

FST.

: SUPERIOR COURT

: JUDICIAL DISTRICT OF

V.

: AT

: AUGUST 23, 2006

MEMORANDUM OF DECISION

This is a post-judgment proceeding on multiple motions filed by both parties. Judgment entered after trial on July 19, 1995, wherein the court, Harrigan, J., ordered the defendant to pay \$1,200 per week unallocated alimony and child support. A motion to modify the judgment was filed in 1998 and after a contested hearing, Judge Harrigan on May 21, 1999 issued a modified order of \$1,200 per week allocated only as alimony. Both parties have now filed four motions. The parties stipulated that all evidence produced at this hearing would be applicable to all four motions. Those motions are: (1) Defendant's Motion for Modification of Alimony dated December 14, 2005 (#165.00); (2) Plaintiff's Motion for Modification of Alimony dated February 6, 2006 (#167.00); (3) Plaintiff's Motion for Contempt dated February 6, 2006 (#168.00); and (4) Plaintiff's Motion for Counsel Fees dated February 14, 2006 (#171.00). In addition the plaintiff requested an order that the defendant provide security for future alimony payments.

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SUPERIOR COURT
STAMFORD-NORWALK
JUDICIAL DISTRICT

After hearing the evidence, considering the exhibits, testimony of the parties, the claims of law and claims of fact, the Court makes the following findings of fact and legal conclusions:

The parties were married on May 18, 1974. There are two children issue of the marriage now ages 26 and 30. He was employed by PepsiCo., Inc., Inc. as of the date of the 1995 dissolution as well as the 1999 decision on the Motion for Modification. He worked for PepsiCo., Inc. for 33 years and resigned on December 31, 2005 as Vice President Industry Relations for Pepsico Food Services. He held that position for one year. Immediately prior he was the Vice President of Entertainment Sales of the Pepsi Cola Company, a position he had held for the previous fourteen years. The defendant is now unemployed.

At age 52 the defendant testified that he felt his continued employment was doubtful. He stated he was in the process of losing his perks, vesting rights, his pay grade, medical benefits, his bonus and even his retirement benefits. At age 52 he signed an employment contract securing his job until age 55. The defendant is in good health.

The plaintiff is now unemployed. Her sole source of income is the weekly alimony order of \$ 1,200. She was last employed at a Westport, Connecticut jewelry store earning \$265 a week net at the time. She is 53 years old and in good health. In the last year the plaintiff has made no efforts to obtain employment.

There are three issues necessary for the trial court to consider in a Motion for Modification brought pursuant to General Statutes § 46b-86: (1) Does the decree or separation agreement preclude modification? (2) Has there been a "substantial change in circumstances of either party?" and (3) What is the appropriate financial order considering the factors of General Statutes § 46b-82? *Borkowski v. Borkowski*, 228 Conn. 729, 737 (1994).

As to the first issue the Court has examined both the 1995 decree as well as the 1999 modification decision and neither court order prevents the \$1,200 per month alimony from being modified either as to term or amount. No court order prevents upward or downward modification of the \$1,200 per week periodic alimony award, nor does any order contain a precondition that must be met before a modification can be considered.

The parties stipulated that the last financial order was Judge Harrigan's May 21, 1999 Memorandum of Decision on the defendant's Motion for Modification, wherein he ordered the \$1,200 per week to continue as alimony in lieu of the former order of \$1,200 unallocated alimony and child support. Therefore, the base financial circumstances of the parties are as existed in that 1999 proceeding. The parties provided the Court with the financial affidavits on file for that 1999 proceeding. The defendant was gainfully employed in 1999. The defendant is no longer employed. His loss of employment is a substantial change in circumstance. The second issue in both motions for modification has been satisfied.

There is no provision in General Statutes § 46b-86 or in any case law interpreting that statute, that requires that the direction of the modification, if any, must be in the same direction of the change in circumstances. Therefore, it is possible under the statutory scheme, that a change in circumstance can be found that the payor has a lesser income, but after applying the factors of General Statutes § 46b-82 an increase in the periodic order can be ordered. That outcome is permitted by statute and case law and no contrary authority has been brought to this Court's attention.

