Blobel v Kopfli
2018 NY Slip Op 30298(U)
February 13, 2018
Supreme Court, New York County
Docket Number: 656566/2016
Judge: Andrea Masley

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL PART 48

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GUNTER BLOBEL,

Plaintiff,

-against -

Index No.: 656566/2016
Mot. Seq. No. 1

CHRISTIAN KOPFLI, KAMBIZ SHEKDAR, and CHROMOCELL CORPORATION,

Defendants.

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MASLEY, J.:

Defendants Christian Kopfli, Dr. Kambiz Shekdar, and Chromocell Corporation (Chromocell) move, pursuant to CPLR 3211 (a)(1) and (a)(7), to dismiss the complaint based on documentary evidence and failure to state a cause of action.

BACKGROUND

"In assessing the adequacy of a complaint under CPLR 3211 (a) (7), the court must give the pleading a liberal construction, accept the facts alleged in the complaint to be true and afford the plaintiff the benefit of every possible favorable inference" *J.P. Morgan Sec. Inc. v Vigilant Ins. Co.*, 21 NY3d 324, 334 [2013] [internal quotation marks and citations omitted]). For the purposes of this motion, the court accepts, as it must, the facts alleged in the complaint as true.

The individual parties are founders of Chromocell, a biotechnology company engaged in the development of consumer products using its patented proprietary technology, the Chromovert.[1] This dispute arises from an alleged oral agreement between plaintiff and defendants to increase plaintiff's equity ownership in Chromocell.

Plaintiff Dr. Günter Blobel, a Nobel laureate in Medicine, is a Professor at Rockerfeller University where he heads the University's Laboratory of Cell Biology. He also serves as an

[1] The complaint states that Chromovert is a "technology that permit[s] stable transfection of cultured cells with human cDNAs, tagged with a fluorescent reporter, which could then be isolated using a conventional cell sorter that recognizes different colors" (Compl. ¶ 16).

Investigator at the Howard Hughes Medical Institute (HHMI).

Defendant Dr. Shekdar is a former student and research assistant to Dr. Blobel at Rockefeller University.

In 2000, Dr. Blobel and Dr. Shekdar invented Chromovert. On November 22, 2000, they filed a patent application covering the Chomovert technology, but assigned their rights in the patent to Rockefeller University.[2] In July 2001, Dr. Shekdar and Mr. Kopfli, then an associate at Davis, Polk & Wardwell LLP, and close friend of Dr. Shekdar, approached Dr. Blobel about creating a start-up company to commercialize Chromovert. On March 19, 2002, Rockefeller University and Drs. Blobel and Shekdar entered into a Transfer Assignment, transferring the patent rights back to Drs. Blobel and Shekdar.

A few months later, in October 2002, Dr. Blobel, Dr. Shekdar and Mr. Kopfli formed Chromocell with Mr. Kopfli serving as the Chief Executive Officer and Dr. Shekdar serving as the Chief Science Officer.

From the beginning, the parties acknowledged that, unlike Dr. Shekdar and Mr. Kopfli, Dr. Blobel could not receive an equal share of equity ownership in Chromocell because of his employment at HHMI, which maintained "a policy preventing researchers, such as Dr. Blobel, from obtaining more than a 5% ownership interest in a company" (Compl. ¶ 2.) Thus, the parties devised a way to credit Dr. Blobel's status as a founding member of Chromocell while abiding by this policy.

To comply with HHMI's policy, Dr. Blobel agreed to accept a 3.9% equity interest in Chromocell while Dr. Shekdar and Mr. Kopfli shared the remaining interests equally. Plaintiff alleges that the parties orally agreed that "should HHMI ever revise or terminate its policy

[2] A patent for Chromovert was issued on February 17, 2004 (U.S. Patent No. 6,692,965).

regarding equity ownership, [the parties] would allocate sufficient shares to Dr. Blobel to make him a one-third owner of Chromocell" (Compl. ¶ 2) (the Allocation Agreement). The Allocation Agreement was not memorialized in writing.

