

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT
DEPARTMENT OF THE TRIAL COURT
CIVIL ACTION NO. 04-_____ -BLS

04-1846

-----X
 ROBERT A. SHAHEEN, :
 Plaintiff, :
 : :
 v. : :
 : :
 DANIEL H. BATHON, JR., :
 Defendant. :
 -----X

RECEIVED
 DEPARTMENT OF THE TRIAL COURT
 CIVIL DIVISION
 10/11/96 PM 2:27

COMPLAINT AND DEMAND FOR TRIAL BY JURY

Plaintiff Robert A. Shaheen, by his attorneys,
 for his Complaint against defendant Daniel J. Bathon, Jr.
 alleges as follows:

Parties

1. Plaintiff Robert A. Shaheen ("Shaheen") is an individual residing in Saddle River, New Jersey.
2. Defendant Daniel H. Bathon, Jr. ("Bathon") is an individual residing in Lexington, Middlesex County, Massachusetts.

General Allegations

3. On or about June 5, 1996, Bathon and Shaheen entered into an agreement ("the Agreement"), a copy of which is attached hereto and incorporated by reference herein as Exhibit A, whereby Bathon agreed to purchase on behalf of himself, Shaheen and five other individuals a

total of 5,000 shares of Accordance common stock (or an equivalent of any successor entities' stock) from Accordance's then-serving Board of Directors. Of the aforementioned shares, 1,672 shares were to be purchased on behalf of Shaheen. Shaheen's allocation was comprised of 1,172 shares purchased outright and 500 shares as consideration in lieu of interest for a loan to Bathon (the total shares hereafter are referred to as "the Shares"). The 5,000 shares were to be acquired after a merger between Accordance and Software.com, Inc. According to the Agreement, the Shares were to be distributed pro-rata amongst the seven shareholders as Bathon acquired the 5,000 shares. In any event, acquisition of the Shares by Bathon and transfer of the Shares from Bathon to Shaheen was to occur as "soon as legally possible." Shaheen fully performed under the Agreement and provided the requested funds to Bathon.

4. The abovementioned merger took place and Bathon should have obtained the Shares and thereafter have transferred the Shares to Shaheen.

5. Bathon, after inquiries by Shaheen, informed Shaheen that he did not acquire the Shares until April 2002, and could not have acquired them before that date. On information and belief, however, Bathon had obtained

other shares of the same stock for himself and others, yet did not distribute them pro-rata pursuant to the Agreement. Additionally, there was no legal justification that Bathon was unable to obtain the Shares.

6. On October 1, 2002, Bathon sent a letter to Shaheen along with a Share Delivery Agreement for transfer of the Shares which contained, among other things, a general release. Shaheen declined to sign the Share Delivery Agreement because, among other things, he did not receive a satisfactory explanation from Bathon regarding the acquisition and distribution of the Shares, the Share Delivery Agreement set forth a factually inaccurate version of the Agreement concerning the Shares, and the Share Delivery Agreement contained a broad release to which Bathon was not legally entitled. Bathon unlawfully and unjustifiably has refused and refuses to tender the Shares to Shaheen without first obtaining a release from Shaheen.

7. Bathon pursuant to the Agreement should have used reasonable and proper efforts to obtain and deliver the Shares to Shaheen but failed to do so.

8. Bathon, acting as Shaheen's agent, owed Shaheen a fiduciary duty of utmost good faith and fair dealing and breached that duty by failing to use reasonable efforts to obtain the Shares and deliver them to Shaheen.

9. The value of the Shares has declined by an amount substantially exceeding \$25,000.00 during the time Bathon has failed to deliver them.

10. As a result of Bathon's acts and omissions by failing to obtain and deliver the Shares, Shaheen is entitled to damages in an amount to be determined at trial, together with interest from the date of the breach and costs including reasonable attorneys' fees.

Count I

(Breach of Contract)

11. Shaheen incorporates by reference as if set forth in full herein and realleges paragraphs 1 through 10 of the Complaint, and in addition makes the allegations set forth below.

12. Shaheen and Bathon entered into the Agreement concerning the Shares.

13. Bathon materially breached the Agreement when he, among other things, failed to obtain the Shares, or other equivalent shares, and failed to deliver them to Shaheen in accordance with the terms of the Agreement.

14. Bathon's acts and omissions also constitute a violation of the implied covenant of good faith and fair dealing contained in every contract.

15. As a direct and proximate result of Bathon's

material breaches of the Agreement, Shaheen has suffered and continues to suffer damages in an amount to be determined at trial, together with interest from the date of the breach and costs including reasonable attorneys' fees.

Count II

(Promissory Estoppel)

16. Shaheen incorporates by reference as if set forth in full herein and realleges paragraphs 1 through 15 of the Complaint, and in addition makes the allegations set forth below.

17. Bathon, pursuant to the Agreement, agreed to obtain and deliver the Shares to Shaheen.

18. Bathon's promise was of a nature for which he reasonably should have expected to induce Shaheen to rely upon such promise and also provide funds and other consideration to purchase the Shares.

19. Bathon's promise reasonably induced action and forbearance on the part of Shaheen, resulting in substantial damages, and injustice can be avoided only enforcement of the promise.

