$5000 per unpaid employee plus costs and legal fees. In addition to SVC ‘the president or other officers who have control of the payment operations of the corporation’ are liable for ‘actual wages due.’

Investigation regarding the issues surrounding SVC’s severance obligations is ongoing. The contractual liability for the severance obligations are unclear. Also unclear is whether a severance right constitutes a ‘wage’ that may be sought by the Department of Labor or that there may be personal liability for by the president and other officers tasked with payment operations.

Damages. The damages for nonpayment of wages are at least \$371,038, constituting the faculty contract rights, and the \$98,000 for one week of accrued wages, plus up to \$5000 per employee that does not receive the wage amounts due. That number may increase by up to an additional \$312,000 if further investigation reveals that severance obligations constitute a ‘wage.’”

3. Personal liability. Yes. The president and other officers who have control of the payment operations of the corporation have personal liability for unpaid wages.

4. Insurance Coverage. Yes as to wages, not as to severance.

51. Based on comments made by Defendant Wagner during a telephone conference on March 21, 2019, Dr. Evans became increasingly concerned that the Defendants were intending not only to

defer closing the college until after graduation without sufficient funding to meet all of the College's obligations, including obligations to pay earned wages and benefits to College employees, without making full and truthful disclosure to affected stakeholders, but also to insulate themselves against the personal liabilities discussed in the HK Risk Memo by attempting to shift responsibility for implementing the Defendants' scheme to Dr. Evans and the Cabinet.

52. On March 21, 2019, Dr. Evans and Ms. Mackey sent a memo to the Board, with a copy to the HK and Dinse Attorneys, seeking "clarification about employees who depart prior to the closing of the college." Among other things, this Memo raised concerns about "personal liability for unpaid wages potentially attaching to the Officers of the College." The Memo concluded, "We do not feel comfortable acting on these matters without the explicit instruction of the Board of Trustees and await your advice." Dr. Evans never received a response to this communication.

53. On March 27, 2019, CPA Lowey, on behalf of VL, sent his own memorandum to the Board of Trustees, expressing concerns similar to those expressed by Dr. Evans. He wrote:

As you are aware, we have been working with your team at Southern Vermont College ("SVC") and have been able to jointly develop a realistic budget to both get SVC through graduation and to accomplish the teach out through the end of SVC's accreditation in August. We are prepared to share that budget with the secured lenders, as promised, however the overriding question remains funding of the projected deficit and particularly funding the legal obligations as outlined to the Board by its counsel.

It is that deficit that gives rise to this letter. We have been engaged to assist SVC and remain ready, willing and able to do so however we cannot be in the position of potentially becoming liable for deficits in funding legal obligations and standing in the shoes of the current administration in the event they decide to resign prior to the end of August. We understand that the Board may have acted to raise funds necessary to get through graduation but not to cover all of its statutory obligations and legal responsibilities. We cannot remain engaged if that remains the situation and I personally cannot accept the appointment as Chief Restructuring Officer of SVC if those deficits and legal obligations remain unfunded.

To be clear, this is not about getting paid in full for our role. It is about stepping into a situation as an officer of the school where potential personal liability exists due to statutory and legal obligations that remain unfunded. We reiterate our willingness to proceed forward to assist SVC in an orderly winddown but only if the above referenced liabilities are funded.

