

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

RAYMARK INDUSTRIES, INC. : CIVIL ACTION
: :
: :
v. : :
: :
BUTERA, BEAUSANG, COHEN & : :
BRENNAN and MICHAEL BEAUSANG : NO. 97-0034

O P I N I O N

Padova, J.

December 1, 1997

In this action, Plaintiff Raymark Industries, Inc. ("Raymark") seeks the return of a \$1 million non-refundable retainer paid to its former counsel, Michael Beausang ("Beausang") of the law firm of Butera, Beausang, Cohen & Brennan ("the Butera firm")(collectively referred to as "Defendants"). Beausang has asserted counterclaims against Raymark for recovery of additional fees that he claims are due and owing to him.

Before the Court are Plaintiff's and Defendants' Motions for Summary Judgment. These Motions raise significant issues concerning the relationship between an attorney and a client in the setting of fees. In addition, the disposition of a sizable sum of money is at stake. Therefore, it is important at the outset to set forth clearly what this case is, and is not, about.

This case is not about overreaching attorneys who took unfair advantage of an unsophisticated client by demanding an up-front payment of \$1 million, quitting early in the relationship, and keeping money to which they were not entitled. If this were such a case, the Court would not hesitate to require the attorneys to disgorge the ill-gotten fee.

Instead, very different facts are at play in this case. Raymark is a highly-sophisticated client with extensive experience in asbestos-related litigation. After emerging from bankruptcy, Raymark adopted an aggressive litigation strategy, in which it settled claims against it for pre-determined amounts or took the cases to trial; it also filed counterclaims and initiated law suits against claimants and their counsel. Because Raymark's pre-bankruptcy defense had been expensive, Raymark devised a fixed fee structure to control its defense costs. Raymark selected Defendants as its counsel for a key region of the country and required Defendants to accept a non-negotiable, fixed fee agreement as a condition of their employment. Raymark used a \$1 million non-refundable retainer to induce Defendants to represent Raymark on terms set by Raymark. Ten weeks into the relationship, Raymark abruptly fired Defendants because they requested time to investigate serious allegations of wrongdoing by members of the local bar before filing a complaint naming those attorneys as defendants.

In our legal system, a client is free to terminate its attorney at any time -- regardless of the terms of the fee agreement -- and for any reason -- even one made in a fit of pique. Raymark exercised that right and terminated Defendants. But Raymark's decision to terminate Defendants had a \$1 million price tag -- a price set by Raymark, not Defendants.

Because of the unique facts present here, the Court finds that Defendants are entitled to keep the \$1 million retainer, but cannot recover additional fees from Raymark under the parties' fee agreement. The Court will deny Raymark's Motion and grant Defendants' Motion as to the \$1 million retainer and will grant Raymark's Motion and deny Defendants' Motion as to Beausang's counterclaims.

I. BACKGROUND

A. Undisputed Facts¹

On February 10, 1989, an involuntary bankruptcy petition was filed against Raymark. In Re Raymark Industries, Inc., No. 89-20233T, slip op. (U.S. Bankr. Ct., E. D. Pa. August 9, 1996)

¹ In support of their Motion for Summary Judgment, Defendants filed a Statement of Material Facts Not in Dispute, supported by citations to the record. Raymark has not disputed any of the facts set forth in Defendants' Statement. Therefore, the Court finds that the facts contained in the Statement are undisputed. The Court has relied in large part on Defendants' Statement in setting forth herein the undisputed facts relevant to the parties' Motions.

(Defs.' Summ. J. Mot. Exs. Ex. F ("Defs.' Exs.")) Prior to the involuntary bankruptcy, Raymark had been named as a defendant in thousands and thousands of asbestos personal injury lawsuits.² It had retained over 50 law firms as defense counsel; nine law firms, which made up Raymark's national trial team, managed Raymark's asbestos litigation. (Defs.'s Exs. Ex. H, Craig Smith³ Dep. at 47.) Its high volume of litigation resulted in high legal fees,⁴ which were paid from proceeds Raymark received from its insurance policies. (In Re Raymark Industries, Inc., 8/9/96 slip op.) From time to time, the flow of insurance money was interrupted, and Raymark's legal fees became past due. (Id.; C. Smith Dep. at 46.) Raymark had \$5 or \$6 million in past due legal fees at the time of the filing of the involuntary

²Raymark manufactured products containing asbestos. From the early 1970s until June 26, 1988, Raymark had been named as a defendant in more than 68,000 asbestos personal injury lawsuits. Raytech Corp. v. White, 54 F.3d 187, 189 and n.1 (3d Cir. 1995).

³Both before and after Raymark's bankruptcy proceedings, Craig Smith served as a litigation consultant to Raymark. He is the architect of Raymark's defense strategy and the principal decision-maker for Raymark in connection with its asbestos-related litigation. (C. Smith Dep. at 18-19, 27-28; Defs.'s Exs. Ex. G, Consulting Agreement between Craig Smith and Raymark.)

⁴Just prior to the involuntary petition, Raymark began paying for its defense costs on a fixed fee basis. (C. Smith Dep. at 83.) According to Beausang, it was his understanding that the pre-bankruptcy trial team members had been paid on a project-by-project basis. (Defs.' Exs. Ex. K, Michael Beausang Dep. at 32.) It is unclear from the record whether Raymark's legal fees had previously been calculated on the more common, billable hour basis.

bankruptcy petition. (C. Smith Dep. at 46-47.)

In litigating the asbestos claims brought against it, Raymark took the position that the majority of the claims were frivolous and that many of the claimants and their counsel were perpetrating fraud by bringing meritless claims against Raymark. (Id. at 59-60.) In response to this perceived fraud, in 1987 Raymark developed a settlement matrix, in which settlement amounts were set for the different types of injuries allegedly suffered by claimants, with an average settlement value of \$150 per case. (Id.) If a case did not settle for the amount predetermined by the settlement matrix, Raymark took the case to trial. (Id. at 85.)

After bankruptcy proceedings were initiated in 1989, all litigation against Raymark was automatically stayed. The involuntary bankruptcy petition was dismissed on August 9, 1996, and the automatic stay was lifted. (In Re Raymark Industries, Inc., 8/9/96 slip op.) Thereafter, one of Raymark's primary activities was the handling of its asbestos-related litigation. (C. Smith Dep. at 105.) Raymark pursued an aggressive litigation strategy, which included suing plaintiffs and their counsel. (Id. at 54.) Raymark once again utilized a network of lawyers to coordinate and manage its litigation. A key component of its national trial team approach was the use of a fixed fee

structure, composed of set quarterly payments and a one-time, initial, non-refundable payment of \$1 million.

This fee structure benefitted Raymark in a number of ways. First and foremost, Raymark was able to “quantify and control its litigation expenses on an ongoing basis.” (C. Smith Dep. at 83.) By using the fixed fee structure with its national team members, Raymark’s post-bankruptcy legal fees were “extremely reasonable” when compared to its pre-bankruptcy fees. (Defs.’s Exs. Ex. I, James Cobb⁵ Dep. at 82.) In fact, Raymark realized substantial savings in fees. (Id. at 83-84.)