Having found that there is no prohibition against modification contained in the prior court orders and that there has been a substantial change in circumstance, the Court proceeds to the third issue, an examination of the financial circumstances of the parties utilizing the factors of General

Statutes § 46b-82. Certain of those factors are not relevant for the Court's consideration in a modification proceeding. The trial court in 1995 considered the causes of the breakdown of the marriage and therefore, fault is not a relevant factor in a later modification. The court has no power in a motion to change the distribution of assets. The Court lacks subject matter jurisdiction to reallocate assets of the parties after the decree. *Bartlett v. Bartlett*, 220 Conn. 372, 382 (1991). General Statutes § 46b-81(a) "At the time of entering a decree dissolving a marriage" *Santoro v. Santoro*, App. 212, 217 (2002); *Taylor v. Taylor*, 57 Conn. App. 528, 533 (2000). The Court will now consider each of the four motions along with the security request.

THE DEFENDANT'S MOTION FOR MODIFICATION
DATED DECEMBER 14, 2005 (#165.00)

As stated and found by this Court, defendant is no longer employed. The defendant approximately three years ago planned to retire from PepsiCo., Inc., at age 55. This Court finds that the defendant's retirement was voluntary and the defendant's current unemployment is voluntary. The fact that he is not employed does not entitle him to a decrease in the alimony order. "Inability to pay does not automatically entitle a party to a decrease of an alimony order. It must be excusable and not brought about by the defendant's own fault." *Sanchione v. Sanchione*, 173 Conn. 397, 407 (1977); *Gleason v. Gleason*, 16 Conn. App. 134, 137 (1988).

This Court finds that the defendant left his position at PepsiCo., Inc. for inadequate reasons. The defendant had a written agreement with PepsiCo., Inc. that entitled him to retire at age 55 and this agreement gave him the opportunity as of January 2004 to work on a part-time basis. Exhibit #4. Despite that agreement the defendant continued to work on a full-time basis earning a large bonus for each of those years. He voluntarily left PepsiCo., Inc. and is no longer entitled to his

salary, stock options or a bonus. The fact that he felt that maybe in the future his salary would decrease, his bonus would end and he would be awarded no further stock options, does not alter this Court's finding, that he voluntarily left gainful employment. By leaving PepsiCo., Inc. the defendant voluntarily confirmed his worst fears: he no longer has a salary, bonus or stock options.

Tort cases and family use the same rules for proof of earning capacity. "There is no precise mathematical formula to calculate damages for loss of earning capacity." *Jerz v. Humphrey*, 160 Conn. 219, 221 (1971). "Loss of earning capacity is . . . an . . . uncertain area for the assessment of damages. . . . In determining whether there is a loss of earning capacity [t]he 'essential question is whether the plaintiff's capacity to earn [has been] hurt.' . . . Wages before and after an accident are only material as guides to the trier." (Citation omitted.) *Id.*, 222. "The assessment of such damages does not depend on the plaintiff's receipt of any wages at all because it is the capacity to earn that governs the amount of damages to which a plaintiff is entitled." *Lashin v. Corcoran*, 146 Conn. 512, 514 (1959); *Nunez v. Palmer*, supra, 96 Conn. App. 709. The issue is whether the evidence allows a finding of the reasonable estimate of the dollar amount of the earning capacity. *Mulligan v. Rioux*, 38 Conn. App. 546, 553 (1995).

"In evaluating the loss, the fact finder should take into account the type of work the plaintiff had done before the accident and the type of work he will be able to do after the accident in view of his physical condition, education, experience and age. Restatement (Second), Torts, 1924, comment (d)4." *Nunez v. Palmer*, supra, 96 Conn. App. 710.

The defendant learned substantial employment skills in the 33 years he worked at PepsiCo., Inc. He received a BS and an MBA in marketing from St. John's University. He is well known in the entertainment, marketing and publicity industry throughout the country. He is currently an

officer and director of Nevada Gold and Casino, Inc., a publicly traded corporation. He owns 22,900 shares outright and has 70,000 shares of optioned stock in that corporation. He still has multiple business contacts. The skills he acquired during his 33 years at PepsiCo., Inc. would be transferrable. Nevada Gold and Casino, Inc. has asked him to assume responsibility for some of its business ventures and the defendant has declined. The Court finds that he is capable of earning a substantial salary. The defendant has provided no reason why he has not obtained a job similar in duties, responsibilities and pay to what he had at PepsiCo., Inc., *Tracey v. Tracey*, 97 Conn. App. 122, 130 (2006); *Richard v. Richard*, 23 Conn. App. 58, 63 (1990); *Prial v. Prial*, 67 Conn. App. 7, 12-13 (2001). "Loss of employment does not warrant alimony modification unless the moving party also proves that her earning capacity has substantially changed." *Logan v. Logan*, 13 Conn. App. 298, 299-300 (1988); *Wilkins v. Wilkins*, 10 Conn. App. 576, 580 (1987).