54. On April 3, 2019, the SVC faculty sent a memo to the Board demanding confirmation that the Board “will uphold the terms of the contract.”
55. On April 18, 2019, the Vermont Department of Labor served the College with an unpaid wage claim filed by an employee who had been employed on a ten month contract but had elected to have a portion of his wages withheld from each paycheck to be paid out over the remaining two months, and claimed he, and others, should have received those payments within 72 hours of being laid off. (“DOL Complaint”)
56. At about this time, the HK Attorney suggested to Dr. Evans that he should seriously consider whether it might be necessary for the College’s officers to resign immediately in order to avoid personal liability for the Defendants’ scheme, and encouraged Dr. Evans to engage his own legal counsel to provide him with legal advice and guidance with respect to his legal rights, obligations and options as President of SVC and a member of the Board of Trustees.
57. Accordingly, on April 12, 2019, Dr. Evans engaged the law firm of Paul Frank + Collins to provide him with legal advice and guidance with respect to his legal rights, obligations and options as President of SVC and a member of the Board of Trustees.
58. On April 18, 2019, Daniel Summers, Vice President for Enrollment Management, sent a letter to Trustee Defendant Wagner and Dr. Evans. He wrote:
- I have . . . learned that the Board has created a plan does not include adequate safeguards to fund employee payroll and benefits or to ensure the proper wrap of SVC functions. The Board appears to be interested in only funding those ‘expenses associated with graduation’ rather than meeting its obligations to faculty, staff and students. . . .

I believe the Board is in breach of its fiduciary obligations to SVC, its faculty and staff, and its students. . . .

I expect the Board to take immediate action to notify students, both those that are expecting to graduate and those that are not, of the expected funding shortfall and any impact on their ability to earn credits or complete their degrees. In light of my concerns that SVC will be unable to meet its obligations to the faculty and staff, I will be taking steps to notify the Office of Vermont Attorney General, the Vermont Agency of Education, and SVC employees that absent an immediate change in the Board's position, SVC will not be able to meet its obligations to its employees for work performed after April 19, 2019 and of my concerns with regard to the Board's failure to meet its obligations to students to appropriately wind up the affairs of SVC. . . .

As a result of the Board's failure to meet its obligations, I am left with no choice but to tender by resignation effective immediately.

59. On Monday, April 22, 2019, the Board met to discuss a proposed loan agreement to fund some operations through graduation. At the meeting, and in an email the following day from his counsel, Dr. Evans expressed his concern that “[t]he proposed Loan Agreement requires the College to covenant that it will ‘continuously operate through, and perform all necessary obligations with respect to, graduation on May 18, 2019,’ and the available financial resources, even with the \$910,000 loan, are insufficient to satisfy this covenant. The College cannot agree to do something that the College knows it cannot do.”
60. The HK Attorney responded that “The board is meeting for the purpose of forming a special committee of the board comprised of only those board members who are not also lenders so that the special committee, and only the special committee, will analyze, consider and either approve or not approve, the loan. Stated another way, those trustees who are making the loan will not participate in the college’s decision making as to the loan.”
61. On April 23, 2019 Dr. Evans sent an email to the HK and Dinse attorneys seeking “legal guidance as to whether the College has complied with 21 § 345 with respect to [the DOL

Complaint], and others who may become similarly situated. If Mr. [G] or any other employees have not been paid the wages due to them, they must be paid immediately.”

62. At around this time, without seeking or obtaining authorization from Dr. Evans or the Board, Trustee Defendant Wagner began to invite his personal attorney, Andrew Currie, from the law firm of Venable LLP, to Board meetings.
63. Also without seeking or obtaining authorization from Dr. Evans or the Board, Trustee Defendant Wagner also engaged the consulting firm 3Cubed LLC, and its Managing Director Charles R. Goldstein, to provide Financial Advisory and Consulting Services to the College.
64. Also at or about this time, over Poses’ objections, the Defendants caused the College to grant the Defendants a mortgage security interest in the College’s assets, including the Art Center.
65. On April 24, 2019, Dr. Evans wrote a memo to the College’s attorneys at HK and Dinse expressing his concerns and objections Trustee Defendant Wagner’s actions.
66. On April 25, 2019, Dr. Evans asked Trustee Defendant Wagner to place Dr. Evans’ April 24 Memo on the agenda for the Board meeting on April 26, 2019, and stated “If Mr. Goldstein is going to be approved for the purpose of financial controls over payments and payables, I believe he should be specifically appointed by the Board as Acting CFO, reporting directly to the BoT, with control over the payroll operations.”
67. On April 28, 2019, the HK Attorney drafted a Resolution for the Board to appoint Defendant Goldstein as Chief Restructuring Officer “to oversee, administer and be responsible for the financial, operational and administrative aspects of the College’s wind down.”
68. On April 29, 2019, Cincinnati Insurance Company wrote to Dr. Evans advising that the College’s Pillar Policy with CIC provided no coverage with respect to the DOL Complaint.
69. On April 30, 2019, Dr. Evans received a Demand for Reimbursement from Poses’ attorneys.

