IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
CIVIL TRIAL DIVISION

BRUCE J. COLBURN, et al	:	December 2003
Plaintiffs,	:	No. 02521
v.	:	Commerce Program
eRESEARCH TECHNOLOGY, INC.	:	Control Nos. 031666, 060370, 041896
Defendant.	:	

ORDER and MEMORANDUM

AND NOW, this 5TH day of January 2006, upon consideration of the parties' Cross-Motions for Summary Judgment, all responses in opposition, the respective memoranda, all matters of record and following oral argument of the parties, it hereby is **ORDERED** as follows:

1. Plaintiffs' Motion for Partial Summary Judgment is **DENIED** (Control No. 031666);

2. Defendant's Motion for Summary Judgment (Control No. 041896) is **GRANTED** and judgment is entered in favor of Defendant and against Plaintiffs on all counts of Plaintiffs' Amended Complaint; and

3. Defendant's Motion for Leave to File A Reply Brief (Control No. 060370) is **DISMISSED** as moot.

BY THE COURT:

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C. DARNELL JONES, J.

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MEMORANDUM OPINION

C. DARNELL JONES, J.

Currently before the court are the Cross-Motions for Summary Judgment of Plaintiffs' Bruce J. Colburn, *et al.* ("Plaintiffs") (Control No. 031666) and eResearch Technology, Inc. ("Defendant") (Control No. 041896). For the reasons fully set forth below, Defendant's Motion is **granted** and Plaintiffs' Motion is **denied**.

I. BACKGROUND[1]

On March 27, 2000, a former wholly-owned subsidiary of Defendant, also called eResearch Technology, Inc. (the "Subsidiary"), issued a Warrant to non-party SCIREX Corporation ("Scirex"), which was later assigned to Plaintiffs, executives at Scirex. At that time, Defendant was a holding company and all the net operating assets of its business were owned by the Subsidiary. The Warrant entitled its holders to purchase stock of the Subsidiary for an aggregate purchase price of $1 million for a 2 year period after the Subsidiary "consummates its initial Public Offering."

1 The undisputed factual background, which is lengthy indeed, is fully set forth in the parties respective

On December 31, 2001, Defendant, then a publicly traded parent holding company, caused its operating subsidiary to merge into and with Defendant. (the "Merger"). The assets of the Subsidiary were transferred back into Defendant and the stock of the Subsidiary was canceled. The parties agree that the Merger left Defendant as the sole surviving combined legal entity, as the separate legal existence of the Subsidiary ceased to exist. Thereafter, Plaintiffs attempted to exercise the Warrant, which Defendant refused to honor, claiming that the Warrant was exercisable only when the Subsidiary completed an initial public offering ("IPO") in its own name. Plaintiffs dispute this interpretation of the Warrant and advance the theory that a public offering occurred as a result of the Merger and that, accordingly, they are entitled to exercise their rights under the Warrant.

II. DISCUSSION

A. Summary Judgment is Appropriate as to Counts I (Declaratory Judgment) and II (Breach of Contract)

The parties agree that this case is appropriate for summary judgment with respect to Counts I (declaratory judgment) and II (breach of contract). All parties also agree that the completion of an IPO by the Subsidiary was the express condition precedent to the exercise of any possible purchase rights under the Warrant. "[A] condition precedent is an act or event, other than a lapse of time, which, unless the condition is excused, must occur before a duty to perform a promise in the agreement arises." Weiss v. Northwest Broadcasting Inc., 140 F. Supp. 2d 336, 343 (D. Del. 2001). The question becomes whether the express condition precedent was satisfied here. This court concludes that it was not.

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briefs.

Summary judgment is proper where, as here, the pleadings, depositions, answers to interrogatories, admissions on file, and affidavits demonstrate that there exists no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." Pa.R.C.P. 1035.2; Horne v. Haladay, 1999 Pa. Super. 64, 728 A.2d 954 (1999); Pa. R. Civ. P. 1035.2(2). Only facts which directly affect the disposition of a case are considered "material." Allen v. Colautti, 53 Pa. Commw. 392, 398, 417 A.2d 1303, 1307 (1980). This court finds that summary judgment is appropriate at bar because the facts are not in dispute, only the legal implication of such facts.

Despite the apparent complexities, this case is one of simple contract interpretation; stock purchase warrants are merely contracts which are to be to be construed in accordance with their plain and unambiguous terms. Fundamental rules of construction require strict adherence to the language of the contract when its provisions are clear. Progressive Int'l Corp. v. E.I. du Pont de Nemours & Co., 2002 Del. Ch. LEXIS 91, at *35 n.43 (July 9, 2002). In such instances, the court's inquiry is limited to the four corners of the document and no extrinsic evidence may be considered. Id.