Second, using the fixed fee agreements, Raymark shifted to its counsel the responsibility of controlling defense costs. (C. Smith Dep. at 83.) With this arrangement, counsel bore the risk that the costs of representing Raymark could outstrip the fixed fees that Raymark agreed to pay. (Id. at 103.)

Third, Raymark used the \$1 million retainer to secure the commitment of counsel of its choice. (Id. at 65-66.) Raymark set the amount of the retainer at \$1 million.⁶ Raymark decided on a sizable retainer in order to “get the right people involved, with the experience [Raymark was] looking for.” (Id. at 65.)

⁵James Cobb is the President of Raymark Industries, Inc.

⁶The \$1 million figure was chosen by Craig Smith. (Defs.’ Exs. Ex. J, Bradley Smith Dep. at 61.)

The \$1 million retainer was also necessary because of Raymark's prior history of making untimely payments to its attorneys. (Id. at 63-66.) By offering a \$1 million non-refundable retainer, Raymark was able to induce several former members of its national team to come aboard again.⁷ As explained by Craig Smith, Raymark

was interested in hiring counsel that had experience in asbestos litigation. That's why we went back to the national trial team members. And we wanted specific counsel, with specific capability and experience. And to induce them to do that, we felt like we had to put a sufficient retainer up so that we could get them to represent Raymark.

(Id. at 48.) Raymark also used the \$1 million retainer to attract Michael Beausang, who had not previously represented Raymark. (Beausang Dep. at 18.)

Raymark's post-bankruptcy national trial team included six members, each responsible for Raymark's litigation in a designated region of the country. (Defs.' Opp. to Pl.'s Summ. J. Mot., Ex. C.) Raymark selected Beausang to represent it in the jurisdictions of Delaware, New Jersey, and Pennsylvania. Raymark drafted the fee agreement that was presented to Beausang for his signature.⁸ James Cobb, president of Raymark, presented the fee

⁷At least two former members of Raymark's pre-bankruptcy trial team refused to rejoin Raymark's post-bankruptcy trial team because they would not sue other attorneys. (C. Smith Dep. at 67-68, 71.)

⁸Craig Smith prepared an outline of the essential terms of the fee agreement proposed by Raymark. Raymark's in-house counsel, LeGrand Smith, used Smith's outline to draft the initial version of the fee agreement that was presented to prospective

agreement to Beausang on a "take it or leave it" basis; Cobb told Beausang that Raymark would not negotiate any of the terms of the agreement. (Cobb Dep. at 81.) On September 4, 1996, Beausang signed the fee agreement in the form prepared by Raymark.⁹

(Defs.' Exs. Ex. A, 9/4/96 Agreement between Beausang and Raymark ("the September 4 Agreement.)) Raymark considered the September 4 Agreement "a very good business deal" because Raymark was able to cap its litigation costs. (Cobb Dep. at 84.)

The scope of Raymark's retainer of Beausang was two-fold -- Raymark retained Beausang "to participate in a legal network established to protect Raymark in the litigation described herein" and also "to legally represent it in litigation."

(September 4 Agreement.) The September 4 Agreement did not include a provision setting forth the length of the term of the retainer. (Id.)

Paralleling the two-fold nature of Raymark's retainer of

members of Raymark's national litigation team. (Craig Smith Dep. at 38-40.) Raymark prepared the final draft of the fee agreement used with the members of the national litigation team. (Id. at 88.) The fee agreement used for each of the six members of Raymark's national litigation team was the same, except for certain minor differences. (Defs.' Opp. to Pl.'s Summ. J. Mot., Ex. C.)

⁹Although Beausang signed the agreement, it is undisputed that the services described in the agreement were to be performed, and were performed, by other personnel from the Butera firm as well as Beausang. It also is undisputed that the \$1 million retainer was shared by the partners of the Butera firm. Under these circumstances, Raymark appropriately seeks recovery of the funds from both Beausang and the Butera firm.

Beausang, the fees to be paid to Beausang were divided into two categories: (1) a non-refundable retainer of \$1 million, called the "initial jurisdiction legal network organizational and management fee," and (2) fixed payments for services rendered, including set quarterly payments and additional set payments if a matter went to trial. The following fee structure was established in the September 4 Agreement:

In consideration for the legal representation and services hereunder, Raymark agrees to pay Counsel fees as follows:

(a) Initial jurisdiction legal network organizational and management fee of \$1,000,000. This is a non-refundable retainer.

(b) A fixed quarterly fee of \$32,000 to organize and maintain a legal network to handle all administrative aspects of litigation filed against Raymark in the jurisdiction assigned herein.

(c) A fixed quarterly fee of \$280,000 for management of the litigation filed against Raymark in the jurisdiction assigned herein.

(d) A fixed trial fee of \$3,000 per day of trial not to exceed a total of \$15,000 per trial without approval by Raymark.

All fees paid shall be non-refundable.

(Id. at ¶ 3.)

Beausang's responsibilities were defined in the September 4 Agreement as follows:

Counsel shall be responsible to administer and manage all aspects of litigation filed against Raymark in the assigned jurisdiction, to serve on the Raymark National Trial Team to defend Raymark in such litigation, to make such affirmative defenses and file such counterclaims as are deemed appropriate by Raymark and Counsel and to initiate when appropriate causes of action against individual asbestos-

related claimants and/or their lawyers for RICO charges, fraud, and other related or appropriate causes of action in trades or occupations of claimants other than shipbuilders, boilermakers and pipe fitters.

(Id. at ¶ 4.)

Although the September 4 Agreement did not include a provision addressing the withdrawal of counsel, it did include the following provision on the termination of the Agreement by Raymark:

Raymark may terminate this Agreement at will and without cause upon ninety (90) days written notice served upon Counsel. All fees paid as of the termination date shall be non-refundable.

(Id. at ¶ 5.)¹⁰

By letter dated September 11, 1996 from Beausang to Cobb, Beausang clarified certain terms of the September 4 Agreement¹¹ and stated: "As part of this understanding, I acknowledge receipt of the wire transfer of \$1,000,000 as the legal network organizational and management fee. Given the significant impact on my practice, I would not have accepted this engagement had this fee not been fully earned and non-refundable." Cobb signed the letter, "acknowledged and agreed." (Defs.' Exs. Ex. A,

¹⁰The fee agreements entered into by Raymark with the five other national litigation team members contain identical provisions on termination and identical language designating the \$1 million retainer as non-refundable.

¹¹These points of clarification are not relevant to the current Motions.

9/11/96 Ltr. from Beausang to Cobb.) The entirety of the fee agreement between Raymark and Defendants consisted of the September 4 Agreement and the September 11 Letter Agreement.¹² (Cobb Dep. at 85-86.)

On November 13, 1996, approximately ten weeks after Raymark retained Beausang, Raymark terminated its relationship with Beausang without notice and effective immediately. The reason Raymark fired Beausang was because he was "unwilling to file the 'Baron Action' on short notice." (Pl.'s Opp. to Defs.' Summ. J. Mot. at 8 n.3.) The Baron Action was a lawsuit that Raymark filed in the Eastern District of Pennsylvania against a number of local Philadelphia law firms and claimants involved in the institution of the involuntary bankruptcy proceedings against Raymark. The Baron complaint was drafted by a California attorney, who was a member of Raymark's national trial team. (C. Smith Dep. at 126, 135.)