The Court has done independent research to determine whether any trial court or appellate court has lowered periodic payments when the payor voluntarily retired at age 55, is healthy and capable of being gainfully employed. No such case has been located. *Simms v. Simms*, Superior Court, judicial district of Stamford/Norwalk at Stamford, docket no. FST FA 78-0035162S (*Tierney, J.*, October 24, 2005). (Age 68 retirement a valid reason to decrease income.) *Hillis v. Hillis*, Superior Court, judicial district of Stamford/Norwalk at Stamford, docket no. FST FA 00-0179465S (*Shay, J.*, February 19, 2003). (Discussion of physician retiring at age 68. Finding by the trial court that this was a reasonable decision since it is beyond normal retirement age.) *Mark v. Mark*, 40 Conn. App. 171, 174 (1995). (Voluntary restructure of a business at age 62.) *Gay v. Gay*, 70 Conn. App. 772, 773 (2002) (A bonafide retirement prior to age 65.) *Berry v. Berry*, 88 Conn. App. 674, 684 (2005) (A party's illness coupled with loss of employment); *Clark v. Clark*, 66 Conn. App. 657,

668-69 (2001) (Time limited alimony terminating at the age of 62.); *Kemsley v. Kemsley*, Superior Court, judicial district of Stamford/Norwalk at Stamford, Docket Number FA 86 0083278 S (*Harrigan, J.*, December 17, 1999) (Retirement at age 69.); *Misinonile v. Misinonile*, 35 Conn. App. 228, 230 (1994) (Retirement at age 68); *Beer v. Beer*, Superior Court, judicial district of Fairfield at Bridgeport, Docket Number FA 94-311813 (*Dewey, J.*, October 15, 2002) (Early retirement age 62 insufficient to modify alimony. "This is not a situation wherein an individual has worked until a standard retirement age, or a case wherein an individual's health mandates a drastic change in lifestyle.) "It is common knowledge that on average, people in the United States work until at least age sixty-five." *Nunez v. Palmer*, 96 Conn. App. 707, 714, fn. 8 (2006).

Although the defendant left PepsiCo., Inc. on December 31, 2005 he earned a bonus for the efforts he made in the calendar year 2005 and this bonus was paid to him in 2006. His gross bonus paid in 2006 was \$144,530 and a net bonus was \$94,560. His annual salary for all of 2005 was \$178,800. This Court has evidence of his prior pay at PepsiCo., Inc., his substantial business contacts, his current involvement with Nevada Gold and Casino, Inc., along with its \$16,000 annual Director's compensation and the \$144,530 gross and \$94,560 net PepsiCo., Inc. bonus paid in 2006. "Such circumstances include those where there is evidence that a party voluntarily quit or avoided employment in his or her field of expertise and where there is evidence of that party's previous earnings." *Paddock v. Paddock*, 22 Conn. App. 367, 371 (1990). The Court finds that the defendant has sufficient earning capacity to continue to pay \$1,200 periodic alimony.

The Defendant's Motion for Modification of Alimony (#165.00) is denied.

PLAINTIFF'S MOTION FOR MODIFICATION
DATED FEBRUARY 6, 2006 (#167.00)

Plaintiff seeks an increase in the \$1,200 per week alimony arguing that the defendant's earnings have increased. The plaintiff claims the court must take into consideration the exercise of stock options, cashing in of retirement plans, receipt of a 2005 bonus paid in 2006 and his pay up until December 31, 2005. This Court has already found that the defendant's loss of the employment is a substantial change in circumstance. Therefore the first and second issue in the plaintiff's Motion for Modification have been established.