20. As a direct and proximate result of Bathon's breach of his promise, Shaheen has suffered and continues to suffer damages in an amount to be determined at trial,

together with interest from the date of the breach and costs including reasonable attorneys' fees.

Count III

(Breach of Fiduciary Duty)

21. Shaheen incorporates by reference as if set forth in full herein and realleges paragraphs 1 through 20 of the Complaint, and in addition makes the allegations set forth below.

22. As Shaheen's agent under the Agreement, and based upon their past close relationship, Bathon owed Shaheen a fiduciary duty of utmost good faith and loyalty.

23. Bathon, however, acted out of avarice, expediency and self-interest in his dealings towards Shaheen and in derogation of his duty owed to Shaheen by, among other things, failing to obtain the Shares or other equivalent shares and delivering them to Shaheen, and by improperly imposing conditions upon the tendering of the Shares to Shaheen.

24. As direct and proximate result of Bathon's breaches of his fiduciary duty to Shaheen, Shaheen has suffered and continues to suffer damages in an amount to be determined at trial, together with interest from the date of breach and costs including reasonable attorneys' fees.

Count IV

(Negligence)

25. Shaheen incorporates by reference as if set forth in full herein and realleges paragraphs 1 through 24 of the Complaint, and in addition makes the allegations set forth below.

26. Bathon had a contractual and common law duty to to obtain the Shares on behalf of Shaheen and deliver them to him.

27. Bathon breached his duty by failing to take all steps necessary to obtain the Shares on behalf of Shaheen and delivering them to him.

28. Bathon's breach of duty directly and proximately caused Shaheen to incur damages as a result of Bathon's failure to obtain and deliver the Shares in an amount to be determined at trial, together with interest from the date of the breach and costs including reasonable attorneys' fees.

Count V

(Conversion)

29. Shaheen incorporates by reference as if set forth in full herein and realleges paragraphs 1 through 28 of the Complaint, and in addition makes the allegations set forth below.

30. Bathon tendered the Shares to Shaheen, who was the rightful owner of the Shares. However, Bathon knowingly, improperly and unlawfully conditioned the tender of the Shares upon the signing of a Share Delivery Agreement which Shaheen was not legally required to execute prior to obtaining the shares.

31. Shaheen justifiably refused to sign the Share Delivery Agreement.

32. Bathon unlawfully and unjustifiably refused and refuses to tender the Shares without Shaheen's execution of the Share Delivery Agreement and has accordingly converted the Shares for his own use and benefit.

33. As result of Bathon's conversion of the Shares, Shaheen has suffered and continues to suffer damages in an amount to be determined at trial, together with interest from the date of the breach and costs including reasonable attorneys' fees.

Count VI

(Accounting)

34. Shaheen incorporates by reference as if set forth in full herein and realleges paragraphs 1 through 33 of the Complaint, and in addition makes the allegations set forth below.

35. Shaheen does not believe Bathon truthfully informed him of the facts and circumstances of his obtaining and delivering the Shares.

36. Shaheen is entitled to, and therefore, requests a full and accurate accounting from Bathon and an award of any damages to which he may be entitled.

PRAYERS FOR RELIEF

WHEREFORE, plaintiff Robert A. Shaheen prays for relief as follows:

1. For judgment on Count I in favor of plaintiff Robert A. Shaheen against defendant Daniel H. Bathon, Jr. in an amount to be determined at trial, together with interest from the date of the breach and costs including reasonable attorneys' fees;

2. For judgment on Count II in favor of plaintiff Robert A. Shaheen against defendant Daniel H. Bathon, Jr. in an amount to be determined at trial, together with interest from the date of the breach and costs including reasonable attorneys' fees;

3. For judgment on Count III in favor of plaintiff Robert A. Shaheen against defendant Daniel H. Bathon, Jr. in an amount to be determined at trial, together with interest from the date of the breach and costs including reasonable attorneys' fees; and

5. For judgment on Count IV in favor of plaintiff Robert A. Shaheen against defendant Daniel H. Bathon, Jr. in an amount to be determined at trial, together with interest from the date of the breach and costs including reasonable attorneys' fees;

6. For judgment on Count V in favor of plaintiff Robert A. Shaheen against defendant Daniel H. Bathon, Jr. in an amount to be determined at trial, together with interest from the date of the breach and costs including reasonable attorneys' fees;

7. For judgment on Count VI in favor of plaintiff Robert A. Shaheen against defendant Daniel H. Bathon, Jr. ordering a full and accurate accounting and an award of all damages that said plaintiff may be entitled to together with interest from the date of the breach and costs including reasonable attorneys' fees; and

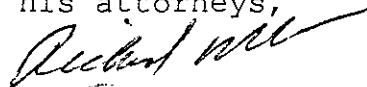
8. For such other and further relief as this Court may deem just and proper.

JURY DEMAND

Plaintiff Robert A. Shaheen hereby demands a trial by jury on all issues so triable in the Complaint and Demand for Trial by Jury.

PLAINTIFF ROBERT A. SHAHEEN,

By his attorneys,



Richard M. Gelb (BBO#188240)
Daniel Hohler (BBO# 633065)
GELB & GELB LLP
20 Custom House Street
Boston, MA 02110
(617) 345-0010

DATED: April 29, 2004