Raymark wanted the complaint filed without delay. Beausang agreed to file the action against the petitioning creditors but advised Raymark that he might need 30 days or more to investigate the allegations of wrongdoing made against the creditors' counsel. (Beausang Aff. in Supp. of Defs.' Opp. to Pl.'s Summ.

¹²For this reason, any reference herein to the parties' "fee agreement" or "contract" encompasses the September 4 Agreement and the September 11 Letter Agreement.

J. Mot. Ex. A, 9/13/96 Ltr. from Beausang to Cobb.) As a result, Raymark fired Beausang on November 13, 1996. That same day, Raymark retained new local counsel to represent it in the Baron action. (Defs.'s Exs. Ex. C, Stipulation.) Raymark's new counsel filed the Baron complaint on November 13, 1996.¹³ Raymark also reassigned Defendants' jurisdiction to other counsel. (C. Smith Dep. at 129-132.) Raymark seeks the return of the \$1 million retainer fee. Defendants have refused to return any part of the fee.

B. The Parties' Claims

1. Raymark's Complaint

Raymark's Complaint contains two counts: (1) rescission¹⁴

¹³The Baron action was subsequently dismissed by Judge Edward N. Cahn on the basis of lack of personal jurisdiction, failure to state a claim, and federal preemption. Raymark Industries, Inc v. Frederick M. Baron, et al., No. 96cv7625, slip op. (E.D. Pa. June 23, 1997).

¹⁴The counts alleged by Raymark in its Complaint have undergone some refinement. In its rescission count, Raymark alleges that "Pennsylvania's Rules of Professional Conduct prohibit the enforcement of the non-refundable retainer provision in the [September 4] Agreement, as enforcement would result in the collection of an unearned and excessive fee by Mr. Beausang and BBCB [the Butera firm] and also would result in the use of funds in violation of court order." (Compl. at ¶ 15.) As both parties have acknowledged, an alleged violation of the Rules of Professional Conduct cannot create a cause of action. RULES OF PROFESSIONAL CONDUCT, Preamble (1987) ("Violation of a Rule should not give rise to a cause of action nor should it create any presumption that a legal duty has been breached."); Maritrans GP Inc. v. Pepper, Hamilton & Scheetz, 602 A.2d 1277, 1284 (Pa. 1992). Raymark argues in its Motion that its rescission claim is

and (2) breach of fiduciary duty. Raymark's complaint is not based on a failure of performance or breach of the fee agreement by Defendants.¹⁵ (Compl. at §§ 1, 6-17.) Such allegations are conspicuously absent from the complaint. Therefore, Defendants' performance under the agreement is not at issue in this case. Instead, both the rescission and the breach of fiduciary duty counts are based on the same legal theory -- the parties' fee agreement is unenforceable, when viewed at the time of its termination, because it is an agreement to collect an excessive fee, and an attorney has a fiduciary and ethical obligation not

not based on a violation of the ethical rules but on Defendants' alleged violations of the common law duty they owed to their former client Raymark not to collect an excessive fee. (Pl.'s Summ. J. Mot. at 6-11.) Similarly, Raymark has retreated from the allegation contained in its Complaint that Defendants violated a court order. The court order referenced in paragraph 15 of the Complaint is apparently the order issued by Bankruptcy Judge Thomas M. Twardowski on August 9, 1996. That order gave Raymark permission to use funds from its settlement with Connecticut Insurance Guaranty Association "only to pay or defend the claims of Tort Claimants and other claims arising under the Transit Policies. . . ." (Defs.' Exs. Ex. F, 8/9/96 Order.) In its Motion, Raymark does not mention Defendants' alleged violation of the bankruptcy court order. It also fails to answer that portion of Defendants' Motion in which Defendants argue that the \$1 million retainer does not violate the bankruptcy court order. Because the Court finds that Raymark no longer bases its rescission claim on Defendants' alleged violation of the bankruptcy court order, the Court does not need to reach this issue.

¹⁵A claim for rescission is typically based on allegations of material breach or failure of performance suffered by the complaining party. See Castle v. Cohen, 676 F.Supp. 620, 627 (E.D.Pa. 1987)(applying Pennsylvania law).

to contract to collect an excessive fee.¹⁶ (Compl. at ¶¶ 15-24.) Both counts also seek the same relief -- that is, the return of the \$1 million retainer.¹⁷ In Count I, Raymark relies on the equitable remedy of rescission as the vehicle to recoup the \$1 million that it paid to Defendants. In Count II, Raymark prays for damages of \$1 million as compensation for Defendants' alleged breach of fiduciary duty.

2. Beausang's Counterclaims

Beausang has counterclaimed against Raymark for recovery of fees that he alleges are due and owing to him pursuant to the parties' fee agreement. In Count I, Beausang alleges that he is entitled to \$240,000 as payment for the period from September 4, 1996 until November 13, 1996. In Count II, Beausang alleges that he is entitled to damages in the nature of lost profits for payments he was entitled to, but deprived of, because Raymark failed to give him ninety (90) days notice of termination as required by the September 4 Agreement.

II. LEGAL STANDARD

¹⁶Because Raymark's claims are confusingly pled in the Complaint, at the hearing on the parties' motions the Court asked Raymark's counsel to clarify the exact nature of each of Raymark's claims. Counsel for Raymark explained that the two counts contained in Raymark's Complaint are based on the same set of operative facts and the same legal theory; they differ only in the nature of the remedy sought. (10/10/97 Hr'g Tr. at 2-6.)

¹⁷Raymark also seeks punitive damages on its breach of fiduciary duty claim. (Compl. at 7.)

Summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c). An issue is "genuine" only if there is sufficient evidence with which a reasonable jury could find for the non-moving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S. Ct. 2505, 2510 (1986). Furthermore, bearing in mind that all uncertainties are to be resolved in favor of the nonmoving party, a factual dispute is only "material" if it might affect the outcome of the case. Id.

A party seeking summary judgment always bears the initial responsibility of informing the district court of the basis for its motion and identifying those portions of the record that it believes demonstrate the absence of a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 322, 106 S. Ct. 2548, 2552 (1986). Where the non-moving party bears the burden of proof on a particular issue at trial, the movant's initial Celotex burden can be met simply by "pointing out to the district court that there is an absence of evidence to support the non-moving party's case." Id. at 325, 106 S. Ct. at 2554. After the moving party has met its initial burden, summary judgment is appropriate if the non-moving party fails to rebut by making a

factual showing "sufficient to establish an element essential to that party's case, and on which that party will bear the burden of proof at trial." Id. at 322, 106 S. Ct. at 2552.

III. DISCUSSION

Although Raymark and Defendants differ on how the Court should resolve their fee dispute, they both maintain that the matter can properly be determined by summary judgment.¹⁸ The Court agrees. There are no material facts in dispute, and the claims raised in Plaintiff's Complaint and in Beausang's Counterclaims can be determined by the Court as a matter of law, pursuant to Rule 56(c).

