DOCKET NO.: (FS1) FST-CV14-6022988-S	:	SUPERIOR COURT
NETSCOUT SYSTEMS, INC., Plaintiff, V. GARTNER, INC., Defendant.	:	JUDICIAL DISTRICT OF STAMFORD/NORWALK AT STAMFORD December 11, 2014

PLAINTIFF'S OBJECTIONS TO DEFENDANT'S REQUEST TO REVISE

Pursuant to Connecticut Practice Book § 10-37, Plaintiff NetScout Systems, Inc. ("NetScout"), by its attorneys Morgan, Lewis & Bockius, hereby submits the following Objections to Defendant Gartner, Inc.'s ("Gartner") Request to Revise.

PRELIMINARY STATEMENT

Gartner's Request to Revise ("Request") underscores the extent to which "pay-to-play" business practices like Gartner's have been found to be unfair, unethical, and contrary to public policy. NetScout's complaint challenges Gartner's extortionate pay-to-play business practices and seeks recovery for the direct and substantial harm those unfair practices have caused NetScout. Gartner's Request seeks to exclude from the complaint the fact that regulators have found similar conduct to be unfair business practices and public policy violations, evidence that is directly relevant to NetScout's claim under the Connecticut Unfair Trade Practices Act ("CUTPA").

For example, Gartner publicly and proudly touts the effect its Magic Quadrant Reports

has on purchasing decisions in the marketplace. Accepting payments that unfairly influence the content of those Reports injures vendors such as NetScout who refuse to pay-to-play, harms customers and investors who rely on false information about "Leaders," and gives an unfair advantage to companies willing to pay to stay in Gartner's good graces. NetScout is entitled to plead and prove these facts to demonstrate that Gartner has engaged in the very type of unfair and deceptive practices in the conduct of trade or commerce that CUTPA is intended to eradicate. Indeed, Gartner's business practices have harmed not only NetScout, but the entire information technology industry. That Gartner wishes to obscure the similarity of its unscrupulous conduct to the unfair and deceptive illegal conduct condemned by the SEC within the securities industry is not grounds for a request to revise.

Likewise, Gartner hopes that this Court will strike statements made by third party witnesses that accuse Gartner of engaging in "pay-to-play" business practices. Gartner's Request, however, is without basis, as it ignores both NetScout's actual allegations and the applicable law.

Finally, Gartner inexplicably complains that NetScout's defamation allegations are insufficient, ignoring that the complaint quotes the false and defamatory statements made by Gartner about NetScout's management, including false statements that NetScout is "currently struggling to deal with new technical demands and rising expectations," has "architectures, features sets and pricing structures that require modernization (often in progress) to better compete with those in the Leaders quadrant," and offers "only a hardware-based deployment model" that "limits its ability to address growing software and SaaS solution demand." See, e.g., Compl. ¶¶ 138, 140, 151-155, 162, 165. Simply put, NetScout's allegations satisfy the pleading

requirements set forth in the Connecticut Practice Book. See Conn. Practice Book § 10-20. Nothing more is required at this stage of the litigation, and any issues concerning the legal sufficiency of NetScout's claim are not appropriately addressed in a request to revise. See Weitzman v. Ribeiro, No. CV000092739S, 2002 WL 319178, at *1 (Conn. Super. Ct. Feb. 13, 2002) (noting that a request to revise is not the proper vehicle to challenge the legal sufficiency of a claim). Of course, any factual disputes concerning NetScout's defamation claim are properly reserved for the trier of fact.

SUMMARY OF ARGUMENT

As a general matter, Gartner's 60-page Request can be divided into three categories. First, Gartner challenges allegations in the Complaint that the SEC has found similar "pay-to-play" business practices in which Gartner engages to be illegal, against public policy, and violative of the rules of the New York Stock Exchange ("NYSE") and the Financial Industry Regulatory Authority ("FINRA"); punished that conduct with substantial fines; and regulated that conduct (collectively, the "SEC Allegations"). Gartner says that these allegations are "irrelevant" and should be deleted based primarily on the following red herring: Gartner's business practices are not regulated by the SEC, NYSE, or FINRA. Gartner's arguments miss the point. NetScout's citation to and reliance upon regulatory precedent demonstrates that Gartner's misconduct violates public policy, making such precedent directly relevant to a central element of NetScout's CUTPA claim. The Supreme Court of Connecticut has held that "unfairness" may be shown by, among other things, establishing that the practice "without necessarily having been previously considered unlawful, offends public policy as it has been established by statutes, the common law, or otherwise - in other words, it is within at least the

penumbra of some common law, statutory, or other established concept of unfairness." Hartford Elec. Supply Co. v. Allen-Bradley Co., 250 Conn. 334, 368, 736 A.2d 824 (1999) (citation omitted) (Hartford). See also Eder Bros. v. Wine Merchants of Connecticut, Inc., 275 Conn. 363, 381, 880 A.2d 138 (2005) ("a plaintiff may bring a CUTPA claim that is predicated upon the public policy embodied in another statute, irrespective of whether the conduct in question expressly is prohibited by the letter of that statute, so long as the claim is consistent with the regulatory principles established by the underlying statute") (Eder Bros.).

That the SEC and other regulatory authorities have found the same pay-to-play business practice in which Gartner actively engages to be unlawful and unfair is directly relevant to satisfying the "unfairness" element of NetScout's CUTPA claim. Try as it might, Gartner cannot shield itself by seeking impermissibly to delete from NetScout's Complaint the legitimate use of the SEC Allegations to show that Gartner's pay-to-play business practices "offend[] public policy as it has been established by statutes, the common law, or otherwise" and fall "within at least the penumbra of some common law, statutory, or other established concept of unfairness." Hartford, supra, 250 Conn. 368. For this reason, and as explained more fully below, Gartner's first through twentieth requests to revise should be denied and NetScout's objections sustained.

Second, Gartner requests the deletion of allegations in the Complaint on the ground that they are hearsay that is inadmissible under the Connecticut Rules of Evidence. Gartner fails to cite a single decision -- not one -- in which a Connecticut court has granted a request to delete an allegation at the pleading stage because the allegation contained inadmissible hearsay. No such case exists. Nor can there be any question concerning the relevance of NetScout's allegations. All of the allegations that Gartner requests to be stricken as inadmissible hearsay are material

and relevant to NetScout's claim that Gartner engages in a general business practice that is unfair, deceptive, and against public policy under CUTPA. Specifically, the challenged allegations support NetScout's allegation that Gartner operates a "pay-to-play" business model, pursuant to which Gartner clients who spend a sufficient amount on its services receive favorable treatment in Gartner's analyst research reports. In the words of Gartner's own founder, Gideon Gartner (who is no longer with the company):

> The reason why people revile the Magic Quadrant is because it is misused . . . . **And when there's potential tainting of the objectivity of research because you have very large contracts with your vendors, with your customers**, people will always come and complain . . . . Today it is overused, **misused and abused, terribly.**

Compl. ¶ 5.[1] These types of well-pled allegations, supported by industry witnesses, are properly pled and appropriately offered at trial. For these reasons, and as explained more fully below, Gartner's twenty-first through thirty-eight requests to revise should be denied and NetScout's objections sustained.

Last, Gartner requests that NetScout revise Count II of the Complaint to "provide a more particular statement" of NetScout's defamation and defamation *per se* claims, including when, where, and by whom the defamatory statements were made. As pled, the Complaint avers, in a concise and intelligible way, the material facts underlying all of the counts in the Complaint, including when, where, and by whom the defamatory statements were made. As such, each of the counts in the Complaint is pled in conformity with the applicable pleading rules under Connecticut law. Nothing more is required at the pleading stage.

[1] Gideon Gartner, http://www.youtube.com/embed/g7zzl1RM02U.

Accordingly, for all of these reasons, each of which is discussed further below, this Court should deny Gartner's Request and sustain NetScout's objections.[2]

FIRST REQUESTED REVISION

1. Portion of Pleading Sought to Be Revised:

Paragraph 7 of the Complaint, which states:

7. The U.S. Securities and Exchange Commission ("SEC") has punished similar business practices by financial analysts on Wall Street (as opposed to technology analysts like Gartner), finding that such business practices violate rules requiring the financial analysts to observe just and equitable principles of trade and principles of good business practice. There, like here, the financial analysts were, on the one hand, publishing analyst reports evaluating companies, while, on the other hand, offering those same companies services for a fee.

2. Revision Requested:

Gartner requests that NetScout delete Paragraph 7 of the Complaint in its entirety.

3. Reason for Request:

The lodestar principle of Connecticut pleading is that the Complaint "shall contain a plain and concise statement of the material facts on which the pleader relies. . . ." Conn. Prac. Book §10-1. NetScout has completely violated this fundamental pleading principle.

Instead, in order to raise an inference of culpable behavior by Gartner, NetScout improperly references allegations of wrongdoing against separate, nonparty financial

[2] Gartner's requests to revise are grouped into three substantive categories. As required by Connecticut Practice Book § 10-37, NetScout has restated Gartner's requests and, for each of Gartner's three categories of requests, has first presented a comprehensive response (*see* Requests 1, 21 and 39) and, like Gartner, presented an abbreviated response to the remaining (and similar) requests within each such category,

institutions, operating in the distinct and highly regulated securities industry, none of which is the subject of this lawsuit. Specifically, Paragraph 7 alleges that the SEC "punished" financial analysts on Wall Street. See Compl. at ¶7. The allegations in Paragraph 7, further elucidated in subsequent portions of the Complaint, relate to SEC enforcement actions against, and settlement with, certain Wall Street firms, and compare NetScout's claims herein to the SEC's claims against the aforementioned Wall Street firms. Id. at ¶¶8-10, 104-19. For example, NetScout alleges that the SEC made allegations against the financial institutions, including, for instance, that the financial institutions "improperly 'aligned' their research analysts with their investment banking divisions in order to leverage their limited research resources, generate new clientele, and/or offset the cost of research." Id. at ¶109; see also id. at ¶¶111, 113. NetScout also references the SEC settlement with those institutions, including the amount of the settlement and the reforms the Wall Street firms agreed to implement. Id. at ¶¶115, 116. NetScout further references the particular SEC, FINRA, and NYSE regulations applicable to those financial institutions. Id. at ¶118.

None of the SEC allegations referenced by NetScout even remotely involves Gartner, let alone the particular claims raised by NetScout in this case. Gartner is an information technology research and advisory firm. Id. at ¶2. It is wholly unconnected to the securities industry. NetScout, in fact, acknowledges that "Gartner's business practices are not regulated by the SEC." Id. at ¶10. Accordingly, the allegations are unnecessary, impertinent, and immaterial to NetScout's claims herein, and scandalous as applied to Gartner. They should be deleted.

A request to revise is appropriate to obtain "the deletion of any unnecessary,

repetitious, scandalous, impertinent, immaterial or otherwise improper allegations in an adverse party's pleading." Conn. Practice Book §10-35(2); see also Stone v. Pattis, 144 Conn. App. 79, 94, 72 A.3d 1138, 1149 (2013) (express language of§ 10-35 permits deletion of improper allegations). The purpose of the rule set out in §10-35 is clear. As the Connecticut Supreme Court recognized over a century ago, "the pleader must state the facts deemed material plainly, clearly, and truthfully, and must so state them as to expose and make certain, not to conceal and confuse, the inferences of law he claims should be drawn from these facts." Arnold v. Kutinsky, Adler & Co., 80 Conn. 549, 549, 69 A. 350, 352 (1908). Likewise, Connecticut courts have long recognized their "duty to keep the files and records of this court free from scandalous matters, and especially so when such matters are not basically connected with the merits of the case." State v. Schafer, 5 Conn. Cir. Ct. 669, 675 n.1, 260 A.2d 623, 628 n.1 (1969).

"Immaterial" and "impertinent" matters are defined as those that are "mere surplusage," which a plaintiff "will have no right to prove although alleged." Adams v. Way, 32 Conn. 160, 168 (1864); see also 5C Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure §1382 (3d ed. 2004) (in addressing motions to strike immaterial, impertinent, or scandalous matter under Fed. R. Civ. P. 12(f), defining "immaterial" matter as "that which has no essential or important relationship to the claim for relief or defenses being pleaded," and "impertinent" matter as "statements that do not pertain, and are not necessary, to the issues in question."); Mahon v. Chicago Title Ins. Co., 3:09CV00690AWT, 2009 WL 4268372, at *1 (D. Conn. Nov. 24, 2009) ("One test that has been advanced for determining whether an allegation in a pleading is immaterial and impertinent within the meaning of Rule

12(f) is whether proof concerning it could be received at trial; if it could not, then the matter is immaterial and impertinent.") (quoting 5C Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 1382 (3d ed. 2004)).

NetScout's attempt here to bootstrap its allegations against Gartner to allegations involving unrelated entities operating under separate rules in a distinct industry is plainly improper. The SEC-related allegations that are the subject of this First Requested Revision (the "SEC Allegations") have no relationship to NetScout's claims against Gartner, nor to the issues in question in this case. Not least, the SEC Allegations concern enforcement actions taken by the SEC in its regulatory capacity, under specific rules of the National Association of Securities Dealers ("NASD") and New York Stock Exchange ("NYSE"). See, e.g., Complaint, 108, 118.[3] NetScout's claims herein, in contrast, are based on CUTPA. Id. at ¶¶174-81. The Connecticut Supreme Court has long held that securities transactions "fall under the comprehensive regulatory umbrella of the Securities and Exchange Commission" and thus are **not** subject to CUTPA. Russell v. Dean Witter Reynolds, Inc., 200 Conn. 172, 180, 510 A.2d 972, 977 (1986). Indeed, "Connecticut has long separated regulation of the purchase and sale of securities from the regulation of unfair trade practices in other industries." Id. at 182-83; see also Lockery v. O'Hara, CV000504936S, 2002 WL 1837774, at *4 (Conn. Super. Ct. July 1, 2002) ("CUTPA does not apply to deceptive practices in the purchase and sale of securities.").

[3] This Court may also take judicial notice of the SEC complaints NetScout references, all of which were filed in the Southern District of New York, and are available at http://www.sec.gov/spotlight/globalsettlement.htm. See, e.g., Torres v. Carrese, No. CV065011368, 2011 WL 1567002 (Conn. Super. Ct. April 5, 2011) (taking judicial notice of court file in adjudicating request to revise).

Accordingly, NetScout cannot use the SEC Allegations to support its claims against Gartner. There is simply no connection between the purported violations of NASD and NYSE rules governing the securities industry, as set out in the SEC Allegations, and CUTPA. Securities regulation is unique. The securities laws "exist because of the unique informational needs of investors." Robert B. Thompson, Market Makers and Vampire Squid: Regulating Securities Markets After the Financial Meltdown, 89 Wash. U.L. Rev. 323, 376 (2011) (*quoting* James D. Cox et al., Securities Regulation 1 (2d ed. 1997)). In these circumstances, no evidence concerning the SEC Allegations could conceivably be admissible against Gartner at trial.

Equally fundamentally, the fact that Gartner is not the subject of the SEC Allegations -- and cannot be the subject of the securities regulation at issue therein -- leads to the ineluctable conclusion that the SEC Allegations are immaterial and impertinent to this case. In similar contexts, courts strike allegations against third parties, even where, unlike here, the allegations relate to third parties in the same industry. In Mahon v. Chicago Title Ins. Co., 3:09CV00690AWT, 2009 WL 4268372 (D. Conn. Nov. 24, 2009), for example, the district court granted a motion to strike portions of the complaint containing "introductory allegations" purporting to "illustrate the serious public policy issues at stake in [that] case and place the defendants' wrongful conduct in the context of an industry-wide epidemic," on grounds that such allegations were "immaterial and impertinent." Id. at *1 (internal quotation marks omitted). As the court in Mahon reasoned, "whether unnamed and unidentified third parties in the same industry engaged in wrongful conduct does not make the existence of any fact that is of consequence to the determination of the claims against the defendants in this case more

probable or less probable than it would be without evidence as to the conduct of such third parties." Id.; see also Ruffino v. Murphy, 3:09-CV-1287 (VLB), 2009 WL 5064452, at *1 (D. Conn. Dec. 16, 2009) (after dismissing claims against certain co-defendants, holding that "any allegations against these former defendants have no relationship to the remaining claims for relief and are immaterial," and therefore granting defendants' motion to strike).