On January 8, 2003, pursuant to Assignment Agreements, Drs. Blobel and Shekdar transferred their respective interests in the Chromovert patent to Chromocell "for good and valuable consideration" (Compl. ¶ 28). Six months later, Dr. Blobel and Chromocell entered into a stock agreement formally recording Dr. Blobel's ownership of 39,000 shares of common stock in Chromocell (the Stock Agreement). On January 1, 2004, Chromocell and Dr. Blobel entered into an "Independent Contractor Services Agreement" (the Consulting Agreement) whereby Dr. Blobel was retained to serve on Chromocell's scientific advisory board, provide scientific advice regarding product lines, and advise Chromocell on production, development and marketing of its products.

Dr. Blobel advised Chromocell to "use Chromovert to identify compounds that would be commercially attractive to potential business partners" (Compl. ¶ 36) and introduced Chromocell to various partnerships including Nestle, Kraft, Coca-Cola, Astella Pharm Inc., and International Flavors & Fragrances, Inc., where Dr. Blobel serves as a member of its Board of Directors (Compl. ¶ 38, 45, 49, 51).

Dr. Blobel also contributed financially to the growth of Chromocell. At the outset, Dr. Blobel contributed $250,000 to Chromocell "as starting capital, pursuant to a convertible note" (Compl. ¶ 32). Also, Dr. Blobel loaned $500,000 to Chromocell, in July 2006, and, $250,000, in August 2010, to cover operating costs. Chromocell repaid these loans.

Around 2012, HHMI lifted its cap on equity ownership for its employees. It is alleged that Dr. Shekdar became aware of the change in HHMI's policy and informed Dr. Blobel. Under the new policy, Dr. Blobel could own equity in Chromocell provided it is "less than a

controlling interest" (Compl. ¶ 53). After learning of this change, Dr. Blobel believed that the Allocation Agreement would be honored and immediately reacted by asking it be implemented. Mr. Kopfli assured him that Chromocell and its lawyers "would work on the details of the share transfer contemplated by the Share Allocation Agreement" (Compl. ¶ 55).

Mr. Kopfli continued to assure Dr. Blobel that "he and Dr. Shekdar would formalize Dr. Blobel's ownership, repeatedly confirmed that Chromocell's lawyers were working on implementing the agreement, and provided excuses for delays in completion" (*id.*) After more than a year of deferrals, Dr. Blobel drafted a "Letter of Intent" describing the terms of the Allocation Agreement, his contributions to Chromocell, and "declaring the Founders' intent to 'raise' Dr. Blobel's ownership of Chromocell to 33.33%" (Compl. ¶ 57). Dr. Blobel circulated the letter to Mr. Kopfli and Dr. Shekdar for their signature. Neither party signed. Dr. Blobel alleges that Dr. Shekdar and Mr. Kopfli, in separate emails, acknowledged that "the parties agreed in principle on the terms of the Share Allocation Agreement" (Compl. ¶ 58).

In 2013, the parties considered discussing the equity issue over dinner. Mr. Kopfli suggested that he, Dr. Blobel, and Dr. Shekdar discuss the topic of the Allocation Agreement over dinner with Michael Weiss, a partner of Cahill, Gordon & Reindell LLP and a friend of Mr. Kopfli. In November 2013, Dr. Blobel joined Michael Weiss for dinner. At the dinner, Mr. Weiss attempted to convince Dr. Blobel "into dropping the ownership issue" (Compl. ¶ 60). Mr. Weiss advised that Chromocell would pursue litigation if Dr. Blobel persisted. On behalf of Chromocell, Mr. Weiss offered to "buy Dr. Blobel off for $10 million" (*id*). Dr. Blobel refused.

On January 4, 2017, Dr. Blobel filed this action alleging: (1) breach of contract against Mr. Kopfli and Dr. Shekdar; (2) unjust enrichment against all defendants; (3) constructive trust against Mr. Kopfli and Dr. Shekdar; (4) promissory estoppel against all defendants; and (5) equitable estoppel against all defendants. Dr. Blobel seeks an order for specific performance

of the Allocation Agreement and, or alternatively, impose equitable or constructive trust, and award restitution or money damages. He also seeks rescission of the Assignment Agreement. Defendants move to dismiss the complaint pursuant to CPLR 3211(a)(1) and (a)(7).

DISCUSSION

Defendants' motion to dismiss is granted in its entirety.

