SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: MELVIN L. SCHWEITZER, Justice — PART 45

FERGHANA PARTNERS INC.

- v -

BIONICHE LIFE SCIENCES INC.

INDEX NO. 650747/09

MOTION DATE

MOTION SEQ. NO. 002

MOTION CAL. NO.

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: [✓] Yes [ ] No

Upon the foregoing papers, it is ordered that this motion by defendant for summary judgment is GRANTED and the complaint is DISMISSED with costs and disbursements to defendant as taxed by the Clerk; and it is further ORDERED that the plaintiff's cross motion to amend its complaint is DENIED as per the attached Decision and Order. The Clerk to enter judgment accordingly.

Dated: October 5, 2011

MELVIN L. SCHWEITZER, J.S.C.

Check one: [✓] FINAL DISPOSITION [ ] NON-FINAL DISPOSITION

Check if appropriate: [ ] DO NOT POST [ ] REFERENCE

[ ] SUBMIT ORDER/ JUDG. [ ] SETTLE ORDER/ JUDG.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 45

FERGHANA PARTNERS INC, Plaintiff, -against- BIONICHE LIFE SCIENCES INC., Defendant.	Index No. 650747/09 DECISION & ORDER Motion Sequence: 002

MELVIN L. SCHWEITZER, J.:

Defendant Bioniche Life Sciences Inc. (Bioniche) moves for summary judgment dismissing the complaint. Plaintiff Ferghana Partners Inc. (Ferghana) cross-moves to amend its complaint.

This action involves plaintiff's claim, as an investment banking firm, for a finder's fee on a financial partnering transaction that defendant, a biotechnology company, entered into with a third party, Endo Pharmaceuticals Inc. (Endo), a pharmaceutical company, regarding the drug Urocidin, which treats bladder cancer. Defendant had engaged plaintiff to provide corporate partnering advice and assistance regarding the development and marketing rights to defendant's Urocidin product. Defendant claims that the plain and unambiguous words of their fee agreement details how plaintiff would provide assistance in identifying potential corporate partners for a transaction, and that plaintiff has not provided such assistance, and actually did nothing to cause or consummate the transaction. Defendant contends that the fee agreement required plaintiff to identify a potential "Counterparty" in conjunction with defendant, propose the company to defendant, and obtain approval from defendant to approach such company. At the very least, defendant asserts that defendant would need to be aware of the identity of a

company for it to be deemed a "Counterparty." It urges that plaintiff has admitted that it never mentioned Endo to defendant as a potential prospect for a transaction. Thus, defendant contends that plaintiff cannot be a finder, having never disclosed it findings to the party from which it demands compensation.

In opposition, plaintiff contends that Endo is a "Counterparty" because it approached plaintiff requesting suggestions with respect to mergers and acquisitions in the urology and cancer sectors, and that plaintiff responded by suggesting Urocidin. Alternatively, it urges that Endo is a "Counterparty" because defendant requested that plaintiff contact every company that would be interested in a partnering transaction regarding Urocidin, a universe which ultimately included Endo. Plaintiff also urges that Endo is a "Counterparty" by virtue of its acquisition of Indevus Pharmaceuticals, Inc. (Indevus). Plaintiff cross-moves to amend its complaint to add facts regarding contacts it had with Indevus, and to assert a claim for declaratory relief regarding the fee agreement with defendant.

Facts

Plaintiff is an investment banking firm focused on the pharmaceutical, diagnostics, healthcare, and specialty chemicals business sectors (Affirmation of William J. Kridel, Jr., dated June 29, 2011, ¶ 2). It provides corporate partnering services primarily to small and mid-sized biotechnology companies, which helps to connect the creator of a drug or diagnostic to a third party with cash and operating expertise or resources (*id.*). Defendant is a biotechnology company which develops, manufactures, and markets proprietary products for the human and animal healthcare markets (Affidavit of Graeme McRae, dated May 19, 2011, ¶ 2). Endo is a pharmaceutical company, and Endo Pharmaceutical Solutions Inc. (Endo Solutions), formerly

known as Indevus Pharmaceuticals, Inc. (Indevus), is a wholly-owned subsidiary of Endo (Exhibit 5 annexed to Affirmation of Jawed Muaddi, dated June 29, 2011). Prior to April 2008, Endo focused only on pain management and some neuroscience indications, and not on urology or oncology (Affidavit of William J. Kridel, Jr., dated June 29, 2011, ¶ 18).