Even if Gartner were the subject of the SEC Allegations, which it decidedly is not, those allegations would be inappropriate in NetScout's complaint. In Lipsky v. Commonwealth United Corp., 551 F.2d 887, 894 (2d Cir. 1976), the Second Circuit held that neither the SEC complaint against the defendant corporation nor references to the complaint, which resulted in consent judgment, could properly be cited in pleadings, and thus found that such allegations were properly stricken under Fed. R. Civ. P. 12(f). The Second Circuit explained that settlements that are not the result of an actual adjudication of any issue "cannot be used as evidence in subsequent litigation" with the settling party. Id. at 893. The Connecticut Supreme Court has recognized Lipsky as stating the "majority view" and adheres to the same rule. *See* State v. Daniels, 248 Conn. 64, 84-85, 726 A.2d 520, 530 (1999), overruled on other grounds by State v. Singleton, 274 Conn. 426, 876 A.2d 1 (2005). Courts have routinely applied Lipsky and its progeny in striking allegations that rely on unsubstantiated or settled allegations from other lawsuits. See In re Platinum and Palladium Commodities Litig., 826 F. Supp. 2d 588, 593 (S.D.N.Y. 2011) ("As courts in this Circuit have found repeatedly, Lipsky teaches 'that references to preliminary steps in litigations and administrative proceedings that did not result in an adjudication on the merits or legal or permissible findings of fact are, as a matter of law, immaterial under Rule 12(f) …'"); In re Merrill Lynch & Co, Inc. Research Reports Sec.

Litig., 218 F.R.D. 76, 78 (S.D.N.Y. 2003) (striking references to SEC and NASD complaints in securities action).

Indeed, even where allegations involve the same defendant, courts routinely deem allegations involving a defendant's relationship with or conduct toward third parties to be immaterial and irrelevant. See, e.g., Bridgeport Harbour Place I, LLC v. Ganim, 131 Conn. App. 99, 143, 30 A.3d 703, 733-34 (2011) (in CUTPA case, affirming preclusion of evidence of defendant's conduct toward third parties as not related to plaintiff's ascertainable loss); Genna v. Captain's Cove Marina of Bridgeport, Inc., CV116019426S, 2012 WL 1089401, at *2 (Conn. Super. Ct. Mar. 12, 2012) (overruling objections to request to revise, deeming allegations relating to defendant's conduct toward two individuals who were not parties to the case to be "irrelevant and immaterial"); Rab Assoc., LLC v. Bertch Cabinet Mfg., Inc., NNHCV106015934S, 2014 WL 4413764, at *4 (Conn. Super Ct. July 30, 2014) (overruling objection to request to revise, where portions of complaint addressing defendant's contractual relationships with third parties were "impertinent and immaterial to the present action because the relationship between the parties is at issue, not the defendant's relationship with other sales representatives"); Mangen v. Pilgrim, CV065002217S, 2006 WL 1530185, at *1 (Conn. Super. Ct. May 19, 2006) (deleting allegations of defendant's violation of traffic laws, on grounds that they were 'unnecessary and immaterial to any negligence claim and improper in the sense that they add nothing to the issue at hand -- proving the defendant drove in a negligent manner in this particular case -- but serve the function of an attack perhaps on character"); Tucker v. Am. Int'l Grp., Inc., 936 F. Supp. 2d 1, 25 (D. Conn. 2013) (granting motion to strike paragraph of complaint relating to allegations of wrongdoing unrelated to case on grounds that "to allow

such irrelevant allegations to remain would unduly prejudice Defendants").

Under well-established precedent of both state and federal courts, therefore, the SEC Allegations must be viewed as immaterial and impertinent. By overtly comparing Gartner to the financial institutions that are the subject of the SEC Allegations, the allegations are also scandalous and unduly prejudicial to Gartner. They seek to create an aura of culpability, based not on Gartner's conduct or Connecticut's unfair trade practices statute, but on the conduct of others operating in a distinct regulatory context. Connecticut courts have a "duty" to keep their files and records free from such scandalous allegations, "especially so when such matters are not basically connected with the merits of the case." State v. Schafer, 5 Conn. Cir. Ct. 669, 675 n.l, 260 A.2d 623, 628 n.l (1969).[4]

4. Objection

Gartner's request should be denied because it ignores the elements of NetScout's CUTPA claim, as well as the relevancy of the challenged SEC Allegations to that claim. In its first through twentieth requests of its Requests to Revise, Gartner targets NetScout's SEC Allegations, i.e., allegations in the Complaint concerning the fact that the SEC has found the same "pay-to-play" business practices in which Gartner engages to be illegal, against public policy by the SEC, and violative of the rules of the NYSE and FINRA. The Connecticut Supreme Court, however, disfavors requests to revise of the type that Gartner has filed here, which "should be avoided by the profession" and "discouraged by the trial courts." Donovan v.

[4] In addition to all the foregoing, the inclusion of NetScout's gratuitous and improper surplusage has the potential to open a Pandora 's Box of attempted discovery that unfairly goes way beyond the factual allegations asserted in this matter against Gartner. This is an additional reason to limit the permitted allegations to the fact pleading the Practice Book requires.

Davis, 85 Conn. 394, 82 A. 1025, 1026 (1912). It is from this hostile procedural ground that Gartner seeks to "delete," wholesale, allegations that are relevant to NetScout's CUTPA claim.

Connecticut Practice Book § 10-1 requires only that "[e]ach pleading shall contain a plain and concise statement of the material facts on which the pleader relies." The power of the Court to require a fuller and more particular statement in the Complaint should therefore "be exercised with caution, and never for frivolous or unsubstantial reasons." Prince v. Takash, 75 Conn. 616, 54 A. 1003 (1903). Indeed, Connecticut courts have made clear that the indiscriminate use of a request to revise is disfavored and "it should never be used, except in plain cases." Southiseng v. Paola, No. CV0381967, 2003 WL 553497, at *2 (Conn. Super. Ct. Feb. 6, 2003); see also Lord v. Int'l Marine Ins. Services, No. 3:08-CV-1299, 2012 WL 45440, at *2 (D. Conn. Jan. 9, 2012) (noting that motions to strike "are viewed unfavorably and rarely granted"). As the Supreme Court of Connecticut has observed regarding requests to revise (then referred to as requests to expunge):

> In many, perhaps in most, cases, no harm is done in leaving the immaterial or irrelevant matter in the pleading and securing its exclusion by objection to its offer on the trial. **The indiscriminate use of motions to expunge and correct prolongs unduly the joining of issue, and burdens the court and the profession with much unnecessary and profitless labor**. Their use, except in plain cases, **should be avoided** by the profession and **discouraged by the trial courts**. In no event should the motion to expunge be permitted to take the place of the demurrer, or of the motion to strike out . . . .

Donovan v. Davis, 85 Conn. 394, 82 A. 1025, 1026 (1912) (emphasis added); see also Fort Trumbell Conservancy LLC v. Alves, 286 Conn. 264, 277 n.12, 943 A.2d 420 (2008) (reversing trial court's grant of request to revise and noting that the court was "troubled" by defendant's request to revise, which requested that "material allegations" be stricken and "that paragraphs be

deleted in their entirety"). Gartner's Request runs afoul of these fundamental precepts.

The SEC Allegations that Gartner targets are directly relevant to NetScout's CUTPA claim, in view of the elements of a claim under CUTPA. The purpose of CUTPA "is to protect the public from unfair practices in the conduct of any trade or commerce. . . . The entire act is remedial in character . . . and must be liberally construed in favor of those whom the legislature intended to benefit." Am. Car Rental, Inc. v. Comm'r of Consumer Prot., 273 Conn. 296, 310, 869 A.2d 1198 (2005) (quotations omitted) (emphasis added). The touchstone to any CUTPA claim remains the element of "unfairness." "Whether a practice is unfair and thus violates CUTPA is an issue of fact." Willow Springs Condo. Ass'n, Inc. v. Seventh BRT Dev. Corp., 245 Conn. 1, 43, 717 A.2d 77 (1998). Courts in Connecticut apply what is commonly referred to as the "cigarette rule" to determine whether a challenged practice is "unfair" under CUTPA. That rule has three prongs, asking:

> (1) whether the practice, without necessarily having been previously considered unlawful, **offends public policy as it has been established by statutes, the common law, or otherwise** - in other words, it **is within at least the penumbra of some common law, statutory, or other established concept of unfairness**; (2) whether it is **immoral, unethical, oppressive, or unscrupulous**; or (3) whether it causes **substantial injury to consumers, competitors or other businesspersons**.

Hartford, supra, 250 Conn. 368 (emphasis added; citation omitted).

The first prong of the "cigarette rule" asks only whether the alleged business practice offends public policy "as it has been established by statutes, the common law, or otherwise." Hartford, supra, 250 Conn. 368; see also Conaway v. Prestia, 191 Conn. 484, 493, 464 A.2d 847 (1983) (while defendants' actions were "not specifically prohibited" by statutes relating to rent

collection, they "unquestionably offended the public policy, as embodied by these statutes"). In other words, "a plaintiff may bring a CUTPA claim that is predicated upon the public policy embodied in another statute, **irrespective** of whether the conduct in question expressly is prohibited by the letter of that statute, **so long as the claim is consistent with the regulatory principles established by the underlying statute**." Eder Bros., supra, 275 Conn. at 381 (plaintiff lacked standing to bring a claim under the Liquor Control Act, but could bring a CUTPA claim predicated on the public policies embodied in the Liquor Control Act) (emphasis added; citation omitted).

The cigarette rule's second prong (an alternative means of proving a CUTPA violation) encompasses conduct that is "immoral, unethical, oppressive, or unscrupulous." Hartford, supra, 250 Conn. 368. "A trade practice that is undertaken to maximize the defendant's profit at the expense of the plaintiff's rights comes under the second prong of the cigarette rule." Votto v. Am. Car Rental, Inc., 273 Conn. 478, 485, 871 A.2d 981 (2005) (affirming finding of CUTPA violation based solely on conduct that implicated second criterion of cigarette rule). Third, and finally, for an act to cause substantial injury to business: (1) the injury must be substantial; (2) it must not be outweighed by any countervailing benefits that the practice produces; and (3) it must be an injury that the plaintiff could not have reasonably avoided. See Hartford, supra, 250 Conn. 368. "All three criteria do not need to be satisfied to support a finding of unfairness," rather "[a] practice may be unfair because of the degree to which it meets one of the criteria or because to a lesser extent it meets all three." Id.

Prong One: Public Policy

The Complaint alleges that Gartner, a research analyst firm that provides analysis on

information technology companies, engages in the same unfair business practices that financial research analysts used in connection with their research reports on public companies. Compl. ¶¶ 2-17, 51-120. The "unfair" conduct in question is the deceptive business practice of, on the one hand, publishing ostensibly unbiased analyst reports, and, on the other hand, offering those same companies services for a fee. Compl. ¶ 6.

The SEC has determined such conduct to be illegal, unfair, deceptive, and against public policy as it relates to research analysts in the financial services industry. The SEC punished these business practices, finding that such business practices violate NYSE and FINRA rules requiring analysts to observe just and equitable principles of trade and principles of good business practice. Compl. ¶¶ 7-9, 105-18. The SEC instituted enforcement actions against ten Wall Street firms based on these actions, which resulted in an over $1 billion settlement and structural reforms of the entire financial analysts industry. Compl. ¶¶ 115-16, 118. Those structural reforms were intended to remove the conflicts of interest and unfair and deceptive business practices that led to biased and inaccurate analyst reports. Compl. ¶ 117. The SEC and other regulators have since promulgated regulations specifically prohibiting financial research firms from engaging in the same types of unfair and deceptive business practices that persist at Gartner to this day. Compl. ¶ 118-19. While the SEC was addressing a different industry, the business practice it condemned was quite similar to the business practice at issue here. It is equally "unfair" in the information technology industry, as it is in the financial services industry. Compl. ¶ 10.

Whether in the securities industry or otherwise, research analyst "pay-to-play" business practices are unfair and deceptive business practices because the analysts pretend to offer

"independent," "objective," and "unbiased" analysis of a company's value or products, when in fact its analysis is influenced by whether or not the company has paid the analysts' firm for other services. Compl. ¶ 3. Further, these business practices are unfair and deceptive because they pressure companies to pay for services in exchange for higher rankings and more favorable statements. Compl. ¶ 4. For these reasons, and as discussed further below, the SEC Allegations are relevant to all three prongs of the cigarette rule.

The fact that these "pay-to-play" business practices have been outlawed in another industry is relevant to the first prong of the "cigarette rule." That is, whether Gartner's business practice "offends public policy as it has been established by statutes, the common law, or otherwise" and "is within at least the penumbra of some common law, statutory, or other established concept of unfairness." Hartford, supra, 250 Conn. 368; see also Eder Bros., supra, 275 Conn. 381 (plaintiff lacked standing to bring a claim under the Liquor Control Act, but could bring a CUTPA claim predicated on the public policies embodied in the Liquor Control Act); Conaway v. Prestia, 191 Conn. 484, 493, 464 A.2d 847 (1983) (while defendants' actions were "not specifically prohibited" by statutes relating to rent collection, they "unquestionably offended the public policy, as embodied by these statutes").[5] Conaway and Eder Bros. are instructive.

The Connecticut Supreme Court's decisions in Conaway and Eder Bros. illustrate the relevance of the SEC Allegations to NetScout's CUTPA claim, and mandate denial of Gartner's request. First, in Conaway, the court was faced with the issue of whether a landlord's practice of

[5] See also Com. v. Fremont Inv. & Loan, 452 Mass. 733, 744 n.20, 897 N.E.2d 548 (2008) (considering as "instructive as to established concepts of unfairness" Office of Comptroller of the Currency guidance letter sent to non-party national banks in action brought under Massachusetts analogue to CUTPA).

continuing to accept rent without first obtaining the necessary certificate of occupancy was an "unfair" practice under CUTPA. Conaway v. Prestia, supra, 191 Conn. 484. In that case, the defendant landlord argued that the practice was not unfair because it was not expressly prohibited by Connecticut's Landlord and Tenant Act. Conaway v. Prestia, supra, 491. The court looked to the United States Supreme Court's decision in FTC v. Sperry & Hutchinson Co. to determine whether plaintiff had established the "threshold requirement" of establishing a "nexus with the public interest" under CUTPA. Id. at 492. The Court's decision in FTC delineated the three-pronged test discussed above, and commonly referred to as the "cigarette rule." FTC v. Sperry & Hutchinson Co., 405 U.S. 233, 244 n.5 (1972). Applying the first prong of the cigarette rule, the Connecticut Supreme Court concluded that defendant's practice, while not specifically prohibited by any Connecticut statute, "unquestionably offended [the] public policy . . . of insuring minimum standards of housing safety and habitability," as embodied in the Landlord and Tenant Act. Conaway v. Prestia, supra, 493.

Subsequently, in Eder Bros., the Connecticut Supreme Court reaffirmed the principle that a particular business practice need not expressly violate an applicable statute, as long as the practice offends the public policy considerations that undergird that statute. In that case, the plaintiff brought a CUTPA claim against the defendant based on conduct that allegedly violated Connecticut's Liquor Control Act. Eder Bros., supra, 275 Conn. 381. The defendant argued that plaintiff's CUTPA claim was improper because the relevant conduct fell under the exclusive purview of the Liquor Control Act, which did not provide for a private right of action. Id. The trial court dismissed plaintiff's CUTPA claim. Id. at 367-68. The Connecticut Supreme Court reversed, noting that "the defendant in the present case does not necessarily have to be found to

have violated the Liquor Control Act in order to be found to have violated CUTPA." Id. at 381. Rather, as the court made clear, a plaintiff may establish unfairness under CUTPA by demonstrating that the conduct at issue offends public policy:

> This court previously has indicated that a plaintiff may bring a CUTPA claim that is predicated upon the public policy embodied in another statute, irrespective of whether the conduct in question expressly is prohibited by the letter of that statute, so long as the claim is "consistent with the regulatory principles established by the underlying statute."

Eder Bros., supra, 275 Conn. 381 (quoting Mead v. Burns, 199 Conn. 651, 665, 509 A.2d 11 (1986)).

Here, under Conaway and Eder Bros., the SEC Allegations unquestionably are relevant to NetScout's CUTPA claim. Indeed, there can be no doubt that Gartner's business practices offend public policy, as they are substantially similar to the business practices that were the target of the SEC's enforcement activity and regulations. To be sure, the SEC, NYSE and FINRA are charged with protecting the interests of investors, whose interests are not directly implicated by NetScout's CUTPA claim. It is the unfairness inherent in the operation of "pay-to-play" business practices that were at the heart of the SEC's enforcement activity -- and so too here. "Pay-to-play" business practices find victims of all types. Whether those victims are investors, like those harmed by the deceptive and unscrupulous business practices of financial analysts, or information technology businesses like NetScout who have been harmed by similar pay-to-play practices of information technology analysts, is irrelevant. The SEC and CUTPA both endeavor to snuff out the underlying behavior that makes innocent parties victim to these "pay-to-play" practices, without regard for whether the victims are individuals or businesses. Cf. Eder Bros., supra, 275 Conn. 379 ("CUTPA is not limited to conduct involving consumer injury .