In the 1995 decree, the court awarded the defendant his pension, his retirement rights, as well as his stock options in PepsiCo., Inc. It is noted that the defendant's assets have increased since 1995 and have further increased since 1999. An increase of assets can be considered a substantial change in the financial circumstances of one party thus satisfying the second issue of a motion for modification of periodic alimony. *Gay v. Gay*, supra, 70 Conn. App. 772 (2002); *Berry v. Berry*, 88 Conn. App. 674, 685 (2005). Since this Court has already found a substantial change in circumstance; the defendant is no longer employed, it is not necessary for this Court to consider whether or not the increase in the defendant's assets are a substantial change in circumstance. The second issue of a modification proceeding has already been established by the evidence and so found by this Court.

The Court now must consider as the third issue, the current financial circumstances of the parties. The Court has no authority to award additional assets post judgment even when the defendant's assets have increased. *Smith v. Smith*, 249 Conn. 265, 277 (1999). "To permit the trial court to reconsider all evidence dating from before the original divorce proceedings, in determining

the adjustment of alimony, would be, in effect, to undermine the policy behind the well established rule of limiting proof of the substantial change of circumstances to events occurring subsequent to the latest alimony order – the avoidance of relitigating matters already settled.” *Spencer v. Spencer*, 71 Conn. App. 475, 481 (2002); *Borkowski v. Borkowski*, supra, 228 Conn. 738. This Court has already found a substantial change in circumstances due to the defendant’s loss of employment. Therefore, under the second issue of a modification, change of financial circumstances, this Court need not consider the assets themselves. “This section shall not apply to assignments under Section 46b-81. . . .” General Statutes § 46b-86 (c).

The defendant has chosen to take his retirement in a lump sum. He has exercised stock options. According to the Internal Revenue Code these financial events are considered taxable income. The retirement plan and the stock options were awarded to him as an asset in the 1995 dissolution judgment. The conversion of an asset from one form to another form is not considered income for periodic alimony purposes. *Denley v. Denley*, 38 Conn. App. 349, 353 (1995). For example, capital gains, although income for IRS purposes, is not considered income for the purposes of modification of alimony. *Gay v. Gay*, 266 Conn. 641, 647- 48 (2003). “Capital gains are not income for purposes of modification of an order for continuing financial support if those gains do not constitute a steady stream of revenue. This is true without regard to whether the assets from which these gains are derived were acquired before or after the dissolution.” *Id.* 648-49. The evidence in this case has failed to establish that the cashing in of his retirement account and exercise of stock options were a “steady stream of revenue.”

This Court believes that a party who has acquired assets post-dissolution or has pre-dissolution assets awarded to that party may not invest those assets in such a fashion so as to insulate

themselves from paying more alimony. *Bartlett v. Bartlett*, supra, 220 Conn. 382. “On the contrary, logic and sound public policy dictate a rule that requires the consideration of all assets, because the contrary rule would encourage parties who acquire substantial amounts of non-liquid assets after the original judgment to insulate themselves from paying more alimony, despite their increased wealth, by simply delaying the liquidation of those assets. We therefore reject the argument that only liquid assets are relevant to alimony modification” Id. 382. Therefore the income earned or capable of being earned by the retirement assets and exercised stock options can be considered income, but the sale of these assets is merely an exchange of one asset for another and is not considered income for periodic alimony payments. *Schorsch v. Schorsch*, 53 Conn. App. 378, 386 (1989). The defendant’s withdrawals from a retirement account are merely an exchange of assets and may not be considered by the court for the purposes of the motion to modify alimony. *Eslami v. Eslami*, Superior Court, judicial district of Waterbury, Docket Number FA-87-0080620 S (*Cutsumpas, J.*, April 29, 2003). The Court further finds that the one time payment of the \$144,530 bonus paid by PepsiCo., Inc. earned in the year 2005 and paid in 2006 which netted \$94,560 will not reoccur. The defendant is no longer earning the \$178,800 annual salary. His only current earnings are \$16,000 a year director fee paid by Nevada Gold and Casino, Inc. It is inappropriate on a going forward basis beyond the year 2006 to increase his financial obligations based upon salary and bonus earnings that he no longer legally possesses and cannot earn in the future. The plaintiff presented insufficient information as to his future earning capacity from prospective employment coupled with prospective investment income on his assets that would warrant an increase in periodic alimony. *Paddock v. Paddock*, supra, 22 Conn. App. 372. The Plaintiff’s Motion for Modification of Alimony (#168.00) therefore is denied.