On February 16, 2006, plaintiff and defendant executed the Letter Agreement, which detailed the rights and obligations of plaintiff in acting as defendant's advisor concerning "corporate partnering with on or more counterparties" for the development and marketing rights to Urocidin (Exhibit A to McRae Aff.), which transaction was defined as "Project PETRO" or "Strategic Transaction." The Letter Agreement set forth the ways in which plaintiff "shall provide such assistance and advice as [Defendant] may reasonably request" (*id.*, Letter Agreement at 1). It provided that such assistance shall include: (1) developing presentations to a Counterparty; (2) identifying, in conjunction with defendant, potential corporate Counterparties for a transaction; (3) analyzing potential Counterparties; (4) developing a model transaction format; (5) coordinating and making approaches to the potential Counterparties; (6) participating in meetings and due diligence sessions with Counterparties; and, (7) "[a]longside attorneys and accountants, assisting in the negotiation/preparation of contracts, documents, approvals and related matters necessary to consummate one or more Strategic Transactions with one or more Counterparties" (*id.*, Letter Agreement at 1-2). Plaintiff would receive compensation for its services in two ways. First, defendant paid a monthly retainer fee, and reimbursed plaintiff for its out-of-pocket expenses. Second, plaintiff would be entitled to a "Success Fee" upon consummation of definitive documentation in connection with a Strategic Transaction with a Counterparty completed during the term of the Letter Agreement, or within 12 months of its

termination (*id.*, Letter Agreement at 2-3, Sections I and IV; *see* Kridel Aff., ¶ 6). The Letter Agreement provided that after "[i]dentifying, in conjunction with [Defendant], potential corporate Counterparties," these Counterparties will be added during the course of the Project when:

> (i) [plaintiff] or [defendant] is approached by a Counterparty not then on the Counterparty List; or (ii) [plaintiff] proposes one or more Counterparties to [defendant] not then on the Counterparty List; or (iii) [defendant] requests [plaintiff] to approach one or more Counterparties not then on the Counterparty List. In each case, [plaintiff] shall only approach a Counterparty concerning a Strategic Transaction upon obtaining approval from [defendant]. Counterparties already approached by [defendant] shall automatically be included on the Counterparty List

(*id.*, Letter Agreement at 1, ¶ 2). The Letter Agreement was extended by mutual written and oral consent of the parties until defendant terminated it on August 29, 2008 (Exhibit D annexed to McRae Aff.). This termination was effective September 29, 2008 (*id.*).

Beginning in June 2006, plaintiff began assisting defendant in drafting an information memorandum describing the Urocidin opportunity, conferred with defendant regarding the characteristics of a suitable partner, and began contacting companies (*see* Exhibit E to Affirmation of William G. Primps, Deposition of J. Matthew Symonds, Ferghana Senior Associate, at 46; Exhibit F to Primps Affirm., Deposition of Steven A. Mermelstein, plaintiff's Managing Director, at 44-45, 81).

William Kridel, plaintiff's founder and Managing Director, testified at his deposition that by 2008, plaintiff had explored approximately 60 to 70 companies that could be considered potentially interested in a Urocidin transaction of one type or another (Exhibit C to Primps Affirm., Deposition of William J. Kridel, Jr., at 81-82). Plaintiff maintained a progress report,

tracking communications with and the status of potential partners, and periodically provided the progress reports, as requested by defendant, setting forth the stages each prospect had reached (*id.* at 102-109, 116; *see also* Affidavit of Cameron Groome, dated May 20, 2011, ¶¶ 5-6). Mr. Kridel states, in his affidavit in opposition, that plaintiff had a long-standing relationship with the pharmaceutical company Endo, and that in June 2008, Endo indicated that it was expanding its focus from pain management into the urology sector, but was interested in a merger and acquisition transaction, not partnering (Kridel Aff., ¶¶ 23-25). Plaintiff's Counterparty progress reports did not indicate contacts with Endo, which did not appear on any progress report, update or list of Counterparties (*see* Kridel Dep. at 109; Symonds Dep. at 122-123; *see also* Groome Aff., ¶¶ 6, 14 and Exhibit A annexed thereto).