70. On May 1, 2019, Poses filed a civil action against the College. (“Poses Action”).
71. On May 22, 2019, Cincinnati Insurance Company, through Attorney Victor Peters, agreed to defend the Poses lawsuit and to assign the defense to Dinse.
72. Although Dr. Evans and Mr. Wagner had initially contemplated continuing Dr. Evans’ employment through the end of June, in late April or early May, in a conversation with Defendant Goldstein, Dr. Evans agreed to move his last day up to May 24th, the same day that most of the remaining College employees were to be terminated. Dr. Evans agreed to this in good faith, fully expecting that the College would honor the compromise severance agreement he had reached with Defendant Wagner.
73. However, it later became evident that the Defendants intended to withhold Dr. Evans’ severance payments, in breach of the Employment Agreement.
74. The College effectively ceased its operations on May 24, 2019 and the Defendants continued their efforts to sell its assets.
75. On June 4, 2019, Dr. Evans was served with a Summons and Complaint in a civil action entitled Bennington Center for the Arts, Inc., Bruce Laumeister and Elizabeth Small vs. Corporation of Southern Vermont College, Inc. and David R. Evans. (BAC Action).
76. In a letter to the College’s attorneys at Dinse, Dr. Evans tendered the BAC Action to the College for defense and indemnification under the Employment Agreement.
77. On June 18, 2019, Dr. Evans wrote the College’s attorneys at Dinse demanding reimbursement for his legal fees and expenses and severance payments due to him under the Employment Agreement.
78. On June 26, 2019, Cincinnati Insurance Company, through Attorney Victor Peters, agreed to defend the College and Dr. Evans in the BAC lawsuit and to assign the defense to Dinse.

79. Dinse forwarded this letter to Dr. Evans' counsel on June 27, 2019, and advised that "our preference would be for you to assume the defense of Mr. Evans on behalf of Cincinnati. We'd also be interested in discussing a joint defense arrangement."
80. On June 28, 2019, Dr. Evans' counsel informed Cincinnati that Dr. Evans desired to be represented separately and independently from the College and asked Cincinnati to assign the defense to Paul Frank + Collins P.C.
81. On July 2, 2019, Dinse circulated a proposed budget to counsel for all parties in the BAC and Poses Actions, which provided for payments to Defendant Goldstein's company and Dinse for the College's fees and expenses, but made no provision for payment of Dr. Evans' severance or his legal fees and expenses.
82. On July 11, 2019, Dinse attorneys wrote to Dr. Evans' counsel in response to his letter of June 18, 2019. They claimed that Dr. Evans was not entitled to severance because he had "resigned voluntarily," and was only entitled to be reimbursed for his attorneys fees incurred in claims against him personally, but would not be reimbursed anyway because his bills were redacted and there were no funds allocated to paying them.
83. On July 29, 2019, Cincinnati, through Attorney Peters, wrote to Dr. Evans' counsel advising that Cincinnati was no longer willing to assign the defense of the claims against Dr. Evans in the BAC Action to PFC because PFC was representing Dr. Evans in claims against the College.
84. On August 7, 2019, Dr. Evans' counsel sent an email to the Dinse attorneys and Cincinnati attorney Peters:

I am writing in response to Amy and Kendall's letter of July 11, 2019 ("Dinse letter") and Victor's letter of July 29, 2019 ("Cincinnati letter"), both of which address Dr. Evans' demand for reimbursement and/or indemnification under his Employment Agreement ("Agreement") and/or the Cincinnati Pillar Policy ("Policy"). Dr. Evans' claim for severance will be addressed separately.