A. The \$1 Million Initial Jurisdiction Legal Network Organizational and Management Fee

In presenting their motions to the Court, the parties have staked out opposite positions that suffer from the same defect -- each side takes its argument a step too far. Defendants maintain that the Court should simply enforce the clear and unambiguous

¹⁸Raymark contends that its right to a refund of the \$1 million fee and Defendants' payment in quantum meruit for the services they performed on behalf of Raymark are questions of law. Raymark further contends that the only factual issue in this case is the valuation of the services Defendants performed for Raymark. Because the Court finds that Defendants are entitled to retain the \$1 million fee, the Court does not need to reach the quantum meruit issue.

terms of the parties' fee agreement. The cornerstone of Defendants' argument is that "the parties were not in a fiduciary relationship with respect to the negotiation of the attorney-client relationship or the general retainer payment by Raymark." (Defs.'s Opp. to Pl.'s Summ. J. Mot. at 22.) From there, Defendants argue that the Court should interpret the parties' fee agreement as it would any contract negotiated at arm's length by sophisticated business entities.¹⁹ With this analysis, Defendants paint themselves into a lonely corner, adopting a position that runs counter to the current legal trend to view broadly the parameters of the attorney/client relationship.

Raymark's legal analysis fares no better. Raymark contends that the \$1 million retainer provision is unenforceable because the retainer constitutes an excessive fee. In advancing its position, Raymark turns a blind eye to basic tenets of contract law and the singular facts of this case. Even though Raymark -- a highly sophisticated consumer of legal services -- set the amount of the non-negotiable retainer at \$1 million, designated the retainer as non-refundable, and reaped substantial benefits from the fixed fee agreement with Defendants, Raymark faults Defendants for "contracting for and collecting an excessive fee

¹⁹Defendants state that the parties' "contract is analogous to what would be regarded as a 'requirements' contract in the sale of goods context except that payment for Raymark's litigation requirements was capped." (Defs.' Opp. to Pl.'s Summ. J. Mot. at 5.)

in violation of their common law fiduciary responsibilities and their ethical obligations." (Pl.'s Opp. to Defs.' Summ. J. Mot. at 1.) Raymark points an accusatory finger at Defendants while it continues to operate under five other fee agreements containing identical non-refundable \$1 million retainer provisions. (10/10/97 Hr'g Tr. at 12.)

In resolving the parties' fee dispute, the Court finds it unnecessary to adopt either side's reasoning. Instead, the parties' Motions can be properly determined by applying established contract principles, while at the same time showing appropriate deference to the fiduciary nature of the attorney/client relationship and the supervisory role of the courts over members of the bar. Within this legal framework, the unique facts of this case compel the Court's conclusion that Defendants are entitled to retain the \$1 million fee.

In analyzing the current Motions, the Court will address the following three questions. First, was it permissible for Defendants and Raymark to enter into a fee agreement that contained a non-refundable retainer provision? Second, if so, what did the parties' fee agreement provide? And third, is the fee agreement enforceable?

1. Non-Refundable Retainer Agreements

The Court begins its analysis with the fundamental principle

that, under Pennsylvania law,²⁰ parties are given wide latitude in bargaining with one another for mutual exchange. "Few principles of law are more firmly established than the principle conferring upon parties the right to freely contract."

Commw., Dept. of Transp. v. Paoli Const. Co., 386 A.2d 173, 175

(Pa. Commw. Ct. 1978). This principle extends to the attorney/client relationship. Under Pennsylvania law, the relationship between an attorney and a client is contractual.

Novinger v. E.I. DuPont de Nemours & Co., Inc., 809 F.2d 212, 218

(3d Cir. 1987). Although other jurisdictions disallow non-refundable retainers, no Pennsylvania statute prohibits non-refundable retainers, and no court in Pennsylvania has declared that non-refundable retainers are per se against public policy. (App. in Supp. of Pl.'s Summ. J. Mot. Ex. D. ("Pl.'s App.") Ex. O, Pennsylvania Bar Association, Formal Op. 85-120.) Therefore, Raymark and Defendants were free to fashion a fee agreement that included a non-refundable retainer.

2. The Parties' Fee Agreement

The terms of the parties' fee agreement are contained in the September 4 Agreement and the September 11 Letter Agreement.

²⁰The basis for this Court's jurisdiction is diversity of citizenship, pursuant to 28 U.S.C. § 1332. As such, the law of Pennsylvania governs the parties' dispute. Erie Railroad Co. v. Tompkins, 304 U.S. 64, 58 S. Ct. 817 (1938).

Because the entirety of the parties' agreement consists of these two separate writings, the two writings must be interpreted as a whole. Landreth v. First Nat. Bank of Philadelphia, 31 A.2d 161, 163 (Pa. 1943)(a writing is interpreted as a whole and all writings forming part of the same transaction are interpreted together); Shehadi v. Northeastern Nat. Bank of Pennsylvania, 378 A.2d 304, 306 (Pa. 1977).

In interpreting the terms of a contract, a court's fundamental goal is to ascertain and give effect to the objective mutual intent of the contracting parties. Duquesne Light Co. v. Westinghouse Elec. Corp., 66 F.3d 604, 613 (3d Cir. 1995) (applying Pennsylvania law). "When a written contract is clear and unequivocal, its meaning must be determined by its contents alone." Commw., Dept. of Transp. v. Manor Mines, Inc., 565 A.2d 428, 432 (Pa. 1989). Under the "plain meaning rule," when parties reduce their agreement to writing, Pennsylvania courts presume that the mutual intent of the parties can be determined by examining the language of the writing itself. Duquesne Light Co., 66 F.3d at 613; Steuart v. McChesney, 444 A.2d 659, 661-62 (Pa. 1982)(the parties' mutual intent "must be ascertained from the language of the written agreement"). In ascertaining the objective mutual intent of the parties, the Court gives the express terms of the contract their plain and ordinary meanings. Warren v. Greenfield, 595 A.2d 1308, 1311-12 (Pa. Super. Ct.

1991)(non-technical terms are given their plain and ordinary meaning).

In its Motion, Raymark does not claim that there is any ambiguity or lack of clarity with respect to the language of the parties' agreement. Absent a challenge by Raymark, and based on the Court's independent review of the writings at issue, the Court finds that the terms of the parties' agreement are clear and unambiguous.²¹ Thus, the Court construes the contract as a matter of law. Community College v. Community College, Society of the Faculty, 375 A.2d 1267, 1275 (Pa. 1977).

The contract interpretation question presented in this case is as follows: Did the parties mutually intend that the \$1 million paid by Raymark to Defendants would be non-refundable if Raymark terminated the fee agreement? The answer to this question is yes. In the September 4 Agreement, the aptly-named \$1 million "initial jurisdiction legal network organizational and management fee" is described as a "non-refundable retainer." (September 4 Agreement at ¶ 3(a).) In this same paragraph, the

²¹Because the Court finds that the writing is unambiguous, the Court will not consider evidence outside of the contract concerning the meaning of these terms. Compass Technology, Inc. v. Tseng Laboratories, Inc. 71 F.3d 1125, 1131-32 (3d Cir. 1995). Moreover, although agreements are generally construed against the drafter, this canon of contract construction only comes into play when the terms of a contract are ambiguous. Dieter v. Fidelcor, Inc., 657 A.2d 27, 30 (Pa. Super. Ct. 1995). Where, as here, the terms of the parties' fee agreement are clear and unambiguous, the written language of the agreement is controlling.

agreement provides that "[a]ll fees paid shall be non-refundable." (Id. at ¶ 3.) Moreover, the parties specifically addressed the issue of the status of fees paid to counsel if Raymark were to terminate the agreement -- "[a]ll fees paid as of the termination date shall be non-refundable." (Id. at ¶ 5.)