In June 2008, plaintiff was assisting defendant with Watson Pharmaceuticals, Inc. (Watson), which had previously approached defendant, regarding Project PETRO (Melmerstein Dep. at 85-87). Once plaintiff confirmed from Watson that it already had a Confidential Disclosure Agreement (CDA) in place with defendant from Watson's earlier interest in defendant, plaintiff was able to, and did, facilitate the exchange of confidential information regarding Urocidin from defendant to Watson (Symonds Dep. at 41-43), and assisted in due diligence and the preparation and negotiation of term sheets (Mermelstein Dep. at 102-104; Symonds Dep. at 151). Watson eventually pulled out of ongoing talks in April 2009.

By letter dated August 29, 2008, defendant terminated its relationship with plaintiff, effective September 29, 2008 (Affidavit of Graeme McRae, dated May 19, 2011, ¶ 21 and Exhibit D annexed thereto). In the letter, defendant indicated that it would continue to work with

plaintiff with regard to both Watson and another company, Orphan Australia, through the month of September (*id.*).

On January 4, 2009, Endo announced a deal to acquire Indevus (Cobuzzi Dep. at 59-60). Through this acquisition, Endo Solutions obtained Indevus' Valstar product, a drug used to treat late stage refractory bladder cancer, which Endo viewed as complimentary to Urocidin (*id.* at 175-176). The Indevus transaction closed on March 23, 2009 (*id.* at 81). On that same date, Endo contacted defendant regarding Urocidin (Affidavit of Cameron Groome, dated May 20, 2011, ¶ 13 and Exhibit B annexed thereto; *see also* Cobuzzi Dep. at 83-84). Defendant and Endo engaged in discussions regarding Urocidin, and on April 21, 2009, they executed a Confidential Disclosure Agreement (CDA) to facilitate the sharing of non-public confidential and proprietary information (McRae Aff., ¶¶ 24-25).

On July 9, 2009, defendant and Endo executed an agreement for the licensing, marketing, and manufacturing of Urocidin (*id.*, ¶ 27). Plaintiff then demanded payment of a "Success Fee" under the Letter Agreement, which defendant refused to pay.

Plaintiff commenced this action, asserting claims for breach of contract, for recovery in quantum merit, and for unjust enrichment (*see* Exhibit B to Plaintiff's Notice of [Cross] Motion).

In moving for summary judgment, defendant urges that the unambiguous terms of the parties' Letter Agreement demonstrate that plaintiff is not entitled to any "Success Fee" for defendant's transaction with Endo. It argues that the Letter Agreement clearly and unambiguously required that plaintiff had to notify defendant, and obtain its preapproval for all "Counterparties." It asserts that plaintiff freely admits that it never identified Endo to defendant as a potential Counterparty, and it is undisputed that plaintiff never sought or obtained

defendant's approval to add it as a Counterparty (Kridel Dep.at 181-182). Defendant also points to the Counterparty Lists developed by plaintiff during the term of the Letter Agreement, which did not include Endo (*see* Exhibit A annexed to Groome Aff.; Exhibit 12 to Affirmation of Jawed Muaddi, dated June 29, 2011). Defendant further contends that the term "Counterparty" cannot be read to mean all companies that have evinced some form of interest in any transaction. According to defendant, the agreement clearly requires defendant's knowledge of, and consent to, the particular Counterparty.

Defendant further urges that Endo was not added as a Counterparty, as required by the Agreement. It points to plaintiff's admission that Mr. Kridel, and not Endo, was the first to raise Urocidin to Endo, in August 2008, in discussing a number of various potential opportunities for it (*see* Exhibit B to Affirmation of William G. Primps, dated May 23, 2011, Plaintiff's Response to Notice to Admit, # 6; *see* Kridel Dep. at 156). In addition, defendant did not request that plaintiff approach Endo (*see* Kridel Dep. at 181; Groome Aff., ¶ 25). According to defendant, the only way Endo could then become a Counterparty was for plaintiff to propose Endo to defendant, which it did not do. Defendant argues that the Letter Agreement is clear that plaintiff could not unilaterally designate a company as a Counterparty.