The suggestion in the Dinse Letter that the College's indemnification obligations are limited to potential claims against Dr. Evans is inconsistent with the plain language of the Agreement:

15. Indemnification. The College maintains, and Dr. Evans shall be a beneficiary of, a directors' and officers' liability insurance policy that provides, in pertinent part, (i) coverage annually of not less than \$3,000,000 per claim and not less than \$3,000,000 in the aggregate, exclusive of and in addition to defense costs, and (ii) a retention of not more than \$1,000 per claim as a director, trustee, or officer. To the fullest extent permitted by applicable law, the College shall indemnify and hold Dr. Evans harmless from and against all losses, liabilities, damages, and expenses (including attorneys' fees and disbursements) arising in connection with or as a result of his employment by the College or his service as a member of the Board of Trustees.

All of the bills for legal services provided by our firm to Dr. Evans reflect "expenses (including attorneys' fees and disbursements) arising in connection with or as a result of [Dr. Evans'] employment by the College or [his] service as a member of the Board of Trustees", and are therefore subject to the College's indemnification obligations under the Agreement. To the extent our services relate to claims threatened or asserted against Dr. Evans, they are also subject to Cincinnati's defense and/or indemnification obligations under the Policy, as acknowledged in the Cincinnati Letter. To the extent Dr. Evans' legal fees are not covered by the Policy, Dr. Evans is aware that the College is preparing a budget in connection with the Poses and Laumeister lawsuits which allocates funds for a variety of purposes, and that the College intends to make payments to other individuals, including insiders, from funds resulting from the sale of the Art Center which we understand is expected to close within the next 60-90 days. If there is money available to pay the Trustees what is owed to them, then there is money available to pay Dr. Evans what is owed to him.

The Cincinnati Letter states that "Cincinnati is assigning the independent law firm Ryan Smith & Carbine Ltd. to defend Dr. Evans going forward against the BCA Complaint" and "will be asking attorneys at Ryan Smith & Carbine to contact you in the coming days to discuss transitioning Dr. Evans' defense." We have not been contacted by Ryan Smith & Carbine, and we continue to take the actions we consider to be appropriate to defend Dr. Evans against the "BCA Complaint." Moreover, in light of the reference in the Cincinnati Letter to Section III. Exclusion B of the Educator's Part of the Policy and Cincinnati's control of the defense of the claims against the College in both actions through the same defense counsel, we believe Cincinnati has a conflict of interest which should entitle Dr. Evans to select his own defense counsel without waiving coverage. Without waiving the conflict, Dr. Evans has authorized us to cooperate in the transition of the defense to Ryan Smith & Carbine, but we will continue to monitor the proceedings to assure that Dr. Evans' interests are fully protected, and Dr. Evans will expect to be fully indemnified for our services by either Cincinnati or the College.

The Dinse letter states that the redacted invoice we provided earlier "does not include sufficient information to determine whether the services rendered by your firm appropriately arise under Paragraph 15 of the Agreement." Likewise, the Cincinnati letter requests "the full invoice no. 175593 and any more recent invoices regarding your firm's representation of

Dr. Evans against the BCA Complaint so that Cincinnati may evaluate whether or the extent to which payment is due to Dr. Evans or your firm for defense costs.” Without waiver of and intending to preserve to the fullest extent the attorney-client, work-product and any other applicable privileges, I have attached the following unredacted invoices:

Matter 13654-00001 Southern Vermont College Closure Issues

Invoice No. 174634 May 31, 2019 for \$15,648.28

Invoice No. 175592 July 3, 2019 for \$17,151.76, including past due

Invoice No. 176179 August 6, 2019 for \$18,170.59, including past due

Matter 13564-00002 Laumeister Litigation

Invoice No. 175593 July 3, 2019 for \$2,603.46

Invoice No. 176180 August 6, 2019 for \$10,298.86, including past due

Please make payment directly to Paul Frank + Collins P.C.

