IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

HOWARD LITSKY,	)	CIVIL ACTION
	)	
Plaintiff,	)	NO.: 1:03-CV-0701-CC
	)	
v.	)	
	)	
GI APPAREL, INC.,	)	
	)	
Defendant.	)	

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Court having presided over a six (6) day non-jury trial in the above-styled case; and the Court having heard the opening statements of counsel for both the Plaintiff and Defendant; and the Court having been asked to determine whether there was a contract between the parties and whether the Plaintiff is entitled to recover on his breach of contract claim against Defendant; and the Court having been asked also to consider Plaintiff's claim of quantum meruit as an alternative to Plaintiff's claim of breach of contract; and the Court having weighed and considered the testimony of all fourteen (14) witnesses called by both the Plaintiff and the Defendant, some of whom testified via deposition; and the Court having weighed, reviewed and considered all the exhibits introduced into evidence during the trial of the case; and the Court having applied the law applicable thereto, including the law governing the credibility of witnesses and

the weight to be given their testimony; and the Court having applied the preponderance of the evidence standard to the facts of this case; and the Court having heard closing argument of counsel; and the Court having considered all the facts and circumstances surrounding the four (4) pre-employment contracts as well as the Plaintiff's claim of breach of contract or quantum meruit; and the Court having found the Plaintiff's testimony to be more credible and more logical than that of the Defendant with respect to the terms of the pre-employment contracts as well as his claim of quantum meruit, the Court hereby **FINDS** in favor of the Plaintiff and against the Defendant because the Plaintiff has shown by a preponderance of the evidence that he is entitled to a five per cent (5%) commission on one of the three pre-employment contracts as well as a sum of money which accurately reflects the reasonable value of his services with respect to the **SAVINGS** the Defendant was able to realize through the Plaintiff's **EFFORTS** and **CONTACTS.**

In light of the foregoing, the Court hereby submits a more definitive analysis of its decision:

I. FINDINGS OF FACT

Plaintiff, Howard Michael Litsky, a Georgia resident, has been involved in the apparel business for over twenty-five (25) years and has vast knowledge in apparel sales, sourcing, costing, and manufacturing. Specifically, Plaintiff has

been an owner of various companies and a representative of other companies engaged in the design, production, and sale of clothing including, but not limited to, T- shirts, pique golf shirts, and sweatshirts. Defendant, GI Apparel, Inc., is a major supplier of imprinted basic T-shirts and other sports apparel. Mr. Anthony Prisco is the President and sole shareholder of Defendant.

A. INTRODUCTION

Plaintiff and Mr. Prisco met each other in or around February 2002 while Plaintiff was representing a clothing distributor at a clothing industry trade show called the MAGIC Show in Orlando, Florida. Two (2) months later the parties met again at another clothing industry trade show in Atlantic City, New Jersey. At or around the same time, Defendant gave Plaintiff a "sourcing" opportunity for certain garments in exchange for a five percent (5%) commission based on the total cost of the goods ultimately ordered on behalf of Defendant. This first deal (the **"Baby Doll Tee Shirts"** referred to infra) was characterized as a "test" to determine if Plaintiff could provide the services he stated he could perform.

"Sourcing" is when a purchaser, (in this case Defendant), gives instructions to a "Sourcer" (in this case Plaintiff) for certain goods with a set of requirements, and then the "Sourcer" uses his contacts within the clothing industry to either locate the goods or arrange for the manufacture of the goods. For example, if a purchaser requested ten thousand (10,000) dozen of a certain type of basic tee

shirt with certain requirements (size, color, etc.) the Sourcer would go to the marketplace and either find (source) the finished goods, or find (source) the necessary components in order to have the goods manufactured, in exchange for an agreed upon commission. Once the purchaser places an order with a ready, willing, and able supplier and the order is confirmed by the supplier, then the Sourcer would be entitled to receive the agreed upon commission if the sale of the goods is consummated.

In this case, Plaintiff and Defendant's relationship consisted of three (3) distinct phases. Phase I was the sourcing of the Baby Doll Tee Shirts for which the parties entered into an agreement for a five percent (5%) commission and that commission was paid (this transaction is not at issue in this current law suit). Phase II consisted of three (3) transactions known as: 1) Atlantika; 2) Haiti; and 3) Roochi. Just as in Phase I, in Phase II Plaintiff would source goods which met Defendant's specifications in exchange for an agreed upon five percent (5%) commission. Phase III concerns Plaintiff's relationship with Defendant under a purported employment contract or in the alternative quasi contract, quantum meruit, and unjust enrichment and will be discussed in detail below.

B. PRE-EMPLOYMENT COMMISSIONS ON THE FOUR TRANSACTIONS

The Court finds that Plaintiff was asked to source four (4) specific transactions for Defendant in exchange for a five percent (5%) commission upon

consummation of the sale. Plaintiff agreed to source the goods and did source the goods (by either in finding the finished goods directly or finding the component parts). While Plaintiff was paid in full for the Baby Doll Tee Shirts transaction, Plaintiff was not been paid in full for the Roochi transaction, and received no payments at all for the Atlantika and Haiti transactions since neither of these transactions culminated in a sale. With respect to the four (4) transactions at issue the Court finds as follows:

1. BABY DOLL TEE SHIRTS TRANSACTION

The Baby Doll Tee Shirts transaction involved T-shirts for juniors. The parties entered into an oral agreement whereby Plaintiff was to source approximately eight thousand (8,000) dozen Baby Doll Tee Shirts in exchange for a five percent (5%) commission paid by Defendant. The commission was based upon the total cost of the completed order. Plaintiff did not find finished goods, but rather he found the component parts and then found the manufacturer. Upon completion of Plaintiff's duties he was paid his agreed upon five percent (5%) commission by Defendant.