The court finds the provisions of the Warrant to be clear and unambiguous.. The Warrant expressly provides that it is only exercisable "***after the date*** on which the [Subsidiary] consummates its ***initial Public Offering*** . . . ." (Warrant, Ex. K, § 2.01) (emphasis added). It is significant that the Warrant specifically defined a "Public Offering" as ***"[a] public offering of any of the Company's Common Stock pursuant to a registration statement under the Securities Act.***" (Warrant, Ex. K, § 1.01(g)) (emphasis added). This definition also comports with the common definition of an initial public offering as being the "***first*** offering of equity

securities of an issuer to the public pursuant to a registration statement." 69 Am. Jur. 2d Securities Regulations – States §101, n. 93 (2003) (emphasis added).

It is well-settled under Delaware law, which governs here, that the failure to satisfy a condition precedent completely excuses the duty of the other party to perform. *See e.g.*, Rhone-Poulenc Basic Chem. Co. v. Am. Motorists Ins. Co., 616 A.2d 1192 (Del. 1992);); Wells v. Lee Builders, Inc., 99 A.2d 620 (Del. 1953); National Commodity Corp. v. Am. Fruit Growers, Inc., 70 A.2d 28 (Del. Super. Ct. 1949). In this case, it is undisputed that the contemplated IPO of the Subsidiary, the event upon which the entire Warrant was based, simply did not occur. Therefore, Plaintiffs cannot exercise the Warrant or any rights thereunder.

Because it is undisputed that no actual IPO of the Subsidiary occurred, Plaintiffs argue that the Merger somehow satisfied the condition precedent. In other words, Plaintiffs argue that, as a result of the Merger, a "initial public offering" occurred because the parent and Subsidiary companies became one and the same and the surviving entity was a publicly traded company. However, based upon the plain language of the Warrant, it is clear the Merger does not satisfy the express condition precedent. The Merger was not completed "pursuant to a registration statement," as specifically required by the Warrant. Moreover, there was no new stock offered to the public - or to anyone, for that matter - by either Defendant or the Subsidiary in connection with the Merger. To the contrary, the Subsidiary's stock was actually cancelled. Moreover, even if the Merger could be considered a "Public Offering" under the Warrant, which it cannot, it certainly was not a public offering by "the Company," which is specifically defined by the Warrant as the Subsidiary. Thus, there can be no credible argument under the plain language of the Warrant that the Merger constituted "a public offering of any of the [Subsidiary's] common stock pursuant to a registration statement under the Securities Act." (Warrant, Ex. K, § 1.01(g))

and Plaintiffs have proffered no legal basis for ignoring the Warrant's clear language.

Nonetheless, Plaintiffs ask this court to equate the parent company's stock, which had been publicly traded since 1997, with an initial public offering of the Subsidiary's stock. However, this argument entirely ignores the express language of the Warrant. While there arguably may be multiple avenues to "take a company public," [2] the critical fact remains is that only one such method satisfies the express condition precedent of the Warrant. "Courts do not assume that a contract's language was chosen carelessly, nor do they assume that the parties were ignorant of the meaning of the language they employed." Murphy v. Duquesne Univ., 565 Pa. 571, 591, 777 A.2d 418, 429 (2001). The Warrant very specifically requires the consummation of an IPO by the Subsidiary, pursuant to a registration statement, before any purchase rights under the Warrant would be triggered. The Warrant certainly does not indicate that merely "going public," or completing a "reverse merger" would satisfy this express condition precedent. Nor could such be implied, given the clear and unambiguous language of the Warrant.

In addition, Plaintiffs' contention that the Merger of Defendant and its wholly-owned Subsidiary constituted a "*de facto* IPO", while creative, lacks legal support. First, this legal theory does not appear to have been adopted in any jurisdiction and squarely contradicts well-settled Delaware law, as well as practicality. *See e.g.* Movielab, Inc. v. United States, 494 F.2d 693, 699 (U.S. Ct. Cl. 1974) (holding that merger of wholly-owned subsidiary into parent corporation results, by definition, in a change of "mere form"). An IPO and a Merger clearly are

2 Furthermore, the effects of the Merger do not remotely resemble the effects of an IPO. *See e.g.* Movielab, Inc. v. United States, 494 F.2d 693, 699 (U.S. Ct. Cl. 1974)(holding that merger of wholly owned subsidiary into parent corporation results, by definition in a change of mere form.)