The parties' objective mutual intent that the \$1 million fee was not subject to refunding is also manifested in the language of the September 11 Letter Agreement. There, the parties agreed that the \$1 million fee was both "non-refundable" and "fully earned." (9/11/96 Ltr. Agreement.) In using the term "fully earned" in the September 11 Letter Agreement, the Court finds that the parties intended that the \$1 million rightfully belonged to Defendants when received.²² In viewing the parties' agreement as a whole and in assigning the plain and ordinary meaning to the terms of the contract, the Court finds that the parties mutually intended that the \$1 million retainer was not subject to refunding to Raymark and was fully earned by Defendants upon receipt. This is the only reasonable interpretation of the terms "non-refundable" and "fully earned."²³

²²In the September 11 Agreement, Beausang acknowledges "receipt of the wire transfer of \$1,000,000 as the legal network organizational and management fee." Raymark states that on September 9, 1996, it paid Defendants \$1 million. (Pl.'s Summ. J. Mot. at 3.)

²³Counsel for Raymark conceded that "if the words of these contracts are enforceable they [Defendants] keep the money." (10/10/97 Hr'g Tr. at 9-10.)

3. The Enforceability of the Fee Agreement

If this were a contract between commercial parties for the sale of goods, the Court's analysis would stop here. However, this is a contract between an attorney and a client. Because of the special relationship between an attorney and a client, the Court must take the analysis a step further and determine whether the contract is enforceable.

This Court has the authority and the duty, under both its equitable jurisdiction and its inherent power to regulate attorney-client relations, to determine whether the parties' fee agreement is enforceable. McKenzie Const., Inc. v. Maynard, 758 F.2d 97, 100 (3d Cir. 1985); Dunn v. H. K. Porter Co., Inc., 602 F.2d 1105, 1108 (3d Cir. 1979); Schlesinger v. Teitelbaum, 475 F.2d 137, 141 (3d Cir. 1973). When a client challenges a fee charged by an attorney, it is the court's responsibility to assess the reasonableness of the fee. This issue arises most often in cases involving contingent fee agreements. See McKenzie, 758 F.2d 97; Schlesinger, 475 F.2d 137. The United States Court of Appeals for the Third Circuit ("Third Circuit") has held, however, that "[e]ven with respect to market determined fees, courts retain some supervisory authority if a dispute arises between attorney and client." Coup v. Heckler, 834 F.2d 313, 324 (3d Cir. 1987).

Courts most frequently have exercised their supervisory

power over attorneys' fees in cases involving persons with presumed incapacity to conduct their affairs competently. Schlesinger, 475 F.2d at 139. In such cases, courts seek "to protect those unable to bargain equally with their attorneys and who, as a result, are especially vulnerable to overreaching." Dunn, 602 F.2d at 1109. The supervisory powers of the courts, however, are not confined to that narrow category of cases. Courts will examine fee agreements that "yield[] an unreasonable fee." Id.

The Third Circuit's findings concerning the supervisory powers of courts over members of the bar in general and over fee disputes in particular are consistent with findings made by Pennsylvania courts. Under Pennsylvania law, "[a] duly admitted attorney is an officer of the court and answerable to it for dereliction of duty." Childs v. Smeltzer, 171 A. 883, 886 (Pa. 1934). Although no Pennsylvania court has addressed the reasonableness of a non-refundable retainer, the Pennsylvania Supreme Court has held that "contingent fees . . . are a special concern of the law." Peyton v. Margiotti, 156 A.2d 865, 867 (Pa. 1959).

Raymark challenges the fee agreement on the following three grounds: (1) the \$1 million fee is excessive; (2) the collection by Defendants of an excessive fee constitutes a breach of fiduciary duty; and (3) the Court's enforcement of the agreement

will effectively deprive Raymark of its right to terminate Defendants. The Court will address each of these grounds in turn.

a. The Amount of the Retainer

Although in Pennsylvania an attorney is allowed to secure a non-refundable retainer from a client, no court applying Pennsylvania law has addressed the issue of the permissible amount of such a retainer. In the context of confessions of judgment, Pennsylvania courts have, however, approved the reduction of an unreasonable attorney's fee. PNC Bank v. Bolus, 655 A.2d 997 (Pa. Super. Ct. 1995); Dollar Bank v. Northwood Cheese Co., Inc., 637 A.2d 309 (Pa. Super. Ct. 1994)(court may modify amount of attorney's fee if excessive). Although the reasonableness of an attorney's fee is addressed in these cases, a standard for determining whether a fee is reasonable is not delineated.

Moreover, the Pennsylvania Supreme Court has not established a standard for determining the permissible amount of a non-refundable retainer. Because Plaintiff has invoked this Court's diversity jurisdiction, this Court must predict how the state's highest court would decide this issue of law. City of Erie, Pa. v. Guaranty Nat. Ins. Co., 109 F.3d 156, 159 (3d Cir. 1997).

Without Pennsylvania case law on this subject, the Court looks to analogous authority for such a standard. Wassall v. DeCaro, 91 F.3d 443, 445 (3d Cir. 1996)(policies underlying applicable legal doctrine, current trends in the law and decisions of other courts relevant in predicting how the Pennsylvania Supreme Court would rule on an issue).

The Court predicts that the Pennsylvania Supreme Court will adopt the standard set forth in the Third Circuit's decision in McKenzie to evaluate the reasonableness of a non-refundable retainer fee.²⁴ In McKenzie, a contingent fee case controlled by Virgin Islands law, the Third Circuit rejected the "clearly excessive" standard set forth in Disciplinary Rule 2-106(A) of the ABA Model Code of Professional Responsibility for determining the reasonableness of a contingent fee.²⁵ McKenzie, 758 F.2d at 100-101. Instead, the Third Circuit held that

when the matter is the enforcement of a fee contract in an adversary proceeding between an attorney and his former client, . . . the court is not deciding whether a lawyer's conduct is unethical but whether, as against the client, it has resulted in such an enrichment at the expense of the client that it offends a court's sense of fundamental

²⁴Raymark has urged the Court to follow the standard set forth in McKenzie. (Pl.'s Summ. J. Mot. at 11.)

²⁵Rule 1.5, the corollary provision under Pennsylvania's Rules of Professional Conduct, provides that "[a] lawyer shall not enter into an agreement for, charge, or collect an illegal or clearly excessive fee."

fairness and equity.²⁶

Id. at 101.

Rather than applying a "clearly excessive" standard to the fee at issue here, the Court will use the standard announced in McKenzie, which has two interdependent components. First, did the attorney's conduct, as against the client's conduct, result in a fee that enriched the attorney at the client's expense? And second, does that enrichment offend the Court's sense of fundamental fairness and equity?

As a framework for applying this standard, the Third Circuit has identified a number of guiding principles that must inform the Court's evaluation of the retainer. The supervision of fees charged by attorneys is a special concern of courts. Id. For that reason, fee agreements "are not to be enforced on the same basis as ordinary commercial contracts." Id. (citing Dunn, 602 F.2d at 1108.) However, "courts should be reluctant to disturb contingent fee arrangements freely entered into by knowledgeable and competent parties. . . . It should therefore be the unusual circumstance that a court refuses to enforce a contractual contingent attorney's fee arrangement because of events arising after the contract's negotiation." Id. at 101-102.