2. ATLANTIKA TRANSACTION

The Atlantika transaction involved the sourcing of T-shirts. Plaintiff received a telephone call from Mr. Prisco who told Plaintiff that he would pay him five percent (5%) commission of the gross total purchase price for all the T-shirts that Plaintiff could find up to one million (1,000,000) dozen T-shirts. The

only parameters that were placed were: 1) the shirts had to be at least fifteen percent (15%) less than what Defendant was paying his main supplier of these goods (Delta Apparel) for dark colored T-shirts; and 2) Defendant would take any size and color that Plaintiff could find; however, if the sizes and colors were odd, then in that event, Defendant would need a bigger discount.

Plaintiff accepted Defendant's offer and later attended a trade show called the Off-Price Apparel Show in Las Vegas, Nevada, at his expense. The Off-Price Show is a trade show wherein sellers of closeout items get together and show their merchandise. Before Plaintiff made it to the floor of the show in order to source his new order from Defendant, he ran into a longtime business acquaintance, Mr. Harvey Cohen, in the lobby of the Venetian hotel.

Plaintiff approached Mr. Cohen and told him about the order he was trying to source for Defendant. Mr. Cohen informed Plaintiff that he would be able to fill Plaintiff's order due to his recent arrangement with Peter Rudge and Mr. Rudge's company, Atlantika. Atlantika was attempting to sell a very large quantity of basic T-shirts in a variety of sizes and colors. Plaintiff and Mr. Cohen went to Mr. Cohen's hotel room where Peter Rudge was located, for the sole and singular purpose of attempting to negotiate a deal. Plaintiff, Mr. Cohen, and Mr. Ruge then spent the next five (5) hours intensely negotiating a deal wherein there were several phone calls made by Plaintiff to Mr. Prisco, the President and sole shareholder of Defendant (the purchaser) and by Mr. Cohen and Mr. Rudge

to Mr. Gregg (the supplier). At the conclusion of the negotiations, Defendant agreed to enter into purchase order 84601 (the **"Atlantika Purchase Order"**). (Ex. 54). The Atlantika Purchase Order required Atlantika to sell to Defendant and for Defendant to buy 203,057.34 dozen T-shirts for a price of $2,987,898.90 subject to Defendant having the right to inspect the goods; however, after issuing a purchase order in favor of Atlantika, the Defendant cancelled the Atlantika purchase order, claiming, among other things, that Atlantika neither owned nor possessed the goods in question. The Defendant then issued a purchase order to South Carolina Tees, the manufacturer, owner and possessor of the goods.

Defendant then sent Plaintiff to the South Carolina Tees' plant to inspect the goods as they were being packaged in order to be shipped to Defendant in approximately forty (40) trucks. Plaintiff wrote an e-mail to Defendant stating that the goods looked "good" to him. (Ex. 62). Subsequent to that e-mail, Defendant received six (6) cases of the goods and then wrote a letter to South Carolina Tees canceling the purchase order, stating that the goods were of an inferior quality and did not meet in-house standards. (Ex.63).

For foregoing reasons, the Atlantika transaction was never consummated. Therefore, the Court finds that Plaintiff is not entitled to any commissions by virtue of his involvement in procuring the Atlantika Purchase Order because the Defendant ultimately rejected the goods and derived no benefit from the transaction. The Court finds Defendant's testimony credible that it would have

paid Plaintiff a commission had the sale been consummated under the South Carolina Tees' Purchase Order.

3. HAITI TRANSACTION

Under the Haiti Transaction, Plaintiff entered into an agreement with Plaintiff into an agreement with Defendant whereby Plaintiff was to find the fabric, buttons, embroidery, and manufacturer and have ten thousand (10,000) dozen pique golf shirts manufactured in exchange for a five percent (5%) commission for each facet of the manufacturing process including freight. Defendant entered into this agreement with Plaintiff so that it would have "stock product" on hand for anticipated future orders. Plaintiff found the various suppliers of the component parts comprising the piques and the corresponding manufacturers of those goods. After all of the components were assembled, the anticipated cost per shirt equaled Two Dollars and Ninety-Five cents ($2.95) per shirt plus an additional Eighty-nine cents ($0.89) for the embroidery, for a total of Three Dollars and Eighty-Four cents ($3.84).

Several weeks later, Defendant ultimately received orders from the department stores (specifically J.C. Penney's and Goody's) for pique golf shirts; however, the orders did not conform to the goods that Defendant ordered with Plaintiff. Defendant subsequently canceled this order for three (3) stated reasons, to-wit: 1) quality problems, specifically shrinkage; 2) embroidery costs were too high; and 3) mismatch of collar with body.

