

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

DOUGLAS KLIGMAN and : CIVIL ACTION  
ALBERT M. KLIGMAN :  
 :  
v. :  
 :  
ADVANCED POLYMER SYSTEMS, INC. : NO. 00-580

M E M O R A N D U M

WALDMAN, J.

October 2, 2001

I. Introduction

This case arises from a licensing dispute involving a chemical skin peel known as Beta Hydroxy invented by plaintiffs. They assert raise six state law claims seeking damages and equitable remedies against Advanced Polymer Systems, Inc. ("APS").<sup>1</sup>

The first two claims are predicated on plaintiffs' allegation that they had an implied partnership relationship with defendant. The first claim is for judicial dissolution of the partnership on the express will of the parties pursuant to 15 Pa. C.S.A. § 8359 (2001). The second claim is for dissolution on the basis of defendant's alleged breach of the partnership agreement under 15 Pa. C.S.A. § 8354(a)(4) (2001). The third claim is for breach of fiduciary duty. The fourth claim is for breach of a contract implied-in-law which plaintiffs ask the court to find.

---

<sup>1</sup>Plaintiffs' initial complaint included a seventh claim for breach of defendant's duty to negotiate in good faith which they have elected not to pursue.

The fifth claim is for relief under a theory of promissory estoppel based upon plaintiffs' asserted reliance on promises allegedly made by defendant. The sixth claim is for invasion of privacy resulting from use of plaintiffs' names in connection with the marketing of Beta Hydroxy.

Plaintiffs seek a decree dissolving the purported partnership between the parties and requiring defendants to relinquish all rights to confidential information provided by plaintiffs in connection with the production of Beta Hydroxy. They also seek to enjoin defendant from using the names, likenesses or endorsements of plaintiffs and from permitting any putative sublicensee acting in concert with defendant from doing so.

In addition to monetary damages, plaintiffs seek an accounting of Beta Hydroxy sales by defendant so that plaintiffs can be paid a "reasonable amount" based upon defendant's sales. They also ask for a minimum return for each year that defendant or any sublicensee has sold Beta Hydroxy and a reasonable share of the value of the purported partnership after its remaining liabilities are resolved. Plaintiffs also seek reimbursement for costs incurred in obtaining international patents for Beta Hydroxy based on their promissory estoppel theory.

The plaintiffs are respectively citizens of Pennsylvania and New Jersey. The defendant is a corporation

organized under the laws of Delaware, with its principal place of business in California. The amount in controversy exceeds \$75,000. The court has subject matter jurisdiction pursuant to 28 U.S.C. § 1332.

APS has moved for summary judgment on each of plaintiffs' claims.

## II. Legal Standard

In considering a motion for summary judgment, the court must determine whether "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247 (1986); Arnold Pontiac-GMC, Inc. v. General Motors Corp., 786 F.2d 564, 568 (3d Cir. 1986). Only facts that may affect the outcome of a case are "material." Anderson, 477 U.S. at 248. All reasonable inferences from the record are drawn in favor of the non-movant. See id. at 256.

Although the movant has the initial burden of demonstrating the absence of genuine issues of material fact, the non-movant must then establish the existence of each element on which it bears the burden of proof. See J.F. Feeser, Inc. v. Serv-A-Portion, Inc., 909 F.2d 1524, 1531 (3d Cir. 1990) (citing Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986)), cert. denied, 499

U.S. 921 (1991). A plaintiff cannot avert summary judgment with speculation or by resting on the allegations in his pleadings, but rather must present competent evidence from which a jury could reasonably find in his favor. Anderson, 479 U.S. at 248; Ridgewood Bd. Of Educ. v. N.E. for M.E., 172 F.3d 238, 252 (3d Cir. 1999); Williams v. Borough of West Chester, 891 F.2d 458, 460 (3d Cir. 1989); Woods v. Bentsen, 889 F. Supp. 179, 184 (E.D. Pa. 1995)

### **III. Facts**

From the competent evidence of record, as uncontroverted or otherwise taken in the light most favorable to plaintiffs, the pertinent facts are as follow.