PLAINTIFF'S MOTION FOR CONTEMPT
DATED FEBRUARY 6, 2006 (#168.00)

On December 31, 2005 the defendant resigned his position with PepsiCo., Inc. and is no longer employed. He did so with the knowledge that he had a \$1,200 weekly periodic alimony obligation to the plaintiff. There is no provision in the 1995 decree or in the 1999 modification decision that permitted the self-executing termination of the periodic alimony award. *Lawrence v. Lawrence*, 92 Conn. App. 212, 217, fn. 3 (2005); *Eldridge v. Eldridge*, 244 Conn. 523, 530 (1998). "An order of the court must be obeyed until it has been modified or successfully challenged." Id. 530.

The filing of his December 2005 Motion for Modification did not stay or terminate his \$1,200 per week obligation. The weekly order of \$1,200 remains in full force and effect. The defendant received his annual salary \$178,800 through December 31, 2005. Although neither the cashing in of the retirement assets nor the sale of stock options is income, the lump sum asset generated is capable of producing income and that income can be considered a source for making periodic payments. The defendant has sufficient liquid assets in order to continue to pay \$1,200 weekly for the remainder of 2006 and thereafter until modified by court order. The defendant has failed to make those payments after January 1, 2006. The Court finds said non-payment wilful. The Court finds the defendant in contempt.

The first \$1,200 weekly payment that was not made in calendar year 2006 was due on January 6, 2006. Through and including July 21, 2006, the defendant has not paid any periodic alimony and these arrears are \$34,800. Those arrears may have or may not have continued to accrue each Friday after July 21, 2006. The last hearing was July 27, 2006 and the Court cannot consider

events, payments, credits, non-payments that may or may not have occurred after July 27, 2006 without further evidence.

The defendant is requesting that interest be awarded on the unpaid periodic alimony at the rate of 10% per year. "Interest at the rate of ten percent a year and no more may be recovered and allowed in civil actions as damages for the detention of money after it becomes payable." General Statutes § 37-3a: Family matters are considered "civil actions" under the interest statute. *LaBow v. LaBow*, 13 Conn. App. 330, 353 (1998). "When a former spouse is not justified in failing to pay sums due under a separation agreement, the award of interest is proper." *Id.* 353; *Marcus v. Marcus*, 175 Conn. 138, 146 (1978). The court must find that the money has been wrongfully withheld. *Cecio Brothers, Inc. v. Feldmann*, 161 Conn. 265, 275 (1971). The court finds that the alimony payments have been wrongfully detained.

General Statutes § 37-3a does not require that 10% interest be imposed. The statute gives the Court the opportunity to order interest in an amount not to exceed 10% , *Ceci Brothers, Inc. v. Five Twenty One Corp.*, 81 Conn. App. 419, 435, fn. 5 (2004); *Knapp v. Knapp*, 270 Conn. 815, 825 (2004); *Choi v. Argenti*, Superior Court, judicial district of Stamford/Norwalk at Stamford, Docket Number CV 98-0168119S (*Lewis, J.*, April 21, 2003); *Gianoni Revocable Trust v. Bristol General Manufacturing Co.*, Superior Court, judicial district of New Britain at New Britain, Docket Number X03 CV 99-0496551 S (*Aurigemma, J.*, December 16, 2002). The trial court is not bound to enter the maximum interest award of 10%. The Court has examined the current mortgage rates for residential real property in southern Fairfield County; from a low of 5.5% to a high of 6.5%. These are fixed rate mortgages amortized over 15 years or 30 years. The Court believes that it is equitable under the circumstances to apply General Statutes § 37-3a at the Court's discretion and award 6.0

% interest on the alimony arrears as these arrears occur on the day each payment is due.

A calculation is required to determine 6.0 % interest on the \$1,200 due on January 6, 2006 to the date of its payment. Since there is no evidence of payment, interest would then continue to accrue. A separate calculation is required at 6.0 % on the next \$1,200 due on January 13, 2006 to the date of its payment and so on for each weekly payment. The plaintiff did not submit this calculation. It is a calculation of simple interest not compound interest. *Loomis & Loomis Industries v. Stecker & Colavecchio Architects, Inc.*, 6 Conn. App. 88, 94 (1986). The plaintiff requested that this Court estimate that interest to be \$750. This Court refuses to estimate an award of interest. Since the plaintiff did not make the rather laborious interest calculation on each of the 29 weeks of nonpayment, this court would be within its power to deny interest since the plaintiff failed in her proof of damages.