For the foregoing reasons, the defendant chose not to follow through on the purchase of the goods in question because they were of an inferior quality and did not meet the Defendant's in-house standards.

Therefore, the Court finds that Plaintiff is not entitled to any commission by virtue of his involvement in procuring the Haiti Purchase Order because the Defendant ultimately rejected the goods and derived no benefit from the transaction. The Court finds Defendant's testimony credible that it would have paid Plaintiff a commission had the sale been consummated.

4. ROOCHI TRANSACTION

The Roochi transaction involved the sourcing of pique golf shirts. The factual issue in the Roochi transaction concerns whether Plaintiff is entitled to a one percent (1%) or five percent (5%) commission. The Court finds that during the same telephone call between Plaintiff and Mr. Prisco referenced above, wherein Mr. Prisco asked Plaintiff to source T-shirts for the Atlantika transaction in exchange for a five percent (5%) commission, Mr. Prisco told Plaintiff that he would pay him five percent (5%) of the gross total purchase price for all the pique golf shirts that Plaintiff could find that were under Three Dollars ($3.00). If Plaintiff found the goods within those parameters Defendant would buy them and pay Plaintiff the agreed commission. The Court finds that Plaintiff accepted Defendant's offer and with the above conditions in mind, he attended the MAGIC Show.

Defendant executed a purchase order in favor of Roochi for Seventy-Seven Thousand Three Hundred Ninety Dollars and Fifty cents ($77,390.50), which was accepted by Roochi. The Court finds that Plaintiff fully performed under his brokerage agreement with Defendant, and was entitled to a five percent (5%) commission equaling Three Thousand Eight Hundred and Sixty-Nine Dollars and Fifty-Two cents ($3,869.52). Mr. Prisco testified that Plaintiff was only entitled to a one percent (1%) commission based solely on the fact that he found a check in his records, which only equaled one percent (1%) due to the fact that he could not remember his exact arrangement with Plaintiff. The Court finds Mr. Prisco's testimony not persuasive as the evidence showed that Plaintiff turned down a three percent (3%) commission, offered by Roochi, (as corroborated by Neeraj "Mickey" Sachdeva in his deposition) because Plaintiff had already entered into the agreement with Defendant to receive a five percent (5%) commission. Despite Plaintiff's agreement with Defendant to receive a five percent (5%) commission, Plaintiff was only paid Seven Hundred and Seventy-Three Dollars and Ninety cents ($773.90), which represented one percent (1%), not the agreed upon five percent (5%). The Court finds that by a preponderance of the evidence that Plaintiff was entitled to a five percent (5%) commission but since Plaintiff had already received a one percent (1%) commission, Plaintiff is entitled to Three Thousand Ninety-Five Dollars and Forty cents ($3,095.40), which represents the remaining four percent

(4%) that he is owed pursuant to his agreement with Defendant for his work on this transaction that Defendant had breached.

C. EMPLOYMENT AGREEMENT OR IN THE ALTERNATIVE QUANTUM MERUIT AND UNJUST ENRICHMENT

As a result of the Plaintiff's skill and knowledge, the Defendant, , being satisfied with Plaintiff's performance, attempted to enter into an employment relationship with Plaintiff to source goods for it on a full time, exclusive basis. By accepting Defendant's offer of purported employment, Plaintiff forbore an employment opportunity with Branco Zunjic and also gave up representing Plaintiff's existing customers, because he expected substantial compensation from Defendant on a full-time, permanent basis. This purported employment arrangement was discussed in several oral conversations and e-mails in September 2002, and the parties' attempted to memorialize this arrangement in two (2) e-mails on September 24, 2002. See Exs. 16-17. Despite the party's attempts, the Court finds that many salient terms of the employment arrangement including, but not limited to, the basis upon which the bonus was to be structured, the term of employment, and Plaintiff's status, i.e., whether Plaintiff was an employee or a per diem independent contractor were never agreed upon and consequently since there was no meeting of the minds, no valid and enforceable employment contract was created. However, the Court does find that Plaintiff is entitled to compensation under the theories of quasi contract, quantum meruit, and unjust enrichment as more fully described below.

1. EMPLOYMENT ARRANGEMENT

The terms of the purported employment arrangement, according to Plaintiff, included that:

(1) Plaintiff would receive a base salary of One Hundred and Thirty Thousand Dollars ($130,000) per year;

(2) Plaintiff would move from Georgia to New Jersey and Defendant would pay for Plaintiff's moving expenses;

(3) Upon moving to New Jersey, Defendant would pay for Plaintiff's apartment;

(4) Since Defendant required Plaintiff to move to New Jersey, Defendant would pay for Plaintiff's flights to Georgia every other weekend to visit his son;

(5) As a condition of employment, Plaintiff would be required to be exclusive to Defendant and therefore cease all other sources of employment, including the representation of other manufacturers and distributors once he started working for Defendant;

(6) Plaintiff would be entitled to a bonus of up to One Hundred and Twenty Thousand Dollars ($120,000) per year, which would represent approximately one-half of Plaintiff's total compensation;

(7) The term of employment would be to last, "as long as Plaintiff provided value to Defendant and made Defendant money" and that as long as Plaintiff complied with this provision, no other grounds for termination existed; and

(8) The previous sourcing agreements, including the Atlantika, Haiti, and Roochi transactions (Phase II) would remain intact, meaning that all commissions earned during the pre-employment period would be paid.