With respect to plaintiff's contention that Endo was transformed into a Counterparty by virtue of its acquisition of Indevus in 2009, defendant asserts that neither the facts, the Letter Agreement, nor the law supports such a contention. In July 2006, plaintiff sent Indevus a non-confidential information package regarding Urocidin, and a CDA, which Indevus did not sign. Furthermore, by December 2006, Indevus indicated to plaintiff that it was not interested in Urocidin (Kridel Aff., ¶ 35). Three years later, in March 2009, after the Letter Agreement was

terminated, Endo Pharmaceutical Solutions, which then merged with BTB Purchaser Inc., a wholly-owned subsidiary of Endo, acquired all outstanding stock in Indevus (Exhibit 5 to Muaddi Aff.). Defendant contends that this acquisition did not somehow transform Endo into a Counterparty. Instead, Endo would have had to be a Counterparty by the time the Letter Agreement terminated by September 30, 2008.

Defendant also argues that plaintiff's quasi contract claims are barred, because there is a written contract governing the subject matter of its claims, and the claims are barred by the Statute of Frauds.

In opposing summary judgment, plaintiff asserts that Endo had "approached" plaintiff regarding an opportunity to license a drug in the urology and cancer sectors, which "approach" resulted in Endo becoming a Counterparty under the Letter Agreement. Plaintiff asserts that it had substantive contacts with Endo regarding Urocidin, which lead Endo eventually to contact defendant in March 2009, after Endo had acquired Indevus. Plaintiff relies on Mr. Kridel's testimony and affidavit in which he states that he had contacts with Endo for over ten years prior to the appointment of David Holveck as Endo's new CEO in March 2008 (Kridel Aff., ¶¶ 20-21). He attests that he visited Mr. Holveck and David Cobuzzi, Endo's Vice President of Corporate Development, on June 12, 2008, and Mr. Holveck explained Endo's probable new strategy of expanding from just pain management into urology and cancer, and its interest in purchasing companies (Kridel Aff., ¶ 23; Kridel Dep. at 153-154). Mr. Kridel states that from that time to August 4, 2008, he had a series of conversations with Mr. Holveck regarding a variety of mergers and acquisitions opportunities consistent with Endo's strategies and interests, but that on August 4, when Mr. Holveck indicated that Endo was now open to the idea of licensing (partnering)

specific drugs instead of just acquiring a company, Mr. Kridel then presented Urocidin as an opportunity (Kridel Dep. at 155-157; Kridel Aff., ¶¶ 23, 25-26; Cobuzzi Dep. at 118). Thereafter, Mr. Kridel sent a non-confidential information package to Endo on a Urocidin partnering transaction (Kridel Aff., ¶ 26). On August 11, 2008, Endo conducted in-house due diligence, but because Endo had concerns about the clinical trials for Urocidin, and it was not sufficiently close to being on the market, Endo chose to pass on Urocidin (Kridel Aff., ¶ 29). On August 26, 2008, Mr. Kridel states that Endo again indicated to him that it was not interested in entering into a CDA with defendant, and after that, he did not further pursue Endo as a potential partner for defendant (*id.*, ¶ 31).

Plaintiff also urges that even if Endo did not "approach" it, Endo was still a Counterparty, because plaintiff had a general approval from defendant to approach all potential partners, and the agreement did not require that it obtain specific pre-approval of each potential partner before it made an approach. Plaintiff further argues that the Letter Agreement did not require it to introduce or recommend Endo to defendant.

Alternatively, plaintiff argues that Endo was a Counterparty by virtue of its acquisition of Indevus. Plaintiff points to its contact with Indevus on July 17, 2006, in which it sent a non-confidential information package regarding Urocidin and a CDA (which Indevus did not sign), and the fact that Indevus was indicated as a Counterparty on its lists. It urges that if defendant had partnered with Indevus within 12 months of the termination of the Letter Agreement on September 29, 2008, it would have been entitled to the disputed fee. It submits Mr. Cobuzzi's testimony in which he states that Endo made its own initial evaluation to pursue the opportunity, but that some of the analysis performed by Indevus regarding Project PETRO was later used by

Endo after it purchased Indevus (Cobuzzi Dep. at 76-78). Plaintiff contends that Endo viewed its acquisition of Indevus as an important factor in elevating its interest in Urocidin, because Urocidin and Indevus' product Valstar, are complementary bladder cancer drugs (*see* Cobuzzi Dep. at 175-176). Thus, in light of Indevus' status as a Counterparty, and now Endo Solution's subsidiary, and plaintiff's role in discussions with Endo, plaintiff urges that Endo is a Counterparty by virtue of the chain of events for which plaintiff deserves credit.