²⁶The burden of proving that a contingent fee is reasonable -- that is, equitable and fair -- is on the attorney. McKenzie, 758 F.2d at 100. The burden of proof does not shift to the client merely because the client initiated the suit regarding the fees. Id.

Nevertheless, "the district court must be alert to fees where 'the lawyer's retention of it would be unjustified and would expose him to the reproach of oppression and overreaching.'" Id. at 102 (citations omitted).

With these guiding principles in mind, the Court will determine, based on the undisputed facts, whether Defendant's conduct, viewed as against Raymark's conduct, has resulted in a fee that has enriched Defendants at the expense of Raymark such that it offends this Court's sense of fundamental fairness and equity. Raymark argues that "the time to evaluate the reasonableness of Defendants' fee under the Agreement is November 13, 1996, the date Defendants were terminated by Raymark." (Pl.'s Summ. J. Mot. at 13.) In contrast, Defendants argue that the reasonableness of the parties' fee agreement "must be judged from the point in time of its making." (Defs.' Summ. J. Mot. at 7.) Both times must be considered. The Third Circuit has instructed that the circumstances existing at the time the parties entered into their fee agreement -- that is, the negotiation of the agreement -- and the circumstances occurring after the agreement was made -- that is, the performance and enforcement of the agreement -- are both relevant to an inquiry into the reasonableness of a fee. Id. at 101.

As a starting point, the Court finds that the fee agreement at issue here was freely entered into by knowledgeable and

competent parties and was fair to both parties when made. What makes this case so unusual is that the terms and conditions of the representation, the amount of the fees, and the non-refundable nature of the retainer were all set by the client, not the attorneys. Significantly, there is absolutely no evidence of overreaching by the attorneys or unequal bargaining power of the parties in the setting of the amount of the retainer fee and in the designation of the retainer as non-refundable.

As such, this case stands in stark contrast to the typical case in which a client challenges a fee as unfair and inequitable. Courts have unwound fee agreements where attorneys have overreached or have taken advantage of clients in setting fees or where attorneys have imposed fee agreements, tantamount to adhesion contracts, on clients who, because of their circumstances, had to accede to the attorneys' demands. Facts of this type are completely missing in this case. Raymark, not the attorneys, held all of the cards during the negotiation of the fee agreement and demanded, and got, the exact agreement it wanted. That agreement included a \$1 million retainer that was fully earned by Defendants and non-refundable upon Raymark's termination of the agreement.

There is no question that Raymark is a sophisticated client, fully conversant in the requirements of litigation and knowledgeable about possible alternatives to paying for its

defense costs. Raymark drafted the fee agreement at issue here, insisted on a fixed fee structure, and offered and set the \$1 million retainer as an incentive to secure Beausang's commitment to represent Raymark under terms dictated by Raymark.

Defendants, experienced litigators, accepted the terms of the agreement, the fees that Raymark was willing to pay, and the attendant risk inherent in a fixed fee structure.

Because the agreement was freely entered into by sophisticated parties and was fair to both parties when made, the Court must next determine whether unusual circumstances occurred after the agreement was executed that justify disturbing the parties' agreement. In making this determination, the Court pays particular attention to the conduct of Raymark and Defendants. Raymark argues that its act of terminating the agreement provides the necessary justification under McKenzie to render the agreement unenforceable as a matter of law. According to Raymark, termination of the agreement transformed it from one that was fair to both parties when made into one that was unfair to Raymark at the time of termination. In other words, although the \$1 million retainer was not unreasonable when the parties agreed to it, it became unreasonable when Raymark terminated the agreement.

The termination of the agreement by Raymark is not the type of unusual circumstance that justifies unwinding the parties'

agreement. The possibility that Raymark could terminate the agreement was contemplated by the parties at the time of contracting. Raymark included an express provision on the termination of the agreement in the fee agreement. That provision clearly provides that all fees paid at the time of termination of the agreement by Raymark are non-refundable. Moreover, it bears repeating that it was Raymark's, not Defendants', conduct that resulted in the termination of the agreement. Raymark does not argue that Defendants are not entitled to the retainer because they failed to perform under the fee agreement or otherwise breached the agreement.

In support of its argument that the \$1 million retainer provision is unenforceable, Raymark focuses on the dollar value of the legal services performed by Defendants for Raymark, calculated as of November 13, 1996, the date Raymark terminated the agreement. It is undisputed that at the time of their termination, Defendants had incurred approximately \$37,000 in costs and spent 335.5 hours on the Raymark representation. (Pl.'s App. Ex. D.) During the period of their representation of Raymark, Defendants hired no new lawyers or paralegals to work on Raymark matters, never appeared in court or at any deposition on Raymark's behalf, and never prepared or filed a pleading for Raymark. (Beausang Dep. at 61-62, 156-57, and 161.) Many of the 187 hours billed by Beausang were spent interviewing outside

lawyers to whom Defendants could subcontract Raymark work. (Id. at 137 and 161-62.) Raymark argues that because it did not receive \$1 million worth of legal services from Defendants before the agreement was terminated, the Court should find that the \$1 million non-refundable retainer provision of the parties' fee agreement is unenforceable.

Raymark's position is seriously flawed because the Court's inquiry is not limited to the value of the hourly billings performed by Defendants but more broadly encompasses other benefits received by Raymark for the \$1 million retainer. Compelling evidence that the \$1 million retainer was not a payment only for legal services is found in the parties' fee agreement. The \$1 million retainer was a payment for what Raymark called an "initial jurisdiction legal network organizational and management fee." (September 4 Agreement; September 11 Letter Agreement). In essence, the \$1 million was paid by Raymark to Defendants for Defendants' membership in the legal network created by Raymark to manage its defense and assume the financial risks thereof. In addition, Raymark agreed to make fixed quarterly payments for the legal services performed by Defendants. Therefore, the fact that the hourly billings performed by Defendants did not total \$1 million does not mean

that the retainer was unconscionable.²⁷

Although not in the form of legal services, Raymark received significant and valuable benefits in exchange for the \$1 million it paid to Defendants. After it emerged from bankruptcy, Raymark was faced with the revival of those law suits that had been stayed and the filing of additional claims against it. Raymark decided to once again use a national trial team approach to handling its defense. In order for this approach to work, Raymark needed an attorney to bear the responsibility of managing Raymark's defense in each of the six designated regions. A number of the prior members of Raymark's national trial team agreed to represent Raymark once again. However, the attorney Raymark wanted for the important region that included Delaware, New Jersey, and Pennsylvania (which had historically been the situs of a large volume of asbestos litigation), turned down Raymark's offer because his law firm would not sue other attorneys. Although Defendants did not have experience in asbestos-related litigation, Raymark extended to Defendants an offer to represent Raymark in this region. With Defendants' acceptance of Raymark's offer, Raymark was able to put all of the pieces together to complete its national trial team.

²⁷ The parties agree that Raymark was not obligated to make quarterly payments to Defendants for the period from September 1996 to December 1996.