The Court finds that as a result of the purported employment arrangement and with Defendant's full knowledge, Plaintiff turned down other employment opportunities and moved from Georgia to New Jersey. Furthermore, Plaintiff, with Defendant's full knowledge ceased his current employment in order to devote his time exclusively and solely to Defendant introduced conflicting evidence that there was never a meeting of the minds to create a formal employment contract. Defendant's evidence included, but was not limited to, the following:

(1) Defendant contended that Plaintiff was an independent contractor and not an employee (which would effect employee benefits to which Plaintiff may or may not be entitled)

(2) Defendant contended that Plaintiff was being paid on a per diem basis (not as a salary employee) at the rate of Two Thousand Five Hundred Dollars ($2,500) a week;

(3) Plaintiff did not have to move to New Jersey and the parties mutually agreed that Plaintiff would return to Atlanta;

(4) Plaintiff did not have to be exclusive to Defendant and he could represent other manufacturers and distributors;

(5) The bonus never had definite terms with respect to how it was to be paid, structured, or funded;

(6) The previous agreements, including the Atlantika, Haiti, and Roochi transactions would be incorporated into Plaintiff's bonus (as opposed to remaining separate); and

(7) Plaintiff was not offered permanent employment and could be terminated for any ground including, but not limited to, if Plaintiff did not get along with Defendant's employees.

After considering the conflicting evidence on whether a formal employment contract was created and based upon the preponderance of the evidence the Court finds that the parties had widely divergent understandings and expectations under the purported employment arrangement and thus the Court finds that there was no meeting of the minds to establish a valid and enforceable contract of employment and consequently the Court further finds that no contract for employment existed.

2. QUASI CONTRACT, QUANTUM MERUIT, AND UNJUST ENRICHMENT

Plaintiff has shown by a preponderance of the evidence and the Court finds that Plaintiff had a reasonable expectation of payment for his services rendered to Defendant based upon Defendant's implied promise to pay Plaintiff for such, which services were readily accepted, and from which services Defendant benefitted immensely. As found by the Court, Defendant hired Plaintiff due to Plaintiff's vast knowledge of the industry on the whole and specifically due to Plaintiff's significant and numerous contacts within the apparel industry that would benefit Defendant. During the course of Plaintiff's employment with Defendant, Plaintiff was able to provide a significant amount of value and other substantial benefits both in the present and in the future to Defendant, which the Court finds, under theories of quasi contract, quantum meruit, and unjust enrichment, made or saved Defendant substantial sums of money and provided

other material and significant value including, but not limited to, competitive advantages, competitive opportunities, and bargaining opportunities. Additionally, Plaintiff had arranged various, substantial cost savings from which Defendant benefitted during Plaintiff's employment and post-termination. For example, on the first day Plaintiff was employed he engineered a discount that benefitted Defendant by saving Defendant Fifty-Four Thousand Dollars ($54,000). In fact, the preponderance of the evidence shows that Defendant can reasonably expect to receive these substantial benefits and savings into the future. Specifically, Plaintiff has obtained discounts and introduced Defendant to new suppliers, lines of goods from existing suppliers, aided Defendant with costing other sources, and educated Defendant as to certain other advantageous business methods that have provided Defendant substantial benefit and will provide Defendant with substantial future benefit. The Court finds that Defendant has presently received significant direct benefits, value, and savings over and above any compensation paid to Plaintiff as a direct result of Plaintiff's efforts. The evidence further shows and the Court finds that Plaintiff relied upon his twenty-five (25) years of apparel experience and his contacts within the apparel business to provide value and save Defendant monies from the following suppliers:

1) Alstyle - $371,597;

2) Shavin Textiles - $41,781;

3) Inlink - $86,436;

4) Ameritech - $48,900;

5) Network Sourcing - $46,976;

6) The Greene Company - $377,520; and

7) Casual Knit - $19,424.

The total of all of these savings obtained by Defendant, just during the period of Plaintiff's employment, as a direct result of Plaintiff's efforts equals Nine Hundred and Ninety-Two Thousand Six Hundred and Thirty-Four Dollars ($992,634). The Court further finds that Defendant may avail itself of Plaintiff's contacts and other benefits conferred so as to realize additional cost savings and other competitive advantages in the future.