On a motion to dismiss under CPLR 3211, "the pleading is afforded a liberal construction" (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994] [citation omitted]). However liberally construed, "bare legal conclusions" and "factual claims" contradicted by documentary evidence will not be accorded a favorable inference (*Sud v Sud*, 211 AD2d 423, 424 [1st Dept 1995]). Documentary evidence may be considered where "proved or conceded to be authentic" (*Erich Fuchs Enters. v American Civ. Liberties Union Found., Inc.*, 95 AD3d 558, 558 [1st Dept 2012] [internal quotation marks and citations omitted]). Once its authenticity is confirmed, dismissal is appropriate "only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law" (*Leon*, 84 NY2d at 88 [internal citation omitted]).

1. Breach of Contract

Defendants argue that the breach of contract claim must be dismissed as barred by the parol evidence rule, as it precludes consideration of the oral Allocation Agreement. They assert that without a contract on which to base a breach of contract claim, no claim exists.

First, defendants argue that the parol evidence rule applies because of two fully integrated written agreements, the Stock and Consulting Agreements, which govern Dr. Blobel's equity ownership in Chromocell and contain merger clauses establishing that they are fully integrated agreements on the issue of Dr. Blobel's equity allocation. Defendants assert that the Allocation Agreement would also add to and contradict the terms of the Stock and Consulting Agreements, which are the complete statements of the parties' agreement

concerning Dr. Blobel's equity allocation.

In response, Dr. Blobel claims that the parol evidence rule is inapplicable for three reasons. First, Dr. Blobel asserts that neither the Stock Agreement nor Consulting Agreement is final on the issue of his equity share because those Agreements were not signed by the same parties that orally agreed to the terms of Allocation Agreement. Dr. Blobel argues that the parol evidence rule does not bar extrinsic evidence of an alleged oral promise made by one not a party to the written agreement, and here, the Stock and Consulting agreements were executed by Dr. Blobel and Chromocell, not Dr. Blobel, Dr. Shekdar and Mr. Kopfli. According to Dr. Blobel, because the signatories are different, the Stock and Consulting Agreements are not integrated as required for the parol evidence rule, and thus, the rule is no bar to enforcing the oral Allocation Agreement.

Second, Dr. Blobel argues that the Allocation Agreement does not contradict the terms of either the Stock Agreement or Consulting Agreement, and that its terms would not be expected to be found in either of those Agreements. Dr. Blobel maintains that Mr. Kopfli and Dr. Shekdar are required, under the Allocation Agreement, to transfer shares sufficient to make him a one-third owner of Chromocell whether it is through transferring their own shares or causing Chromocell to issue shares to Dr. Blobel. In his view, the Stock Agreement does not limit the obligation of Mr. Kopfli and Dr. Shekdar to transfer additional shares of Chromocell stock to Dr. Blobel. On this basis, Dr. Blobel contends that the requested transfer of shares would not constitute an impermissible "indirect" holding of Chromocell stock in violation of the Consulting Agreement because the transfer is sought from Dr. Shekdar and Mr. Kopfli and not from Chromocell.

Third, Dr. Blobel asserts that the parol evidence rule is unavailable for Mr. Kopfli and Dr. Shekdar as "corporate insiders" of Chromocell because "corporate insiders" cannot, absent

certain circumstances, rely on subsequent contracts by the corporation to avoid prior oral agreements. In particular, Dr. Blobel argues that, because neither the Stock nor Consulting Agreement contain language expressly releasing Mr. Kopfli and Dr. Shekdar from claims by Dr. Blobel, Mr. Kopfli and Dr. Shekdar are not entitled to rely on these written agreements for the purposes of the parol evidence rule.

As legal support for his arguments, Dr. Blobel asserts that the agreements are not integrated. Because the law presumes a fully executed agreement as "the exclusive evidence of the parties' intent" on the terms of the agreement (*Unisys Corp. v Hercules, Inc.*, 224 AD2d 365, 368 [1st Dept 1996] [internal citation omitted]), the parol evidence rule "exclude[s] evidence of all prior or contemporaneous negotiations between parties offered to contradict or modify the terms of their writing" (*Dogwood Residential, LLC v Stable 49, Ltd.*, 2016 NY Slip Op 32581[u],*18 [Sup Ct, NY County 2016] [internal quotes and citations omitted]). Integration, or a full agreement, renders antecedent agreements inoperative (*Unisys Corp.*, 224 AD2d at 368). Further, "[a] completely integrated contract precludes extrinsic proof to add to or vary its terms" (*Primex Int'l Corp. v Wal-Mart Stores*, 89 NY2d 594, 600 [1997] [internal citation omitted]). Thus, extrinsic evidence may be considered where an agreement is not integrated.