two separate types of corporate transactions with different legal significance; to simply interchange the two belies common sense in addition to well-settled law. Moreover, Delaware law has long recognized the doctrine of "independent legal significance." Pursuant to this doctrine, courts refuse to ignore the form of a transaction regardless of the alleged effects of such a transaction. *See e.g.*, Nixon v. Blackwell, 626 A.2d 1366, 1380-81 & 1381 n.21 (Del. 1993); Rothschild International Corporation v. Liggett Group Inc., 474 A.2d 133 (Del. 1984); Hariton v. Arco Electronics, Inc., 188 A.2d 123 (Del. 1963). That is precisely what the Plaintiffs have requested this court to do in this instance.[3]

In further support of their position, Plaintiffs cite § 3.04 of the Warrant, the so-called anti-destruction clause, which provides:

> **Preservation of Purchase Rights in Certain Transactions**. [I]n case of any consolidation or merger of the Company with or into another corporation . . . the Company shall, as a condition precedent to such transaction, cause such successor or purchasing corporation, as the case may be, to execute with the Warrantholder an agreement granting the Warrantholder the right thereafter, upon payment of the ***Exercise Price in effect immediately prior to such action***, to receive upon exercise of this Warrant the kind and amount of shares and other securities and property that it would have owned or have been entitled to receive after the happening of such reclassification, change, consolidation, merger, sale or conveyance ***had this Warrant been exercised immediately prior to such action.***

(Warrant, Ex. K, § 3.04) (emphasis added). However, the court finds this provision bolsters Defendant's argument rather than that of the Plaintiffs. The court sees no language within § 3.04 which creates an alternative or substitute for the express condition precedent of the Warrant, namely the completion of an IPO. In fact, § 3.04 of the Warrant is serves only to "preserve" any purchase rights the holder of the Warrant might already have. However, according to the

3 Plaintiffs admit that they do not challenge the validity of the Merger. Pl. Mem. at 15.

express language of the Warrant, there are no "purchase rights" to be preserved unless and until the Subsidiary consummates an IPO, which it never did. In other words, nothing in § 3.04 can create or expand the Warrantholder's so-called "purchase rights." Since it is undisputed that there were no purchase rights before the Merger, and because § 3.04 cannot itself create any purchase rights that would not otherwise exist, Plaintiffs' reliance upon § 3.04 is misplaced.

Based on the foregoing, this court grants summary judgment in favor of Defendant as to Counts I (declaratory judgment) and II (breach of contract).

B. Summary Judgment is Appropriate as to Plaintiffs' Quasi-Contractual Claims (Counts III and IV)

Finally, with respect to Plaintiffs' quasi-contractual claims (Count III - promissory estoppel and Count IV - unjust enrichment), the court finds summary judgment to be appropriately entered in favor of Defendant because such claims are inapplicable where, as here, there exists an express written contract which encompasses the very issues that are the basis for the quasi-contractual claims. *See* Chrysler Corp. v. Airtemp Corp., 426 A.2d 845 (Del. Super. Ct. 1980); Mitchell v. Moore, 1999 Pa. Super. 77, 729 A.2d 1200 (1999) ("[w]e may not make a finding of unjust enrichment . . . where a written or express contract between parties exists."); First Wis. Trust. Co. v. Strausser, 439 Pa. Super. 192, 653 A.2d 688, 693 n.2 (1995)("[t]he quasi-contract doctrine of unjust enrichment is inapplicable . . . when the relationship between the parties is founded upon a written agreement or express contract"); McClellan Realty Corp. v. Institutional Investors Trust, 714 F. Supp. 733, 739 (E.D. Pa. 1988)("[i]t is axiomatic that a claim for promissory estoppel is applicable only in the absence of an enforceable contract"); Fox v. Rodel, Inc., 1999 U.S. Dist. LEXIS 15502, at *32 (D. Del. Sept. 13, 1999); Kysor Indus. Corp.

v. Margaux, 674 A.2d 889, 896 (Del. Super. Ct. 1996) (finding it unnecessary to address the issue of promissory estoppel where there is a contract).

Because the Warrant dictates all the rights, obligations and responsibilities between the parties, Plaintiffs' quasi-contractual claims fail as a matter of law. As such, summary judgment on Plaintiffs' claims for promissory estoppel (Count III) and unjust enrichment (Count IV) is granted and such claims are dismissed.

III. CONCLUSION

For the reasons fully set forth above, the court finds as follows:

1. Plaintiffs' Motion for Partial Summary Judgment is **DENIED** (Control No. 031666); and

2. Defendant's Motion for Summary Judgment (Control No. 041896) is **GRANTED** and judgment is hereby entered in favor of Defendant and against Plaintiffs on all counts of Plaintiffs' Amended Complaint; and

3. Defendant's Motion for Leave to File A Reply Brief (Control No. 060370) is **DISMISSED** as moot.

The court will enter a contemporaneous Order consistent with this Opinion.

BY THE COURT:

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C. DARNELL JONES, J.