The Court finds that Plaintiff's testimony with respect to his analysis of the above savings was compelling, very credible, and persuasive. The Court further finds that Defendant's attempt to contradict Plaintiff's thorough analysis through Mr. Prisco and Mr. Ginsberg was unsuccessful. Mr. Prisco admitted during cross examination that he had not done any analysis to determine what savings, if any, may have been attributable to Plaintiff. Additionally the Court finds, Mr. Ginsberg's testimony to have little or no weight due to the fact that his testimony may have been unduly influenced by Mr. Prisco, who had violated the rule of sequestration when he had discussions with Mr. Ginsberg during the course of the trial, about the case, before Mr. Ginsberg was called to testify. Regardless of the

violation of the rule of sequestration, the Court further finds that Mr. Ginsberg never persuasively challenged the veracity of the savings put forth by Plaintiff and Mr. Ginsberg further acknowledged that he was not in a position to comment on the deals that Plaintiff worked on, due to that fact that he had no personal knowledge of those deals as he was not directly involved with them at all times relevant. Additionally, despite Mr. Ginsberg testifying that none of Plaintiff's sources, identified above, were ever used again, this Court finds his testimony not credible or persuasive in that the testimony of Mr. Prisco and the relevant exhibits, all of which were business records of Defendant, directly refute Mr. Ginsberg's statements. Specifically, Mr. Prisco testified that he had done additional deals with some of Plaintiff's sources, including Inlink and the Greene Company, which demonstrate that Defendant entered into deals with Plaintiff's contacts post Plaintiff's termination. Furthermore, the exhibits demonstrate that post termination deals were entered into by Defendant with Plaintiff's sources including certain Alstyle lines and Casual Knits. Mr. Ginsberg's testimony further lacked credibility and was biased as evidenced by his testimony that he, as an officer and employee of Defendant, had a vested interest in the financial outcome of the case and he specifically testified that he "wanted Defendant to win". Defendant had only one other witness, Bob Gordon, the art director for Defendant, who offered no testimony bearing on the issues of quasi contract, quantum meruit, and unjust enrichment.

The Court finds that Plaintiff is entitled to be compensated in the principal amount of Nine Hundred and Ninety-Two Thousand Six Hundred and Thirty-Four Dollars ($992,634) under theories of quasi contract, quantum meruit, and unjust enrichment, the same representing some of the value of the benefit Plaintiff conferred upon and accepted by Defendant over and above any compensation received by Plaintiff pursuant to Defendant's implied promise to pay. Said sum represents immense savings and benefits Defendant obtained from Plaintiff's services, contacts, and efforts. Furthermore the Court finds that Defendant never offered any probative, credible, or persuasive evidence with respect to the mitigation of this amount in any manner. Defendant's sole efforts with respect to mitigation of damages, related entirely to the purported employment contract and since the Court finds no contract to exist, this mitigation attempt is moot and not relevant to Plaintiff's recovery under quasi contract, quantum meruit, and unjust enrichment. Since Defendant has failed to offer any evidence on mitigation under quasi contract, quantum meruit, and unjust enrichment, Defendant has, as a matter of law, waived mitigation.

D. ATTORNEY'S FEES DUE TO DEFENDANT'S BAD FAITH, STUBBORNLY LITIGIOUS BEHAVIOR, OR HAVING CAUSED PLAINTIFF UNNECESSARY TROUBLE AND EXPENSE

The Court finds that Defendant has acted in bad faith, was stubbornly litigious, and caused Plaintiff unnecessary trouble and expense. Based on the evidence presented in court, the Court finds that Defendant retained the services

of Plaintiff in order to access his contacts within the clothing industry and then after doing so, Defendant discharged Plaintiff without fully compensating him in return. Specifically, immediately upon employment, Defendant asked Plaintiff for a list of all of his contacts under the pretext that Defendant wanted to create a central database of all contacts; however, and despite direct testimony to the contrary, Mr. Prisco testified that Plaintiff's contacts were never used post termination. The facts speak otherwise. As further evidence of Defendant's bad faith, stubbornly litigious behavior, and causing Plaintiff unnecessary trouble and expense, the Court finds that Defendant had a pattern and practice of hiring people to extract information about their contacts and sources based upon promises of employment only to terminate the employees shortly after they divulge this critical information. Defendant had asked two (2) other former employees, David Price and Tammy Rosen, for all of their contacts when they were each hired, and then shortly after divulging their contacts within the industry they were terminated. As additional evidence of Defendant's bad faith, Defendant unilaterally attempted to amend, to Defendant's benefit but to Plaintiff's detriment, the terms of the purported employment contract that Plaintiff believed was in effect as evidenced by Defendant sending Plaintiff an e-mail changing Plaintiff's pay structure by eliminating the base salary. (Ex. 8). As further evidence of Defendant's bad faith, despite having an agreement to pay

Plaintiff a five percent (5%) commission on the Roochi transaction, Defendant only paid Plaintiff a one percent (1%) commission.

Defendant has been stubbornly litigious and has caused Plaintiff unnecessary trouble and expense by filing a motion to transfer the case on the eve of trial after having acknowledged in the pre-trial order that venue was proper and that there were no pending motions. Additionally, while Plaintiff was acting pro se, Plaintiff had to file motions to compel the production of various documents and other information.