This court finds that the Stock and Consulting Agreements are fully integrated agreements. Where an agreement contains a merger clause, the agreement is deemed "a completely integrated writing" (*New York City Health & Hosps. Corp. v St. Barnabas Hosp.*, 10 AD3d 489, 490-491 [1st Dept 2004] [internal quotation marks and citation omitted]). A merger clause establishes the parties' intent to finalize all negotiated terms of the agreement (*see Jarecki v Shung Moo Louie*, 95 NY2d 665, 669 [2001]). The Consulting and Stock Agreements both contain merger clauses constituting the parties' agreed rejection of all prior

agreements. The Consulting Agreement provides that it constitutes the "entire understanding between the parties and supersedes, replaces, and takes precedence over any prior or contemporaneous understanding or oral or written agreement..." Likewise, the Stock Agreement provides that "there have existed or exist no agreements or understandings, written or oral, between the Company and [Dr. Blobel] or entered into by [Dr. Blobel] for the benefit of the Company..." These two Agreements constitute a concerted effort by the parties to finalize the terms of their agreement.

Dr. Blobel's technical signatory argument does not compel a contrary finding. Dr. Blobel insists that neither the Stock nor Consulting Agreement is fully integrated because neither Mr. Kopfli nor Dr. Shekdar were "parties" to them. And that because these Agreements were executed on behalf of Chromocell, and not by the individual defendants, there can be no integration. That is not so. Mr. Kopfli and Dr. Shekdar may seek the protection of the agreement as third parties. A third party may claim the benefit of the parol evidence rule where they are intended beneficiaries to a contract (*SIN, Inc. v Department of Finance*, 126 AD2d 339, 344 [1st Dept 1987] [internal citation omitted], aff'd 71 NY2d 616 [1988]). Mr. Kopfli and Dr. Shekdar are such beneficiaries. Although the Stock and Consulting Agreements were executed between Dr. Blobel and Chromocell, these Agreements were clearly intended to benefit Mr. Kopfli and Dr. Shekdar by conferring upon them certain rights as shareholders of Chromocell. Illustrting this beneficial relationship is the Stock Agreement which requires Dr. Blobel to prioritize offering his shares to Chromocell and, alternatively, to the shareholders, Dr. Shekdar and Mr. Kopfli, before selling it to a third-party.

Further, Dr. Blobel's equity arrangement would be expected to be included in the Stock and Consulting Agreements, and it is. Section 3(b)(i) of the Consulting Agreement, titled "Compensation", states that Dr. Blobel owns 39,000 shares, or 3.9%, of Chromocell stock;

Section 1 of the Stock Agreement, titled "Share Ownership", likewise certifies his equity stake at 3.9%. Together, these Agreements demonstrate that the parties, in at least two instances, revisited and reiterated the final terms of Dr. Blobel's ownership stake. That the parties drafted each Agreement with mirroring references to the other Agreement is not without consequence. To the contrary, the import of this parallel drafting unmistakably reflects the parties' intent that the Agreements are fully integrated on the issue of Dr. Blobel's equity ownership. Even assuming the Consulting Agreement's reference to Dr. Blobel's equity ownership was merely a display of artificial acknowledgment, the same cannot be said of the Stock Agreement; a formal stock agreement would expectedly embody the true terms of a party's equity ownership in a company.

And contrary to Dr. Blobel's assertions, the oral Allocation Agreement would contradict material terms in the Consulting and Stock Agreements. Section 3(b)(i) of the Consulting Agreement prohibits Dr. Blobel from holding a "significant equity interest" in Chromocell, directly or indirectly. Section 3(b)(i) declares that Dr. Blobel holds, directly or indirectly, 39,000 shares of Chromocell common stock and then proceeds to define the parameters constituting an impermissible indirect holding as including: (1) securities issued or issuable by Chromocell to members of Dr. Blobel's immediate family; and (2) securities issued or issuable by Chromocell to Dr. Blobel or securities allocated to Dr. Blobel under the University's inventorship policies.