The Court believes interest on the alimony arrears is appropriate under the circumstances of this case. *Dowd v. Dowd*, 96 Conn. App. 75, 85 (2006). Thus this court must perform 29 separate calculations of interest, through the date of this decision on the said \$34,800 (29 payments of the \$1,200 weekly alimony). 6% interest for each day of non-payment of each \$1,200 weekly payment from Friday, January 6, 2006 through and including Friday, July 21, 2006 is \$794.60. The per diem interest on said \$34,800 from the date of this Memorandum of Decision is \$5.80, using a 360 day calendar year as permitted by General Statutes §37-1(a).

The defendant is ordered to pay said 6% interest for each \$1,200 weekly payment not made. The sum of \$35,594.60 (\$34,800 arrears plus \$794.60 interest to the date of this Memorandum of Decision) plus the per diem interest of \$5.80 after August 22, 2006 is to be paid by the defendant immediately. All payments will be first allocated to interest. The plaintiff shall submit the

appropriate interest income tax forms to the defendant upon payment of interest. No order of interest or determination of arrears is being made for any payment due, but not paid after, July 21, 2006. No credit is given for any payments made after the close of evidence on July 27, 2006.

The plaintiff is not claiming attorney's fees on the Motion for Contempt under General Statutes § 46b-87 even though she is requesting a finding of contempt. The plaintiff states that the amount of attorney's time expended by the plaintiff in prosecuting her Motion for Contempt are minimal compared to the efforts necessary to defeat the defendant's Motion for Modification and to prepare and prosecute her own Motion for Modification. The plaintiff is therefore seeking attorney's fees under General Statutes § 46b-62. It is not necessary to enter an award of attorney's fees on this contempt motion, since the plaintiff has filed a February 14, 2006 Motion for Counsel Fees (#171.00) which this court will consider.

The plaintiff is claiming travel expenses \$1,619.56 for six days of hearings on contempt motion. Exhibit #19. The plaintiff has had to travel from Virginia for each court appearance. The contempt statute § 46b-87 does not provide for an award for travel. As the sole legal authority for an award of travel expenses, the plaintiff cites *Benson v. Benson*, 5 Conn. App. 95, 99 (1985). *Benson* involved the UCCJA statute, General Statutes § 46b-92(g), that contained a provision for an award cost of travel. General Statutes § 46b-97(g), the Uniform Child Custody Jurisdiction and Enforcement Act, was repealed on July 1, 2000 and replaced by the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA). The UCCJEA adopted a similar travel expense provision in General Statutes § 46b-115(c). "It shall assess against the party seeking to invoke its jurisdiction reasonable expenses including costs . . . attorneys fees . . . travel expenses. . . ." *Benson* does not apply to a statutory contempt proceeding. The UCCJEA does not apply to these

proceedings. No travel costs can be awarded.

The defendant is ordered to pay to the plaintiff the marshal's fees of \$42.80. "The court may award to the petitioner . . . the fees of the officer serving the contempt citation . . ." General Statutes §46b-87.

In addition, the plaintiff claims that the defendant will be in arrears in the plaintiff's Motion for Modification. She requested \$1,700 a week alimony retroactive to February 2006, the date in the return of service. Since the plaintiff's Motion for Modification has been denied, there are no additional arrears that have been established by the plaintiff other than the \$34,800 through and including the payment due July 21, 2006.

PLAINTIFF'S MOTION FOR COUNSEL FEES
DATED FEBRUARY 14, 2006 (#171.00)

Plaintiff is claiming attorney's fees of \$14,479.70. Plaintiff's counsel filed an affidavit along with contemporary time records. Exhibit # 15. In addition, plaintiff's attorney presented himself as a witness in the event that the defendant wished to call him. This claim for attorney fees is made pursuant to General Statutes § 46b-62. The court has the authority to award attorney fees incurred in defending and prosecuting motions for modification. *Benson v. Benson*, supra, 5 Conn. App. 92. The Supreme Court has set forth the standards for the award of attorney's fees. *Smith v. Snyder*, 267 Conn. 456, 478, 480 (2004). The Court finds that the Exhibit #15 and the willingness of the plaintiff's attorney to testify satisfies the "contours" of *Smith v. Snyder*. The defendant does not dispute the amount of hours spent nor does he contest the reasonableness of the hourly rate set forth in Exhibit #15. The defendant argues that both parties should pay for their own attorney's fees and that the plaintiff has sufficient liquid assets to pay her own attorney fees. *Koizim v. Koizim*, 181

Conn. 492, 501 (1980).