Therefore the Court finds that Defendant has acted in bad faith, was stubbornly litigious, and caused Plaintiff unnecessary trouble and expense, consequently an award of attorney's fees to Plaintiff is appropriate. The Court finds that Plaintiff hired the law firm of Kaufman, Miller & Sivertsen pursuant to a contingency fee arrangement of forty percent (40%). Further, the Court heard probative evidence from Plaintiff's counsel as to the actual time and charges expended as attorney's fees in this case and finds the time, rate, and scope of work commensurate with attorneys of similar experience in handling matters of this nature in this jurisdiction. Defendant never challenged the actual attorney's fees of Plaintiff in any respect whatsoever, except to say that it thought the amount was high but left the amount of the award totally within the absolute discretion of the court. The Court, in exercising its discretion upon consideration of the case, finds that the appropriate measure of attorney's fees is the actual

attorney's fees incurred rather than awarding attorney's fees pursuant to the contingency fee agreement. The Court finds that the actual attorney's fees is reasonably necessary and appropriate under these circumstances and further finds that Plaintiff has made an accurate and specific showing of same as further evidenced by the introduction of Exhibit 159, Plaintiff's summary of attorney's fees, which was not challenged by Defendant. The Court finds that an award of attorney's fees and expenses of litigation to Plaintiff of One Hundred and Ten Thousand Fifty-Seven Dollars and Fifty-Eight cents ($110,057.58) is reasonable under these circumstances and awards such amount to Plaintiff, due to the bad faith and stubbornly litigious behavior of Defendant, which caused Plaintiff necessary trouble and expense.

II. CONCLUSIONS OF LAW

This case involves issues of contract regarding the commission deals and quasi contract, quantum meruit, and unjust enrichment with respect to Plaintiff's subsequent employment arrangement with Defendant. Consequently, some of the issues stem from a relationship between Plaintiff and Defendant that pre-dated a formal employment relationship – the commission deals; and some stem from the subsequently formed employment relationship. Plaintiff also seeks to recover his attorney's fees and expenses of litigation.

A. COMMISSION DEALS

Plaintiff has claimed a breach of contract under each of the following transactions: 1) Atlantika; 2) Roochi; and 3) Haiti. The Court concludes that Plaintiff and Defendant entered into an agreement wherein he was hired as a broker in each transaction and upon sourcing goods acceptable to Defendant; Plaintiff was to receive a five percent (5%) commission based on the total cost of the goods sourced. Pursuant to O.C.G.A. § 10-6-32 "[t]he broker's commissions are earned when, during the agency, he finds a purchaser who is ready, able, and willing to buy and who actually offers to buy on the terms stipulated by the owner." See also Hope v. DeForest Realty, Inc., 144 Ga. App. 269, 270, 241 S.E.2d 49, 50 (1977).

1. Atlantika Transaction

The Court concludes that in this transaction, Plaintiff, in his capacity as a broker, pursuant to a five percent (5%) brokerage agreement with Defendant and during the course of his agency, found a ready, willing, and able seller acceptable to Defendant in Atlantika. Plaintiff was able to find Atlantika (the seller) who was able to provide goods that satisfied all of Defendant's stipulated terms and who accepted the purchase order. (Ex. 55). The seller, Atlantika, was ready, able, and willing to sell 203,057.34 dozen tee shirts for $2,987,898.90 to Defendant. In fact, Defendant issued a purchase order in favor of Atlantika for the agreed goods and Atlantika subsequently accepted the purchase order.

(Exs. 54;55). Although the Atlantika Purchase Order allowed for Defendant to inspect the goods, the Court concludes that Defendant never exercised this right but later rejected the goods despite the Plaintiff's contention that Defendant had waived his right of inspection and thus created an impossibility of performance. Further by Defendant canceling the Atlantika Purchase Order without cause, it created an impossibility of performance. "'[I]mpossibility of performance of a contract covenant personal to the promissor does not excuse nonperformance.'" Scott v. Hussmann Refrigeration, Inc., 183 Ga. App. 39, 40, 357 S.E.2d 860, 861 (1987) (quoting Phillips v. Marcin, 162 that Ga. App. 202, 204, 290 S.E.2d 546, 548 (1982)) (alteration in original). In this case, Defendant terminated the Atlantika Purchase Order, claiming, among other things that Atlantika neither owned nor possessed the goods in question.

The fact that the Defendant attempted to purchase the same goods from South Carolina Tees is irrelevant to this analysis since the Plaintiff sought payment of a commission based on the Atlantika Purchase Order. Therefore, since Defendant never took possession of the goods under the purchase orders, the Court concludes that Plaintiff is not entitled to his five percent (5%) commission equaling One Hundred and Forty-Nine Thousand Three Hundred and Ninety-Four Dollars and Ninety-Four cents ($149,394.94).

2. Haiti Transaction

In this transaction, Plaintiff, in his capacity as a broker, pursuant to a five

percent (5%) commission brokerage agreement with Defendant and during the course of his agency, found suppliers necessary to manufacture ten thousand (10,000) dozen pique golf shirts. Plaintiff was able to find the necessary suppliers who were able to provide goods that satisfied all of Defendant's stipulated terms. The suppliers were ready, able, and willing to produce ten thousand (10,000) dozen pique golf shirts for a cost of Three Dollars and Eighty-Four cents ($3.84) per shirt to Defendant. Defendant subsequently cancelled the order because the fifteen hundred (1,500) dozen shirts did not meet the Defendant's specifications with respect to quality, cost, etc. Again, since Defendant never took possession of all of the goods, the Court concludes that Plaintiff is not entitled to his five percent (5%) commission equaling Twenty-Three Thousand Forty Dollars ($23,040).