Plaintiffs Albert M. Kligman and Douglas E. Kligman are father and son. They are dermatologists and co-inventors of a salicylic skin peel known as Beta Hydroxy.<sup>2</sup> Albert Kligman is a practicing dermatologist, professor of dermatology at the University of Pennsylvania School of Medicine and president of S.K.I.N., Inc. ("S.K.I.N."), a company he founded in 1980. Douglas Kligman is a part-time employee at S.K.I.N. and a dermatologist with a private practice. Douglas Kligman conducted most of the research and development related to Beta Hydroxy while Albert Kligman primarily contributed financial support and

---

<sup>2</sup>Skin peeling is a method of employing acidic molecules to the outer layer of the skin in order to treat cosmetic problems such as aging, sun damage, or precancerous growths.

consulting services. Douglas Kligman completed the research and development of Beta Hydroxy in December 1995.

In June 1995, Albert Kligman began meeting with executives at APS to discuss methods for licensing and marketing various formulations. Albert Kligman was introduced to APS by Les Riley, a long-standing business and social acquaintance.<sup>3</sup> Between August and November 1995, Albert Kligman and Jack Meakem, then Chairman, President and CEO of APS, exchanged drafts of a letter agreement to develop and promote skin care products (the "Product Development Agreement"). The final version of the Product Development Agreement is dated November 8, 1995. It provides that:

You, Dr. Albert M. Kligman ("AMK"), will license Advanced Polymer Systems, Inc. ("APS") to the exclusive worldwide use of your name in connection with skin care products formulated either by you or by or on behalf of APS (the "Products"). The specific Products to be covered by this agreement shall be approved in advance and in writing by APS. It would be our intention to use your name on actual Products sold only outside Germany, France and the United States and use your name for promotional purposes in Germany, France, and the U.S. The use of your name in any promotional material prepared for use by or on behalf of APS will be subject to your reasonable approval.

The agreement also contained a compensation clause which provided for a payment of 3% of net sales by APS of all products

---

<sup>3</sup>The relationship between Albert Kligman and Les Riley dates back to the mid-1970's when Albert Kligman was issued a patent for Retin-A. He licensed the product to Johnson and Johnson where Les Riley was then a marketing director. In 1995, Mr. Riley joined APS.

formulated by Albert Kligman conditioned on his promotion of the products at the request of APS. The agreement also granted Albert Kligman options for 30,000 shares of APS common stock.

The compensation clause concluded with the following limitation:

Notwithstanding the foregoing, if APS should license rights to any Product described herein, the payments to be made to you will not exceed 50% of the net income received by APS from such third party with respect to such license.

The agreement also contained the following clause whereby Dr. Kligman agreed to promote the products covered by the agreement:

You will make yourself available at reasonable times and places, as we mutually agree, to actively promote the Products in the United States as well as in Europe and Asia. It is understood that at no time will you take action that may be reasonably considered to be in derogation of any APS Product. APS will pay all of your reasonable out-of-pocket expenses, (air travel being business class) incurred on behalf of APS in such promotion, provided that you get the approval of APS before incurring such promotional expenses. Your wife, Dr. Lorraine Kligman, may also travel with you at the expense of APS in such approved promotions.

During the course of negotiations, Albert Kligman paid little attention to the Product Development Agreement and only glanced at the final draft before signing it. His wife, Lorraine Kligman, and his attorney, Mark Kessler, read the agreement more closely and made suggested changes in the various drafts.<sup>4</sup>

---

<sup>4</sup>Albert Kligman testified that he was aware the agreement he was signing was legally binding and was satisfied with its contents when he signed it. In any event, the failure of a literate adult to read a contract or a decision by him to sign in haste without understanding the terms does not alter the enforceability of the contract. See Tose v. First Pennsylvania Bank, N.A., 648 F.2d 879, 900 (3d Cir. 1981); Simeone v. Simeone, 581 A.2d 162, 165 (Pa. 1990); Thrasher v. Rothrock, 105 A.2d 600, 604 (Pa. 1954).

While drafts of the Product Development Agreement were exchanged, Douglas Kligman continued developing Beta Hydroxy. In a September 11, 1995 letter to Les Riley, Albert Kligman included the following post-script bringing to Mr. Riley's attention the development of Beta Hydroxy:

Douglas Kligman has developed a salicylic acid peel for use by [dermatologists]. It beats glycolic acid by a mile. We also have a 2% salicylic acid cream for daily use by consumers. The uses are acne and photoaging.