. . [A] competitor or other business person can maintain a CUTPA cause of action without showing consumer injury.") (citations omitted; internal quotation marks omitted). Accordingly, Gartner's practices are "within at least the penumbra" of an "established concept of unfairness." Id. at 381. NetScout's objection should be sustained for this reason alone.

Prong Two: Unethical, Unscrupulous Conduct

The SEC Allegations are also relevant to the cigarette rule's second prong, which asks whether the business practice is "immoral, unethical, oppressive, or unscrupulous." See supra 16-17. As alleged in the Complaint, the purpose of the SEC's enforcement actions was to eradicate "undue bias, conflicts of interest and unfair and deceptive business practices pertaining to financial research analysts at large financial institutions." Compl. ¶ 117. As discussed above, Gartner engages in similar business practices, which likewise smack of "undue bias, conflicts of interest and unfair and deceptive business practices." Id. Such practices are immoral, unethical, oppressive and unscrupulous under the cigarette rule.

None of Gartner's arguments address the fact that the SEC Allegations are directly relevant to the issue of whether Gartner's business practices are "unfair" under CUTPA. As explained above, Gartner's business practices are "unfair," within the meaning of CUTPA, and the SEC Allegations are directly relevant to that issue. Thus, all of Gartner's arguments miss the point.[6]

[6] Although this Court need look no further than the first or second prong of the cigarette rule, the SEC Allegations are relevant to the third prong as well. That is, the SEC Allegations are relevant to whether Gartner's business practices cause substantial injury to "businesspersons." See Hartford, supra, 250 Conn. 368 (discussing relevant factors).

The Complaint Is Not Scandalous or Prejudicial

To the extent that Gartner believes that the business practices that were the subject of the SEC Allegations are "scandalous," would "poison the mind of the jury" and give rise to "undue prejudice," Gartner only indicts itself. Gartner's "pay-to-play" business practices are similar to those at issue in the SEC Allegations, and Gartner identifies nothing about its industry that somehow cleanses such unfair and deceptive "pay-to-play" business practices. Further, nowhere does Gartner explain **why** the SEC Allegations constitute "scandalous allegations." After all, as the court explained in Tucker (which Gartner cites in its Request): "'a scandalous allegation' has been described as 'one that reflects **unnecessarily** on the defendant's moral character, or uses repulsive language that detracts from the dignity of the court." See Tucker v. American Intern. Group, Inc., 936 F. Supp. 2d 1, 16 (D. Conn. 2013) (emphasis added); see also Urashka v. Griffin Hosp., 841 F. Supp. 468, 476-77 (D. Conn. 1994) (giving notice to parties that if age discrimination action proceeded, court would strike as "scandalous" allegations regarding assistant director's derogatory sexual references). Here, the SEC Allegations are not unnecessary, but rather directly relevant to NetScout's CUTPA claim. Of course, Gartner cannot point to any allegations that constitute "repulsive language that detracts from the dignity of the court." Tucker v. American Intern. Group, Inc., supra, 936 F. Supp. 2d 16.

Nor does Garter's concern that the SEC Allegations in the Complaint would "poison the mind of the jury," and result in "undue prejudice," present a legitimate ground for deleting well-plead allegations from the Complaint. After all, there is no requirement that the Complaint be submitted to the jury under Connecticut law. Cruz v. Montanez, 294 Conn.

357, 377-78, 984 A.2d 705 (2009). Indeed, whether a complaint is submitted to the jury is within the discretion of the trial court, and it is an issue that is resolved at a later stage of the litigation. See McCrae Assocs. LLC v. Universal Capital Mgmt., Inc., 554 F. Supp. 2d 249, 256-57 (D. Conn. 2008) ("Whether . . . evidence will be admissible at trial is an issue to be resolved at a later stage of the litigation."); cf. Schutz v. Ne. Mortgage Corp., No. 3:05CV423(MRK), 2005 WL 1868888, at *1 (D. Conn. July 27, 2005) (motion to strike on the grounds that the language would "unduly inflame[e]" and "prejudice[e] the jury" denied as "unnecessary because the Complaint will not be submitted to the jury"); Johnson v. M & M Commc'ns, Inc., 242 F.R.D. 187, 190 (D. Conn. 2007) (motion to strike denied, noting that the "danger of unfair prejudice" is minimal "because a complaint is not submitted to the jury") Accordingly, Gartner's stated concerns about the SEC Allegations "poisoning the mind of the jury" and causing "undue prejudice" are premature at this early stage of the litigation where the trial court has yet to decide whether the Complaint will even be submitted to the jury.

The Cases Cited by Gartner Are Inapposite

Gartner's argument that the SEC Allegations are immaterial because securities transactions are not subject to CUTPA is similarly misguided. Request at 8; supra at 9 (citing Russell v. Dean Witter Reynolds, Inc., 200 Conn. 172, 510 A.2d 972 (1986)). Russell has no application here because it stands for the simple proposition that where a Connecticut Uniform Securities Act ("CUSA") claim lies, a CUTPA claim does not. Securities transactions are excluded from CUTPA coverage because the purchase and sale of securities is "comprehensively regulated by a different regime." Normand Josef Enters., Inc. v. Connecticut Nat. Bank, 230

Conn. 486, 516, 646 A.2d 1289 (1994). NetScout's claim is not founded upon a securities transaction, and, therefore, NetScout has not brought a CUSA claim because that statute does not apply. Rather, NetScout has asserted a CUTPA claim against Gartner, and it has supported its claim with allegations showing that Gartner's business practices are unfair. As explained above, the SEC Allegations are relevant to that key issue.

Of the four decisions cited by Gartner in which the plaintiff asserted a CUTPA claim, not one of those decisions addressed the question of whether defendant's business practices violated public policy "as established by statutes, common law or otherwise," or satisfied the "cigarette rule" on any other ground. See Tucker v. American Int'l Group, Inc., supra, 936 F. Supp. 2d 21-25 (striking allegation related of "bid-rigging and commission-related kickbacks" that were wholly unrelated to unfair settlement claims, but sustaining plaintiff's objections where it was "conceivable" that plaintiff could offer evidence in support of his allegations); Rab Assocs., LLC v. Bertch Cabinet Mfg., Inc., No. NNHCV106015934S, 2014 WL 4413764 (Conn. Super. Ct. July 30, 2014) (granting in part, and denying in part, request to revise in breach of contract action where allegations regarding relationship between the defendant-employer and third-party employees were irrelevant to whether defendant breached contract with the plaintiff); Bridgeport Harbour Place I, LLC v. Ganim, 131 Conn. App. 99, 143, 30 A.3d 703 (2011) (affirming exclusion of evidence at trial that defendant bribed state officials on ground that evidence was unrelated to construction project that was the foundation of CUTPA claim); Mahon v. Chicago Title Ins. Co., 3:09CV00690AWT, 2009 WL 4268372 (D. Conn. Nov. 24, 2009) (striking allegations of industry-wide conduct offered to demonstrate the propensity of defendants to act improperly).

The remaining cases that Gartner cites are similarly inapposite, as they do not even involve a claim under CUTPA, let alone the question of whether a particular business practice is unfair under the "cigarette rule." See, e.g., Ruffino v. Murphy, 3:09CV-1287 (VLB), 2009 WL 5064452 (D. Conn. Dec. 16, 2009) (striking allegations against former co-defendants who were previously dismissed from case); Lipsky v. Commonwealth United Corp., 551 F.2d 887, 893-94 (2d Cir. 1976) (holding that SEC complaint that led to consent judgment against defendant could not be used show whether defendant used best efforts to register stock because there was no final adjudication on the merits); In re Merrill Lynch & Co, Inc. Research Reports Sec. Litig., 218 F.R.D. 76, 78-79 (S.D.N.Y. 2003) (fact that SEC filed complaints against defendants could not be used "to prove underlying facts of liability"); State v. Daniels, 248 Conn. 64, 83, 726 A.2d 520 (1999) overruled by State v. Singleton, 274 Conn. 426, 876 A.2d 1 (2005) (citation to concurring opinion in criminal action holding that a plea of nolo contendere may not be used in a subsequent probation revocation action as proof that defendant violated the conditions of his probation); In re Platinum and Palladium Commodities Litig., 828 F. Supp. 2d 588, 593-95 (S.D.N.Y. 2011) (Commodities Futures Trading Commission consent order could not be used to establish the "underlying facts of liability") (citation omitted); Mangen v. Pilgrim, No. CV065002217S, 2006 WL 1530185, at *1 (Conn. Super. Ct. May 19, 2006) (negligent driving case where allegations that defendant operated an unregistered vehicle without a license and failed to carry an insurance card immaterial to issue of whether defendant drove in a negligent manner). Accordingly, all of the cases that Gartner relies upon are inapposite, as none of those cases involved the key issue to which the SEC Allegations are relevant. That is, whether a particular business practice qualifies as "unfair" under the "cigarette rule" -- an element of

NetScout's CUTPA claim.

In sum, NetScout's SEC Allegations, including the allegations in Paragraph 7, are directly relevant to NetScout's claims, and there is nothing unnecessary, impertinent, immaterial, or scandalous about them. NetScout's allegations support its claim that Gartner violated CUTPA and the fact that Gartner's business practices are "unfair," one of the elements of a CUTPA claim. None of Gartner's arguments addresses that issue, and none of the decisions Gartner cites constitutes a valid basis supporting its request to revise.

SECOND REQUESTED REVISION

1. Portion of Pleading Sought to Be Revised:

Paragraph 8 of the Complaint, which states:

8. Indeed, the SEC instituted enforcement actions against ten Wall Street firms, which resulted in an over $1 billion settlement and structural reforms of the entire financial analyst industry. See infra paragraphs 115-116. Those structural reforms were intended to remove the conflicts of interest and unfair and deceptive business practices that led to biased and inaccurate analyst reports. See infra paragraphs 105-118.

2. Revision Requested:

Gartner requests that NetScout delete Paragraph 8 of the Complaint in its entirety.

3. Reason for Request:

The allegations in Paragraph 8, further elucidated in subsequent portions of the Complaint, relate to SEC enforcement actions against, and settlement with, certain Wall Street firms, and compare NetScout's claims herein to the SEC's claims against the aforementioned Wall Street firms. The allegations involve unrelated entities which are not parties to this

lawsuit, operating under separate rules, in a distinct industry. They are plainly improper. Gartner requests deletion of this paragraph for all the reasons set forth in its First Requested Revision.

4. Objection:

Gartner's request should be denied for all of the reasons stated in NetScout's objection to Gartner's First Request, as it seeks the deletion of allegations that are directly relevant to a necessary element of NetScout's CUTPA claim. Under CUTPA, NetScout must plead and prove that Gartner's business practice was "unfair," and it may do so by identifying whether the alleged business practice offends public policy "as it has been established by statutes, the common law, or otherwise." Hartford, supra, 250 Conn. 368. As Gartner's business practices are virtually identical to business practices that the SEC found to be illegal, unethical and against public policy, the SEC Allegations in the Complaint are relevant to NetScout's CUTPA claim and, in particular, the unfairness element of that claim. Consequently, NetScout's objection should be sustained. See supra 13-26.

THIRD REQUESTED REVISION

1. Portion of Pleading Sought to Be Revised:

Paragraph 9 of the Complaint, which states:

9. The SEC and other regulators have since promulgated regulations specifically prohibiting financial research firms from engaging in the same types of unfair and deceptive business practices that persist at Gartner to this day. See SEC Regulation AC; FINRA Rule 2711; NYSE Rule 472.

2. Revision Requested:

Gartner requests that NetScout delete Paragraph 9 of the Complaint in its entirety.

3. Reason for Request:

The allegations in Paragraph 9 relate to SEC enforcement actions against, and settlement with, certain Wall Street firms, and compare NetScout's claims herein to the SEC's claims against the aforementioned Wall Street firms. The allegations involve unrelated entities which are not parties to this lawsuit, operating under separate rules, in a distinct industry. They are plainly improper. Gartner requests deletion of this paragraph for all the reasons set forth in its First Requested Revision.

4. Objection:

Gartner's request should be denied for all of the reasons stated in NetScout's objection to Gartner's First Request, as it seeks the deletion of allegations that are directly relevant to a necessary element of NetScout's CUTPA claim. Under CUTPA, NetScout must plead and prove that Gartner's business practice was "unfair," and it may do so by identifying whether the alleged business practice offends public policy "as it has been established by statutes, the common law, or otherwise." Hartford, supra, 250 Conn. 368. As Gartner's business practices are virtually identical to business practices that the SEC found to be illegal, unethical and against public policy, the SEC Allegations in the Complaint are relevant to NetScout's CUTPA claim and, in particular, the unfairness element of that claim. Consequently, NetScout's objection should be sustained. See supra 13-26.

FOURTH REQUESTED REVISION

1. Portion of Pleading Sought to Be Revised:

Paragraph 10 of the Complaint, which states:

10. While Gartner's business practices are not regulated by the SEC, its business practices are no less unscrupulous or unethical. The unfair and deceptive business practices employed by Gartner have damaged NetScout and its business through, among other things, reputational harm and lost business opportunities. Gartner has further damaged NetScout by forcing it to expend considerable sums of money to counteract Gartner's false and defamatory statements within the marketplace.

2. Revision Requested:

Gartner requests that NetScout delete the first sentence of Paragraph 10, which states: While Gartner's business practices are not regulated by the SEC, its business practices are no less unscrupulous or unethical."

3. Reason for Request:

The allegations in Paragraph 10 seek to compare NetScout's claims herein to the SEC's claims against the aforementioned Wall Street firms. The allegations seek to create an aura of culpability, based not on Gartner's conduct or Connecticut's unfair trade practices statute, but on the conduct of others operating in a distinct regulatory context. They are plainly improper. Gartner requests deletion of the aforementioned portions of this paragraph for all the reasons set forth in its First Requested Revision.

4. Objection:

Gartner's request should be denied for all of the reasons stated in NetScout's objection to Gartner's First Request, as it seeks the deletion of allegations that are directly relevant to a necessary element of NetScout's CUTPA claim. Under CUTPA, NetScout must plead and prove that Gartner's business practice was "unfair," and it may do so by identifying whether the alleged

business practice offends public policy "as it has been established by statutes, the common law, or otherwise." Hartford, supra, 250 Conn. 368. As Gartner's business practices are virtually identical to business practices that the SEC found to be illegal, unethical and against public policy, the SEC Allegations in the Complaint are relevant to NetScout's CUTPA claim and, in particular, the unfairness element of that claim. Consequently, NetScout's objection should be sustained. See supra 13-26.

FIFTH REQUESTED REVISION

1. Portion of Pleading Sought to Be Revised:

Paragraph 104 of the Complaint, which states:

104. These "pay-to-play" business practices are not new to the research analyst industry. Regulators have attempted to eradicate as unscrupulous, unethical and against public policy similar "pay-to-play" business practices among research analysts in the financial services industry.

2. Revision Requested:

Gartner requests that NetScout delete Paragraph 104 of the Complaint in its entirety.

3. Reason for Request:

The allegations in Paragraph 104 relate to SEC enforcement actions against, and settlement with, certain Wall Street firms, and compare NetScout's claims herein to the SEC's claims against the aforementioned Wall Street firms. The allegations involve unrelated entities which are not parties to this lawsuit, operating under separate rules, in a distinct industry. The allegations seek to create an aura of culpability, based not on Gartner's conduct or Connecticut's unfair trade practices statute, but on the conduct of

others operating in a distinct regulatory context. They are plainly improper. Gartner requests deletion of this paragraph for all the reasons set forth in its First Requested Revision.

4. Objection:

Gartner's request should be denied for all of the reasons stated in NetScout's objection to Gartner's First Request, as it seeks the deletion of allegations that are directly relevant to a necessary element of NetScout's CUTPA claim. Under CUTPA, NetScout must plead and prove that Gartner's business practice was "unfair," and it may do so by identifying whether the alleged business practice offends public policy "as it has been established by statutes, the common law, or otherwise." Hartford, supra, 250 Conn. 368. As Gartner's business practices are virtually identical to business practices that the SEC found to be illegal, unethical and against public policy, the SEC Allegations in the Complaint are relevant to NetScout's CUTPA claim and, in particular, the unfairness element of that claim. Consequently, NetScout's objection should be sustained. See supra 13-26.

SIXTH REQUESTED REVISION

1. Portion of Pleading Sought to Be Revised:

Paragraph 105 of the Complaint, which states:

105. Following the collapse of technology stocks in the 1990s and early 2000s, it came to light that research analysts at some of Wall Street's largest investment banks had prepared favorable research reports on companies that were also clients of the investment banks.