3. Roochi Transaction

The Court concludes that in this transaction, Plaintiff, in his capacity as a broker, pursuant to a five percent (5%) commission brokerage agreement with Defendant and during the course of his agency, found a ready, willing, and able seller acceptable to Defendant in Roochi. Roochi was able to provide goods that satisfied all of Defendant's stipulated terms. Roochi sold to Defendant pique golf shirts totaling Seventy-Seven Thousand Three Hundred and Ninety Dollars and Fifty cents ($77,390.50) to Defendant. At that moment, Plaintiff had satisfied all of the requirements under O.C.G.A. § 10-6-32 and was entitled to his five percent

(5%) commission equaling Three Thousand Eight Hundred and Sixty-Nine Dollars and Fifty-Two cents ($3,869.52). Plaintiff was paid Seven Hundred and Seventy-Three Dollars and Ninety cents ($773.90), which represents one percent (1%); however, he is entitled to an additional four percent (4%) equaling Three Thousand Ninety-Five Dollars and Sixty-Three cents ($3,095.63). Plaintiff has never waived his claim for the additional percentage. The Court concludes that Defendant breached the Roochi brokerage agreement and the Court finds for Plaintiff and against Defendant on this count and grants Plaintiff a judgment in the principal amount of Three Thousand Ninety-Five Dollars and Sixty-Three cents ($3,095.63).

B. **EMPLOYMENT ARRANGEMENT**

This Court finds that Plaintiff contends that he and Defendant entered into a bona fide employment agreement, the terms of which were as follows:

(1) Base salary of $130,000;

(2) An expectation of an annual bonus up to $120,000.00;

(3) Plaintiff must move to New Jersey;

(4) Defendant would pay for an apartment;

(5) Defendant would pay for flights every other weekend to Atlanta

(6) Plaintiff would be exclusive for Defendant; and

(7) The term of the Employment Agreement was for "as long as Plaintiff provided value to Defendant and made Defendant

money" and that as long as Plaintiff complied with this provision, no other grounds for termination existed.

The Court further finds that Defendant contends that Plaintiff was not an employee and therefore there was no contract between the parties. Defendant's evidence included but was not limited to the following:

(1) Defendant contended that Plaintiff was an independent contractor;

(2) Defendant contended that Plaintiff was being paid on a per diem basis (not as a salary employee) at the rate of Two Thousand Five Hundred Dollars ($2,500) a week;

(3) Plaintiff did not have to move to New Jersey and that the parties mutually agreed that Plaintiff would return to Atlanta;

(4) Plaintiff did not have to be exclusive to Defendant and he could represent other manufacturers and distributors;

(5) The bonus never had definite terms with respect to how it was to be paid, structured, or funded;

(6) The previous agreements, including Altantika, Haiti, and Roochi transactions would be incorporated into Plaintiff's bonus (as opposed to remaining separate); and

(7) Plaintiff did not have an offer for permanent employment and could be terminated for any ground including, but not limited to, if Plaintiff did not get along with Defendant's employees.

The Court concludes that there was no meeting of the minds and there is no enforceable employment contract of any kind established for four (4) main reasons. First, the Court concludes that Plaintiff contended he was an employee and Defendant contended Plaintiff was an independent contractor. Second, the

Court concludes that the alleged contract was indefinite as to its duration, as the Court concludes that neither party mentioned anything about a "job forever" in the two (2) main e-mails concerning the employment. See Exs. 16-17. The Court would assume that if such a term were significant term would have appeared in either those writings or another writing; thus any mention of that term by Mr. Prisco is deemed to be "puffing". Third, the Court concludes that the bonus was vague as to when and how the bonus was to be structured. Fourth, the Court concludes that the parties disagreed on the grounds of termination. Consequently, the Court concludes that the purported employment contract was too vague and indefinite to be enforced, did not constitute a meeting of the minds, and therefore the Court concludes that no formal contract of employment existed.

Alternatively, under the theory of quasi contract, quantum meruit, and unjust enrichment the Court concludes that Plaintiff conferred substantial economic benefits to Defendant for which Plaintiff expected to be compensated, amounting to an implied promise to pay at the time he conferred the economic and other substantial benefits. The conferred economic benefits consisted of value Defendant has already received and value Defendant will receive in the future as a direct result of Plaintiff's efforts on Defendant's behalf. The economic and other substantial benefits include, but are not limited to, money Defendant saved due to Plaintiff's contacts, Plaintiff's educating Defendant on

how to do cost analysis, and Plaintiff's exposing Defendant to his substantial business contacts and sources.

" 'The theory of unjust enrichment applies when as a matter of fact there is no legal contract . . . , but where the party sought to be charged has been conferred a benefit by the party contending an unjust enrichment which the benefitted party equitably **ought to return** or compensate for.' " Georgia Tile Distribs., Inc. v. Zumpano Enter., Inc., 205 Ga. App. 487, 491, 422 S.E.2d 906, 908 (1992) (quoting Regional Pacesetters v. Halpern Enter., 165 Ga. App. 777, 782, 300 S.E.2d 180, 186 (1983)) (emphasis added). "Because an implied contract is not necessary for unjust enrichment, a showing of an expectation of compensation is not required." Yoh v. Daniel, 230 Ga. App. 640, 643, 497 S.E.2d 392, 394-95 (1998).

