IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

BARKER CAPITAL LLC,	)	
	)	
Plaintiff,	)	
	)	
v.	)	C.A. No. 04C-10-269 MMJ
	)	
REBUS LLC, a Delaware limited liability company, MARK A. FOX and TWINLAB CORPORATION, a Delaware corporation,	)	
	)	
Defendants.	)	

MEMORANDUM OPINION

Upon
Cross-Motions for Summary Judgment
and
Defendants' Motion* in Limine *to Exclude Testimony of Plaintiff's Expert Witness

Submitted: October 13, 2005
Decided: January 12, 2006

Henry E. Gallagher, Jr., Esquire, Christos T. Adamopoulos, Esquire, Connolly, Bove, Lodge & Hutz LLP, Wilmington, Delaware, Attorneys for Plaintiff

Douglas M. Hershman, Esquire, Linda E. Beebe, Esquire; The Bayard Firm, Wilmington, Delaware; Rayford L. Etherton, Esquire (argued), Mobile, Alabama, Attorneys for Defendants

JOHNSTON, J.

PROCEDURAL AND FACTUAL CONTEXT

Plaintiff Barker Capital LLC ("Barker") filed this action on October 28, 2004 against Defendants Rebus LLC ("Rebus") and Mark A. Fox. The Court granted Barker's motion to amend the complaint on May 23, 2005. The Amended Complaint added Defendant Twinlab Corporation ("Twinlab").

The four-count Amended Complaint alleges: Count I - Breach of Contract; Count II - *Quantum Meruit*; Count III - Tortious Interference with Contract; and Count IV - Breach of Contract and Unjust Enrichment. On July 27, 2005, Defendants filed a motion for summary judgment as to all claims in the Amended Complaint. Plaintiff filed a cross-motion for summary judgment, claiming entitlement to damages and attorneys' fees.

Superior Court Civil Rule 56(h) provides: "Cross motions. Where the parties have filed cross motions for summary judgment and have not presented argument to the Court that there is an issue of fact material to the disposition of either motion, the Court shall deem the motions to be the equivalent of a stipulation for decision on the merits based on the record submitted with the motions." No party has argued that genuine issues of material fact need to be resolved. Therefore, this case is deemed to be submitted for resolution on the merits on the paper record.

For purposes of evaluating the summary judgment motions, it appears that the following facts are not in dispute. Barker is a New York firm offering financial advisory services. Rebus is a Delaware limited liability company and Twinlab is a Delaware corporation. Both Defendant entities have offices in New York. Rebus and Twinlab are subsidiaries of IdeaSphere, Inc. ("IdeaSphere"), a Michigan corporation. Defendant Mark A. Fox is the manager of Rebus and the president of IdeaSphere and Twinlab.

Among other ventures, Rebus publishes two medical newsletters - the *Johns Hopkins Medical Letter*, and the *Berkeley Wellness Letter* (collectively the "Newsletters"). The Newsletter businesses and licenses to operate under the university names were owned by Health Letter Associates ("Health Letter") and MedLetter Associates ("MedLetter"). Fifty percent of Health Letter and MedLetter was owned by Rodney Friedman and members of his family. The other fifty percent was owned by Helen Mullen and members of her family.

The $12 Million Highbridge Loan

Fox met with Jacob Barker for the purpose of engaging the services of Barker to obtain financing for the purchase of the Newsletters from Health Letter and MedLetter. Rebus and Barker entered into an engagement agreement on March 27, 2003 ("Engagement Agreement"), which stated, in pertinent part:

> This letter is to confirm the engagement of Barker Capital, LLC ("Barker") to act as a non-exclusive financial advisor to Rebus, LLC ("the Company") in connection with the Company's efforts to identify and consummate a transaction with one or more of the entities listed on Exhibit "A" hereto or with any affiliate of any such entity (each, a "Potential Investor"), to make an Investment . . . (a "Transaction"). . . An "Investment" shall be defined to include any arrangement whereby the Company obtains debt or equity financing, or commitments therefor, in one or a series of transactions for the defined purpose of acquiring Health Letter Associates and Med Letter, Inc. or its related assets.
>
> 1. Retention; Services. The Company hereby retains Barker until the first (1st) anniversary of the state hereof, unless earlier terminated as set forth herein, (the "Term") as its non-exclusive financial advisor in connection with the Company's efforts to obtain financing from a Potential Investor. In connection with its engagement hereunder, Barker shall provide such services as are appropriate and customary for a financial advisor, although the specific services to be rendered by Barker will depend on the nature of the transaction. It is expressly understood and acknowledged that Barker's engagement hereunder does not assure the successful completion of a Transaction. . . .
>
> 2. Fees and Expenses. . . . With respect to Transactions made or agreed to during the Term, a fee shall be due Barker in cash promptly upon the closing of any Transaction (the "Advisory Fee"). The amount of the Advisory Fee shall be two and one half percent (2.5%) of the Transaction Value (defined below).[1]

Barker approached banks and venture capital firms for the purpose of obtaining financing for purchase of the Newsletters. As part of that process,

[1]Because the parties vehemently disagree as to the interpretation of most of the relevant documents, the court will not attempt to paraphrase or characterize, but instead will include sometimes lengthy quotations from the documents.

Barker arranged a meeting between Fox and Highbridge Capital Management ("Highbridge"). In a memorandum dated April 23, 2003, Ivan Zinn of Highbridge stated:

> We have been approached by Rebus to provide financing for the acquisition of certain ownership interests held by founding members by the current management team. Rebus seeks $12 million in debt financing to complete the transaction of which $11 million would go to the purchase price of the ownership interests and the remaining amounts would be used for transaction expenses. . .
>
> The Newsletters Business is comprised of two subscription-based letters: the *Berkeley Wellness Letter* and the *Johns Hopkins Medical Letter*.
>
> *The Berkeley Wellness Letter* . . primarily appeals to nutrition and fitness-conscious baby boomers and older generations who are interested in preserving their health and living optimally. . . . The *Johns Hopkins Medical Letter* . . . is marketed to the booming over-50 audience and focuses on providing readers with early detection and treatment options for particular disorders. . . . Rebus is responsible for deciding on the topics to be covered, researching and writing the stories. . . .

During this time period, discussions were underway about a merger between IdeaSphere and Rebus. The May 9, 2003 IdeaSphere board minutes provide:

> Rebus and Tony Robbins
>
> The Board discussed the planned merger with Rebus and addition of Anthony Robbins as a shareholder. Rebus is a health publishing company in which the corporation has a minority interest. Mark Fox is the principal of Rebus. Rebus provides the personnel and content for two successful health newsletters (under license with Johns Hopkins and Berkeley). Upon resolution of a dispute among Rebus

> owners (which Mr. Fox has stated will occur soon), Rebus will own the licensing entities for the newsletters as well as the personnel that produce, and content used to produce, the newsletters. Similarly, the Board desires to add Anthony Robbins (a recognized authority on peak performance and motivation, author and entrepreneur) as an active shareholder of the corporation. . . .
>
> The Board unanimously approved the following resolutions:
>
> RESOLVED, that the corporation is authorized to issue corporate shares to the Rebus members in exchange for their Rebus membership interests and separately to Mr. Robbins effective as of the date of this meeting, which issuance is to be consummated by management immediately upon resolution of the newsletter dispute or before such resolution if so directed by the CEO or President, and
>
> FURTHER RESOLVED, that in anticipation of their ownership of corporate shares, the corporation will immediately begin to work with Mr. Fox and Mr. Robbins as if the transaction had occurred on this date.
>
> FURTHER RESOLVED, that the relative share ownership of the principal shareholders, including Messrs. Van Andel, Nicholson, Fox, Robbins and Lusk, will reflect the contribution each such principal shareholder is anticipated to make to the corporation's future success ….