Dr. Blobel argues that Dr. Shekdar and Mr. Kopli may transfer shares to him without running afoul of the indirect holding restriction because the restriction prohibits transfers *from* Chromocell, and not from Dr. Shekdar and Mr. Kopfli. By that logic, Dr. Blobel insists, the requested transfer does not amount to an impermissible "indirect" holding of Chromocell stock under the Consulting Agreement, and therefore, no contradiction exists. But even were that

so, the distinction fails to cure the other textual contradiction to the Agreement: Dr. Blobel's formally recorded equity ownership in both that Agreement and the Stock Agreement.

The indirect holding restriction was drafted in accordance to Dr. Blobel's 3.9% equity ownership. The restriction must be contemplated in view of Dr. Blobel's recorded equity interest especially where his recorded interest textually precedes, and informs, the indirect holding restriction. Incongruous interpretations of provisions in a contract would "render meaningless and without effect" previous provisions in the same contract (*Black Bull Contr., LLC v Indian Harbor Ins. Co.*, 135 AD3d 401, 405-406 [1st Dept 2016]). The indirect holding restriction must not be operationally inconsistent with the Agreement's recorded equity interest. And yet that is the effect of Dr. Blobel's reading of the Agreement. Permitting the requested transfer would necessarily increase his total equity ownership beyond the recorded 3.9% threshold and into "significant equity interest" territory. It follows, then, that the requested transfer would contradict the Agreement's stated equity ownership, no matter the source of the transfer. Dr. Blobel's argument fares no better with the Stock Agreement. Like the Consulting Agreement, the Stock Agreement certifies Dr. Blobel's interest at 3.9%. Naturally, a transfer of shares whether from Chromocell or the individual defendants would contradict the Stock Agreement.

Additionally, by executing the Agreement, Dr. Blobel sought to be bound by each Agreement's merger clause, which expressly repudiated all prior agreements. Dr. Blobel's argument requires the court to accept that, despite agreeing to reject all prior agreements on the issue, Dr. Blobel nevertheless believed the Allocation Agreement was exempt from these clauses' controlling reach, even if it misrepresents the Agreements' stated terms. This the court declines to do, particularly, where enforcing the Allocation Agreement would uproot each written Agreement's merger clause and recital of Dr. Blobel's 3.9% equity ownership. As this

is an integrated agreement, the court applies the parol evidence rule with full force.[3]

Lastly, Dr. Blobel contorts *Oxford Commercial Corp. v Landau*, 12 NY2d 362 (1963) to mean that absent an express release from Mr. Blobel, Mr. Kopfli and Dr. Shekdar may not invoke the parol evidence rule and must honor the oral Allocation Agreement. This misstates *Oxford* which held that an express release of "any person whomsoever" from litigation, except certain named individuals, barred application of the parol evidence rule because the release clearly resolved whether defendants were intentionally excluded from the release. A release is not a necessary requirement under the parol evidence rule simply because it was factually relevant in *Oxford*. *Oxford's* broader principle remains controlling as to Dr. Shekdar and Mr Kopli: "the parol evidence rule operates to protect all whose rights depend upon the instrument even though they were not parties to it" (*id.* at 365-366).

Even charitably according the facts in Dr. Blobel's favor, considering the Allocation Agreement a decade later would erode the finality of the Stock and Consulting Agreements. Accordingly, Dr. Blobel's breach of contract claim is dismissed. Further, the dismissal of the breach of contract claim is fatal to Dr. Blobel's claim for rescission of the Assignment Agreements, as a claim for this relief is based on the unenforceable oral agreement.

II. Unjust Enrichment

Dr. Blobel alleges that defendants were unjustly enriched from his many contributions to the defendants. Dr. Blobel's contributions include: (1) assigned rights in the Chromovert patent; (2) contribution of $250,000 in Chromocell; (3) invested resources to Chromocell for his

[3]Application of the parol evidence rule renders moot defendants' alternative arguments that the Allocation Agreement lacks consideration or definiteness.

expert guidance[4]; (4) personal and business relationships that helped Chromocell; (5) loaned contributions; and (6) reputation in the scientific community. Defendants do not dispute that Dr. Blobel provided valuable input in the growth of Chromocell. Rather, they contend that many of his contributions for which he seeks compensation are already governed by either the Consulting and Stock Agreements, or the Statute of Frauds, and thus, cannot sustain a claim of unjust enrichment. In other words, Dr. Blobel's contributions were what he was paid to provide under the Consulting Agreement or, alternatively, the contributions must have been reduced to writing as required by the Statute of Frauds. Defendants also argue that Dr. Blobel qualifies as an "intermediary" under the Statute of Frauds requiring use of his personal relationships for "assisting in the negotiation or consummation of a business opportunity" be memorialized in writing.