In January 1996, Les Riley was invited to S.K.I.N. to meet with Albert and Douglas Kligman to discuss a potential business relationship related to the Beta Hydroxy peel. At a meeting at S.K.I.N. on February 12, 1996, the parties agreed that Albert and Douglas Kligman would amend the Beta Hydroxy patent application to include APS's patented Microsponge technology.<sup>5</sup> At the same meeting, the three parties signed a non-disclosure agreement regarding the use of the proprietary technology related to Beta Hydroxy. In anticipation of sharing of confidential information, the parties promised not to disclose such information to third parties. The first paragraph of the agreement summarized the parties' relationship at this stage as follows:

We have recently discussed the possibility of a cooperative business arrangement with your organization

---

<sup>5</sup>Microsponge is an adjuvant, which is a substance that may be added to an active substance to alter its consistency or delivery.

involving the skin treatment technology developed by Drs. Albert and Douglas Kligman.

When asked at his deposition whether "[a]t any time did you or Mr. Riley ever discuss the possibility of forming a partnership as opposed to just having a license agreement," Albert Kligman responded "no."

In June 1996, APS invited Albert Kligman to California to meet with APS representatives including Jack Meakem, Les Riley and various scientists and consultants to discuss potential products for commercialization under the Product Development Agreement. The first item on the agenda for the meeting was the salicylic acid skin peel. Douglas did not attend the meeting and no mention was made of his involvement in the development of the skin peel.

APS decided to move forward with commercializing Beta Hydroxy. On September 25, 1996, Mr. Riley came to S.K.I.N. where he met with Douglas Kligman and discussed the terms of a licensing agreement for Beta Hydroxy. As he was leaving later that day, Mr. Riley handed a letter agreement to Albert Kligman and advised him to consult with his attorney before signing it. Albert said that he did not need to do so and signed it on the spot. The agreement provides:

We should like to confirm our agreement that the Beta Hydroxy Peel Product developed by you is one of the Products covered by our letter agreement of November 8, 1995. As a result, Advanced Polymer Systems will have an exclusive license to the Beta Hydroxy Peel Product, subject to the diligence provision contained in paragraph 1 of the November 8, 1995 letter agreement and the obligation of Advanced

Polymer Systems to make royalty payments to you and your successors and assigns and estate as set forth in paragraph 8 of the November 8, 1995 letter agreement.

Albert Kligman did not inform Douglas Kligman that Albert had granted APS an exclusive license to Beta Hydroxy. Albert Kligman did not then realize that he had licensed Beta Hydroxy by signing this document.<sup>6</sup>

Over the course of the next year, APS entered into three exclusive sub-licensing agreements. On October 29, 1996, APS granted Medicis Pharmaceutical Corporation an exclusive license to sell the Beta Hydroxy peel in the dermatology field. Under the terms of the agreement, APS agreed to manufacture the Peel and supply it to Medicis. On July 2, 1997, APS entered into a licensing agreement with Sothys granting it an exclusive license to sell the product to health salons. On August 27, 1997, APS granted BioMedic an exclusive license to market the peel to plastic surgeons.

In the early months of 1997, the sub-licensees prepared to launch the product. Representatives of Medicis came to S.K.I.N. where Douglas Kligman performed demonstrations on the use of the peel for them. Douglas also assisted Pamela Doyles, the Medicis Vice President of Marketing and New Product Development, in producing training and marketing materials. Nevertheless, Douglas did not inquire about the licensing

---

<sup>6</sup>Albert Kligman indicated at his deposition that he believed APS had a worldwide license on Beta Hydroxy by virtue of the Product Development Agreement.

relationship between APS and Medicis until shortly before the launch of Beta Hydroxy in March of 1997.

On March 3, 1997, Douglas conducted a video interview with Medicis that he believed would be used as a teaching tool for dermatologists, explaining how to perform the peel.<sup>7</sup> Using before and after photographs of patients provided by Douglas, Medicis also created a promotional brochure. The brochure uses Douglas Kligman's name and includes quotes from him as well as data supplied by S.K.I.N. Douglas reviewed the documents, which were modified in accordance with his comments.<sup>8</sup> Although Douglas consented to the use of his name and quotes in the Medicis brochure, he objected at some point in 1998 to use of the quotes in pamphlets by BioGlen Pharma and BioMedic.<sup>9</sup> Plaintiffs have submitted brochures by Biomedic, Medicis and Sothys containing pictures and quotes of Albert and Douglas Kligman.