85. On August 21, 2019, Dr. Evans’ counsel wrote to Dinse and Cincinnati regarding his severance:

As promised in my email of August 7, 2019, I am writing to address issues relating to the College’s breach of the severance provisions of Dr. Evans’ Employment Agreement. Your characterization of Dr. Evans’ termination as a “voluntary resignation” is unsustainable. Dr. Evans’ employment ended due to the closure of the college. Dr. Evans had no choice in the matter; his employment was terminated because the college ceased its operations. Because the closure involved “the sale of all or substantially all of the College’s assets,” rather than the “merger or consolidation of the College with or into another institution,” there is no “surviving entity” to assume Dr. Evans’ contract. Consequently, Dr. Evans was “entitled to a lump sum payment equal to twelve (12) months of salary, minus all withholdings and deductions required by law.”

In phone calls and an exchange of emails in February, initiated by Board Chair Wagner, who was authorized by the Board to negotiate this issue with Dr. Evans, Mr. Wagner acknowledged that Dr. Evans’ employment would end after the closure and that Dr. Evans would be entitled to severance. Mr. Wagner agreed that Dr. Evans’ compromise proposal of 4 months’ severance and continuation of certain benefits through the end of the year was fair, provided Dr. Evans would use up some of his accrued vacation prior to his last day and that the benefits obligation would be set off by future employment, and promised “to have Jeff Nolan write it up and take it to the BOT.” Although Dr. Evans and Mr. Wagner had initially contemplated continuing Dr. Evans’ employment through the end of June, in late April or early May, in a conversation with Charles Goldstein, Dr. Evans agreed to move his last day up to May 24th, the same day that that most of the remaining College employees were to be terminated. Dr. Evans agreed to this in good faith, fully expecting that the College would honor the compromise agreement he had reached with Mr. Wagner. However, following commencement, it soon became evident that the Board intended to withhold Dr. Evans’ severance payments, in breach of the Employment Agreement.

Neither of the authorities cited in your letter support your assertion that severance payments are not “wages” under 21 V.S.A. §341. The severance payment is subject to “all withholdings and deductions required by law” precisely because it is remuneration for services rendered. *U.S. v. Quality Stores, Inc.*, 572 U.S. 141 (2014) (“The [FICA] chapter governing income-tax withholding has a broad definition of the term ‘wages’: ‘all remuneration . . . for services performed by the employee for his employer’”). And because severance is forfeited under circumstances constituting “cause,” it is a form of incentive pay. As the Vermont Supreme Court has recognized, the “coverage of the statute is broad, and it would clearly undermine the legislative intent if an employer could choose a method of payment that left no remedy if the employer failed to pay compensation in a timely fashion.” *Stowell v. Action Moving & Storage, Inc.*, 2007 VT 46.

The College’s refusal to pay Dr. Evans his severance is a breach of contract, and trustees who have induced that breach in furtherance of their own personal interests may be personally liable. The Trustees and other officers in charge of the college’s payment operations, including those who are causing the college to pay themselves without paying Dr. Evans, are personally liable to him under 21 V.S.A. § 345(a).

Further, even if Dr. Evans’ claim were not covered by the wage provisions of Title 21, subchapter 2, it is a fair inference that the Board’s actions toward Dr. Evans’ were motivated by Dr. Evans’ vocal and ultimately successful opposition to the stated intention of several Board members to close the college without satisfying its obligations to pay earned salary and benefits to employees, including the employees who filed charges with the Department of Labor and any similarly situated employees. As such, the College, and the individual Board members and Mr. Goldstein are liable to Dr. Evans as his “employer” and as “agents of the employer,” pursuant to 21 V.S.A. §§ 302(1) and 495(a)(8)(A), (C) and/or (E). Dr. Evans is entitled to recover compensatory and punitive damages, costs, reasonable attorneys’ fees, and other appropriate relief, pursuant to 21 V.S.A. § 495b(b).

As previously stated, if there is money available to pay the insiders, then there is money available to pay Dr. Evans what is owed to him. Further, Dr. Evans’ demand is an “employment claim” for an “employment wrongful act” under the Employment Practices Liability Coverage part of the Cincinnati Pillar Policy.