On May 12, 2003, Highbridge gave Fox a Letter of Intent to provide financing to Rebus for the purpose of acquiring the Newsletters' interests and assets. The transaction contemplated a loan in the amount of $12 million and personal guarantees by majority principals and equity owners of Rebus. In an email dated May 12, 2003, Fox stated: "We should get documentation completed over the next two or three weeks and get the transaction closed in about 30 days."

That same day, IdeaSphere's general counsel replied: "Mark, remind me – is the entire $12 million to be used to complete the newsletter deals or is there cash left?"[2] The parties continued to discuss the financing and structure of the transaction, as evidenced by memoranda and email records.

On August 28, 2003, Highbridge sent a second Letter of Intent to provide $12 million in financing:

> This letter shall serve to confirm Highbridge/Zwirn Capital Management, LLC's ("H/Z") intent to complete the financing as referenced in our Letter of Intent dated May 12, 2003. We have completed the substantive part of the negotiations associated with Financing Agreement and our closing of the financing is subject to . . . the satisfaction of the closing conditions referenced in the Letter of Intent and the Financing Agreement, including importantly the consolidation of the ownership of Medletter and Healthletter ownership interests on terms and conditions satisfactory to us, to ensure, among other things, that we receive a proper and adequate security interest in the underlying business. We believe this entails Helen Mullen's acquisition of Rodney Freedman's ownership interest in the newsletter entities and the dilution of Rodney Friedman's interest in the ongoing Rebus entity.

The proposed transaction was further explained in a September 3, 2003 email from by Zinn of Highbridge to David Zwirn, Managing Principal of Highbridge:

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[2]The series of email generated during this time period was not produced until after the Court heard oral argument on the pending motions.

a simple background: the newsletters own the licensing agreements and is owned 50% by helen mullen and 50% by rodney freedman, rebus, LLC is the publisher of the newsletters and is owned 50% by rodney freedman and 50% by mark fox. mark is buying the newsletters for $11 million (where the vast majority of the value is). despite prior attempts he can't solve the M&A issue of buying the 50% of rebus, llc interest from rodney freedman until he owns/controls the newsletters.

we were going to lend $12 million of which $5 million was personally guaranteed. i've always told him we need to be able to perfect our security interests on the entire business to be able to sell it all if necessary. he's asked that if he guaranteed more of the loan whether we would proceed without having the benefit of a pledge of the 50% of rebus, llc. rebus, llc is technically the publisher and houses certain of the employees and is where the predominant portion of the expenses sit. mark paints a bullish picture (of course) or why rebus, llc isn't important. i believe it is a less important part of the security but increases our risk of selling the business as a whole if we get hung up only having a 50% security interest in one of the entities. note that mark's intention is to dilute [Rodney Friedman] down through an offering and a buyout of his contract but i'm assuming worst case. therefore, my thought is to go back to him with the following - they guarantee $8 million of the $12 million and we close into this bastardized structure. we will then give them some period <180 days for them to clean it up. . . .

For what it's worth mark has also said that tony robbins is going to go on the PG [personal gurantee] as well.

The minutes of the September 9, 2003 IdeaSphere board meeting reflect detailed discussion of the Newsletter purchase:

ISI/Rebus merger

Mark reported that while Rodney Friedman is being an obstacle to completion of the transaction he can resolve all issues. Mark and his attorneys will foreclose on Rebus and move its assets into a new ISI entity. The transaction will be completed in a "maximum of 30 days". $12 million will be borrowed from Highbridge to complete the transaction and pursuant to Highbridge's request; the assets of each of the newsletters will be placed in a distinct corporate subsidiary. Mark stated that Rebus has $1.8 million in working capital and $500,000 in excess loan proceeds (borrowed $12 million from Highbridge, of which $11.5 million is needed for the transaction). After discussion, the board unanimously adopted the following resolutions:

RESOLVED, that the corporation form three entities for use in completing the Rebus transaction; Health Med, Inc. - a wholly owned subsidiary of the corporation that will own Health Letter, Inc. (which will absorb the Johns Hopkins newsletter assets) and Med Letter, Inc. (which will absorb the Berkeley Wellness newsletter assets).