Unjust enrichment is a quasi-contract claim (*IDT Corp. v Morgan Stanley Dean Witter & Co.*, 12 NY3d 132, 142 [2009]). "The theory of unjust enrichment is one created in law in the absence of any agreement" (*Loreley Fin. (Jersey) No. 3 Ltd. v Citigroup Global Mkts. Inc.*, 119 AD3d 136, 148 [1st Dept 2014] [internal quotes and citations omitted]). The theory embodies "the equitable principle that a person shall not be allowed to enrich himself unjustly at the expense of another" (*Georgia Malone & Co., Inc. v Rieder*, 19 NY3d 511, 516 [2012] [internal quotes and citations omitted]). Although invoked as an equitable principle, the theory is not a catchall cause of action and will not support claims duplicative of a "conventional contract or tort claim" (*Corsello v Verizon N.Y., Inc.*, 18 NY3d 777, 790 [2012] [internal quotes and citations omitted]). To establish unjust enrichment, a party must demonstrate "that (1) the other party was enriched, (2) at that party's expense, and (3) that 'it is against equity and good

[4]All parties agree that Dr. Blobel's invested resources, namely, his "time and effort to provide expert guidance," are governed by the Consulting Agreement, and thus, the claim is precluded.

conscience to permit [the other party] to retain what is sought to be recovered'" (*Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173,182 [2011] [internal quotes and citations omitted]).

Dr. Blobel's unjust enrichment claim fails as a matter of law. Dr. Blobel argues that defendants were unjustly enriched from the Chromovert patent assignment, loans to Chromocell, and Chromocell's use of his stature in the scientific community. The existence of a valid and enforceable written contract governing a disputed subject matter precludes recovery "in quasi contract for events arising out of the same subject matter" (*Goldman v Metro. Life Ins. Co.*, 5 NY3d 561, 572 [2005]). As to the patent, its assignment to Chromocell is governed by the Assignment Agreements, and thus, no claim of unjust enrichment is stated. Furthermore, in the complaint, Dr. Blobel alleges that he did not wholly own the patent outright. Rather, Dr. Blobel shared his rights to the patent with Dr. Shekdar and both parties, under the Assignment Agreements, transferred their patent rights to Chromocell. These facts do not establish that defendants were enriched at Dr. Blobel's expense.

As to the loans to Chromocell, Dr. Blobel does not dispute that the loans were repaid (Compl. ¶ 64). The hallmark of an unjust enrichment claim is where it is against "equity and good conscience" to permit the other party to retain what is sought to be recovered (*Corsello,* 18 NY3d at 790). The repaid loans do not establish that Chromocell was unjustly enriched at Dr. Blobel's expense. Lastly, Dr. Blobel's contributions based on his status in the scientific community is a contracted service governed by the Consulting Agreement.[5] Under this Agreement, Dr. Blobel agreed to "serv[e] on the Company's scientific advisory board." These facts do not provide a basis for concluding that defendants were enriched to such a degree that it is against equity and good conscience to warrant restitution.

[5] "'Services' shall consist of the following: (1) providing scientific advice regarding the Company's product lines, the general direction of its research program."

Further, Dr. Blobel's contributions stemming from his personal connections are governed by the Statute of Frauds. The Statute of Frauds seeks "to protect the parties and preserve the integrity of contractual agreements" (*William J. Jenack Estate Appraisers and Auctioneers, Inc. v Rabizadeh*, 22 NY3d 470, 476 [2013]). Codified as Section 5-701 (a) (10) of the General Obligations Law[6], the Statute of Frauds applies to "a contract implied in fact or in law to pay reasonable compensation" for services such as "negotiating the purchase . . . of any real estate or interest therein, or of a business opportunity" (*JF Capital Advisors, LLC v Lightstone Group, LLC*, 25 NY3d 759, 765 [2015]). Services of this nature are void unless "some note or memorandum thereof be in writing" (General Obligation Law § 5-701 [a] [10]). Under the statute, "negotiating" includes "procuring an introduction to a party to the transaction or assisting in the negotiation or consummation of the transaction" (*JF Capital Advisors, LLC,* 25 NY3d at 765). Similarly, "business opportunity" covers an intermediary's contributions on 'know-how' or 'know-who' in facilitating business arrangements between parties (*Freedman v Chemical Constr. Corp.*, 43 NY2d 260, 267 [1977]).