Dr. Evans’ potential recovery is as follows:

Compensatory Damages: \$210,000

Interest: TBD

Punitive Damages: TBD

Costs and Attorneys’ Fees: TBD

Dr. Evans understands that the Employment Agreement contains an arbitration clause. Provided an agreement can be reached without initiating formal proceedings, Dr. Evans will release the College and its officers, directors, agents and their insurers of liability for severance or damages arising out of the termination of his employment and for

reimbursement/ indemnification for legal fees and expenses incurred as of the date of the settlement, in consideration of a lump sum payment of \$85,000.00 to Dr. Evans and a separate payment to our firm for Dr. Evans' legal fees and expenses incurred prior to the effective date of the settlement. This settlement would be without prejudice to the College and its insurer's continuing obligation to defend and indemnify Dr. Evans in the Laumeister/Art Center litigation, and without prejudice to any right to indemnification which has not yet accrued.

86. On September 5, 2019, Dr. Evans, through counsel, sent the following letter to the College's attorneys, and Cincinnati attorney Peters:

This letter shall constitute notice of Dr. Evans' intention to arbitrate his claims against Southern Vermont College and its officers and agents, pursuant to ¶ 16 of the Employment Agreement.

The nature of the dispute is as set forth in my prior communications, including the following (attached hereto):

1. June 18, 2019 letter to Jeffrey Nolan;
2. August 7, 2019 email to A. McLaughlin, K. Hoechst and V. Peters;
3. August 21, 2019 letter to A. McLaughlin, K. Hoechst and V. Peters.

The amounts involved include up to 12 months' unpaid wages and reimbursement/ indemnification for legal fees and expenses. Dr. Evans seeks money damages plus interest, punitive damages, and specific performance of the Employment Agreement. We will identify the arbitrator Dr. Evans has selected within 30 days of the date of this letter, and request that the College do the same.

Dr. Evans would also be prepared to attempt to resolve this matter through mediation prior to appointing the Arbitration Panel and/or scheduling the hearing.

87. On or about October 10, 2019, Cincinnati belatedly paid Paul Frank + Collins for Dr. Evans' legal fees related to the Art Center litigation.

88. Dr. Evans has not been indemnified for the balance of his legal fees and expenses incurred as a result of his employment by the College and his service on the Board.

89. Dr. Evans has not been paid the severance owed to him under the Employment Agreement.

90. Upon information and belief, Plaintiffs in the Art Center Action are prepared to dismiss their claims against the College and Dr. Evans if the College will deed the art center back to its donors.

91. Defendants are refusing to release the mortgage they gave themselves on the Art Center to secure their loans to the College.
92. On information and belief, Defendants' mortgage on the Art Center assets is invalid under the Vermont Uniform Prudent Management of Institutional Funds Act, 14 V.S.A. § 3411.
93. On information and belief, the Defendants and/or their agents destroyed evidence after the duty to preserve evidence had attached by wiping a server and replacing an operating system.

COUNT ONE

94. The foregoing allegations are incorporated by reference.
95. The severance payments owed to Dr. Evans are "wages" within the meaning of 21 V.S.A. §§ 341 and 345(a), and/or benefits to which Dr. Evans is entitled under a written employment agreement within the meaning of 21 V.S.A. §345(b).
96. The payments owed to Dr. Evans as indemnification for legal fees and expenses incurred as a result of his employment by the College and his service on the Board are benefits to which Dr. Evans is entitled under a written employment agreement within the meaning of 21 V.S.A. §345(b).
97. As a result of the nonpayment of such benefits, Dr. Evans has sustained losses for which he is entitled to recover damages, including additional legal fees and expenses.
98. Defendants, as the officers in charge of the College's payment operations, have willfully participated in knowing violations of Dr. Evans' right to receive such wages and benefits.
99. Defendants are liable to Dr. Evans, jointly and severally, for such wages and benefits pursuant to 21 V.S.A. § 345(a).
100. Defendants are also liable to Dr. Evans, jointly and severally, for Dr. Evans' damages caused by their failure to pay such benefits.