FURTHER RESOLVED, that the corporation secures funding of $12 million from Highbridge for the purchase of the Rebus newsletters and

FURTHER RESOLVED, that the President and CEO are authorized to take any and all action and enter into any and all documents deemed necessary to finance and consummate the purchase of the Rebus newsletter assets.

The acquisition of the Newsletters became exceedingly complicated. Rodney Friedman and Fox each controlled 50% of Rebus, and each was a co-manager of Rebus. Friedman, whose consent was required to consummate the financing and acquisition, had a buy-sell agreement with Helen Mullen. Fox informed Friedman in writing that, if Friedman did not consent, "We are prepared

to go forward with the transaction as described by forming a new business entity in which you will have no part." Health Med, Inc. ("Health Med") was formed as a wholly-owned subsidiary of IdeaSphere. Fox was the president of Health Med.

The minutes of the September 30, 2003 IdeaSphere board meeting describe the anticipated steps toward consummation of the "Rebus transaction:"

> Rebus transaction and merger into ISI — Mark presented the strategy to accelerate Rodney's exit from Rebus. He will draw down the balance of the loan from Highbridge to dilute Rodney to 10% ownership in Rebus LLC and to pay Helen for the newsletter acquisitions. He noted that once Rodney's interest was diluted, he would terminate Rodney's employment. After discussion, the principals (both individually and as the Executive Committee) unanimously agreed to the following:
>
> RESOLVED, that Mark has the authority to draw down the balance of the Highbridge loan and to deposit the proceeds into Health Med, Inc., (a Michigan corporation that is wholly owned by IdeaSphere), which will purchase a 35% Class C Membership interest in Rebus LLC in exchange for $4 million.
>
> FURTHER RESOLVED, that the officers of Health Med are to cause Health Med to borrow the $4 million from Rebus LLC to be used by Health Med, together with the remaining proceeds from the Highbridge loan, to pay for the newsletter acquisitions.
>
> FURTHER RESOLVED, that the officers of Health Med and the Corporation are directed to take such actions and execute such documents as are necessary to consummate the transaction contemplated above.

On October 2, 2003, Highbridge disbursed $11 million directly to individuals, and not to Rebus LLC.[3] The Credit Agreement reflecting this loan does not expressly restrict the borrowers' use of the funds. Nor does the Credit Agreement set forth the specific purpose of the loan.

From the loan proceeds, $4 million was transferred to a Health Med account. Health Med paid Rebus $4 million to acquire an ownership interest in Rebus. Also in October 2003, $12 million in debt was added to the liability section of Rebus' balance sheet. The monthly interest obligations were booked as expenses of Rebus, not as obligations of Fox and the other borrowers.

By email to Fox dated October 9, 2003, Jacob Barker requested information about submitting his fee for services:

> I understand from Ivan [Zinn] that you have completed stage one of a transaction to finalize the purchase of the newsletter assets. Congratulations on at least the first step forward resulting from your hard work and perseverance. Since it is my understanding that a loan has been funded that resulted from my introduction of you to Highbridge I wanted to send you a bill related to the Barker Capital transaction fee. Could you please let me know where to send the bill and to whom it should be addressed?

Fox responded:

> Rebus LLC has not yet secured funding for the Newsletter acquisition. The partners have taken a signature loan personally from

[3] $1 million had been applied to loan-related fees.

> Ivan to be used in a specific way (of our choice) that if successful will result in Ivan financing into a loan for Rebus and the Newsletters. I will let you know when that is complete.

An arbitration proceeding was commenced on October 10, 2003, seeking specific performance by Friedman to either buy or sell his shares in MedLetter Associates, Inc. Although not a party, Rebus paid the legal fees and other costs of arbitration.