Although Albert had formally consented in the November 8, 1995 Agreement to the use of his name, he had a change of heart after speaking with some colleagues at Penn. On October 2, 1996, after signing the Licensing Agreement, Albert

---

<sup>7</sup>APS characterizes the video as "promotional." No party has introduced evidence as to how the video was actually used. Douglas raised no objections concerning the use of the video.

<sup>8</sup>On July 14, 1997, Douglas entered into a consulting agreement with Medicis.

<sup>9</sup>No party has identified precisely when Douglas learned of these pamphlets.

Kligman sent a letter to Les Riley addressing to the use of his name in connection with marketing Beta Hydroxy which reads:

I have discussed with my colleagues at Penn the appropriateness of selling the salicylic acid peel under the name of Kligman.

This seems to smack of frank commercialization and puts us in the same category as Obagi and Murad.

The University strongly disapproves of this activity since I am a faculty member and must not use my name to sell products.

At first I thought nothing of it but I see nothing but trouble and adverse publicity if our name is used as planned.

So please alter the plan. Nonetheless, our name can be discreetly used in advertising by stating that this was developed by Douglas and myself. Our data can be used and references to published papers can also be appended.

In October 1997, Douglas met with representatives of Sothys at S.K.I.N. and he was invited to Miami to demonstrate the process for Sothys staff. For this trip, he received \$750 each from Sothys and APS.

Sales of Beta Hydroxy from APS to the sub-licensees commenced in the second quarter of 1997. On August 13, 1997, the first quarterly royalty payments were made to the Kligmans. As requested by Albert Kligman, the payments were divided equally between Albert and Douglas. Consistent with the terms of the Product Development Agreement, APS calculated the total royalty payment as 3% of net sales by APS to the sub-licensees. APS issued, and the Kligmans each accepted, quarterly payments through the second quarter of 2000.<sup>10</sup> On June 22, 2000, APS sold

---

<sup>10</sup>It appears that the product was not altogether successful. Records of royalty payments were submitted for the last three quarters of 1997, all of 1998 and the first two quarters of 2000. The payments to plaintiffs during these quarters ranged from a high of \$2901.78 in the first quarter of 1998 to a low in the last two quarters of 1997 in which no sales were made.

its cosmeceutical products division, including its rights under the Beta Hydroxy License, to R.P. Scherer.

On June 16, 1997, Les Riley sent a letter to the Kligmans to confirm an agreement governing Beta Hydroxy which provided:

Advanced Polymer Systems will have an exclusive worldwide license to the Beta Hydroxy product, subject to the diligence provision contained in paragraph 1 of the November 8, 1995 Agreement between APS and Albert M. Kligman.

Advanced Polymer Systems will make royalty payments of 3% of the Net Sales of the Beta Hydroxy Product by APS to be shared equally with Dr. Albert Kligman. Each party will receive 1.5% royalty of APS' Net sales of the Beta Hydroxy Product within 60 days after the end of each quarter and shall be accompanied by a repeat setting forth Net Sales by Product and country.

Les Riley and Albert Kligman signed the document. Douglas declined. Albert then tried to bring the parties together. On July 15, 1997, he sent a letter to Les Riley seeking to negotiate a new contract to govern Beta Hydroxy. Noting that the Kligmans had expended an additional \$30,000 on developing the product and \$23,000 in securing patent protection, Albert suggested that the royalty rate be renegotiated to 5%. Negotiations continued but the parties never came to terms on the content of a new contract.

On August 13, 1997, the first royalty payments were made to Albert and Douglas. Lorraine Kligman was concerned by the small amount that the Kligmans were receiving and inquired of APS how the royalty was calculated. APS sent a response by mail indicating that the royalty was calculated at 3% of net sales

from APS to the sub-licensees, rather than 3% of net sales by the sub-licensees to the purchaser. It was at this time that Douglas learned of the royalty rate agreed to by Albert and that APS has received about \$2 million in "license fees" or "license transfer fees." These fees, paid by the sub-licensees, were not calculated by APS into the "net sales" of the product and the Kligmans thus never received a percentage of those fees.

As negotiations continued, the parties focused on a few key issues. Foremost was the matter of the royalty rate. The parties also continued to negotiate about a minimum quarterly payment to be made to the Kligmans, a percentage payment to the Kligmans for additional consideration paid to APS by sub-licensees in connection with licensing rights, and which party should bear the costs of procuring foreign patents.