The \$1 million retainer was the carrot that induced Defendants to make the commitment to represent Raymark on a fixed fee basis. With Defendants' commitment to be a member of Raymark's national trial team, Raymark was guaranteed Defendants' availability to handle all of Raymark's asbestos-related litigation. (Pl.'s App. Ex. O, Pennsylvania Bar Association, Formal Op. 95-100 n.4 (citing Brickman and Klein, 43 S.C.L.Rev. at pp. 1066-67) ("Because the consideration for a general retainer is paid in exchange for availability, it is a charge separate from the fees incurred for services actually performed.")). The value of Defendants' commitment was heightened because of the nature of the litigation required by Raymark -- that is, aggressively litigating each case that did not settle in accordance with the settlement matrix and filing counterclaims and initiating law suits against claimants and their counsel. The value of Defendants' commitment to Raymark was also enhanced because the agreement guaranteed Defendants' unconditional commitment. Although the parties' fee agreement contained a provision on the termination of the agreement by Raymark, it did not provide for the withdrawal of counsel.²⁸

Finally, the value received by Raymark for its \$1 million payment to Defendants also included a benefit that few clients in

²⁸Prior to the bankruptcy proceedings, Raymark had objected to every request for withdrawal made by its counsel. (C. Smith Dep. at 82.)

our legal system ever receive -- the ability to quantify and control its legal costs. Under the most commonly used, billable hour system, attorneys do not have the same incentive to control costs as they would have if they were paid a fixed amount for services rendered. When fees are determined by the number of billable hours, clients have limited control over the amount of fees and costs. Raymark rejected the use of a billable hour system. As an alternative, Raymark adopted a fixed fee structure, in which it could cap its defense costs and shift the risk to its counsel that the demands of Raymark's litigation would exceed the fixed payments. Raymark recognized that the caliber of attorney it wished to attract, for the type of aggressive litigation it required, would not assume that risk unless Raymark offered a large, guaranteed financial incentive. Raymark fashioned that financial incentive in the form of an initial payment of \$1 million, which, by the terms of the fee agreement, was non-refundable once paid, even if Raymark terminated the agreement.²⁹

²⁹Raymark also points out that Beausang turned down just one new piece of business, which he estimated would have generated \$10,000 to \$40,000 in fees, because of the Raymark engagement. (Beausang Dep. at 135.) Raymark suggests that because Defendants did not turn away significant business as a result of the Raymark engagement, Defendants cannot rely on lost business opportunities to justify their retention of the \$1 million. If Defendants had turned away highly lucrative business because of their representation of Raymark, this factor would tend to bolster their position that they were justified in keeping the \$1 million after Raymark terminated the agreement. The absence of this

Who better knew the value of capping defense costs in asbestos litigation than Raymark, a company with over 25 years of first-hand experience in asbestos litigation? Certainly not Defendants, who are admitted newcomers to this type of litigation. And not this Court, who, in view of all of the circumstances, sees no need and finds no basis to impugn the value of \$1 million selected by Raymark.

Raymark argues that the benefits it bargained for, such as the opportunity to cap its defense costs, were not fully realized because of the early termination of its relationship with Defendants. Although this may be true, the Court has serious difficulties with Raymark's argument. First, opportunities have a value, perhaps not as great a value as fully realized opportunities, but they nevertheless possess real value. An option contract is a prime example. Raymark valued these opportunities at \$1 million. Second, Raymark's current predicament is solely of its own making. Raymark abruptly ended its relationship with Defendants after only ten weeks. If, as a result, Raymark cut short its ability to exploit the full potential of the \$1 million retainer, this was a knowing decision that Raymark made and that the Court will not second guess. The Court concludes that under the unique facts of this case it would

factor, however, does not minimize in any way the benefits received by Raymark in exchange for its \$1 million.

be unjust and inequitable to allow Raymark to take advantage of its own act nullifying the fee agreement to secure the return of the retainer.

Raymark further charges that if the Court enforces the fee agreement, Defendants will reap a windfall. Obviously, Defendants have been enriched by Raymark's payment to them of \$1 million. But that is not the issue here. In accordance with the first component of the McKenzie standard, the issue is whether Defendants' conduct, as against Raymark's conduct, resulted in their enrichment at the expense of Raymark. In this regard, Defendants cannot be exposed "to the reproach of oppression and overreaching" with respect to their conduct when the agreement was made or when it was terminated. In addition, Raymark received tangible, valuable benefits for its \$1 million payment to Defendants. Under these circumstances, the Court finds that Defendants' conduct, as against Raymark's, did not result in their unjust enrichment at the expense of Raymark.

With respect to the second component of the McKenzie standard, Defendants' retention of the \$1 million retainer does not offend the Court's sense of fundamental fairness and equity.³⁰ Raymark, not Defendants, had control over all of the facts that make this case unique -- the amount of the retainer,

³⁰In this regard, the Court finds that Defendants have met their burden of proving the reasonableness of the retainer fee.

the non-refundable nature of the retainer, and the termination of the agreement. These facts, together with the benefits received by Raymark for its \$1 million payment, support this Court's conclusion that the \$1 million retainer is fair and equitable as a matter of law.³¹

³¹ Although the Court has applied the standard adopted by the Third Circuit in McKenzie, the Court finds that the Ninth Circuit's decision in Brobeck, Phleger & Harrison v. Telex Corp., 602 F.2d 866 (9th Cir. 1979) is instructive on the issue of whether a fee is unconscionable and a fee agreement is enforceable. In Brobeck, the Ninth Circuit held that a \$1 million minimum contingent fee for filing a petition of certiorari was not unconscionable and the contingent fee agreement was enforceable. The client Telex made the same argument that Raymark makes here -- the \$1 million fee was so excessive as to render the contract unenforceable. In finding that the contract was not unconscionable and that the attorney could keep the \$1 million fee, the Ninth Circuit relied on the following factors: Telex, which was threatened with bankruptcy, sought the most experienced and capable antitrust attorney in the country to file a petition for certiorari on its behalf for review of the Tenth Circuit's reversal of the money judgment Telex had been awarded against IBM; Telex chose Moses Lasky of the Brobeck firm and insisted on a contingent fee agreement; the parties were of equal bargaining power; and Telex received substantial value from Brobeck's services by using Brobeck's petition as leverage to settle the case, thereby saving Telex from possible bankruptcy if the Supreme Court denied the petition for certiorari. Id. at 875. Some of the same factors relied on by the Ninth Circuit in Brobeck are present in this case -- the sophistication of the client, the client's insistence on the type of fee agreement used, the equal bargaining power of the parties, and the substantial value the client received for the \$1 million it paid the attorney. In Brobeck, the value received by the client was in the form of an actual legal product, a petition for certiorari. Here, the value received by Raymark was not in the form of a legal product. Nevertheless, the value received by Raymark constituted a tangible benefit, and therefore the parties' fee agreement is not so excessive as to render the contract unenforceable.

b. The Fiduciary Nature of the
Attorney/Client Relationship

Raymark contends that Defendants breached the fiduciary duty they owed to Raymark by collecting an excessive fee. Because the Court has determined that the \$1 million retainer is fair and equitable, and hence not excessive, it necessarily follows that Defendants are not liable as a matter of law for breach of fiduciary duty.