101. Defendants acted with malice, with the specific intention of causing harm to Dr. Evans, and/or with a wanton and reckless disregard for Dr. Evan's rights and interests.

COUNT TWO

102. The foregoing allegations are incorporated by reference.

103. Defendants have caused the College to withhold wages and benefits owed to Dr. Evans in retaliation for his complaints that they were planning to violate college employees' rights to receive compensation and benefits to which they were entitled under Chapter 5, Subchapter 2 of Title 21 of the Vermont Statutes, and his intention to cooperate in the Department of Labor's investigation of such violations, in violation of 21 V.S.A. § 348(a).

104. Defendants acted with malice, with the specific intention of causing harm to Dr. Evans, and/or with a wanton and reckless disregard for Dr. Evans' rights and interests.

105. As a consequence of Defendants' unlawful and malicious retaliation in violation of 21 V.S.A. § 348(a), Dr. Evans is entitled to recover compensatory and punitive damages, equitable relief, including restitution, costs, reasonable attorneys fees', and other appropriate relief, pursuant to 21 V.S.A. § 348(b).

COUNT THREE

106. The foregoing allegations are incorporated by reference.

107. The Defendants have interfered with Dr. Evans' contractual relations with the College and Cincinnati, deliberately, willfully and intentionally, by wrongful means, and without privilege.

108. As a direct and proximate result of Defendants' tortious interference, Dr. Evans has sustained losses for which he is entitled to recover damages from the Defendants, jointly and severally.

109. Defendants acted with malice, with the specific intention of causing harm to Dr. Evans, and/or with a wanton and reckless disregard for Dr. Evans' rights and interests, such that Dr. Evans is entitled to an award of punitive damages.

COUNT FOUR

110. The foregoing allegations are incorporated by reference.

111. The Defendants conspired with each other and with Cincinnati to carry out their tortious actions, causing damage to Dr. Evans for which the Defendants are jointly and severally liable.

112. Defendants acted with malice, with the specific intention of causing harm to Dr. Evans, and/or with a wanton and reckless disregard for Dr. Evans' rights and interests, such that Dr. Evans is entitled to an award of punitive damages.

COUNT FIVE

113. The foregoing allegations are incorporated by reference.

114. Plaintiff's Employment Agreement requires any controversies or disputes arising out of Plaintiff's employment or termination to be submitted to arbitration.

115. On September 5, 2019, Plaintiff requested arbitration in accordance with his Employment Agreement.

116. Defendants, in breach of the requirements of the contract, refused to participate in arbitration in violation of the Employment Agreement.

117. As a result of Defendants breach, Plaintiff has suffered and will continue to suffer losses which cannot be fully and adequately redressed through money damages, as well as losses for which Plaintiff has been and will be severely damaged in the amount determined at trial.

118. Defendants acted with malice, with the specific intention of causing harm to Dr. Evans, and/or with a wanton and reckless disregard for Dr. Evans' rights and interests, such that Dr. Evans is entitled to an award of punitive damages.

COUNT SIX

119. The foregoing allegations are incorporated by reference.

120. The Defendants undertook to destroy material evidence of their respective wrongdoing, by wiping a server and replacing an operating system after the duty to preserve evidence had already attached.

121. Any such destruction of evidence, will have been accomplished with the intent to deprive Plaintiff of evidence to support his claims in anticipation that Plaintiff may pursue legal action against one or more of the Defendants for the harm caused by each of the Defendants.

122. Such destruction of evidence has caused and will cause Plaintiff to suffer additional harm, for which Defendants are liable, and for which Plaintiff is entitled to an award of punitive damages.

WHEREFORE, Plaintiff demands judgment in his favor and against the Defendants, jointly and severally, together with an award of compensatory and punitive damages, equitable relief, including restitution, costs, reasonable attorneys' fees, and such other relief as the Court deems appropriate.

DEMAND FOR JURY TRIAL

Plaintiff demands a trial by jury.

DATED at Burlington, Vermont this 30th day of December, 2019.

PAUL FRANK + COLLINS P.C.

By *pamela pearson*

Stephen D. Ellis, Esq.

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