In the spring of 2004, the arbitration was resolved in favor of Friedman. Friedman was not required to sell his interest in the Newsletters. The arbitration claimants were ordered to sell their 50% interest to Friedman. In May 2004, the $12 million liability on Rebus' balance sheet was booked as an IdeaSphere debt. On June 22, 2004, four days after the New York Supreme Court confirmed the arbitration award, the $12 million loan was repaid to Highbridge.

Thus, ultimately, neither Rebus nor any other Defendant acquired the Newsletters or any related assets using the $12 million Highbridge loan as financing. Therefore, the acquisition of the Newsletters was not consummated as a permitted investment.

The $35 Million Highbridge Loan

On December 18, 2003, Highbridge, IdeaSphere and Twinlab entered into a Loan and Security Agreement for a $35 million loan. The Agreement listed permitted investments including: "Investments in the Healthmed Newsletter Business and Rebus so long as...such Investments do not exceed $12,000,000 in the aggregate."

When questioned during deposition about his involvement in assisting the borrowers to obtain $35 million in financing from Highbridge, Barker testified:

Q: Have you ever entered into [any] kind of contract with Twin Labs?

A: No.

* * * *

Q: Did you do any work in connection with the loan that was made to Twin Lab other than, as you say, making an introduction the prior spring?

A: No.

Q: And you agree that Twin Lab is not covered in your engagement letter, correct?

A: There is no reference to Twin Lab.

Q: At the time that you signed this contract, the engagement letter that's the basis of your lawsuit, you knew about IdeaSphere, didn't you?

A: Yes.

Q: And they're not referenced in your contract either, correct?

A: Correct.

ANALYSIS

Count I: Breach of Contract

Barker's Entitlement to an Advisory Fee under the Engagement Agreement in Connection with the $12 Million Highbridge Loan

The salient issue is whether the $12 million Highbridge loan falls within the terms of the Engagement Agreement, thus entitling Barker to an Advisory Fee equal to 2.5% of the Transaction Value.

Plaintiff argues that the central purpose for the formation of Rebus was to acquire, own and operate the Newsletter assets. Therefore, according to Plaintiff, any conceivable expenditure of the Highbridge loan proceeds to support or operate Rebus was ultimately directed towards the goal of acquiring the Newsletters. Although the structure of the loan transaction changed, the loan proceeds were listed on Rebus' balance sheet as a liability. The loan terms were the same, with the exception that the original guarantors became the borrowers. In short, Plaintiff asserts that there can be no question that the $12 million loan was for the purpose of acquiring the Newsletters. Because Barker arranged for the financing, Barker claims that it is entitled to the an Advisory Fee in the amount of $318,308.45.

Defendants argue that Barker is not entitled to any fee whatsoever for four reasons: (a) the loan was not for the defined purpose, as set forth in the March 27, 2003 Engagement Agreement, of "any arrangement whereby [Rebus] obtains debt or equity financing, or commitments therefor, in one or a series of transactions for the defined purpose of acquiring Health Letter Associates and Med Letter, Inc. or its [sic] related assets;" (b) Rebus did not receive a "commitment for financing" for acquiring the Newsletters; (c) Rebus did not "close" a transaction to acquire the Newsletters; and (d) Rebus did not otherwise acquire the Newsletters or any interest in the Newsletters.

First, the Court finds that the $12 million Highbridge loan clearly was an arrangement whereby "debt or equity financing, or commitments therefor, in one or a series of transactions" was obtained "for the defined purpose of acquiring" the Newsletters. There is no evidence that the parties contemplated that the *lender's* inclusion or exclusion of the specific purpose for the loan in the financing documents would govern the terms of the Engagement Agreement. The parties' course of dealing, and the documents reflecting the parties' contemporaneous intentions, plainly demonstrate that the borrowers intended to use the loan proceeds for the defined purpose, regardless of the lack of restrictive language in the Highbridge commitment letter.