In its cross motion to amend, plaintiff seeks to amend its complaint to add facts regarding its contacts with Indevus, Endo's acquisition of Indevus, to allege that Indevus was a Counterparty, and to allege a new fourth cause of action seeking a declaratory judgment declaring that Endo's transaction with defendant was a "Strategic Transaction," with a "Counterparty," and that plaintiff is entitled to receive the "Success Fee" sought in the first claim for breach of contract. It claims that it first learned of the facts regarding Indevus in the March 23, 2011 deposition of Mr. Cobuzzi, and that it may amend as of right, because defendant just served its Amended Answer and Counterclaims on May 25, 2011. Alternatively, plaintiff seeks leave to amend to add the allegations and fourth cause of action.

Discussion

The motion for summary judgment is granted and the complaint is dismissed, and the cross motion for leave to amend is denied.

To establish a claim for breach of contract, the plaintiff must show a contract, performance by the plaintiff, breach by the defendant and damages (*see Furia v Furia*, 116 AD2d 694 [2d Dept 1986]; *Rexnord Holdings v Bidermann*, 21 F3d 522, 525 [2d Cir 1994]). A contract provision is unambiguous if it has a "definite and precise meaning," and is not

reasonably susceptible to differing interpretations (*see Riverside S. Planning Corp. v CRP/Extell Riverside, L.P.*, 13 NY3d 398, 404 [2009]). A court should construe a contract to give full meaning and effect to the material provisions, and should not adopt an interpretation which would leave any provision without force and effect (*Excess Ins. Co. v Factory Mut. Ins. Co.*, 3 NY3d 577, 582 [2004]; *see Beal Sav. Bank v Sommer*, 8 NY3d 318 [2007]). A contract which is unambiguous should be enforced according to its terms, and "[e]vidence outside the four corners of the contract as to what was really intended but unstated or misstated is generally inadmissible to add to or vary the writing" (*W.W.W. Assocs. v Giancontieri*, 77 NY2d 157, 162 [1990]; *see Koren Rogers Assocs. v Standard Microsystems Corp.*, 79 AD3d 607, 608 [1st Dept 2010]). Whether a contract is ambiguous is a question of law for the court, and extrinsic evidence should not be considered to create an ambiguity where there otherwise would be none (*W.W.W. Assocs. v Giancontieri*, 77 NY2d at 162-163). Clear language does not become ambiguous just because the parties argue differing interpretations (*see Bethlehem Steel Co. v Turner Constr. Co.*, 2 NY2d 456, 460 [1957]; *Riverside S. Planning Copr. v CRP/Extell Riverside, L.P.*, 60 AD3d 61, 67 [1st Dept 2008], *affd* 13 NY3d 398 [2009]; *Slattery Skanska Inc. v American Home Assur. Co.*, 67 AD3d 1, 14 [1st Dept 2009]).

The parties, here, agree that the agreement is properly characterized as one for a finder's fee. "[A] finder is required to introduce and bring the parties together, without any obligation or power to negotiate the transaction, in order to earn the finder's fee" (*Northeast Gen. Corp. v Wellington Adv., Inc.*, 82 NY2d 158, 163 [1993]). Although a finder is not obligated to perform any function beyond introducing the parties to the transaction, there must be a continuing causal connection between the finder's introduction and the ultimate transaction in order for it to earn a

finder's fee (*see Simon v Electrospace Corp.*, 32 AD2d 62, 66 [1st Dept 1969], *modified with regard to damages* 28 NY2d 136 [1971] [transaction must be direct result of the finder's disclosure of opportunity]). To establish this causal connection, the finder must show that there is some continuing connection, a continuity of negotiations, between the finder's initial efforts and the transaction that came about (*Gregory v Universal Certificate Group LLC*, 32 AD3d 777, 778-779 [1st Dept 2006]; *Moore v Sutton Res., Ltd.*, 1998 WL 67664, * 4, 1998 US Dist LEXIS 1782, * 13 [SD 1998], *affd* 165 F3d 14 [2d Cir 1998] [finder must establish that the final transaction which occurred flowed directly from the introduction]; *see Karelitz v Damson Oil Corp.*, 820 F2d 529, 532 [1st Cir 1987] [must show that successful negotiations bore a direct relationship to original introduction]). A 'but for' connection is not sufficient (*see Moore v Sutton Res., Ltd.*, 1998 WL 67664, * 4, 1998 US Dist LEXIS 1782, * 13 [a significant lapse of time between introduction and deal, significant unforeseen changes in circumstances, and a prior relationship and multiple third-party interventions can provide an independent basis for the transaction barring recovery of the finder's fee]).