2. Revision Requested:

Gartner requests that NetScout delete Paragraph 105 of the Complaint in its entirety.

3. Reason for Request:

The allegations in Paragraph 105 relate to SEC enforcement actions against, and settlement with, certain Wall Street firms. The allegations involve unrelated entities which are not parties to this lawsuit, operating under separate rules, in a distinct industry. They are plainly improper. Gartner requests deletion of this paragraph for all the reasons set forth in its First Requested Revision.

4. Objection:

Gartner's request should be denied for all of the reasons stated in NetScout's objection to Gartner's First Request, as it seeks the deletion of allegations that are directly relevant to a necessary element of NetScout's CUTPA claim. Under CUTPA, NetScout must plead and prove that Gartner's business practice was "unfair," and it may do so by identifying whether the alleged business practice offends public policy "as it has been established by statutes, the common law, or otherwise." Hartford, supra, 250 Conn. 368. As Gartner's business practices are virtually identical to business practices that the SEC found to be illegal, unethical and against public policy, the SEC Allegations in the Complaint are relevant to NetScout's CUTPA claim and, in particular, the unfairness element of that claim. Consequently, NetScout's objection should be sustained. See supra 13-26.

SEVENTH REQUESTED REVISION

1. Portion of Pleading Sought to Be Revised:

Paragraph 106 of the Complaint, which states:

106. Many Wall Street investment banks employ research analysts that issue research reports on the financial performance of corporations. Those analysts are

commonly referred to as financial analysts or research analysts.

2. Revision Requested:

Gartner requests that NetScout delete Paragraph 106 of the Complaint in its entirety.

3. Reason for Request:

The allegations in Paragraph 106 relate to SEC enforcement actions against, and settlement with, certain Wall Street firms. The allegations involve unrelated entities which are not parties to this lawsuit, operating under separate rules, in a distinct industry. They are plainly improper. Gartner requests deletion of this paragraph for all the reasons set forth in its First Requested Revision.

4. Objection:

Gartner's request should be denied for all of the reasons stated in NetScout's objection to Gartner's First Request, as it seeks the deletion of allegations that are directly relevant to a necessary element of NetScout's CUTPA claim. Under CUTPA, NetScout must plead and prove that Gartner's business practice was "unfair," and it may do so by identifying whether the alleged business practice offends public policy "as it has been established by statutes, the common law, or otherwise." Hartford, supra, 250 Conn. 368. As Gartner's business practices are virtually identical to business practices that the SEC found to be illegal, unethical and against public policy, the SEC Allegations in the Complaint are relevant to NetScout's CUTPA claim and, in particular, the unfairness element of that claim. Consequently, NetScout's objection should be sustained. See supra 13-26.

EIGHTH REQUESTED REVISION

1. Portion of Pleading Sought to be Revised:

Paragraph 107 of the Complaint, which states:

107. Much like Gartner today, at the time, those same investment banks purported to employ analysts and issue research reports that were independent, objective and free from bias.

2. Revisions Requested:

Gartner requests that NetScout delete Paragraph 107 of the Complaint in its entirety.

3. Reason for Request:

The allegations in Paragraph 107 relate to SEC enforcement actions against, and settlement with, certain Wall Street firms, and compare NetScout's claims herein to the SEC's claims against the aforementioned Wall Street firms. The allegations involve unrelated entities which are not parties to this lawsuit, operating under separate rules, in a distinct industry. The allegations seek to create an aura of culpability, based not on Gartner's conduct or Connecticut's unfair trade practices statute, but on the conduct of others operating in a distinct regulatory context. They are plainly improper. Gartner requests deletion of this paragraph for all the reasons set forth in its First Requested Revision.

4. Objection:

Gartner's request should be denied for all of the reasons stated in NetScout's objection to Gartner's First Request, as it seeks the deletion of allegations that are directly relevant to a necessary element of NetScout's CUTPA claim. Under CUTPA, NetScout must plead and prove that Gartner's business practice was "unfair," and it may do so by identifying whether the alleged business practice offends public policy "as it has been established by statutes, the common law, or otherwise." Hartford, supra, 250 Conn. 368. As Gartner's business practices are virtually identical to business practices that the SEC found to be illegal, unethical and against public

policy, the SEC Allegations in the Complaint are relevant to NetScout's CUTPA claim and, in particular, the unfairness element of that claim. Consequently, NetScout's objection should be sustained. See supra 13-26.

NINTH REQUESTED REVISION

1. Portion of Pleading Sought to Be Revised:

Paragraph 108 of the Complaint, which states:

108. However, in 2003, the SEC filed complaints against ten of the largest Wall Street investment banking firms, in which it accused these firms and their analysts of engaging in practices substantially similar to those that Gartner and its analysts currently practice.

2. Revision Requested:

Gartner requests that NetScout delete Paragraph 108 of the Complaint in its entirety.

3. Reason for Request:

The allegations in Paragraph 108 relate to SEC enforcement actions against, and settlement with, certain Wall Street firms, and compare NetScout's claims herein to the SEC's claims against the aforementioned Wall Street firms. The allegations involve unrelated entities which are not parties to this lawsuit, operating under separate rules, in a distinct industry. The allegations seek to create an aura of culpability, based not on Gartner's conduct or Connecticut's unfair trade practices statute, but on the conduct of others operating in a distinct regulatory context. They are plainly improper. Gartner requests deletion of this paragraph for all the reasons set forth in its First Requested Revision.

4. Objection:

Gartner's request should be denied for all of the reasons stated in NetScout's objection to

Gartner's First Request, as it seeks the deletion of allegations that are directly relevant to a necessary element of NetScout's CUTPA claim. Under CUTPA, NetScout must plead and prove that Gartner's business practice was "unfair," and it may do so by identifying whether the alleged business practice offends public policy "as it has been established by statutes, the common law, or otherwise." Hartford, supra, 250 Conn. 368. As Gartner's business practices are virtually identical to business practices that the SEC found to be illegal, unethical and against public policy, the SEC Allegations in the Complaint are relevant to NetScout's CUTPA claim and, in particular, the unfairness element of that claim. Consequently, NetScout's objection should be sustained. See supra 13-26.

TENTH REQUESTED REVISION

1. Portion of Pleading Sought to Be Revised:

Paragraph 109 of the Complaint, which states:

109. The SEC alleged that six of these firms improperly "aligned"[11] their research analysts with their investment banking divisions in order to leverage their limited research resources, generate new clientele, and/or offset the cost of research.

2. Revision Requested:

Gartner requests that NetScout delete Paragraph 109 of the Complaint in its entirety.

3. Reason for Request:

The allegations in Paragraph 109 relate to SEC enforcement actions against, and settlement with, certain Wall Street firms. The allegations involve unrelated entities which are not parties to this lawsuit, operating under separate rules, in a distinct industry. They are plainly improper. Gartner requests deletion of this paragraph for all the reasons set forth in

its First Requested Revision.

4. Objection:

Gartner's request should be denied for all of the reasons stated in NetScout's objection to Gartner's First Request, as it seeks the deletion of allegations that are directly relevant to a necessary element of NetScout's CUTPA claim. Under CUTPA, NetScout must plead and prove that Gartner's business practice was "unfair," and it may do so by identifying whether the alleged business practice offends public policy "as it has been established by statutes, the common law, or otherwise." Hartford, supra, 250 Conn. 368. As Gartner's business practices are virtually identical to business practices that the SEC found to be illegal, unethical and against public policy, the SEC Allegations in the Complaint are relevant to NetScout's CUTPA claim and, in particular, the unfairness element of that claim. Consequently, NetScout's objection should be sustained. See supra 13-26.

ELEVENTH REQUESTED REVISION

1. Portion of Pleading Sought to Be Revised:

Paragraph 110 of the Complaint, which states:

110. Similarly, Gartner improperly markets and cross-sells its "consulting" services to IT vendors that are the subject of its analysts' research. Gartner's business model openly seeks to: (1) "facilitate increased client spending on [its] research, consulting services and events;" (2) "identify relationships with the greatest sales potential and expand [ ] those relationships by offering strategically relevant research and advice;" and (4) deepen "relationships with … Research clients … through custom consulting engagements." Gartner further disclosed that the foregoing initiatives "created additional revenue streams through more

effective packaging, campaigning and cross-selling of [its] products and services."

2. Revision Requested:

Gartner requests that NetScout delete the term "Similarly," in Paragraph 110.

3. Reason for Request:

Through the use of the term "Similarly," the allegations in Paragraph 110 seek to compare NetScout's claims herein to the SEC's claims against the aforementioned Wall Street firms. The allegations seek to create an aura of culpability, based not on Gartner's conduct or Connecticut's unfair trade practices statute, but on the conduct of others operating in a distinct regulatory context. They are plainly improper. Gartner requests deletion of the term "Similarly," for all the reasons set forth in its First Requested Revision.

4. Objection:

Gartner's request should be denied for all of the reasons stated in NetScout's objection to Gartner's First Request, as it seeks the deletion of allegations that are directly relevant to a necessary element of NetScout's CUTPA claim. Under CUTPA, NetScout must plead and prove that Gartner's business practice was "unfair," and it may do so by identifying whether the alleged business practice offends public policy "as it has been established by statutes, the common law, or otherwise." Hartford, supra, 250 Conn. 368. As Gartner's business practices are virtually identical to business practices that the SEC found to be illegal, unethical and against public policy, the SEC Allegations in the Complaint are relevant to NetScout's CUTPA claim and, in particular, the unfairness element of that claim. Consequently, NetScout's objection should be sustained. See supra 13-26.

TWELFTH REQUESTED REVISION

1. Portion of Pleading Sought to Be Revised:

Paragraph 111 of the Complaint, which states:

111. The SEC alleged that research analysts at all ten of the firms participated in investment banking marketing efforts, including working with investment bankers to compile "pitch" materials and attendance at industry "road shows."

2. Revision Requested:

Gartner requests that NetScout delete Paragraph 111 of the Complaint in its entirety.

3. Reason for Request:

The allegations in Paragraph 111 relate to SEC enforcement actions against, and settlement with, certain Wall Street firms. The allegations involve unrelated entities which are not parties to this lawsuit, operating under separate rules, in a distinct industry. They are plainly improper. Gartner requests deletion of this paragraph for all the reasons set forth in its First Requested Revision.

4. Objection:

Gartner's request should be denied for all of the reasons stated in NetScout's objection to Gartner's First Request, as it seeks the deletion of allegations that are directly relevant to a necessary element of NetScout's CUTPA claim. Under CUTPA, NetScout must plead and prove that Gartner's business practice was "unfair," and it may do so by identifying whether the alleged business practice offends public policy "as it has been established by statutes, the common law, or otherwise." Hartford, supra, 250 Conn. 368. As Gartner's business practices are virtually identical to business practices that the SEC found to be illegal, unethical and against public policy, the SEC Allegations in the Complaint are relevant to NetScout's CUTPA claim and, in

particular, the unfairness element of that claim. Consequently, NetScout's objection should be sustained. See supra 13-26.

THIRTEENTH REQUESTED REVISION

1. Portion of Pleading Sought to Be Revised:

Paragraph 112 of the Complaint, which states:

112. Likewise, Gartner research analysts are involved in the "packaging, campaigning and cross-selling of Gartner's products and services" to the same IT vendors that are the subject of Gartner's research reports. Gartner analysts also attend "Gartner Symposium/ITxpo events and Gartner Summit events" that "offer [ ] current, relevant and actionable technology sessions led by Gartner analysts to clients and non-clients." Gartner clients and non-clients spend thousands of dollars to attend and participate in these events in order to achieve a more favorable ranking in Gartner's research reports, including its Magic Quadrant reports.

2. Revision Requested:

Gartner requests that NetScout delete the term "Likewise," in Paragraph 112.

3. Reason for Request:

Through the use of the term "Likewise," the allegations in Paragraph 112 seek to compare NetScout's claims herein to the SEC's claims against the aforementioned Wall Street firms. The allegations seek to create an aura of culpability, based not on Gartner's conduct or Connecticut's unfair trade practices statute, but on the conduct of others operating in a distinct regulatory context. They are plainly improper. Gartner requests deletion of the term "Likewise," for all the reasons set forth in its First Requested Revision.

4. Objection:

Gartner's request should be denied for all of the reasons stated in NetScout's objection to Gartner's First Request, as it seeks the deletion of allegations that are directly relevant to a necessary element of NetScout's CUTPA claim. Under CUTPA, NetScout must plead and prove that Gartner's business practice was "unfair," and it may do so by identifying whether the alleged business practice offends public policy "as it has been established by statutes, the common law, or otherwise." Hartford, supra, 250 Conn. 368. As Gartner's business practices are virtually identical to business practices that the SEC found to be illegal, unethical and against public policy, the SEC Allegations in the Complaint are relevant to NetScout's CUTPA claim and, in particular, the unfairness element of that claim. Consequently, NetScout's objection should be sustained. See supra 13-26.

FOURTEENTH REQUESTED REVISION

1. Portion of Pleading Sought to Be Revised:

Paragraph 113 of the Complaint, which states:

113. The SEC alleged that, at eight of the ten firms, research analyst conflicts of interest resulted in analysts publishing research that was exaggerated, unwarranted, and/or inaccurate.

2. Revision Requested:

Gartner requests that NetScout delete Paragraph 113 of the Complaint in its entirety.

3. Reason for Request:

The allegations in Paragraph 113 relate to SEC enforcement actions against, and settlement with, certain Wall Street firms. The allegations involve unrelated entities which are

not parties to this lawsuit, operating under separate rules, in a distinct industry. They are plainly improper. Gartner requests deletion of this paragraph for all the reasons set forth in its First Requested Revision.

4. Objection:

Gartner's request should be denied for all of the reasons stated in NetScout's objection to Gartner's First Request, as it seeks the deletion of allegations that are directly relevant to a necessary element of NetScout's CUTPA claim. Under CUTPA, NetScout must plead and prove that Gartner's business practice was "unfair," and it may do so by identifying whether the alleged business practice offends public policy "as it has been established by statutes, the common law, or otherwise." Hartford, supra, 250 Conn. 368. As Gartner's business practices are virtually identical to business practices that the SEC found to be illegal, unethical and against public policy, the SEC Allegations in the Complaint are relevant to NetScout's CUTPA claim and, in particular, the unfairness element of that claim. Consequently, NetScout's objection should be sustained. See supra 13-26.

FIFTEENTH REQUESTED REVISION

1. Portion of Pleading Sought to Be Revised:

Paragraph 114 of the Complaint, which states:

114. Gartner's analysts suffer from the same disabling conflicts. IT vendors who spend more on Gartner's services thus are similarly more likely to receive favorable rankings in Gartner' s research reports and, in particular, Gartner's Magic Quadrant reports.

2. Revision Requested:

Gartner requests that NetScout (a) delete the first sentence of Paragraph 114, which

states: "Gartner's analysts suffer from the same disabling conflicts;" and (b) delete the terms "thus" and "similarly" in the second sentence of Paragraph 114.

3. Reason for Request:

The allegations in Paragraph compare NetScout's claims herein to the SEC's claims against the aforementioned Wall Street firms. The allegations seek to create an aura of culpability, based not on Gartner's conduct or Connecticut's unfair trade practices statute, but on the conduct of others operating in a distinct regulatory context. They are plainly improper. Gartner requests deletion of the aforementioned portions of this paragraph for all the reasons set forth in its First Requested Revision.

4. Objection:

Gartner's request should be denied for all of the reasons stated in NetScout's objection to Gartner's First Request, as it seeks the deletion of allegations that are directly relevant to a necessary element of NetScout's CUTPA claim. Under CUTPA, NetScout must plead and prove that Gartner's business practice was "unfair," and it may do so by identifying whether the alleged business practice offends public policy "as it has been established by statutes, the common law, or otherwise." Hartford, supra, 250 Conn. 368. As Gartner's business practices are virtually identical to business practices that the SEC found to be illegal, unethical and against public policy, the SEC Allegations in the Complaint are relevant to NetScout's CUTPA claim and, in particular, the unfairness element of that claim. Consequently, NetScout's objection should be sustained. See supra 13-26.

SIXTEENTH REQUESTED REVISION

1. Portion of Pleading Sought to Be Revised:

Paragraph 115 of the Complaint, which states:

115. The SEC settled its enforcement actions against these ten Wall Street firms in what the SEC titled the "Global Research Analyst Settlement." These firms, collectively, agreed to the following terms:

a) $487.5 million in penalties;

b) $387.5 million as a disgorgement;

c) $432.5 million to provide the firms' clients with independent research;

d) $80 million to be used for investor education; and

e) An injunction against future violations of NASD and NYSE rules.

2. Revision Requested:

Gartner requests that NetScout delete Paragraph 115 of the Complaint in its entirety.