Second, the Court must determine whether the financing was obtained on behalf of Rebus. The transaction evolved from a loan to Rebus, guaranteed by individuals, to a loan to the formerly-contemplated guarantors. The financial terms of the loan remained identical in all substantive respects. The IdeaSphere board minutes reflect discussion that the transaction was designed to enable Rebus to acquire the Newsletters. Correspondence from the relevant time period consistently refers to the "Rebus transaction." The loan proceeds were listed on Rebus' balance sheet as a liability and Rebus assumed the responsibility for making loan payments. The Court finds that this arrangement falls within the parties' original intention of "one of a series of transactions for the defined purpose of acquiring [the Newsletters]."

The final question is whether "closing of any Transaction" occurred, triggering Rebus' obligation to pay the Advisory Fee. The Court finds that the only reasonable interpretation of the Engagement Agreement is that a "closing" occurred when loan proceeds were transferred by Highbridge to the borrowers. The plain language of the Engagement Agreement refers to "one or a series of transactions." Therefore, is would be unreasonable to deny payment of any Advisory Fee until closing of an *acquisition* of the Newsletters, which might occur

as one of several transactions (in which Barker might or might not be involved) spanning an unspecified period of time.

THEREFORE, Plaintiff's motion for summary judgment on Count I of the Amended Complaint, concerning breach of the Engagement Agreement with regard to the $12 million loan, is hereby **GRANTED.** Barker Capital LLC is entitled to an Advisory Fee in the amount of 2.5% of the Transaction Value. Defendants' cross-motion for summary judgment on this issue is hereby **DENIED.**

Count IV: Breach of Contract and Unjust Enrichment

Barker's Entitlement to a Fee under the Engagement Agreement in Connection with the $35 Million Highbridge Loan

Plaintiff contends that Barker is entitled to be paid a fee under the Engagement Agreement. Plaintiff argues that even if Barker were not contractually entitled to a fee based on Highbridge's $12 million loan, Barker still would be entitled to a fee because the $35 million loan included a commitment by Highbridge for refinancing.

Defendants counter that the Engagement Agreement could not have obligated Twinlab to pay a fee because Twinlab was not even incorporated until five months after the Engagement Agreement was signed. Additionally, Jacob Barker does not dispute that he did not provide any services in connection with the $35 million loan, except for the initial introduction of Highbridge to Fox. In fact,

Barker was not even aware of the $35 million loan until the December 2003 documents were produced in discovery in this action.

Having found that Barker is entitled to the Advisory Fee for his services in connection with the $12 million loan, the Court holds that Barker should not receive any fee for subsequently obtaining the same loan proceeds. Had Barker expended substantial effort in connection with the $35 million loan, Plaintiff's argument might be more persuasive. As it is, however, Barker did not provide any financial advisory services in any way directly relating to the $35 million loan. Compensating Barker for his services connected with the $12 million loan and also paying Barker a fee for the subsequent $35 million loan would result in a windfall to Barker. Such a double recovery would amount to unjust enrichment to Barker.

With regard to the amount of the $35 million loan over and above $12 million, there is nothing in the express language of the Engagement Agreement which would justify payment of a fee to Barker. There is no dispute that the value of purchase of the Newsletters was not contemplated to exceed $12 million. The Engagement Agreement narrowly outlined the defined purpose of the investment as acquisition of the Newsletters or related assets. The parties clearly are experienced and sophisticated in business. Had the parties contemplated that

Barker's non-exclusive financial advisory services would encompass more than the Newsletter acquisition, the Engagement Agreement could have and should have stated that intention.