On October 17, 1997, the Kligmans sent a proposed agreement to Les Riley by which APS would pay a 5% royalty based on net sales. If no sales were made by APS, the royalty rate would be based on sales made by APS sub-licensees. In addition, the Kligmans would be entitled to 25% of revenue from sub-licensing rights. The proposal also provided for a minimum annual advance on royalties of \$100,000. Additional drafts were submitted by the Kligmans to APS over the next year. With a draft sent on December 26, 1997, the Kligmans stated that "[t]his amount for the minimum royalty is typical for agreements of this

type, particularly in view of the Kligmans being responsible for all patent costs under this Agreement."<sup>11</sup>

The parties, however, failed to come to terms. On February 8, 1999, the Kligmans sent a letter to APS formally terminating negotiations. The Kligmans demanded the return of all confidential information related to Beta Hydroxy and that use of the information or Kligman name cease. They also demanded an accounting for all sales made by APS to any sub-licensees.

Jack Meakem sent several letters to Albert Kligman between February 11, 1999 and August 19, 1999 offering to revive the negotiations. Mr. Meakem offered to increase the royalties to 4% and promised a minimum annual royalty of \$50,000. The Kligmans, however, continued to press their demands for payment of patent costs to which APS refused to agree. No new agreement was reached.

#### **IV. Discussion**

##### **A. The Partnership Claims**

APS argues that the Kligmans have failed to produce evidence to support a finding of a partnership, the existence of

---

<sup>11</sup>Both Albert and Douglas Kligman testified that Mr. Riley made some representations that APS would pay some part of the cost of procuring international patents. They suggest that securing international patent protection was something neither had even considered. Neither Albert nor Douglas, however, pointed to any promise, oral or written, whereby representatives of APS would absorb the cost of procuring international patents. According to Douglas Kligman, "there was an implication that they would be involved. Whether they would pay for it all or pay for some of it or how it would be worked out, I can't tell you. They were the ones who told us what countries to file in."

which is a necessary requisite to sustain each of plaintiffs' first two claims.<sup>12</sup>

The Pennsylvania Uniform Partnership Act ("Partnership Act") provides in pertinent part that "[u]nless otherwise agreed, the partners who have not wrongfully dissolved the partnership, or the legal representative of the surviving partner, not bankrupt, has the right to wind up the partnership affairs." 15 Pa. C.S.A. § 8359 (2001). The Act also provides that "[o]n application by or for a partner, the court shall decree a dissolution whenever . . . a partner willfully or persistently commits breach of the partnership agreement or otherwise so conducts himself in matters relating to the partnership business that it is not reasonably practicable to carry on the business of the partnership with him." 15 Pa. C.S.A. § 8354(a)(4) (2001). The existence of a partnership is clearly a necessary prerequisite to a successful dissolution claim.

The Partnership Act defines a partnership as "an association of two or more persons to carry on as co-owners a business for profit." 15 Pa. C.S.A. § 8311(a). The

---

<sup>12</sup>In Count III, plaintiffs claim that APS breached its fiduciary duty to the Kligmans as partners. Initially, the Kligmans claimed a breach of fiduciary duty without reference to a partnership between the parties. In their memorandum opposing summary judgment, the Kligmans claim that this duty rests upon a partnership relationship. In the alternative, they claim that a fiduciary relationship can be based on a reliance theory. The claim based on this alternative theory is addressed in section IV(B), infra.

"indispensable requisites of a partnership" are co-ownership of a business and the sharing of profits. Schuster v. Largman, 162 A. 305, 307 (Pa. 1932).<sup>13</sup>

The "fundamental requisite" is co-ownership of a business. Provident Trust Co. v. Rankin, 5 A.2d 214, 216 (Pa. 1939). An entitlement to a share of profits from a business venture alone is insufficient to establish a partnership. See Abel v. American Art Analog, 838 F.2d 691, 697 (3d Cir. 1988).

A partnership agreement need not be in writing. A partnership may be implied from the "entire set of agreements between the parties" and "all of the attending circumstances." Schuster, at 307; See also Cohen v. Gravelle, 192 A.2d 414, 415 (Pa. 1963).

Plaintiffs have failed to present evidence to show that the parties entered or intended to enter into a partnership. There is no competent evidence of record that the parties carried on a business as co-owners.