3. Reason for Request:

The allegations in Paragraph 115 relate to SEC enforcement actions against, and settlement with, certain Wall Street firms. The allegations involve unrelated entities which are not parties to this lawsuit, operating under separate rules, in a distinct industry. They are plainly improper. Gartner requests deletion of this paragraph for all the reasons set forth in its First Requested Revision.

4. Objection:

Gartner's request should be denied for all of the reasons stated in NetScout's objection to Gartner's First Request, as it seeks the deletion of allegations that are directly relevant to a necessary element of NetScout's CUTPA claim. Under CUTPA, NetScout must plead and prove that Gartner's business practice was "unfair," and it may do so by identifying whether the alleged

business practice offends public policy "as it has been established by statutes, the common law, or otherwise." Hartford, supra, 250 Conn. 368. As Gartner's business practices are virtually identical to business practices that the SEC found to be illegal, unethical and against public policy, the SEC Allegations in the Complaint are relevant to NetScout's CUTPA claim and, in particular, the unfairness element of that claim. Consequently, NetScout's objection should be sustained. See supra 13-26.

SEVENTEENTH REQUESTED REVISION

1. Portion of Pleading Sought to be Revised:

Paragraph 116 of the Complaint, which states:

116. In addition, the Wall Street firms agreed to structural reforms in the operations of research and investment banking divisions intended to prevent similar conflicts of interest from occurring in the future. These reforms include:

a) Research and investment banking functions within the firm must be physically separated;

b) Firewalls must be put in place that are reasonably designed to prevent all improper communication between investment banking and research personnel;

c) Research analysts are not permitted to participate in efforts to solicit investment banking business, including pitches and "road shows;"

d) Investment banking personnel are prohibited from playing any role in determining which companies are covered by research analysts;

e) Research analyst compensation may not be related, directly or indirectly, to investment banking revenue or input from investment banking personnel; and

f) Research analyst compensation must be based, in large part, on the quality and accuracy of the analyst's research.

2. Revision Requested:

Gartner requests that NetScout delete Paragraph 116 of the Complaint in its entirety.

3. Reason for Request:

The allegations in Paragraph 116 relate to SEC enforcement actions against, and settlement with, certain Wall Street firms. The allegations involve unrelated entities which are not parties to this lawsuit, operating under separate rules, in a distinct industry. They are plainly improper. Gartner requests deletion of this paragraph for all the reasons set forth in its First Requested Revision.

4. Objection:

Gartner's request should be denied for all of the reasons stated in NetScout's objection to Gartner's First Request, as it seeks the deletion of allegations that are directly relevant to a necessary element of NetScout's CUTPA claim. Under CUTPA, NetScout must plead and prove that Gartner's business practice was "unfair," and it may do so by identifying whether the alleged business practice offends public policy "as it has been established by statutes, the common law, or otherwise." Hartford, supra, 250 Conn. 368. As Gartner's business practices are virtually identical to business practices that the SEC found to be illegal, unethical and against public policy, the SEC Allegations in the Complaint are relevant to NetScout's CUTPA claim and, in particular, the unfairness element of that claim. Consequently, NetScout's objection should be sustained. See supra 13-26.

EIGHTEENTH REQUESTED REVISION

1. Portion of Pleading Sought to Be Revised:

Paragraph 117 of the Complaint, which states:

117. The SEC's settlement with these firms is but one example of its efforts to remove the undue bias, conflicts of interest and unfair and deceptive business practices pertaining to financial research analysts at large financial institutions.

2. Revision Requested:

Gartner requests that NetScout delete Paragraph 117 of the Complaint in its entirety.

3. Reason for Request:

The allegations in Paragraph 117 relate to SEC enforcement actions against, and settlement with, certain Wall Street firms. The allegations involve unrelated entities which are not parties to this lawsuit, operating under separate rules, in a distinct industry. They are plainly improper. Gartner requests deletion of this paragraph for all the reasons set forth in its First Requested Revision.

4. Objection:

Gartner's request should be denied for all of the reasons stated in NetScout's objection to Gartner's First Request, as it seeks the deletion of allegations that are directly relevant to a necessary element of NetScout's CUTPA claim. Under CUTPA, NetScout must plead and prove that Gartner's business practice was "unfair," and it may do so by identifying whether the alleged business practice offends public policy "as it has been established by statutes, the common law, or otherwise." Hartford, supra, 250 Conn. 368. As Gartner's business practices are virtually identical to business practices that the SEC found to be illegal, unethical and against public policy, the SEC Allegations in the Complaint are relevant to NetScout's CUTPA claim and, in particular, the unfairness element of that claim. Consequently, NetScout's objection should be sustained. See supra 13-26.

NINETEENTH REQUESTED REVISION

1. Portion of Pleading Sought to Be Revised:

Paragraph 118 of the Complaint, which states:

118. The SEC, FINRA and the NYSE have since passed regulations specifically prohibiting within financial research firms the same business practices, undue influence, conflicts of interest, and structural biases that persist at Gartner to this day. *See* SEC Regulation AC; FINRA Rule 2711; NYSE Rule 472. Those rules and regulations provide, among other things, as follows:

a) Research analysts may not be paid any bonus, salary or other form of compensation that is based upon a specific investment banking transaction;

b) Research analysts are prohibited from participating in efforts to solicit investment banking business; and

c) Research analysts are prohibited from having communications with companies for the purpose of soliciting investment banking business.

2. Revision Requested:

Gartner requests that NetScout delete Paragraph 118 of the Complaint in its entirety.

3. Reason for Request:

The allegations in Paragraph 118 relate to SEC enforcement actions against, and settlement with, certain Wall Street firms, and reference particular SEC, FINRA, and NYSE regulations applicable to those financial institutions. The allegations relate to unrelated entities which are not parties to this lawsuit, operating under separate rules, in a distinct industry. They are plainly improper. Gartner requests deletion of this paragraph for all the reasons set forth in its First Requested Revision.

4. Objection:

Gartner's request should be denied for all of the reasons stated in NetScout's objection to Gartner's First Request, as it seeks the deletion of allegations that are directly relevant to a necessary element of NetScout's CUTPA claim. Under CUTPA, NetScout must plead and prove that Gartner's business practice was "unfair," and it may do so by identifying whether the alleged business practice offends public policy "as it has been established by statutes, the common law, or otherwise." Hartford, supra, 250 Conn. 368. As Gartner's business practices are virtually identical to business practices that the SEC found to be illegal, unethical and against public policy, the SEC Allegations in the Complaint are relevant to NetScout's CUTPA claim and, in particular, the unfairness element of that claim. Consequently, NetScout's objection should be sustained. See supra 13-26.

TWENTIETH REQUESTED REVISION

1. Portion of Pleading Sought to Be Revised:

Paragraph 119 of the Complaint, which states:

119. The same concerns relating to research analyst conflicts of interest, client bias, lack of objectivity, and cross-selling and marketing of other services that prompted the foregoing rules and regulations apply with equal or greater force to Gartner's business practices for, among other things, the following reasons:

a) The same Gartner analysts that draft Gartner's research reports also provide Gartner's consulting services;

b) Gartner encourages its research analysts to cross-sell its consulting services to its "most valuable" clients with the "greatest sales potential," which clients are also the subject of those same analysts' research reports; and

c) Gartner recommends to the vendors that are the subject of its research reports that they spend substantial amounts of money on Gartner "consulting" services to achieve a "healthy mix" of interaction with Gartner's research analysts, and improve their "analyst relationship."

2. Revision Requested:

Gartner requests that NetScout delete that portion of Paragraph 119 that states: "The same concerns relating to research analyst conflicts of interest, client bias, lack of objectivity, and cross-selling and marketing of other services that prompted the foregoing rules and regulations apply with equal or greater force to Gartner's business practices for, among other things, the following reasons."

3. Reason for Request:

The allegations in Paragraph 119 relate to SEC enforcement actions against, and settlement with, certain Wall Street firms, and compare NetScout's claims herein to the SEC's claims against the aforementioned Wall Street firms. The allegations involve unrelated entities which are not parties to this lawsuit, operating under separate rules, in a distinct industry. The allegations seek to create an aura of culpability, based not on Gartner's conduct or Connecticut's unfair trade practices statute, but on the conduct of others operating in a distinct regulatory context. They are plainly improper. Gartner requests deletion of the aforementioned portion of Paragraph 119 for all the reasons set forth in its First Requested Revision.

4. Objection:

Gartner's request should be denied for all of the reasons stated in NetScout's objection to Gartner's First Request, as it seeks the deletion of allegations that are directly relevant to a necessary element of NetScout's CUTPA claim. Under CUTPA, NetScout must plead and prove

that Gartner's business practice was "unfair," and it may do so by identifying whether the alleged business practice offends public policy "as it has been established by statutes, the common law, or otherwise." Hartford, supra, 250 Conn. 368. As Gartner's business practices are virtually identical to business practices that the SEC found to be illegal, unethical and against public policy, the SEC Allegations in the Complaint are relevant to NetScout's CUTPA claim and, in particular, the unfairness element of that claim. Consequently, NetScout's objection should be sustained. See supra 13-26.

TWENTY-FIRST REQUESTED REVISION

1. Portion of Pleading Sought to Be Revised:

The last sentence of Paragraph 51 of the Complaint, which states: "In particular, an article in InformationWeek entitled "Credibility of Analysts" reported on Gartner's "troubling" business practices and influence within the IT industry."

2. Revision Requested:

Gartner requests that NetScout delete the last sentence of Paragraph 51.

3. Reason for Request:

A request to revise is appropriate to obtain "the deletion of any unnecessary, repetitious, scandalous, impertinent, immaterial or otherwise improper allegations in an adverse party's pleading." Conn. Practice Book §10-35(2); see also Stone v. Pattis, 144 Conn. App. 79, 94, 72 A.3d 1138, 1149 (2013) (express language of §10-35 permits deletion of improper allegations). "Immaterial" and "impertinent" matters are defined as those that are "mere surplusage," which a plaintiff "will have no right to prove although alleged." Adams v. Way, 32 Conn. 160, 168 (1864); see also 5C Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure

§1382 (3d ed. 2004) (in addressing motions to strike immaterial, impertinent, or scandalous matter under Fed. R. Civ. P. 12(f), defining "immaterial" matter as "that which has no essential or important relationship to the claim for relief or defenses being pleaded," and "impertinent" matter as "statements that do not pertain, and are not necessary, to the issues in question."); Mahon v. Chicago Title Ins. Co., 3:09CV00690AWT, 2009 WL 4268372, at *1 (D. Conn. Nov. 24, 2009) ("One test that has been advanced for determining whether an allegation in a pleading is immaterial and impertinent within the meaning of Rule 12(t) is whether proof concerning it could be received at trial; if it could not, then the matter is immaterial and impertinent.") (quoting 5C Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 1382 (3d ed. 2004)).

The allegations relating to an InformationWeek article are immaterial and improper, as the news article is hearsay falling within no applicable exception, and therefore is plainly inadmissible. *See* Conn. Code. Evid. §§8-1; 8-2 (out of court statement offered "to establish the truth of the matter asserted" is inadmissible); §8-3 (listing hearsay exceptions, none of which apply to the InformationWeek article at issue). This "is a well-settled rule of evidence," repeatedly affirmed by Connecticut courts. Cherniske v. Jajer, 171 Conn. 372, 377, 370 A.2d 981, 984 (1976) ("As an exhibit offered in this case, the newspaper article was clearly hearsay and should have been excluded."); State v. Falcone, 191 Conn. 12, 17,463 A.2d 558, 561 (1983); Cach, LLC v. Sninsky, AANCV116007757S, 2013 WL 1189465, at *4 (Conn. Super. Ct. Mar. 8, 2013). Because no evidence concerning the InformationWeek article could be received at trial, the allegations related to that article are immaterial and impertinent, and should be deleted.

Moreover, and in any event, the InformationWeek article is not alleged to relate to Gartner's conduct toward NetScout, or to the March 6, 2014 Report challenged herein. Allegations involving Gartner's relationship with or conduct toward nonparties are immaterial and irrelevant. See, e.g., Bridgeport Harbour Place I, LLC v. Ganim, 131 Conn. App. 99, 143, 30 A.3d 703, 733-34 (2011) (in CUTPA case, affirming preclusion of evidence of defendant's conduct toward third parties as not related to plaintiff's ascertainable loss); Genna v. Captain's Cove Marina of Bridgeport, Inc., CV116019426S, 2012 WL 1089401, at *2 (Conn. Super. Ct. Mar. 12, 2012) (overruling objections to request to revise, deeming allegations relating to defendant's conduct toward two individuals who were not parties to the case to be "irrelevant and immaterial"); Rab Assocs., LLC v. Bertch Cabinet Mfg., Inc., NNHCV106015934S, 2014 WL 4413764, at *4 (Conn. Super. Ct. July 30, 2014) (overruling objection to request to revise, where portions of complaint addressing defendant's contractual relationships with third parties were "impertinent and immaterial to the present action because the relationship between the parties is at issue, not the defendant's relationship with other sales representatives."); Mangen v. Pilgrim, CV065002217S, 2006 WL 1530185, at *1 (Conn. Super. Ct. May 19, 2006) (deleting allegations of defendant's violation of traffic laws, on grounds that they were "unnecessary and immaterial to any negligence claim and improper in the sense that they add nothing to the issue at hand-proving the defendant drove in a negligent manner in this particular case-but serve the function of an attack perhaps on character"); Tucker v. Am. Int'l Grp., Inc., supra, 936 F. Supp. 2d 25 (granting motion to strike paragraph of complaint relating to allegations of wrongdoing unrelated to case on grounds that "to allow such irrelevant allegations to remain would unduly prejudice Defendants.").

4. Objection:

Gartner's requests to revise, as set forth in its twenty-first through thirty-eighth requests, are based on the argument that some of NetScout's allegations are not admissible evidence and do not relate directly to Gartner's conduct toward NetScout. NetScout is not aware of any authority that supports the proposition -- and Gartner cites none -- that allegations in a complaint should be stricken if they constitute hearsay under applicable rules of evidence. There is no rule limiting pleadings to statements made by parties or excluding from pleadings all evidence from third-party witnesses. In this civil action, NetScout is entitled to the opportunity to engage in discovery, including from witnesses in the industry, and offer evidence in support of its well-pled allegations at trial. At trial, Gartner may raise whatever evidentiary objections it deems appropriate in response to the evidence that NetScout proffers. In addition, NetScout's allegations concerning Gartner's treatment of third parties and third parties' statements regarding Gartner's business practices, including information set forth in the InformationWeek article that is the subject of Gartner's twenty-first request, are directly relevant to NetScout's claim that Gartner engages in "pay-to-play" business practices that are unfair and deceptive under CUTPA. For these reasons, and as discussed below, NetScout's objection should be sustained.

As noted above, Gartner fails to cite to single decision -- not one -- where a Connecticut court grants a request to delete allegations from a complaint on the ground that they are hearsay under applicable rules of evidence.[7] No such case exists, and for good reason. Nearly every

[7] None of the decisions that Gartner relies on in its Request struck allegations from a complaint pursuant to a request to revise on the ground that those allegations were inadmissible hearsay. Cherniske v. Jajer, 171 Conn. 372, 370 A.2d 981 (1976) (newspaper article offered as an exhibit at trial inadmissible as proof of property value); State v. Falcone, 191 Conn. 12, 463 A.2d 558 (1983) (upholding trial court's refusal to admit as evidence on post-trial motion a newspaper article purported to prove that the criminal prosecutor withheld exculpatory evidence); Cach, LLC v. Sninsky, No. AANCV116007757S, 2013 WL 1189465, at *4 (Conn. Super. Ct. Mar. 8, 2013)

allegation in a complaint is an out of court statement offered for the truth of the matter asserted. Taken to its logical conclusion, Gartner's novel theory of applying the rules of evidence woodenly at the pleading stage to strike allegations would create a nearly insurmountable bar to the filing of civil litigation.

Not surprisingly, the cases that Gartner cites actually reject its argument. As the Second Circuit noted in Lipsky:

> [T]he courts should not tamper with the pleadings unless there is a strong reason for so doing. **Evidentiary questions** . . . **should especially be avoided at such a preliminary stage of the proceedings**. **Usually, the questions of relevancy and admissibility in general require the context of an ongoing and unfolding trial in which to be properly decided**. And ordinarily neither a district court nor an appellate court should decide to strike a portion of the complaint on the grounds that the material could not possibly be relevant on the sterile field of the pleadings alone.