This Court has carefully reviewed Exhibit #15 and cannot differentiate the time spent by the plaintiff in defending the defendant's Motion for Modification as opposed to prosecuting her Motion for Modification. The Court believes it is fair and equitable for the plaintiff to be awarded attorney's fees to defend the Motion for Modification. The plaintiff did not prevail on her Motion for Modification and thus the Court concludes that an award for attorney's fees would not be appropriate since she was not the prevailing party. *Marquardt & Roche/Meditz & Hackett, Inc. v. Riverbend Executive Center, Inc.*, 74 Conn. App. 412, 428-30 (2003). The Court therefore awards the plaintiff attorney's fees under General Statute § 46b-62 in the amount of \$7,289.85; One-half of the original claim set forth in Exhibit #15. This payment is to be made by the defendant immediately. *50 Day Street Associates L.P. v. Norwalk Housing Authority*, Superior Court, judicial district of Stamford/Norwalk at Stamford, docket number X08-CV02-01913965S (*Adams, J.*, June 21, 2006).

SECURITY FOR FUTURE ALIMONY PAYMENTS

Should security for the future payment of periodic alimony be awarded to the plaintiff under the provisions of General Statutes § 46b-82? "The order may direct that security be given therefor on such terms as the court may deem desirable. . . ." There are three mentioned forms of security set forth in that statute. The plaintiff concedes that none of these three forms allow the security relief the plaintiff is requesting. The plaintiff argues and this Court agrees, that the Court is not limited to those three stated forms of security because the Court may order security "on such terms as the Court may deem desirable." The three forms of security mentioned in General Statutes § 46b-82 are: (1) life insurance, (2) an order for the payor to contract with a third party for periodic payments, and (3) post-judgment proceedings pursuant to Chapter 906 regarding executions and examination

of judgment debtors.

The Court notes that there is has been no previous order for security in this case. The security measures requested by the plaintiff are; (1) a judgment lien on the real property owned by the defendant in Guilford, Connecticut, which is currently on the market for sale; (2) the posting by the defendant of \$88,400 cash into an escrow account approved and monitored by the plaintiff; or (3) purchasing a bond from a surety company in the amount of \$88,400. The plaintiff claims that these requests are consistent with General Statutes § 46b-82. The \$88,400 is one year of the requested increased alimony of \$1,700 weekly.

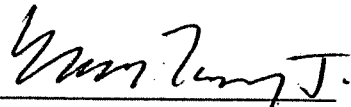
This Court has found the defendant in contempt. By denying his Motion for Modification, the Court is ordering the defendant to pay on a continuous basis until further order of this Court said sum of \$1,200 per week as periodic alimony. The Court believes that the defendant has sufficient cash assets with which to make these payments. The Court at this time does not feel that it is prudent for the defendant to post security.

In addition the court has not been furnished with legal authority that the three requested forms of security are permitted by statute. The Court has researched this security for alimony issue and has read dozens of cases. Not one of the cases authorize any of the security measures suggested by the plaintiff. That fact was made known to the plaintiff at oral argument and no further legal authority has been furnished to the Court. *Stein v. Hillebrand*, 240 Conn. 35, 41 (1997); *Devlin v. Weiner*, 232 Conn. 550, 557 (1995).

If the defendant is found to be further in arrears and a request for security is made in that new

motion, this court will consider security. To support such a claim for security, the plaintiff must submit sufficient legal authority and a draft of security orders and documents to be signed by the Court. The request for security is denied without prejudice.

BY THE COURT


TIERNEY, J.

*Decision entered in accordance with
the foregoing 8-23-2006.*

All Counsel notified 8-23-2006.

*Clk. Robert/KS1 +
Clk*