THEREFORE, Plaintiff's motion for summary judgment on Count IV of the Amended Complaint, concerning breach of contract in connection with the $35 million Highbridge loan, is hereby **DENIED.** Defendants' cross-motion for summary judgment on this issue is hereby **GRANTED.**

Counts II and IV: *Quantum Meruit*

$12 Million Highbridge Loan

The Court has ruled that Barker is entitled to an Advisory Fee for services provided under the Engagement Agreement. The benefit obtained by Defendants does not fall outside the contract. Where, as here, a plaintiff will be made whole under the breach of contract cause of action, the plaintiff is precluded from also recovering damages under a *quantum meruit* theory.[4]

[4] *See, e.g.*, *Fisher v. A.W. Miller Tech. Sales, Inc.*, 762 N.Y.S.2d 205, 207 (N.Y. App. Div. 2003); *American Tel. & Utility Consultants, Inc. v. Beth Israel Medical Center*, 763 N.Y.S.2d 466 (N.Y. App. Div. 2003); *Reckson Operating Partnership, L.P. v. New York State Urban Devel. Corp.*, 751 N.Y.S.2d 279 (N.Y. App. Div. 2002); *Curtis Properties Corp. V. Grief Cos.,* 653 N.Y.S.2d 569 (N.Y. App. Div. 1997); *Joseph Sternberg, Inc. V. Walber 36th Street Associates*, 594 N.Y.S.2d 144, 145 (N.Y. App. Div. 1993); *Clark-Fitzpatrick, Inc. v. Long Is. R.R. Co.,* 516 N.E.2d 190 (N.Y. 1987).

$35 Million Highbridge Loan

For the same reasons the Court denied Barker recovery on a breach of contract theory in connection with the $35 million Highbridge loan, Barker is not entitled to *quantum meruit* damages. The question is whether Barker reasonably contemplated that he would be compensated for his services in connection with the $35 million loan. Any services provided by Barker for this loan were *di minimus* at best. Although the Engagement Agreement does not control whether Barker may recover under a *quantum meruit* theory, the Engagement Agreement, as well as the contemporaneous documents, are evidence of the parties' intentions. The Engagement Agreement narrowly outlined the defined purpose for which Barker was engaged to obtain an investment. As an experienced and sophisticated businessperson, Jacob Barker could have, and surely would have, set forth in writing any other services for which he anticipated compensation.

THEREFORE, Plaintiff's motion for summary judgment on Counts II and IV of the Amended Complaint, concerning *quantum meruit,* is hereby **DENIED.** Defendants' cross-motion for summary judgment on this issue is hereby **GRANTED.**[5]

[5]Having found that Plaintiff is not entitled to *quantum meruit* damages, for the same reasons, the Court finds that Plaintiff cannot recover damages under the theory of unjust enrichment.

Count III - Tortious Interference with Contract

The Court need not address in detail the merits of Plaintiff's claim of tortious interference with contract. First, in order to find Fox personally liable, a court would have to determine whether his actions justify piercing the corporate veil. Plaintiff's allegations appear to couch Fox' acts in his capacity as an officer of the Defendant entities. This Court lacks subject matter jurisdiction to pierce the corporate veil, even if it were inclined to do so (which it is not).[6]

Second, having found that Barker is entitled to an Advisory Fee pursuant to the terms of the Engagement Agreement, in all probability the damages for tortious interference with contract would be measured in terms of loss of the Advisory Fee. Therefore, recovery for tortious interference with contract would amount to double recovery.

THEREFORE, Plaintiff's motion for summary judgment on Count III of the Amended Complaint, concerning tortious interference with contract, is hereby **DENIED.** Defendants' cross-motion for summary judgment on this issue is hereby **GRANTED.**

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[6]*Sonne v. Sacks*, 314 A.2d 194, 197 (Del. 1973); *Wilson v. Klabe Construction Co.*, 2004 WL 1732217, at *3.

Attorneys' Fees

By letter agreement attached to the Engagement Agreement, Rebus agreed "to indemnify and hold harmless [Barker] ... from and against any loss, cost, [or] expense, ... including without limitation counsel fees and expenses and any other fees and expenses incurred in connection with investigating, preparing or defending any action or claim ... related to or arising out of [Barker's] engagement or [Barker's] role in connection therewith."