Lipsky v. Commonwealth United Corp., 551 F.2d 887, 893 (2d Cir. 1976) (cited at page 10 of Gartner's Request); see also Tucker v. American Intern. Group, Inc., supra, 936 F. Supp. 2d 16-25 (noting that "the party moving to strike bears a heavy burden" and refusing to strike alleged hearsay from complaint where "Court [could] conceive of possible circumstances in which the report might be admissible" at trial) (citing Lipsky). Put simply, NetScout should be allowed the opportunity to prove its allegations through the proffer of admissible evidence at trial and, as is customary, Gartner's evidentiary objections may be lodged and considered by the Court at that time. See McCrae Assocs. v. Universal Capital Mgmt., 554 F. Supp. 2d 249, 256-57 (D. Conn. 2008) (denying motion to strike allegedly "irrelevant" allegations because "[w]hether such

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(refusing to consider newspaper article submitted by defendant in support of motion to dismiss to demonstrate lack of standing).

evidence will be admissible at trial is an issue to be resolved at a later stage of the litigation").

Gartner's argument that NetScout's allegations regarding Gartner's conduct towards third parties are "immaterial" and "irrelevant" ignores the particulars of NetScout's CUTPA claim. "In deciding whether to [grant] a Rule 12(f) motion on the ground that a matter is impertinent and immaterial, it is settled that the motion will be denied, unless it can be shown that no evidence in support of the allegation would be admissible." Tucker v. American Intern. Group, Inc., supra, 936 F. Supp. 2d 16 (quoting Lipsky). As noted above, "[u]sually, the questions of relevancy and admissibility in general require the context of an ongoing and unfolding trial in which to be properly decided." Id. at 15 (quoting Lipsky). Thus, "[w]hether . . . evidence will be admissible at trial is an issue to be resolved at a later stage of the litigation." McCrae Assocs. v. Universal Capital Mgmt., 554 F. Supp. 2d 257. As the court explained in Tucker:

> [T]o prevail in such a motion, defendant must demonstrate that (1) no evidence in support of the allegations would be admissible; (2) that the allegations have no bearing on the issues in the case; **and** (3) that to permit the allegations to stand would result in prejudice to the movant.

Tucker v. American Intern. Group, Inc., supra, 936 F. Supp. 2d 16 (emphasis added; citations omitted). Consequently, "[t]he party moving to strike bears a heavy burden to establish the basis for the motion." Id.

Gartner has not carried its "heavy burden" here. NetScout's allegations concerning Gartner's conduct toward third parties, including the allegations that are the subject of Gartner's twenty-first request, are directly relevant to NetScout's CUTPA claim. That is, NetScout alleges that Gartner engages in general business practices that are tantamount to an unfair and deceptive

"pay-to-play" scheme. Compl. ¶¶ 51-104, 176. To establish that Gartner engages in unfair "pay-to-play" business practices, NetScout intends to submit evidence at trial demonstrating that Gartner clients that spend a sufficient amount on Gartner's consulting services receive favorable rankings in Gartner's influential Magic Quadrant research reports. Compl. ¶ 3. Conversely, those companies that do not spend a sufficient amount on Gartner's consulting services, such as NetScout, receive unfavorable rankings in those same reports. Compl. ¶¶ 4, 143, 145. As a result, NetScout's allegations concerning Gartner's conduct towards third parties are relevant to NetScout's CUTPA claim. Therefore, NetScout's objection to Gartner's request should be sustained. See Schramm v. Krischell, 84 F.R.D. 294, 299 (D. Conn. 1979) ("[i]f there is any doubt as to the possibility of relevance, a judge should err on the side of denying a Rule 12(f) motion").

TWENTY-SECOND REQUESTED REVISION

1. Portion of Pleading Sought to Be Revised:

Paragraph 52 of the Complaint, which states:

52. In that article, InformationWeek publicized what many IT vendors had long known, but were reluctant to state publicly for fear of reprisal: Gartner's business model is inherently biased and favors those IT vendors who are high-paying Gartner clients. As InformationWeek reported regarding Gartner's business model:

> [T]hey … rake in **millions** providing services **to the very same companies they monitor**, heavyweights like Cisco, IBM, Microsoft, and Oracle. Which leads to a question that continues to dog the research firms: **How much influence do technology vendors have over their work?**
>
> **At issue are business practices that beg for closer scrutiny.**

2. Revision Requested:

Gartner requests that NetScout delete Paragraph 52 in its entirety.

3. Reason for Request:

The allegations relating to an InformationWeek article are immaterial and improper, as the news article is hearsay falling within no applicable exception, and therefore is plainly inadmissible. Moreover, and in any event, the allegations are also immaterial and irrelevant because the InformationWeek article is not alleged to relate to Gartner's conduct toward NetScout, or to the March 6, 2014 Magic Quadrant Report, but rather to Gartner's relationship with or conduct toward nonparties. Accordingly, Gartner requests deletion of this paragraph for all the reasons set forth in its Twenty-First Requested Revision.

4. Objection:

For all of the reasons discussed in NetScout's objection to Gartner's Twenty-First Request, Gartner's request lacks any legitimate legal basis. See supra 54-57. First, NetScout is not aware of any Connecticut authority that supports the proposition -- and Gartner cites none -- that allegations in a complaint should be stricken if they constitute hearsay under applicable rules of evidence. NetScout is permitted the opportunity to engage in discovery and offer evidence in support of its well-pled allegations. Gartner may then raise whatever evidentiary objections it deems appropriate in response to the evidence that NetScout proffers at trial. There is no rule limiting pleadings to statements made by parties or excluding from pleadings all evidence from third party witnesses. Second, the InformationWeek article, like NetScout's other allegations concerning Gartner's treatment of third parties, is directly relevant to NetScout's claim that Gartner engages in "pay-to-play" business practices that are unfair and deceptive under CUTPA.

For these reasons, and as discussed above, NetScout's objection should be sustained.

TWENTY-THIRD REQUESTED REVISION

1. Portion of Pleading Sought to Be Revised:

Paragraph 53 of the Complaint, which states:

53. InformationWeek provided specific examples of how IT vendors feel compelled to buy into Gartner's "pay-to-play" business model due to its outsized influence within the IT industry. InformationWeek highlighted the experience of IT vendor and Gartner client, Proofpoint. Proofpoint's senior VP of marketing and products acknowledged the importance of receiving a favorable placement in Gartner's Magic Quadrant reports:

> Proofpoint, **a Gartner client since 2003**, expects to be included in Gartner's first ever Magic Quadrant for content monitoring and filtering software … **"This matters more than you want it to matter,"** says Sandra Vaughan, ProofPoint's Senior VP of marketing and products.
>
> **Failure to get a favorable mention in an analyst report could undermine years of product development**. Acceptance, on the other hand, boosts a company's exposure and is essential for buyers drawing up short lists. Our target market is big companies, so **Gartner matters,"** Vaughan says.

2. Revision Requested:

Gartner requests that NetScout delete Paragraph 53 in its entirety.

3. Reason for Request:

The allegations relating to the InformationWeek article are immaterial and improper, as the news article is hearsay falling within no applicable exception, and therefore is plainly inadmissible. Moreover, and in any event, the allegations are also immaterial and irrelevant because the InformationWeek article is not alleged to relate to Gartner's conduct toward

NetScout, or to the March 6, 2014 Magic Quadrant Report, but rather to Gartner's relationship with or conduct toward nonparties. Accordingly, Gartner requests deletion of this paragraph for all the reasons set forth in its Twenty-First Requested Revision.

4. Objection:

For all of the reasons discussed in NetScout's objection to Gartner's Twenty-First Request, Gartner's request lacks any legitimate legal basis. See supra 54-57. First, NetScout is not aware of any Connecticut authority that supports the proposition -- and Gartner cites none -- that allegations in a complaint should be stricken if they constitute hearsay under applicable rules of evidence. NetScout is permitted the opportunity to engage in discovery and offer evidence in support of its well-pled allegations at trial. Gartner may then raise whatever evidentiary objections it deems appropriate in response to the evidence that NetScout proffers. There is no rule limiting pleadings to statements made by parties or excluding from pleadings all evidence from third party witnesses. Second, the InformationWeek article, like NetScout's other allegations concerning Gartner's treatment of third parties, is directly relevant to NetScout's claim that Gartner engages in "pay-to-play" business practices that are unfair and deceptive under CUTPA. For these reasons, and as discussed above, NetScout's objection should be sustained.

TWENTY-FOURTH REQUESTED REVISION

1. Portion of Pleading Sought to Be Revised:

Paragraph 54 of the Complaint, which states:

54. The InformationWeek article concludes by noting that "[r]esearch firm executives are well aware of the questions being raised about their business models, but don't

expect changes to be fast or wide-sweeping. The financial stakes are too high - and the incentives for change aren't compelling enough."

2. Revision Requested:

Gartner requests that NetScout delete Paragraph 54 in its entirety.

3. Reason for Request:

The allegations relating to the InformationWeek article are immaterial and improper, as the news article is hearsay falling within no applicable exception, and therefore is plainly inadmissible. Moreover, and in any event, the allegations are also immaterial and irrelevant because the InformationWeek article is not alleged to relate to Gartner's conduct toward NetScout, or to the March 6, 2014 Magic Quadrant Report. Accordingly, Gartner requests deletion of this paragraph for all the reasons set forth in its Twenty-First Requested Revision.

4. Objection:

For all of the reasons discussed in NetScout's objection to Gartner's Twenty-First Request, Gartner's request lacks any legitimate legal basis. See supra 54-57. First, NetScout is not aware of any Connecticut authority that supports the proposition -- and Gartner cites none -- that allegations in a complaint should be stricken if they constitute hearsay under applicable rules of evidence. NetScout is permitted the opportunity to engage in discovery and offer evidence in support of its well-pled allegations at trial. Gartner may then raise whatever evidentiary objections it deems appropriate in response to the evidence that NetScout proffers. There is no rule limiting pleadings to statements made by parties or excluding from pleadings all evidence from third party witnesses. Second, the InformationWeek article, like NetScout's other

allegations concerning Gartner's treatment of third parties, is directly relevant to NetScout's claim that Gartner engages in "pay-to-play" business practices that are unfair and deceptive under CUTPA. For these reasons, and as discussed above, NetScout's objection should be sustained.

TWENTY-FIFTH REQUESTED REVISION

1. Portion of Pleading Sought to Be Revised:

Paragraph 55 of the Complaint, which states:

55. The concerns expressed in the InformationWeek article about Gartner's business practices are widespread amongst persons who work in the IT industry. One person noted how his experience with one of Gartner's research analysts led him to conclude that "you need to be paying to play." As that person stated:

> When with a previous employer, in one MQ interview I did it was **suggested by the Gartner analyst that we were "not visionary enough" for that part of the quadrant**. When I asked what was visionary I was told that to get that information we needed to be clients. So I concluded that **you had to pay** to know what was visionary and then re-work that into your vision in a nice circular process. **So I do not know what the cost is but it seems to me you need to be paying to play.**

2. Revision Requested:

Gartner requests that NetScout delete Paragraph 55 in its entirety.

3. Reason for Request:

The allegations relating to the InformationWeek article are immaterial and improper, as the news article is hearsay falling within no applicable exception, and therefore is plainly inadmissible. Moreover, the allegations regarding one unnamed person's experience with

Gartner are also hearsay, and are immaterial and irrelevant because the purported statements are not alleged to relate to Gartner's conduct toward NetScout or to the March 6, 2014 Magic Quadrant report, but rather to Gartner's relationship with or conduct toward unnamed third parties. Accordingly, Gartner requests deletion of this paragraph for all the reasons set forth in its Twenty-First Requested Revision.

4. Objection:

For all of the reasons discussed in NetScout's objection to Gartner's Twenty-First Request, Gartner's request lacks any legitimate legal basis. See supra 54-57. First, NetScout is not aware of any Connecticut authority that supports the proposition -- and Gartner cites none -- that allegations in a complaint should be stricken if they constitute hearsay under applicable rules of evidence. NetScout is permitted the opportunity to engage in discovery and offer evidence in support of its well-pled allegations at trial. Gartner may then raise whatever evidentiary objections it deems appropriate in response to the evidence that NetScout proffers. There is no rule limiting pleadings to statements made by parties or excluding from pleadings all evidence from third party witnesses. Second, the InformationWeek article, like NetScout's other allegations concerning Gartner's treatment of third parties, is directly relevant to NetScout's claim that Gartner engages in "pay-to-play" business practices that are unfair and deceptive under CUTPA. For these reasons, and as discussed above, NetScout's objection should be sustained.

TWENTY-SIXTH REQUESTED REVISION

1. Portion of Pleading Sought to Be Revised:

Paragraph 56 of the Complaint, which states:

56. Another person recounted how insiders at web content management firms have indicated to him that "you need to shell out" money to Gartner to be included in Gartner's Magic Quadrant reports:

> I don't put much stake in their magic quadrants simply because **I've got contacts at a number of [web content management] firms who've been told in a nutshell that they have to shell out [money to Gartner] to be included**. I will not mention names but I trust them. While [Gartner] may not come right out and say they charge a fee, they certainly aren't going to give you something for nothing. It's all based on how much you do or might spend [on Gartner], as far as I'm concerned.

2. Revision Requested:

Gartner requests that NetScout delete Paragraph 56 in its entirety.

3. Reason for Revision:

The allegations relating to statements made by an unnamed person, relaying purported statements made to him by unnamed others, are immaterial and improper. They alleged statements are hearsay, and hearsay within hearsay, falling within no applicable exception, therefore are plainly inadmissible. See Conn. Code. Evid. §§8-1; 8-2 (out of court statement offered "to establish the truth of the matter asserted" is inadmissible); §8-3 (listing hearsay exceptions, none of which apply to an anonymous commentator).

Moreover, the allegations are also immaterial and irrelevant because the purported statements are not alleged to relate to Gartner's conduct toward NetScout, or to the March 6, 2014 Magic Quadrant report challenged herein. Accordingly, Gartner requests deletion of this paragraph for all the reasons set forth in its Twenty-First Requested Revision.

4. Objection:

For all of the reasons discussed in NetScout's objection to Gartner's Twenty-First Request, Gartner's request lacks any legitimate legal basis. See supra 54-57. First, NetScout is not aware of any Connecticut authority that supports the proposition -- and Gartner cites none -- that allegations in a complaint should be stricken if they constitute hearsay under applicable rules of evidence. NetScout is permitted the opportunity to engage in discovery and offer evidence in support of its well-pled allegations at trial. Gartner may then raise whatever evidentiary objections it deems appropriate in response to the evidence that NetScout proffers. There is no rule limiting pleadings to statements made by parties or excluding from pleadings all evidence from third party witnesses. Second, NetScout's allegations concerning Gartner's treatment of third parties are directly relevant to NetScout's claim that Gartner engages in "pay-to-play" business practices that are unfair and deceptive under CUTPA. For these reasons, and as discussed above, NetScout's objection should be sustained.

TWENTY-SEVENTH REQUESTED REVISION

1. Portion of Pleading Sought to Be Revised:

Paragraph 57 of the Complaint, which states:

57. Yet another person has recounted his own personal experience with Gartner's "pay-to-play" business practices while employed at an IT vendor:

> I have had personal experience via a company I worked for that we were only included in an M[agic] Q[uadrant] when we became a Gartner customer, and **when we stopped being a customer we weren't invited to participate in the MQ again**.

2. Revision Requested:

Gartner requests that NetScout delete Paragraph 57 in its entirety.

3. Reason for Revision:

The allegations relating to statements made by an unnamed third party working for an unnamed company are hearsay, and are immaterial and irrelevant because the purported statements are not alleged to relate to Gartner's conduct toward NetScout, or to the March 6, 2014 Magic Quadrant report challenged herein. Accordingly, Gartner requests deletion of this paragraph for all the reasons set forth in its Twenty-First Requested Revision.

4. Objection:

For all of the reasons discussed in NetScout's objection to Gartner's Twenty-First Request, Gartner's request lacks any legitimate legal basis. See supra 54-57. First, NetScout is not aware of any Connecticut authority that supports the proposition -- and Gartner cites none -- that allegations in a complaint should be stricken if they constitute hearsay under applicable rules of evidence. NetScout is permitted the opportunity to engage in discovery and offer evidence in support of its well-pled allegations at trial. Gartner may then raise whatever evidentiary objections it deems appropriate in response to the evidence that NetScout proffers. There is no rule limiting pleadings to statements made by parties or excluding from pleadings all evidence from third party witnesses. Second, NetScout's allegations concerning Gartner's treatment of third parties are directly relevant to NetScout's claim that Gartner engages in "pay-to-play" business practices that are unfair and deceptive under CUTPA. For these reasons, and as discussed above, NetScout's objection should be sustained.