Here, the Letter Agreement is clear and unambiguous and requires, as both parties urge, that plaintiff only earns a Success Fee if defendant consummates a Strategic Transaction with a Counterparty (Kridel Aff., ¶ 6; Defendant's Memorandum at 13). The Letter Agreement clearly sets forth the process by which a potential corporate partner becomes a designated Counterparty (Exhibit A to McRae Aff., Letter Agreement, ¶ 2). Initially, the potential party is "identified], in conjunction with [defendant]" during the term of the Letter Agreement for a Strategic Transaction (*id.*). It then sets forth three ways in which a potential corporate partner could be added as a Counterparty: if (i) the company approached plaintiff or defendant about Urocidin, (ii)

plaintiff proposed such company to defendant, or (iii) defendant requested plaintiff to approach such company. The parties then clearly agreed that, in each case, plaintiff could only approach a Counterparty about a Strategic Transaction, that is, a transaction involving a corporate partnering with regard to defendant's Urocidin treatment, upon obtaining defendant's approval. Together these provisions set forth a process for defendant to work with plaintiff in identifying and approving the companies before they become designated as a Counterparty for a Strategic Transaction involving Urocidin. It provides for a collaborative relationship.

Defendant has presented undisputed proof that it was not aware of Endo's interest in a Strategic Transaction from plaintiff. Plaintiff, in fact, admitted, through Mr. Kridel's testimony, that it did not inform defendant of any of the discussions Mr. Kridel held with Endo, or even mention Endo as a potential prospect, because he deemed it premature (Kridel Dep. at 157-158, 166, 171, 174, 179-180; *see also* Kridel Aff., ¶¶ 29-33). Defendant also presents undisputed proof that Endo was not "identif[ied,] in conjunction with" defendant, and because plaintiff never informed defendant that Endo was even a potential counterparty, plaintiff indisputably did not obtain defendant's approval to approach Endo.

The Letter Agreement also contemplates the making of a Counterparty List, which would document the identity of companies identified and added as Counterparties. In fact, defendant has presented proof that plaintiff had created a Counterparty List, and it is undisputed that Endo was not on that list (*see* Exhibit A to Groome Aff.). Thus, according to the plain terms of the agreement, the plaintiff shall identify the potential Counterparty in conjunction with defendant, plaintiff shall obtain defendant's approval prior to approaching such potential Counterparty, and

then the Counterparty would be added to the Counterparty List. Defendant presents undisputed proof that plaintiff failed to follow these requirements.

Plaintiff does not present contrary proof, but, instead, argues that Endo became a Counterparty by "approaching" plaintiff, in August 2008, when it requested plaintiff's assistance regarding an opportunity to license or partner in a drug in the urology and cancer sectors, and plaintiff then proposed Urocidin (*see* Plaintiff's Memorandum at 17). The Letter Agreement, however, provides that the "approach" by a Counterparty must be "concerning a Strategic Transaction," and "Strategic Transaction" is defined as a corporate partnering concerning the development rights to defendant's Urocidin, that is "Project PETRO" (Exhibit A to McRae Aff., Letter Agreement at 1, Preamble and ¶ 2). The purpose of the Letter Agreement was for plaintiff to advise and assist defendant in finding a strategic partner for its Urocidin treatment. To expand the meaning of "approach" to include any company's interest in any type of transaction in the urology and cancer field, as plaintiff argues, would require ignoring the terms "Strategic Transaction" and "Project PETRO," which this court will not do. Plaintiff's contact with Mr. Holveck, Endo's CEO, in June 2008, in which Mr. Holveck indicated Endo's interest in a merger and acquisitions transaction in urology and cancer (Kridel Aff., ¶ 23; Kridel Dep. at 155-157), and even its later contact in August 2008, in which Endo indicated an interest in partnering for individual drugs, but did not indicate interest in Urocidin (Kridel Dep. at 155-157, 181), does not fall within the "approach" for a "Strategic Transaction" language. Plaintiff readily admits, through Mr. Kridel's testimony, that it was Mr. Kridel who brought Urocidin to Endo's attention, testifying that "[t]he moment [Mr. Holveck] opened that door [regarding a possible partnering], I ran through it with Petro and said 'How about this'" (Kridel Dep. at 156; *see* Exhibit B to Primps

Affirm., Plaintiff's Response to Notice to Admit # 6). Mr. Cobuzzi confirmed this when he testified that Mr. Kridel pitched Urocidin to Endo first (Cobuzzi Dep. at 118). Therefore, plaintiff's reading of this provision is unreasonable as it fails to consider all the language and the parties' purpose, and its proof fails to raise a genuine issue as to whether Endo approached plaintiff with regard to a Strategic Transaction.