---

<sup>13</sup>Other states which similarly define a partnership as "an association of two or more persons to carry on as co-owners a business for profit" also require a sharing of losses. See, e.g., Savers Federal Savings & Loan Ass'n. v. Amberly Huntsville, Ltd., 934 F.2d 1201, 1208 (11th Cir. 1991); City of Corpus Christi v. Bayfront Associates, Ltd., 814 S.W. 2d 98, 107 (Tex. App. 1991); Blaustein v. Lazar Borck & Mensch, 555 N.Y.S. 2d 776, 777 (N.Y. App. Div. 1990). While this is a very logical indicia of a partnership, the Pennsylvania courts have not expressly acknowledged or disavowed the significance of this factor. The court believes that if it were squarely to address the matter, the Pennsylvania Supreme Court would conclude that the presence or absence of an agreement to share losses is at least relevant evidence and part of "the attending circumstances" fairly considered in determining the existence of a partnership. The court in this case, however, need not and does not rely on the absence of an agreement to share losses in assessing the claim of partnership.

From the time of the Product Development Agreement of November 8, 1995, the record is clear that negotiations between the parties focused exclusively upon licensing rights. The ensuing agreements and correspondence between the parties are to the same effect. The September 24, 1996 letter agreement between Les Riley (on behalf of APS) and Albert Kligman states that APS "will have an exclusive license to the Beta Hydroxy Peel Product." The draft agreements prepared by the Kligmans in 1997 and 1998 are each entitled "License Agreement" or "Proposed License Agreement."

The February 8, 1996 Confidentiality Agreement does reference "the possibility of a cooperative business arrangement" between APS and the Kligmans. A mere reference to the prospect of a future cooperative business arrangement in a confidentiality agreement cannot support a finding that the parties intended to be co-owners of a business. To conclude otherwise would transform virtually all commercial arrangements into partnerships.

Albert Kligman himself acknowledged there was no discussion about the forming of a partnership. Significantly, plaintiffs also have presented no competent evidence that APS had any intention of entering into a partnership with them.

Plaintiffs contend that the stock options from APS suggest the carrying on of a business for profit as co-owners.

While the option of becoming a shareholder in a corporation creates the possibility of sharing in that corporation's profits, stock ownership does not indicate the existence of a partnership between the shareholder and the issuing corporation. In any event, it is uncontroverted that the options were never exercised. The only payments made to plaintiffs pursuant to any agreement were royalties.

B. Breach of Fiduciary Duty

Plaintiffs claim that a fiduciary duty arose from the purported partnership relationship with APS or alternatively as a result of an alleged promise by APS that an agreement between the parties would be reached. As the competent evidence of record cannot sustain a finding of a partnership, the court addresses only the alternative theory.

Under Pennsylvania law, a fiduciary or confidential relationship exists when one person has reposed a special confidence in another to the extent that the parties do not deal with each other on equal terms. See In re Estate of Clark, 359 A.2d 777, 781 (Pa. 1976). This inequality arises because of an "overmastering influence" on the one side or "weakness, dependence or trust, justifiably reposed" on the other. Frowen v. Blank, 425 A.2d 412, 417 (Pa. 1981). See also City of Harrisburg v. Bradford Trust Co., 621 F. Supp. 463, 473 (M.D. Pa. 1985); Basile v. H&R Block, Inc., 777 A.2d 95, 103 (Pa. Super.

2001). In the context of a business association, such a relationship can arise only if one party surrenders substantial control over some portion of his affairs to the other. In re Estate of Scott, 316 A.2d 883, 886 (Pa. 1974).<sup>14</sup>

Plaintiffs suggest that a fiduciary or confidential relationship arose when that they gave APS confidential technology for the manufacture of Beta Hydroxy and permitted APS to use their names. This occurred pursuant to the Confidentiality Agreement of February 8, 1996 and the Licensing Agreement of September 24, 1996 which was executed in an arms-length transaction by Albert Kligman, an experienced and sophisticated individual who had licensed an invention in the past.<sup>15</sup> There is no evidence that APS used the proprietary information about Beta Hydroxy or plaintiffs' names for other than the agreed purpose of marketing the product.<sup>16</sup>

While Douglas Kligman did not execute the licensing agreement, he signed the Confidentiality Agreement, assisted sub-licensees of APS in marketing the product his co-inventor father had licensed and accepted royalty payments thereunder.

---

<sup>14</sup>Where a fiduciary relationship exists, a fiduciary must conduct himself with the utmost good faith and honesty. See Snellbaker v. Hermann, 462 A.2d 713, 718 (Pa. Super. 1983).