TWENTY-EIGHTH REQUESTED REVISION

1. Portion of Pleading Sought to Be Revised:

Paragraph 66 of the Complaint, which states:

66. One employee at an IT vendor covered by Gartner analysts recounted his own experience with Gartner's cross-selling" of its services in a post entitled "How much does it cost to be included in Gartner Magic Quadrant?" As that employee stated:

> I received [the] following email from [a] Gartner sales rep: your biggest competitor [in] SF just came onboard this quarter and took advantage of our flexibility. Also they are in the process of filling out the BI MQ questionnaire which they are not guaranteed to be included but are working with the analysts to get more coverage in 2011. **I want to give you a heads up because if you see that they are included and you are not, being a client will give you a good vehicle to plead your case.**

2. Revisions Requested:

Gartner requests that NetScout delete Paragraph 66 in its entirety.

3. Reason for Revision:

The allegations relating to statements made by an unnamed third party "employee at an IT vendor" are immaterial and irrelevant because the purported statements are hearsay, and are not alleged to relate to Gartner's conduct toward NetScout, or to the March 6, 2014 Magic Quadrant report challenged herein. Accordingly, Gartner requests deletion of this paragraph for all the reasons set forth in its Twenty-First Requested Revision.

4. Objection:

For all of the reasons discussed in NetScout's objection to Gartner's Twenty-First Request, Gartner's request lacks any legitimate legal basis. See supra 54-57. First, NetScout is not aware of any Connecticut authority that supports the proposition -- and Gartner cites none -- that allegations in a complaint should be stricken if they constitute hearsay under applicable rules of evidence. NetScout is permitted the opportunity to engage in discovery and offer evidence in

support of its well-pled allegations at trial. Gartner may then raise whatever evidentiary objections it deems appropriate in response to the evidence that NetScout proffers. There is no rule limiting pleadings to statements made by parties or excluding from pleadings all evidence from third party witnesses. Second, NetScout's allegations concerning Gartner's treatment of third parties are directly relevant to NetScout's claim that Gartner engages in "pay-to-play" business practices that are unfair and deceptive under CUTPA. For these reasons, and as discussed above, NetScout's objection should be sustained.

TWENTY-NINTH REQUESTED REVISION

1. Portion of Pleading Sought to be Revised:

Paragraph 67 of the Complaint, which states:

67. Thus, whether and how much a vendor pays Gartner for its "consulting" services is an important factor that bears on where Gartner places an IT vendor in the Magic Quadrant and what Gartner states regarding the IT vendor in its Magic Quadrant report.

2. Revision Requested:

Gartner requests that NetScout delete the term "Thus," in Paragraph 67.

3. Reason for Revision:

By the inclusion of the term "Thus," the allegations in Paragraph 67 relate back to the improper allegations in Paragraph 66, which Gartner requests be deleted in their entirety, as set forth in the Twenty-Eighth Requested Revision. Accordingly, Gartner requests deletion of the term "Thus," for all the reasons set forth in its Twenty-Eighth Requested Revision.

4. Objection:

For all of the reasons discussed in NetScout's objection to Gartner's Twenty-First

Request, Gartner's request lacks any legitimate legal basis. See supra 54-57. First, NetScout is not aware of any Connecticut authority that supports the proposition -- and Gartner cites none -- that allegations in a complaint should be stricken if they constitute hearsay under applicable rules of evidence. NetScout is permitted the opportunity to engage in discovery and offer evidence in support of its well-pled allegations at trial. Gartner may then raise whatever evidentiary objections it deems appropriate in response to the evidence that NetScout proffers. There is no rule limiting pleadings to statements made by parties or excluding from pleadings all evidence from third party witnesses. Second, NetScout's allegations concerning Gartner's treatment of third parties are directly relevant to NetScout's claim that Gartner engages in "pay-to-play" business practices that are unfair and deceptive under CUTPA. For these reasons, and as discussed above, NetScout's objection should be sustained.

THIRTIETH REQUESTED REVISION

1. Portion of Pleading Sought to Be Revised:

Paragraph 4 of the Complaint, which states:

This "pay-to-play" business model is facilitated by Gartner's immense influence within the IT industry. A favorable ranking in Gartner's Magic Quadrant report can "make or break" an IT Company. IT companies are pressured into spending substantial sums on Gartner's "consulting" services to better position themselves in these "magic" reports. As one published article questioning Gartner's business practices observed: "[f]ailure to get a favorable mention in an analyst report could undermine years of product development. Acceptance, on the other hand, boosts a company's exposure and is essential for buyers drawing up short lists."

2. Revision Requested:

Gartner requests that NetScout delete that portion of Paragraph 4 that states: As one published article questioning Gartner's business practices observed: "[f]ailure to get a favorable mention in an analyst report could undermine years of product development. Acceptance, on the other hand, boosts a company's exposure and is essential for buyers drawing up short lists."

3. Reason for Request:

A request to revise is appropriate to obtain "the deletion of any unnecessary, repetitious, scandalous, impertinent, immaterial or otherwise improper allegations in an adverse party's pleading." Conn. Practice Book §10-35(2); see also Stone v. Pattis, 144 Conn. App. 79, 94, 72 A.3d 1138, 1149 (2013) (express language of § 10-35 permits deletion of improper allegations). "Immaterial" and "impertinent" matters are defined as those that are "mere surplusage," which a plaintiff "will have no right to prove although alleged." Adams v. Way, 32 Conn. 160, 160 (1864); see also 5C Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure §1382 (3d ed. 2004) (in addressing motions to strike immaterial, impertinent, or scandalous matter under Fed. R. Civ. P. 12(f), defining "immaterial" matter as "that which has no essential or important relationship to the claim for relief or defenses being pleaded," and "impertinent" matter as "statements that do not pertain, and are not necessary, to the issues in question."); Mahon v. Chicago Title Ins. Co., 3:09CV00690AWT, 2009 WL 4268372, at *1 (D. Conn. Nov. 24, 2009) ("One test that has been advanced for determining whether an allegation in a pleading is immaterial and impertinent within the meaning of Rule 12(f) is whether proof concerning it could be received at trial; if it could not, then the matter is immaterial and impertinent.") (quoting 5C Charles Alan Wright & Arthur R. Miller, Federal

Practice and Procedure§ 1382 (3d ed. 2004)).

The allegations in Paragraph 4 referencing and quoting a news article are immaterial and improper, as the news article is hearsay falling within no applicable exception, and therefore is plainly inadmissible. See Conn. Code. Evid. §§8-1; 8-2 (out of court statement offered "to establish the truth of the matter asserted" is inadmissible); §8-3 (listing hearsay exceptions, none of which apply to the InformationWeek article at issue). This "is a well-settled rule of evidence," repeatedly affirmed by Connecticut courts. Cherniske v. Jajer, 171 Conn. 372, 377, 370 A.2d 951, 984 (1976) ("As an exhibit offered in this case, the newspaper article was clearly hearsay and should have been excluded."); State v. Falcone, 191 Conn. 12, 17, 463 A.2d, 558, 561 (1983); Cach, LLC v. Sninsky, AANCV116007757S, 2013 WL 1189465, at *4 (Conn. Super. Ct. Mar. 8, 2013). Because no evidence concerning the news article quoted in Paragraph 4 could be received at trial, the allegations related to that article are immaterial and impertinent, and should be deleted.

4. Objection:

For all of the reasons discussed in NetScout's objection to Gartner's Twenty-First Request, Gartner's request lacks any legitimate legal basis. See supra 54-57. First, NetScout is not aware of any Connecticut authority that supports the proposition -- and Gartner cites none -- that allegations in a complaint should be stricken if they constitute hearsay under applicable rules of evidence. NetScout is permitted the opportunity to engage in discovery and offer evidence in support of its well-pled allegations at trial. Gartner may then raise whatever evidentiary objections it deems appropriate in response to the evidence that NetScout proffers. There is no rule limiting pleadings to statements made by parties or excluding from pleadings all evidence

from third party witnesses. Second, the InformationWeek article, like NetScout's other allegations concerning Gartner's treatment of third parties, is directly relevant to NetScout's claim that Gartner engages in "pay-to-play" business practices that are unfair and deceptive under CUTPA. For these reasons, and as discussed above, NetScout's objection should be sustained.

THIRTY-FIRST REQUESTED REVISION

1. Portion of Pleading Sought to Be Revised:

Paragraph 5 of the Complaint, which states:

Gartner was founded in 1979 by prominent Wall Street computer analyst Gideon Gartner. Gideon Gartner has stated that Gartner's Magic Quadrant reports are "misused and abused" and commented on the "potential tainting" of the "objectivity of [its] research." As Gideon Gartner, who is no longer affiliated with Gartner, stated:

> The reason why people revile the Magic Quadrant is because it is misused … As a guideline for a bunch of amateurs it's one thing. But when all your clients live or die on the basis of whether Gartner Group puts you in the upper right hand corner in the **–** or wherever **–** that's really bad news. **And when there's potential tainting of the objectivity of research because you have very large contracts with your vendors, with your customers**, people will always come and complain … Today it is overused, **misused and abused, terribly.**

2. Revision Requested:

Gartner requests that NetScout delete Paragraph 5 in its entirety.

3. Reason for Request:

The allegations in Paragraph 5 relating to the date of Gartner's founding are immaterial

and impertinent to NetScout's claims herein. Further, the reference in Paragraph 5 to statements allegedly made by Gideon Gartner are hearsay falling within no applicable exception, and therefore is plainly inadmissible. See Conn. Code. Evid. §§8-1; 8-2 (out of court statement offered "to establish the truth of the matter asserted" is inadmissible); §8-3 (listing hearsay exceptions, none of which apply to an anonymous online commentator). Because no evidence concerning the out of court hearsay statement could be received at trial, the allegations related to that statement are immaterial and impertinent, and should be deleted.

Moreover, and in any event, the allegations set forth in Paragraph 5 are immaterial and irrelevant because the purported statements are not alleged to relate to Gartner's conduct toward NetScout, or to the March 6, 2014 Magic Quadrant report challenged herein. Accordingly, Gartner requests deletion of this paragraph for all the reasons set forth in its Twenty-First Requested Revision.

4. Objection:

For all of the reasons discussed in NetScout's objection to Gartner's Twenty-First Request, Gartner's request lacks any legitimate legal basis. See supra 54-57. First, NetScout is not aware of any Connecticut authority that supports the proposition -- and Gartner cites none -- that allegations in a complaint should be stricken if they constitute hearsay under applicable rules of evidence. NetScout is permitted the opportunity to engage in discovery and offer evidence at trial in support of its well-pled allegations at trial. Gartner may then raise whatever evidentiary objections it deems appropriate in response to the evidence that NetScout proffers. There is no rule limiting pleadings to statements made by parties or excluding from pleadings all evidence from third party witnesses. Second, NetScout's allegation concerning the "potential tainting of

the objectivity [Gartner's] research" on the basis of "very large contracts with . . . customers," as well as the allegation that Gartner's research "is overused, misused and abused, terribly," are directly relevant to NetScout's claim that Gartner engages in "pay-to-play" business practices that are unfair and deceptive under CUTPA. For these reasons, and as discussed above, NetScout's objection should be sustained.

THIRTY-SECOND REQUESTED REVISION

1. Portion of Pleading Sought to Be Revised:

Paragraph 78 of the Complaint, which states:

Gartner's founder, Gideon Gartner, has commented on the "potential tainting" of the "objectivity of [Gartner's] research." As Gideon Gartner stated:

> The reason why people revile the Magic Quadrant is because it is misused … As a guideline for a bunch of amateurs it's one thing. But when all your clients live or die on the basis of whether Gartner Group puts you in the upper right hand corner in the -- or wherever -- that's really bad news. **And when there's potential tainting of the objectivity of research because you have very large contracts with your vendors, with your customers**, people will always come and complain … **Today it is overused, misused and abused, terribly**.

2. Revision Requested:

Gartner requests that NetScout delete Paragraph 78 in its entirety.

3. Reason for Request:

A request to revise is appropriate to obtain "the deletion of any unnecessary, repetitious, scandalous, impertinent, immaterial or otherwise improper allegations in an adverse party's pleading." Conn. Practice Book §10-35(2). Here, Paragraph 78 of the complaint repeats

verbatim allegations contained in Paragraph 5 of the complaint. Defendants therefore request that Plaintiffs delete Paragraph 78 as repetitive, unnecessary, and improper. See, e.g., Sandru v. Boyle, CV075014056, 2008 WL 4252852, at *2 (Conn. Super. Ct. Sept. 3, 2008) (request to revise is the appropriate procedural device for deletion of duplicative pleadings) (citing cases).

Moreover, and in any event, the allegations set forth in Paragraph 78 are immaterial and irrelevant because the purported statements are not alleged to relate to Gartner's conduct toward NetScout, or to the March 6, 2014 Magic Quadrant report challenged herein. Accordingly, Gartner requests deletion of this paragraph for all the reasons set forth in its Twenty-First Requested Revision.

4. Objection:

For all of the reasons discussed in NetScout's objection to Gartner's Twenty-First Request, Gartner's request lacks any legitimate legal basis. See supra 54-57. First, NetScout is not aware of any Connecticut authority that supports the proposition -- and Gartner cites none -- that allegations in a complaint should be stricken if they constitute hearsay under applicable rules of evidence. NetScout is permitted the opportunity to engage in discovery and offer evidence at trial in support of its well-pled allegations. Gartner may then raise whatever evidentiary objections it deems appropriate in response to the evidence that NetScout proffers. There is no rule limiting pleadings to statements made by parties or excluding from pleadings all evidence from third party witnesses. Second, NetScout's allegation concerning the "potential tainting of the objectivity [Gartner's] research" on the basis of "very large contracts with . . . customers," as well as the allegation that Gartner's research "is overused, misused and abused, terribly," are directly relevant to NetScout's claim that Gartner engages in "pay-to-play"

business practices that are unfair and deceptive under CUTPA. For these reasons, and as discussed above, NetScout's objection should be sustained.

THIRTY-THIRD REQUESTED REVISION

1. Portion of Pleading Sought to Be Revised:

Paragraph 81 of the Complaint, which states:

On October 8, 2009, a Gartner Vice President and research analyst felt the need to "rant a little" about the commonly held belief that Gartner engages in "pay-to-play" business practices "and can be bought." Numerous IT industry commentators responded to the Gartner analyst's "rant" by raising further questions concerning the propriety of Gartner's business practices.

2. Revision Requested:

Gartner requests that NetScout delete Paragraph 81 in its entirety.

3. Reason for Request:

The allegations set forth in Paragraph 81 are immaterial and irrelevant because the purported statements are hearsay, and are not alleged to relate to Gartner's conduct toward NetScout, or to the March 6, 2014 Magic Quadrant report challenged herein. Accordingly, Gartner requests deletion of this paragraph for all the reasons set forth in its Twenty-First Requested Revision.

4. Objection:

For all of the reasons discussed in NetScout's objection to Gartner's Twenty-First Request, Gartner's request lacks any legitimate legal basis. See supra 54-57. First, NetScout is not aware of any Connecticut authority that supports the proposition -- and Gartner cites none --

that allegations in a complaint should be stricken if they constitute hearsay under applicable rules of evidence. NetScout is permitted the opportunity to engage in discovery and offer evidence in support of its well-pled allegations at trial. Gartner may then raise whatever evidentiary objections it deems appropriate in response to the evidence that NetScout proffers. There is no rule limiting pleadings to statements made by parties or excluding from pleadings all evidence from third party witnesses. Second, NetScout's allegations concerning Gartner's treatment of third parties are directly relevant to NetScout's claim that Gartner engages in "pay-to-play" business practices that are unfair and deceptive under CUTPA. For these reasons, and as discussed above, NetScout's objection should be sustained.

THIRTY-FOURTH REQUESTED REVISION

1. Portion of Pleading Sought to Be Revised:

Paragraph 82 of the Complaint, which states:

82. One commentator recounted how, as an IT vendor, he has been told by Gartner sales people that they "must pay between 30 and 50K$" to "enter the Magic Quadrant." As that commentator wrote, responding to the proposition that Gartner does not engage in a pay-to-play scheme:

> Surely you're kidding.
>
> As a software vendor, **we are told first hand by Gartner's salespeople that to enter the Magic Quadrant for our own market, we must pay between 30 and 50k$**.
>
> How can you say you can't be bought then! This is just ludicrous. J. (Not my real name, **withholding the name of my company out of fear of retribution**).

2. Revision Requested:

Gartner requests that NetScout delete Paragraph 82 in its entirety.