> Under the theory of liability for quantum meruit the essential elements are: (1) the provider performed as agent services valuable to the recipient; (2) either at the request of the recipient or knowingly accepted by the recipient; (3) the recipient's receipt of which without compensating the provider would be unjust; and (4) provider's expectation of compensation at the time of rendition of services.

Hollifield v. Monte Vista Biblical Gardens, Inc., 251 Ga. App. 124, 128-29, 553 S.E.2d 662, 669 (2001) (citing O.C.G.A. § 9-2-7; Artrac Corp. v. Austin Kelley Adver., Inc., 197 Ga. App. 772, 777, 399 S.E.2d 529, 533-34 (1990)). "The measure of damages under quantum meruit or unjust enrichment is based upon

the benefit conferred upon the defendant and not upon the cost to render the service or cost of the goods." Zampatti v. Tradebank Int'l. Franchising Corp., 235 Ga. App. 333, 340, 508 S.E.2d 750, 757 (1998) (external cits. omitted) (emphasis added). "The reasonable value which the provider is entitled to recover in quantum meruit is not the value of the labor but the value of the benefit resulting from such labor to the recipient. . . ." Hollifield v. Monte Vista Biblical Gardens, Inc., 251 Ga. App. 124, 130, 553 S.E.2d 662, 669 (2001) (citing Griner v. Foskey, 158 Ga. App. 769, 771, 282 S.E.2d 150, 153 (1981); City of Gainesville v. Edwards, 112 Ga. App. 672, 675, 145 S.E.2d 715, 718 (1965)). "Such duty to pay the value for the benefit in unjust enrichment is analogous to quantum meruit in that the duty to pay arises out of the receipt of the benefit accepted by the plaintiff from the defendant." Cochran v. Ogletree, 244 Ga. App. 537, 539, 536 S.E.2d 194, 197 (2000). Pursuant to O.C.G.A. § 9-2-7, "[o]rdinarily, when one renders services or transfers property which is valuable to another, which the latter accepts, a promise is implied to pay the reasonable value thereof." "The value of services from the perspective of the recipient is uniquely that of opinion and is for jury determination as to value, if any." Watson v. Sierra Contracting Corp., 226 Ga. App. 21, 28, 485 S.E.2d 563, 570 (1997) (citing Williams v. Claussen-Lawrence Constr. Co., 120 Ga. App. 190, 192, 169 S.E.2d 692, 694 (1969) ("Value in its essence is exclusively a matter of opinion.")) (emphasis added). Based solely upon the benefit provided

by Plaintiff to Defendant prior to trial (despite the fact that the Court recognizes that substantial benefits will be provided to Defendant in the future as a direct result of Plaintiff's actions), the Court concludes that the reasonable value of the services provided by Plaintiff and accepted by Defendant over and above any compensation paid to Plaintiff as a direct result of Plaintiff's efforts is Nine Hundred and Ninety-Two Thousand Six Hundred and Thirty-Four Dollars ($992,634). The Court concludes that Plaintiff is entitled to be compensated under theories of quasi contract, quantum meruit, and unjust enrichment in the principal amount of Nine Hundred and Ninety-Two Thousand Six Hundred and Thirty-Four Dollars ($992,634). Defendant failed to provide any probative evidence on the issue of mitigation and as a matter of law Defendant has the burden of proof to provide such evidence and has failed to meet such burden having waived same.

C. ATTORNEY'S FEES

Additionally the Court finds defendant acted in bad faith was stubbornly litigious and has caused Plaintiff unnecessary trouble and expense and makes an award of attorney's fees. O.C.G.A § 13-6-11 allows attorney's fees in cases where the defending party has "acted in bad faith, has been stubbornly litigious, or has caused the plaintiff unnecessary trouble and expense." The Court of Appeals has interpreted this to mean that it is only necessary that Plaintiff show

any one of these three (3) conditions exist. See Altamaha Convalescent Center, Inc. v. Godwin, 137 Ga. App. 394, 395, 224 S.E.2d 76, 78 (1976).

The Court concludes that Plaintiff is entitled to recover his attorney's fees and expenses of litigation in this case pursuant to O.C.G.A. § 13-6-11. The Court has discretion to award attorney's fees based upon the hourly time expended by the attorneys in the preparation and trial of the case if it is found to be reasonable and customary. The Court finds that Defendant has waived any objection to the total attorney's fees awarded to Plaintiff and based on the facts, circumstances, and holdings in this case, it is reasonable and appropriate to award attorney's fees together with expenses that have been incurred by Plaintiff in the amount of One Hundred and Ten Thousand Fifty-Seven Dollars and Fifty-Eight cents ($110,057.58).

In summary, this Court grants a judgment in favor of Plaintiff and against Defendant upon the following:

1) Roochi
   $3,095.63

2) Quantum Meruit and Unjust Enrichment
   $992,634.00

3) Attorney's Fees and Costs of Litigation
   $110,057.58

for a total award of One Million One Hundred and Five Thousand Seven Hundred and Eighty-Seven Dollars and Twenty-One cents ($1,105,787.21).

IT IS SO ORDERED THIS 23rd day of March 2004

Clarence Cooper

CLARENCE COOPER
UNITED STATES DISTRICT COURT