<sup>15</sup>APS did not have a fiduciary duty to negotiate or renegotiate contract terms more favorable to plaintiffs.

<sup>16</sup>Plaintiffs complain that their names were used by sub-licensees of APS. It is clear from the record that all parties contemplated the prospect of sub-licensees. There is no evidence that plaintiffs' names were used for other than the intended purpose of promoting the product.

It is true that plaintiffs later negotiated with APS for a deal more to their liking, but they could not justifiably assume they would be successful. There is no evidence that Douglas Kligman objected to the licensing of the product to APS, but only to the return agreed to by his father after becoming dissatisfied with the amounts it produced. Douglas Kligman could not proceed as he did with knowledge of the agreements on product development, confidentiality and licensing and then claim that in doing so he justifiably reposed trust in APS to later agree to more favorable terms. The evidence of record also does not support a finding of "weakness" on the part of plaintiffs or "overmastering influence" of APS.

Plaintiffs have not sustained their breach of fiduciary duty claim.

C. Implied-In-Law Contract

While plaintiffs have styled this claim as one for breach of an implied-in-law contract, it is actually an equitable claim for unjust enrichment. The claim is predicated on "benefits conferred by plaintiffs upon APS" and relief desired "to avoid the unjust enrichment of APS." It is technically correct that if unjust enrichment is demonstrated, the law will imply a contract to provide value for the benefit conferred.

Plaintiffs contend that they conferred benefits on APS by providing information to manufacture Beta Hydroxy, use of their names, attending dermatology conventions to promote the

product and, in the case of Douglas Kligman, consulting with sub-licensees to facilitate marketing of the product. This, plaintiffs claim, should entitle them to "reasonable remuneration" including a minimum annual royalty payment.

To sustain a claim for unjust enrichment under Pennsylvania law, a plaintiff must show he conferred benefits upon the defendant, appreciation of those benefits by the defendant, and acceptance and retention of such benefits under circumstances in which it would be unjust for defendant to retain the benefit without payment of value. See Allegheny Gen. Hosp. v. Philip Morris, Inc., 228 F.3d 429, 447 (3d Cir. 2000). The most significant requirement is that any enrichment of the defendant be unjust. See Schenck v. K.E. David, Ltd., 666 A.2d 327, 328 (Pa. Super. 1995). Such a claim will not lie, however, where the relationship between the parties is founded upon an express agreement or promise by the defendant to, or for the benefit of, the plaintiff. See Benefit Trust Life Ins. Co. v. Union National Bank of Pittsburgh, 776 F.2d 1174, 1177 (3d Cir. 1985); Schott v. Westinghouse Electric Corp., 259 A.2d 443, 449 (Pa. 1969).

The relationship of the parties is founded upon exclusive license and royalty agreements. APS made payments in accordance with the terms of the agreements which Albert and Douglas Kligman accepted. The benefits that plaintiffs conferred on APS were consistent with the terms of the agreements on which

APS reasonably relied and under which APS performed. Plaintiffs now seek the benefit of more favorable terms which they subsequently attempted unsuccessfully to negotiate. These are not circumstances in which it would be unjust for APS to withhold payment of additional sums.

D. Promissory Estoppel

Plaintiffs claim that the court should enforce, and APS should be estopped from denying, the existence of certain promises purportedly made upon which plaintiffs relied to their detriment.

Plaintiffs contend that Les Riley told them they would be treated "fairly." Plaintiffs contend that APS promised to pay costs related to securing international patents. Plaintiffs point to the letters from Jack Meakem during negotiations in 1999 and contend they constitute a promise by APS to provide a \$50,000 minimum annual payment and a 4% royalty on net sales of Beta Hydroxy. In reliance on these purported promises, plaintiffs claim they supplied APS with proprietary information on Beta Hydroxy, allowed APS to sell the product and participated in promotional efforts.

Under the doctrine of promissory estoppel, a promise unsupported by consideration may nevertheless be enforced to remedy a manifest injustice. See Cardamone v. University of Pittsburgh, 384 A.2d 1228, 1232 n. 4 (Pa. Super. 1978). To sustain a claim for promissory estoppel, a plaintiff must prove

that the defendant made a promise he should have reasonably expected to induce a definite action or forbearance on the part of the plaintiff; that such action or forbearance was actually induced; and, that enforcement of the promise is necessary to prevent an injustice. See C & K Petroleum Prods., Inc. v. Equibank, 839 F.2d 188, 192 (3d Cir. 1988); Engstrom v. John Nuveen & Co., 668 F. Supp. 953, 962 (E.D. Pa. 1987); Cardamone, 384 A.2d at 1233; Restatement, Second of Contracts, § 90.