3. Reason for Revision:

The allegations in Paragraph 82 relate to statements purportedly made by an anonymous "commentator" using a false identity in response to the posting of a "rant" by a Gartner employee. The written posting itself is immaterial, as it is hearsay falling within no applicable exception, and therefore is plainly inadmissible. See Conn. Code. Evid. §§8-1; 8-2 (out of court statement offered "to establish the truth of the matter asserted" is inadmissible; §8-3 (listing hearsay exceptions, none of which apply to an anonymous online commentator). Indeed, evidence of out of court statements made by an anonymous online commentator in an internet forum are so lacking in trustworthiness that they are inadmissible even under the most liberal interpretation of the hearsay rule and its exceptions. See, e.g., Novak v. Tucows, Inc., 06CV1909(JFB)(ARL), 2007 WL 922306, at *5 (E.D.N.Y. Mar. 26, 2007), *aff'd*, 330 F. App'x 204 (2d Cir. 2009). Because no evidence concerning the written anonymous posting could be received at trial, the allegations related to that posting are immaterial and impertinent, and should be deleted.

Moreover, and in any event, the allegations set forth in Paragraph 82 are immaterial and irrelevant because the purported statements are not alleged to relate to Gartner's conduct toward NetScout, or to the March 6, 2014 Magic Quadrant report challenged herein. Accordingly, Gartner requests deletion of this paragraph for all the reasons set forth in its Twenty-First Requested Revision.

4. Objection:

For all of the reasons discussed in NetScout's objection to Gartner's Twenty-First Request, Gartner's request lacks any legitimate legal basis. See supra 54-57. First, NetScout is not aware of any Connecticut authority that supports the proposition -- and Gartner cites none -- that allegations in a complaint should be stricken if they constitute hearsay under applicable rules of evidence. NetScout is permitted the opportunity to engage in discovery and offer evidence in support of its well-pled allegations at trial. Gartner may then raise whatever evidentiary objections it deems appropriate in response to the evidence that NetScout proffers. There is no rule limiting pleadings to statements made by parties or excluding from pleadings all evidence from third party witnesses. Second, NetScout's allegations concerning Gartner's treatment of third parties are directly relevant to NetScout's claim that Gartner engages in "pay-to-play" business practices that are unfair and deceptive under CUTPA. For these reasons, and as discussed above, NetScout's objection should be sustained.

THIRTY-FIFTH REQUESTED REVISION

1. Portion of Pleading Sought to Be Revised:

Paragraph 83 of the Complaint, which states:

83. Yet another commentator questioned Gartner's practice of cross-selling "consulting" services to the subjects of its research reports:

> To eliminate any concerns about vendor bias, **how about Gartner eliminate consulting contracts and payments from vendors?**
>
> I assume this is a naive question.
>
> However, such a move would provide the strongest possible financial incentive[s] and align with end users interest.

2. Revision Requested:

Gartner requests that NetScout delete Paragraph 83 in its entirety.

3. Reason for Revision:

The allegations in Paragraph 83 relate to statements purportedly made by an anonymous "commentator" in response to the posting of a "rant" by a Gartner employee. The written posting itself is immaterial, as it is hearsay falling within no applicable exception, and therefore is plainly inadmissible. See Conn. Code. Evid. §§8-1; 8-2 (out of court statement offered "to establish the truth of the matter asserted" is inadmissible); §8-3 (listing hearsay exceptions, none of which apply to an anonymous online commentator). Indeed, evidence of out of court statements made by an anonymous online commentator in an internet forum are so lacking in trustworthiness that that are inadmissible even under the most liberal interpretation of the hearsay rule and its exceptions. See, e.g., Novak v. Tucows, Inc., 06CV1909(JFB)(ARL), 2007 WL 922306, at *5 (E.D.N.Y. Mar. 26, 2007), *aff'd*, 330 F. App' x 204 (2d Cir. 2009). Because no evidence concerning the written anonymous posting could be received at trial, the allegations related to that posting are immaterial and impertinent, and should be deleted.

Moreover, and in any event, the allegations set forth in Paragraph 83 are immaterial and irrelevant because the purported statements are not alleged to relate to Gartner's conduct toward NetScout, or to the March 6, 2014 Magic Quadrant report challenged herein. Accordingly, Gartner requests deletion of this paragraph for all the reasons set forth in its Twenty-First Requested Revision.

4. Objection:

For all of the reasons discussed in NetScout's objection to Gartner's Twenty-First

Request, Gartner's request lacks any legitimate legal basis. See supra 54-57. First, NetScout is not aware of any Connecticut authority that supports the proposition -- and Gartner cites none -- that allegations in a complaint should be stricken if they constitute hearsay under applicable rules of evidence. NetScout is permitted the opportunity to engage in discovery and offer evidence in support of its well-pled allegations at trial. Gartner may then raise whatever evidentiary objections it deems appropriate in response to the evidence that NetScout proffers. There is no rule limiting pleadings to statements made by parties or excluding from pleadings all evidence from third party witnesses. Second, NetScout's allegations concerning Gartner's treatment of third parties are directly relevant to NetScout's claim that Gartner engages in "pay-to-play" business practices that are unfair and deceptive under CUTPA. For these reasons, and as discussed above, NetScout's objection should be sustained.

THIRTY-SIXTH REQUESTED REVISION

1. Portion of Pleading Sought to be Revised:

Paragraph 84 of the Complaint, which states:

84. Another commentator, IT industry journalist Dennis Howlett, noted how "he gets complaints every week of the 'pay to play' argument." As Howlett explained:

> **I get complaints pretty much every week of the 'pay to play' argument so whether you believe it or not is immaterial.** It goes back to what @vinnie says about **firm level issues and the corporate emphasis on aggressive selling** -- or as one of your major clients puts it to me: **tin cupping**.

2. Revision Requested:

Gartner request that NetScout delete Paragraph 84 in its entirety.

3. Reason for Revision:

The allegations in Paragraph 84 relate to statements purportedly made by a "commentator" in response to the posting of a "rant" by a Gartner employee. The written posting itself is immaterial, as it is hearsay falling within no applicable exception, and therefore is plainly inadmissible. See Conn. Code. Evid. §§8-1; 8-2 (out of court statement offered "to establish the truth of the matter asserted" is inadmissible); §8-3 (listing hearsay exceptions, none of which apply to an online commentator). Because no evidence concerning the written posting could be received at trial, the allegations related to that posting are immaterial and impertinent, and should be deleted.

Moreover, and in any event, the allegations set forth in Paragraph 84 are immaterial and irrelevant because the purported statements are not alleged to relate to Gartner's conduct toward NetScout, or to the March 6, 2014 Magic Quadrant report challenged herein. Accordingly, Gartner requests deletion of this paragraph for all the reasons set forth in its Twenty-First Requested Revision.

4. Objection:

For all of the reasons discussed in NetScout's objection to Gartner's Twenty-First Request, Gartner's request lacks any legitimate legal basis. See supra 54-57. First, NetScout is not aware of any Connecticut authority that supports the proposition -- and Gartner cites none -- that allegations in a complaint should be stricken if they constitute hearsay under applicable rules of evidence. NetScout is permitted the opportunity to engage in discovery and offer evidence in support of its well-pled allegations at trial. Gartner may then raise whatever evidentiary objections it deems appropriate in response to the evidence that NetScout proffers. There is no rule limiting pleadings to statements made by parties or excluding from pleadings all evidence

from third party witnesses. Second, NetScout's allegations concerning Gartner's treatment of third parties are directly relevant to NetScout's claim that Gartner engages in "pay-to-play" business practices that are unfair and deceptive under CUTPA. For these reasons, and as discussed above, NetScout's objection should be sustained.

THIRTY-SEVENTH REQUESTED REVISION

1. Portion of Pleading Sought to Be Revised:

Paragraph 85 of the Complaint, which states:

85. Howlett further elaborated on the IT industry complaints about Gartner's "pay-to-play" business practices:

> I would not repeat what I am told if it was one off or obvious sour grapes but **I can say that some vendors I've spoken with see 'pay to play'** (and not just Gartner but the analyst community as a whole) as an irritant to the point where **I can immediately think of at least a handful that have voted with their wallets and said 'no more' after many years of engagement.**

2. Revision Requested:

Gartner requests that NetScout delete Paragraph 85 in its entirety.

3. Reason for Revision:

The allegations in Paragraph 85 relate to statements purportedly made by a commentator in response to the posting of a "rant" by a Gartner employee. The written posting itself is immaterial, as it is hearsay falling within no applicable exception, and therefore is plainly inadmissible. See Conn. Code. Evid. §§8-1; 8-2 (out of court statement offered "to establish the truth of the matter asserted" is inadmissible); §8-3 (listing hearsay exceptions, none of which apply to an anonymous online commentator). Because no evidence concerning the

written posting could be received at trial, the allegations related to that posting are immaterial and impertinent, and should be deleted.

Moreover, and in any event, the allegations set forth in Paragraph 85 are immaterial and irrelevant because the purported statements are not alleged to relate to Gartner's conduct toward NetScout, or to the March 6, 2014 Magic Quadrant report challenged herein. Accordingly, Gartner requests deletion of this paragraph for all the reasons set forth in its Twenty-First Requested Revision.

4. Objection:

For all of the reasons discussed in NetScout's objection to Gartner's Twenty-First Request, Gartner's request lacks any legitimate legal basis. See supra 54-57. First, NetScout is not aware of any Connecticut authority that supports the proposition -- and Gartner cites none -- that allegations in a complaint should be stricken if they constitute hearsay under applicable rules of evidence. NetScout is permitted the opportunity to engage in discovery and offer evidence in support of its well-pled allegations at trial. Gartner may then raise whatever evidentiary objections it deems appropriate in response to the evidence that NetScout proffers. There is no rule limiting pleadings to statements made by parties or excluding from pleadings all evidence from third party witnesses. Second, NetScout's allegations concerning Gartner's treatment of third parties are directly relevant to NetScout's claim that Gartner engages in "pay-to-play" business practices that are unfair and deceptive under CUTPA. For these reasons, and as discussed above, NetScout's objection should be sustained.

THIRTY-EIGHTH REQUESTED REVISION

1. Portion of Pleading Sought to be Revised:

Paragraph 86 of the Complaint, which states:

86. The foregoing is just a sampling of the serious objections that have been raised by IT industry vendors, observers, commentators, and journalists about Gartner's "pay to play" business practices.

2. Revision Requested:

Gartner requests that NetScout delete Paragraph 86 in its entirety.

3. Reason for Revision:

The allegations in Paragraph 86 relate to statements purportedly made by third parties about Gartner unrelated to Gartner's conduct toward NetScout or to the March 6, 2014 Magic Quadrant Report. As set forth above in the Twenty-First through Thirty-Seventh Requested Revisions, the statements referenced in Paragraph 86 themselves are immaterial. Accordingly, Paragraph 86, too, is immaterial and impertinent, and should be deleted.

4. Objection:

For all of the reasons discussed in NetScout's objection to Gartner's Twenty-First Request, Gartner's request lacks any legitimate legal basis. See supra 54-57. First, NetScout is not aware of any Connecticut authority that supports the proposition -- and Gartner cites none -- that allegations in a complaint should be stricken if they constitute hearsay under applicable rules of evidence. NetScout is permitted the opportunity to engage in discovery and offer evidence in support of its well-pled allegations at trial. Gartner may then raise whatever evidentiary objections it deems appropriate in response to the evidence that NetScout proffers. There is no rule limiting pleadings to statements made by parties or excluding from pleadings all evidence from third party witnesses. Second, NetScout's allegations concerning Gartner's treatment of

third parties are directly relevant to NetScout's claim that Gartner engages in "pay-to-play" business practices that are unfair and deceptive under CUTPA. For these reasons, and as discussed above, NetScout's objection should be sustained.

THIRTY-NINTH REQUESTED REVISION

1. Portion of Pleading Sought to Be Revised:

Second Count (Defamation and Defamation *per se)*.

2. Revision Requested:

Gartner requests that NetScout revise the Second Count to provide a more particular statement of (a) the allegedly defamatory statements on which its defamation claim is based; (b) where such statements were published; (c) when such statements were made; (d) by whom such statements were made; and (e) to whom such statements were made.

3. Reason for Request:

A request to revise is appropriate to obtain "(1) a more complete or particular statement of the allegations of an adverse party's pleading, or … or (3) separation of causes of action which may be united in one complaint when they are improperly combined in one count." Conn. Practice Book §10-35. The purpose of a request to revise is to allow the defendant to obtain information so that it may intelligently plead and prepare its case. See Kileen v. General Motors Corp., 36 Conn. Supp. 347, 349 (Conn. Super. Ct. 1980) ("[a] Request to Revise is permissible to obtain information so that a defendant may intelligently plead and prepare his case for trial …").

In the Second Count of the Complaint, NetScout fails to identify the publication source of the defamatory statements on which it bases its claims. Accordingly, it is unclear, on the

face of the Complaint, whether NetScout has based its defamation claim solely on statements made by Gartner in its Magic Quadrant Report for NPMD published on March 6, 2014, or whether there are other statements or other publications on which NetScout has based the Second Count. To the extent NetScout's defamation claim is based on statements other than those made in the March 6, 2014 Magic Quadrant Report, then the Second Count fails to disclose material facts constituting the cause of action. Without revision, Gartner would be unable to intelligently respond to the allegations. See, e.g., Guberman v. Camillo, No. CV075006202S, 2008 WL 2375564, at *1 (Conn. Super. Ct. May 27, 2008) (addressing the appropriateness of a request to revise to obtain a more complete or particular statement of the allegations); Preston v. O'Rourke, X07CV 9971011S, 1999 WL 1081395, at *1 (Conn. Super. Ct. Nov. 12, 1999) (holding that the "plaintiff shall more specifically plead facts relative to any alleged untruthful statements, in particular, what untruthful statements were made, when they were allegedly made and to whom they were allegedly made."); 2500 SS Ltd. P'ship v. White, 328934, 1996 WL 493188, at *3 (Conn. Super. Ct. Aug. 19, 1996) (holding that defamation claims "lack the specificity ordered and needed to apprise the defendant of the claims against him and to permit the defendant to file a responsive pleading").

Moreover, if the Second Count of the Complaint is based on alleged defamatory statements published independent of the March 6, 2014 Magic Quadrant Report, then each such publication should be alleged in separate counts. See Yavis v. Sullivan, 137 Conn. 253, 261, 76 A.2d 99, 103 (1950) (each defamatory publication must be pled in a separate count); Preston v. O'Rourke, X07CV 9971011S, 1999 WL 1081395, at *1 (Conn. Super. Ct. Nov. 12, 1999) (same); Taylor v. Phyllis Bodel Childcare Ctr. at Yale Sch. of Med., Inc., CV

950377237, 1996 WL 434397, at *7 (Conn. Super. Ct. July 10, 1996) (same).

4. Objection:

Gartner's request is without merit. "[A] party has the right to plead his case in his own way unless it is clearly in nonconformity with an applicable rule of pleading." Wilder v. Brewer, No. CV94-053 85 73, 1994 WL 529991, at *1 (Conn. Super. Ct. Sept. 19, 1994) (internal quotation marks omitted) (citing First National Bank and Trust Co. v. Blakeslee, 4 Conn. Supp. 354 (Conn. Super. Ct. 1936)). Thus, the test for a request to revise "is not whether the pleading discloses all that the adversary desires to know in aid of his own cause, but whether it discloses the material facts which constitute the cause of action." Kileen v. General Motors Corp., 36 Conn. Supp. 347, 348, 421 A.2d 874 (Conn. Super. Ct. 1980) (citation omitted; internal quotation marks omitted); see Practice Book § 10-20 (requiring only that the complaint "contain a concise statement of the facts constituting the cause of action"). "The defendant is not entitled to know the plaintiff's proof but only what he claims as his cause of action." Id. at 349; see also Cervino v. Coratti, 131 Conn. 518, 520, 41 A.2d 95 (1945) (finding no error in trial court's denial of defendant's motion for a more specific statement where the complaint "fully disclosed the ground of claim" and "sufficiently defined the issues").

Here, the Complaint pleads the material facts necessary to constitute NetScout's claims for defamation and defamation *per se*. NetScout's Complaint identifies each statement that was defamatory, where the statement was made, when the statement was made, and the reasons why the statement was defamatory. Compl. ¶¶ 147-173. As such, NetScout's allegations satisfy the pleading requirements set forth in the Connecticut Practice Book. See Conn. Practice Book § 10-20 (requiring that the complaint "contain a concise statement of the facts constituting the

cause of action"). Nothing more is required. NetScout is simply not obligated to "disclose[] all that [Gartner] desires to know in aid of his own cause," which is exactly what Gartner's request seeks here. Kileen v. General Motors Corp., supra, 36 Conn. Supp. 348. For these reasons, NetScout's objection to Gartner's request should be sustained.

CONCLUSION

For all of the foregoing reasons, NetScout respectfully requests that its objections to Gartner's Request be sustained.

Dated at Hartford, Connecticut this 11th day of December, 2014.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of this document was sent by e-mail and first class mail on December 11, 2014 to all counsel of record.

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