Moreover, no matter which of the ways a potential party became added as a Counterparty (Letter Agreement, ¶ 2 [i], [ii], or [iii]), defendant's approval was always required for a company to be approached as and designated a Counterparty. Plaintiff plainly admits that it never informed defendant about Endo, and that it did not obtain defendant's approval because it was, in Mr. Kridel's own words, "premature" (Kridel Dep. at 171, 174, 179-180; Kridel Aff., ¶¶ 29-33). Further, plaintiff's argument that Endo was a Counterparty because plaintiff had a general approval from defendant to approach all potential partners and no specific pre-approval was required, is belied by the clear language of the Letter Agreement. It contends that "approach" includes where a potential counterparty has a therapeutic sector interest, such as in urology and cancer, not just an interest in Urocidin. After setting forth the manner in which Counterparties could be added to the Counterparty List, the agreement unambiguously requires that "[i]n each case, [plaintiff] shall only approach a Counterparty concerning a Strategic Transaction upon obtaining approval of [defendant]" (Exhibit A to McRae Aff., Letter Agreement, ¶ 2). Plaintiff's interpretation would, again, require the court to ignore the clear language of the agreement. If plaintiff were not required to obtain defendant's specific approval before a potential party could be approached and become a designated Counterparty, then this provision would be meaningless.

Plaintiff's argument that pre-approval was merely the outer limit of what defendant could, but did not, require, is unpersuasive. The opening phrase of this part of the Letter Agreement states that plaintiff "shall provide such assistance and advice as [defendant] may reasonably request," and continues to list plaintiff's services in paragraphs one through seven (*id.* at 1). Defendant requested such assistance from plaintiff in identifying Counterparties in paragraph two, and defendant's pre-approval was required before a Counterparty was approached about a Urocidin transaction. Plaintiff's contention that defendant waived this contract provision by not requiring such pre-approval is unavailing. Evidence outside the four corners of this agreement (e.g Mr. Kridel's affidavit) submitted to vary the writing will not be considered as the Letter Agreement is unambiguous (*see Iconoclast Advisers LLC v Petro-Suisse Ltd.*, 27 Misc 3d 1230 [A], 2010 NY Slip Op 50972 [U] [Sup Ct, NY County 2010] [Fried, J.]). This court will not, by construction, excise terms, or distort the meaning of those used, and make a new contract for these parties (*see Reiss v Financial Performance Corp.*, 97 NY2d 195, 199 [2001]; *see also Vermont Teddy Bear Co. v 538 Madison Realty Co.*, 1 NY3d 470, 475 [2004]). In addition, a waiver must be unequivocal and deliberate. Plaintiff's reliance on Mr. Kridel's testimony that defendant gave plaintiff "inexplicit" approval in advance to approach any and all companies (Kridel Dep. at 182) is insufficient to raise a genuine issue of an unequivocal, deliberate waiver.

To the extent that plaintiff claims that the Letter Agreement did not require it to introduce or recommend Endo to defendant, in order to obtain defendant's approval to approach a Counterparty, plaintiff would have to let defendant know who it was approving. The case plaintiff relies upon in urging that no introduction was required is distinguishable. In *DeFren v Russell* (71 AD2d 416 [1st Dept 1979]), the parties' contract provided for a finder's fee if there

was the consummation of any relationship described therein "with or through" a number of named companies and/or any of their subsidiaries (*id.* at 418). The plaintiff finder made the initial introduction of the defendant to one of the named "with or through" companies, and it was "through" that named company's efforts on defendant's behalf that the acquisition was consummated (*id.* at 418-419). This contractual language and fact pattern is clearly different from the instant agreement, which does not provide that a Strategic Transaction could be "with or through" plaintiff, but instead requires that plaintiff identify Counterparties in conjunction with defendant, and obtain defendant's approval. As in most finder's fee agreements, the finder is required to introduce and bring the parties together (*see Northeast Gen. Corp. v Wellington Adv., Inc.*, 82 NY2d at 163).