The promises which the Kligmans claim were made appear only in their briefs. Nowhere in the record presented to the court is there any documentary or testimonial evidence that Mr. Riley promised the Kligmans they would be treated "fairly."<sup>17</sup>

As previously noted, plaintiffs have failed to identify any document or conversation with anybody at APS whereby APS promised to pay for the cost of securing international patents. There is no competent evidence of record of such a promise.

The letters from Jack Meakem in 1999 on which plaintiffs rely make clear that Mr. Meakem offered, but did not promise, an enhanced royalty rate of 4% with a minimum annual royalty of \$50,000. As the June 8, 1999 letter makes clear, the offer was not accepted and the parties failed to reach a new agreement.

---

<sup>17</sup>Even if such a promise had been made, it would not be one that reasonably should be expected to induce action or forbearance and would be too indefinite to enforce. See Engstrom, 668 F. Supp. at 962 (assurance of "excellent treatment" insufficiently definite or specific to be enforced by promissory estoppel).

There is no competent evidence of any of these purported promises to enforce. It is clear that the parties were in the process of renegotiation and failed to come to terms. An injustice will not result from the failure to enforce a promise not made or to bestow upon a party the benefit of an offer he did not accept.

E. Wrongful Appropriation

Plaintiffs' invasion of privacy claim is predicated on the use of their names in connection with the promotion and sale of Beta Hydroxy.<sup>18</sup> Plaintiffs' claim is actually one for wrongful appropriation.<sup>19</sup> APS asserts that any such claim is

---

<sup>18</sup>It appears that plaintiffs may also predicate this claim on defendant's use of the likeness of patients, photographs of whom plaintiffs provided in connection with the promotion of Beta Hydroxy. If so, there is no explanation of how plaintiffs are entitled to damages for the use of such photographs, and no evidence that these patients granted permission to plaintiffs to display them.

<sup>19</sup>The action for invasion of privacy is actually composed of four distinct torts: (1) intrusion upon seclusion; (2) appropriation of name or likeness; (3) publicity given to private life; and (4) publicity placing a person in a false light. Marks v. Bell Tel. Co., 331 A.2d 424, 431 (Pa. 1975); See Restatement, (Second) of Torts § 652B-E. No party has cited any case in which a court has set forth the elements of an appropriation claim under Pennsylvania law. Faced with this same dilemma, one court has predicted that the Pennsylvania Supreme Court would clarify the right of appropriation (or publicity) by adopting the approach of the Restatement (Third) of Unfair Competition. See Seale v. Grammercy Pictures, 964 F. Supp. 918, 929 (E.D. Pa. 1997). The Restatement defines the right of publicity as follows:

One who appropriates the commercial value of a person's identity by using without consent the person's name, likeness, or other indicia of identity for the purposes of trade is subject to liability.  
Restatement (Third) of Unfair Competition § 46 (1995).

barred by the one year statute of limitations applicable to claims for invasion of privacy. See 42 Pa. C.S.A. § 5523.

It is uncontroverted that plaintiffs were aware their names were being used in promotional brochures by APS sub-licensees as early as 1997 and did not object. There is no competent evidence of record of appropriation of plaintiffs' names during the year preceding the initiation of this action on February 1, 2000.

#### **VI. Conclusion**

Plaintiffs have failed to sustain their claims. They have shown no more than performance and acceptance of payments under agreements with which they became dissatisfied and negotiated unsuccessfully to improve upon. Defendant is entitled to summary judgment.

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

DOUGLAS KLIGMAN and : CIVIL ACTION  
ALBERT M. KLIGMAN :  
 :  
v. :  
 :  
ADVANCED POLYMER SYSTEMS, INC. : NO. 00-580

O R D E R

AND NOW, this                    day of October, 2001,  
defendant's Motion for Summary Judgment having been granted  
consistent with the accompanying memorandum, **IT IS HEREBY ORDERED**  
that the Clerk shall file and enter said memorandum of record  
herein.

BY THE COURT:

\_\_\_\_\_  
JAY C. WALDMAN, J.