Dr. Blobel's claims of unjust enrichment predicated on his "personal relationships" encounter two fatal problems. First, Dr. Blobel acted as an "intermediary" between Chromocell and various other enterprises as defined by the Statute of Frauds. The statute defines intermediary services as including the "procur[ement] [of] an introduction to a party to the

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[6] "Every agreement, promise or undertaking is void, unless it or some note or memorandum thereof be in writing, and subscribed by the party to be charged therewith, or by his lawful agent, if such agreement, promise or undertaking [] . . . [i]s a contract to pay compensation for services rendered in negotiating . . . the purchase, sale, exchange, renting or leasing of . . . a business opportunity, business, its good will, inventory, fixtures or an interest therein . . . . "Negotiating" includes procuring an introduction to a party to the transaction or assisting in the negotiation or consummation of the transaction. This provision shall apply to a contract implied in fact or in law to pay reasonable compensation but shall not apply to a contract to pay compensation to an auctioneer, an attorney at law, or a duly licensed real estate broker or real estate salesman" (GOL § 5-701 [a] [10]).

transaction or assisting in the negotiation or consummation of the transaction" (General Obligations Law § 5-701[a] [10]). Dr. Blobel's use of his personal and business relationships to facilitate partnerships between Chromocell and other businesses is undeniably subject to the strictures of § 5-701 (a) (10). Second, Dr. Blobel's reliance on *Dorfman v RentJolt, Inc.*, 144 AD3d 10 (1st Dept 2016), is misplaced. In *Dorfman*, the court allowed unjust enrichment claims to the extent the services "went beyond the negotiation or consummation of a business opportunity" (*id.* at 19). Plaintiff Dorfman specifically helped "develop[ ] materials to secure investor backing, recruit[ed] engineers and others to join [the company], and develop[ed] the details of how [the company]'s software" would be implemented" (*id.* at 16). *Dorfman*, however, offers no safe harbor because Dr. Blobel's contributions are governed by contract. Dr. Blobel argues that his proposal to revamp Chromocell's market strategy, like *Dorfman*, caused Chromocell to "identify compounds that would be commercially attractive to potential business partners."[7] Even so, proposing a directional shift to engage new markets is already a contracted service under the Consulting Agreement.[8] An enforceable written contract governing a particular subject matter disposes of unjust enrichment claims arising from the same subject matter (*see Curtis Props. Corp. v Greif Cos.*, 236 AD2d 237, 239 [1st Dept 1997] [internal citation omitted]). For these reasons, Dr. Blobel's unjust enrichment claim must fail.

As to the individual defendants, Dr. Blobel argues that they were unjustly enriched from their disproportionate ownership of Chromocell as officers of Chromocell. Dr. Blobel claims

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[7] Dr. Blobel also asserts that the patent assignment, loans, and "use of his scientific expertise and stature" fall outside the Statute of Frauds. But even were that so, these contributions are only saved from the strictures of the Statute of Frauds. Their viability is not revived from the realm of rejected unjust enrichment claims.

[8] "'Services' shall consist of the following: generally advising the Company in its efforts to produce, develop and market its products".

that the individual defendants particularly benefitted directly from his contributions.

The court finds that the individual defendants' benefits were indirect and do not support a claim of unjust enrichment. The alleged benefit here is analogous to the benefit analyzed in *Levin v Kitsis*, 82 AD3d 1051(2d Dept 2011), and *Norex Petroleum Ltd. v Blavatnik*, 48 Misc 3d 1226 [A], 2015 NY Slip Op 51280 [u] [Sup Ct, NY County 2015]. In *Levin*, the court held that the corporation directly benefited from a consolidated mortgage interest assigned to the corporation, and not to the defendant in her individual capacity (82 AD3d at 1053). Likewise, in *Norex*, the court explained that the defendant, an equity owner of defendant corporation, "only indirectly received the benefits through its ownership interest" in the company (48 Misc. 3d 1226 [A], 2015 NY Slip Op 51280 [u], *24). These cases hold that a benefit directly conferred on a corporation flows indirectly to its equity owners. So too here. The court finds that the individual defendants, like in *Norex* and *Levin*, received indirect benefits insufficient to sustain a claim of unjust enrichment.