Finally, under the terms of the Letter Agreement, contrary to plaintiff's claim, Endo did not become a Counterparty by the acquisition by an Endo subsidiary, Endo Solutions, of Indevus. While the Letter Agreement is silent on the issue of Counterparties that are later acquired, this does not render the contract ambiguous. As defendant aptly points out, Indevus was acquired by Endo Solutions nearly three years after plaintiff had contact with Indevus, and after the Letter Agreement had been terminated months before, in September 2008. Endo's subsidiary's acquisition of Indevus was an intervening event that breaks the causal connection between plaintiff's preliminary efforts with Endo, and the transaction that was actually consummated between defendant and Endo (*see Edward Gottlieb, Inc. v City and Commercial Communications PLC*, 200 AD2d 395, 399 [1st Dept 1994]). Plaintiff fails to meet its burden of demonstrating any continuing causal connection. Plaintiff also fails to present any proof that Endo was one and the same with Indevus. Just the fact that Endo Solutions acquired Indevus, which is now its

wholly-owned subsidiary, does not mean Endo is Indevus. There is no proof that Endo Solutions has no separate corporate existence from Endo. In addition, defendant presents proof that Endo decided to pursue a Strategic Transaction with defendant, based on its own independent research of the drug Urocidin (Cobuzzi Dep. at 17, 79-82, 175). Thus, the Letter Agreement fails to provide a basis for a determination that Endo's subsidiary's acquisition of Indevus resulted in Endo becoming Counterparty under that agreement. Plaintiff has not raised any genuine issues to demonstrate that there was any continuing causal connection between its initial efforts, and Endo's transaction with defendant. Accordingly, there is no basis for plaintiff's breach of contract claim, and it is dismissed.

Plaintiff's second and third claims for *quantum meruit* and unjust enrichment are also insufficient as a matter of law. There is a valid and enforceable written contract, the Letter Agreement, governing the subject of the plaintiff's entitlement to a Success Fee, and, thus, its claims in quantum meruit and for unjust enrichment are barred (*Parker Realty Group, Inc. v Petigny*, 14 NY3d 864, 865-866 [2010]; *IDT Corp. v Morgan Stanley Dean Witter & Co.*, 12 NY3d 132, 142 [2009]; *Schutty v Speiser Krause P.C.*, 86 AD3d 484, 485-486 [1st Dept 2011]).

The plaintiff's cross motion to amend is denied. Whether plaintiff may amend as of right or must seek leave, this court has already considered the allegations plaintiff seeks to add regarding the acquisition of Indevus by Endo Solutions and Endo's transaction with defendant because they were already a part of the summary judgment record, and has nevertheless granted summary judgment dismissing the breach of contract claim. In addition, the court also finds that the declaratory judgment claim is redundant of the breach of contract claim, and is dismissed on

that ground as well. Therefore, there is no basis for the amendment, and the cross motion is denied.

Accordingly, it is hereby

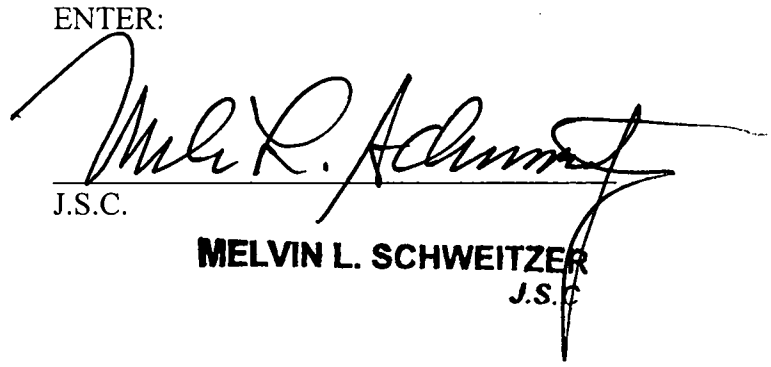
ORDERED that the defendant's motion for summary judgment is granted, and the complaint is dismissed with costs and disbursements to defendant as taxed by the Clerk upon submission of an appropriate bill of costs; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that the plaintiff's cross-motion to amend is denied.

Dated: October 5, 2011

ENTER:



J.S.C.

MELVIN L. SCHWEITZER
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