Defendants argue that the March 27, 2003 agreement ("Indemnification Agreement") does not expressly cover actions by a party to enforce the Engagement Agreement itself. Defendants note that indemnification agreements generally are used defensively, covering the indemnitee's legal fees and expenses should the indemnitee be brought involuntarily into litigation.

The Court finds, however, that the express language in the Indemnification Agreement warrants attorneys' fees to Barker in this case. The Indemnification Agreement does not exclude attorneys' fees for actions brought to enforce the Engagement Agreement. This case is indeed an "action or claim...related to or arising out of" Barker's "engagement or role" in connection with the Engagement Agreement. This is not a case in which the plaintiff is seeking fees and expenses

incurred in pursuing a groundless suit.[7] The Court has held that Barker is the prevailing party in its breach of contract claim. Further, the Indemnification Agreement is not ambiguous on the issue of whether attorneys' fees are contemplated.

THEREFORE, the Court holds that Plaintiff is entitled to attorneys' fees incurred in prosecuting its breach of contract claim in connection with the $12 million Highbridge loan. Such fees and other expenses shall be in proportion to the success achieved by Plaintiff.[8] Within 15 days of the date of this opinion, Plaintiff shall file an affidavit, signed by Plaintiff's counsel, delineating attorneys' fees incurred for the purpose of prosecuting Barker's breach of contract claim in connection with the $12 million Highbridge loan. The submission shall include Plaintiff's position on the legal interest rate, including what jurisdiction's law applies, and whether Plaintiff is entitled to pre- and post-judgment interest. Within 15 days thereafter, Defendants may submit any response to Plaintiff's counsel's affidavit. Any reply shall be submitted within 10 days thereafter.

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[7] *See Swiss Credit Bank v. International Bank, Ltd.*, 200 N.Y.S.2d 828, 830-31 (N.Y. Sup. Ct. 1960).

[8] *See Fasciana v. Electronic Data Systems Corp.,* 829 A.2d 178, 183 (Del. Ch. 2003).

SUMMARY OF RULINGS

THEREFORE, Plaintiff's motion for summary judgment on Count I of the Amended Complaint, concerning breach of the Engagement Agreement with regard to the $12 million loan, is hereby **GRANTED.** Barker Capital LLC is entitled to an Advisory Fee in the amount of 2.5% of the Transaction Value, namely, $318,308.45, together with pre-judgment and post-judgment interest at the legal rate. Defendants' cross-motion for summary judgment on this issue is hereby **DENIED.**

THEREFORE, Plaintiff's motion for summary judgment on Count IV of the Amended Complaint, concerning breach of contract in connection with the $35 million Highbridge loan, is hereby **DENIED.** Defendants' cross-motion for summary judgment on this issue is hereby **GRANTED.**

THEREFORE, Plaintiff's motion for summary judgment on Counts II and IV of the Amended Complaint, concerning *quantum meruit,* is hereby **DENIED.** Defendants' cross-motion for summary judgment on this issue is hereby **GRANTED.**

THEREFORE, Plaintiff's motion for summary judgment on Count III of the Amended Complaint, concerning tortious interference with contract, is hereby

DENIED. Defendants' cross-motion for summary judgment on this issue is hereby **GRANTED.**

THEREFORE, the Court holds that Plaintiff is entitled to attorneys' fees and other expenses incurred in prosecuting its breach of contract claim in connection with the $12 million Highbridge loan. Such fees shall be in proportion to the success achieved by Plaintiff.

THEREFORE, in light of the foregoing , Defendants' Motion *in limine* to Exclude Testimony of Plaintiff's Expert Witness, on the subject of the value of the services under the theory of *quantum meruit,* is hereby **DENIED AS MOOT.**

IT IS SO ORDERED. [9]

_____

The Honorable Mary M. Johnston

[9]By separate Order entered today, the Court has addressed the sanctions portion of Plaintiff's Motion to Compel and for Sanctions, the Court previously having granted motions to compel.