Dr. Blobel's unjust enrichment claim against defendants fails as a matter of law, also defeating his claim for a constructive trust (*see Lipton v Green*, 51 Misc 3d 1210 [A], 2016 NY Slip Op 50532 [U] [Sup Ct, NY County 2016] [dismissing constructive trust claim absent sustainable unjust enrichment claim]).

III. Promissory Estoppel

Dr. Blobel's promissory estoppel claim is simply a reframing of his breach of contract and unjust enrichment claims (Compl. ¶ 88. [seeking to estop defendants "from denying their obligation to plaintiff."]). Like the unjust enrichment claim, Dr. Blobel seeks to recover for "the transfer of the rights in the Chromovert patent, the value of the efforts invested in Chromocell's growth, and the loss of shares" (*id.*)

For promissory estoppel, a party must establish: (1) clear and unambiguous promise; (2) reasonable and foreseeable reliance by the party to whom the promise is made; and (3) an injury sustained in reliance on that promise (*New York City Health & Hosps. Corp.*, 10 AD3d at 491). Where a contract is precluded by the Statute of Frauds, a promissory estoppel claim may nevertheless survive dismissal "where unconscionable injury results from the reliance placed on the alleged promise" (*Castellotti v Free*, 138 AD3d 198, 204 [1st Dept 2016]).

Even construing the facts in Dr. Blobel's favor, the record does not support a claim of unconscionable injury (*see AHA Sales, Inc. v Creative Bath Prods., Inc.*, 58 AD3d 6, 21 [2d Dept 2008] [rejecting claim that plaintiff suffered unconscionable injury where plaintiff "derived substantial revenues over the course of many years in reliance on alleged representations by [Defendants]"). The record likewise does not support a finding of reliance where Dr. Blobel's contributions were contractual obligations under the Consulting Agreement. Having already dismissed the breach of contract and unjust enrichment claims on various grounds, including the Statute of Frauds, the promissory estoppel claim must also be dismissed.

IV. Equitable Estoppel

The bulk of Dr. Blobel's claim in support of equitable estoppel stems from defendants alleged empty promises to increase his equity stake. They too are without merit.

Equitable estoppel applies where a party establishes (1) "a lack of knowledge of the true facts; (2) reliance upon the conduct of the party estopped; and (3) a prejudicial change in position" (*Jumax Assoc. v 350 Cabrini Owners Corp.*, 46 AD3d 407, 411 [1st Dept 2007], quoting *River Seafoods, Inc. v JPMorgan Chase Bank*, 19 AD3d 120, 122 [2005]). The remedy "is triggered by some conduct on the part of the defendant after the initial wrongdoing; mere silence or failure to disclose the wrongdoing is insufficient" (*Ross v Louise Wise Servs.,*

Inc., 8 NY3d 478, 491 [2007] [internal quotations and citations omitted]). Estoppel will not apply where the misrepresentation underlying the estoppel claim forms the same basis as the underlying substantive cause of action (*Knobel v Shaw*, 90 AD3d 493, 494-495 [1st Dept 2011]).

Dr. Blobel insists that defendants never intended on honoring the Allocation Agreement. But defendants' alleged failure to confess their insincere motives are nevertheless insufficient to sustain a claim of equitable estoppel (*Zumpano v Quinn*, 6 NY3d 666, 674 [2006] [stating that "[a] wrongdoer is not legally obliged to make a public confession"]). In any event, Dr. Blobel's equitable estoppel claim fails for the same reasons that defeated the dismissed duplicative claims above (*Duberstein v National Med. Health Card Sys., Inc.*, 37 AD3d 209, 210 [1st Dept 2007] [dismissing equitable estoppel claim where the claim was "not separate and distinct from acts underlying the action itself"]).

Accordingly, it is

ORDERED that defendants' motion to dismiss is granted and the complaint is dismissed in its entirety.

Dated: 2/13/18

ENTER:

HON. ANDREA MASLEY