In reaching this conclusion, the Court recognizes the existence of a fiduciary duty owed by an attorney to a client in the setting of legal fees. The common law of Pennsylvania "imposes on attorneys the status of fiduciaries vis a vis their clients; that is, attorneys are bound at law to perform their fiduciary duties properly. Failure to do so gives rise to a cause of action." Maritrans, 602 A.2d at 1283. The Supreme Court of Pennsylvania explained that the fiduciary nature of the attorney/client relationship "'bind[s] the attorney to the most conscientious fidelity.'" Id. at 1283 n.3 (quoting Tri-Growth Centre City, Ltd. v. Silldorf, Burdman, Duignan & Eisenberg, 216 Cal.App.3d 1139, 1150, 265 Cal.Rptr. 330, 335 (1989)).

The Court rejects Defendants' position that under Pennsylvania law there is no fiduciary relationship between a

commercial client and its counsel in the setting of fees. (Defs.' Summ. J. Mot. at 13-16.) The Court declines to follow Powell v. Wandel, 146 A.2d 61 (Pa. Super. Ct. 1958), the case relied on by Defendants. In Powell, an inventor was represented by counsel for two and a half years without paying any legal fees. The attorney and client then entered into a written fee agreement under which the client agreed to pay his attorney a percentage of royalties he received from his inventions over a ten year period in exchange for the attorneys' agreement to provide the client with legal representation over that same ten year period. Three years after the agreement was made, the client terminated his attorney and refused to account for his royalties. In affirming the jury verdict enforcing the fee agreement in favor of the attorney, the Superior Court stated: "While the question has not been heretofore raised in this case, we have some doubt that the principles of law governing fiduciary relations apply to the present situation." Id. at 64.

The above-quoted dicta in Powell directly conflicts with the holding in Maritrans, in which the Pennsylvania Supreme Court made clear that the attorney-client relationship is a fiduciary one. The Court finds that the scope of this fiduciary relationship extends to the setting of fees. Therefore, the Court will not carve out the exception that Defendants advocate.

In this case, Defendants did not breach any duty owed to Raymark. The only breach alleged by Raymark -- that is, the collection by Defendants of an allegedly excessive fee -- fails as a matter of law because the Court has found that the \$1 million fee did not unjustly enrich Defendants and is fundamentally fair and equitable. Therefore, Defendants are entitled to summary judgment in their favor on Raymark's breach of fiduciary duty claim (Count II).

c. Raymark's Right to Terminate Defendants

Raymark argues that it had an absolute right to terminate Defendants and that if the Court allows Defendants to keep the \$1 million retainer, this "would seriously compromise and chill a client's absolute right to fire a lawyer at any time, for any reason." (Pl.'s Summ. J. Mot. at 13.) Although not fully developed in their Motion, Raymark suggests that the fee agreement is unenforceable because the prohibitive cost of terminating Defendants would eviscerate Raymark's right to discharge Defendants.

The Court agrees that Raymark had an absolute and unfettered right to discharge Defendants. Hiscott and Robinson v. King, 626 A.2d 1235, 1237 (Pa. Super. Ct. 1993) ("The right of a client to terminate the attorney-client relationship is an implied term of every contract of employment of counsel, at least where the

attorney has no vested interest in the case or its subject matter."). This absolute right can be exercised by the client for any reason and "regardless of the contractual arrangement between the client and the attorney." Crabtree v. Academy Life Ins. Co., 878 F. Supp. 727, 731 (E.D.Pa. 1995); Sundheim v. Beaver County Bldg. & Loan Ass'n, 14 A.2d 349 (Pa. Super. Ct. 1940)(despite the existence of a fee agreement, a client may terminate his or her attorney at any time).

On November 13, 1996, Raymark exercised its right to discharge Defendants. Under the agreement drafted by Raymark, fees paid to Defendants at the time of termination were non-refundable. Therefore, Raymark was fully aware of the economic consequences that attended a decision to terminate the agreement. By deciding to end its relationship with Defendants after only ten weeks, Raymark necessarily chose to bear the agreed-upon cost of termination. There is no evidence in the record that the \$1 million cost of termination caused Raymark to hesitate at all in terminating Defendants. Under these circumstances, the Court finds that Raymark's right to discharge Defendants was not impermissibly chilled.

For all of the reasons discussed above, the Court will enforce the parties' fee agreement as written. The \$1 million retainer was non-refundable and fully earned. Therefore,

Defendants are entitled to retain the entire amount of the retainer.

B. Beausang's Counterclaims

Raymark moves for summary judgment on Count I of Beausang's Counterclaims, for fees for the ten week period he was retained by Raymark, based on Beausang's admission that the quarterly payments under the September 4 Agreement were not to begin until January 1997. (Beausang Dep. at 81-82, 160.) Counsel for Defendants also conceded this point. (10/10/97 Hr'g Tr. at 23.) Therefore, summary judgment as to Count 1 of Beausang's Counterclaims will be granted.

The parties have filed cross-motions for summary judgment as to Count 2 of the Counterclaims. Beausang seeks recovery of \$168,000 as payment for the period from January 1, 1997 through February 11, 1997. (Defs.' Summ. J. Mot. at 22.) The \$168,000 is a pro rata share of the fixed \$312,000 quarterly payment set forth in paragraph 3 of the September 4 Agreement. Beausang argues that he is entitled to compensation for this period because Raymark failed to give him 90 days written notice of termination, as required by paragraph 5 of the September 4 Agreement.

Throughout their papers and without any support, Defendants argue that Beausang was fired by Raymark "without cause" and

refer to the "wrongful" termination of Beausang by Raymark. As discussed above, Raymark had the absolute right to terminate Beausang, regardless of the terms of their agreement. Hiscott, 626 A.2d at 1237; Kenis v. Perini Corp., 602 A.2d 845, 849 (Pa. Super. Ct. 1996). The attorneys in Hiscott made the same argument that Defendants make here -- that they were dismissed "without cause." The Superior Court held that "it has long been the law that a client has a right to discharge an attorney, with or without cause." Hiscott, 626 A.2d at 1237. Therefore, the reason why Raymark terminated Beausang is not relevant to the issue of whether Beausang can recover on his counterclaim. The law does not recognize wrongful termination as a breach of a fee agreement by a client.

In support of his \$168,000 Counterclaim, Beausang argues that paragraph 5 of the September 4 agreement "should be enforced as written." (Defs.' Summ. J. Mot. at 22.) The Court agrees. Paragraph 5 reads as follows:

Raymark may terminate this Agreement at will and without cause upon ninety (90) days written notice served upon Counsel. All fees paid as of the termination date shall be non-refundable.

The termination provision is clear and unambiguous as written. Although the agreement requires Raymark to give 90 days notice of termination, the agreement does not provide that Beausang will be compensated on a pro rata basis at the quarterly rate if Raymark terminates the agreement without notice. Defendants, who argued

for the strict construction of paragraph 5 with respect to the non-refundable nature of the \$1 million retainer,³² now want the Court to read into the parties' agreement language that is not there. If the parties had wanted to provide compensation to Beausang for lack of notice, the parties would have included language to this effect in the agreement. They did not. In accordance with the principles of contract interpretation set forth in Section III.A.2 above, the Court will not re-write the parties' agreement to add such a provision. Beausang is not entitled to recover compensation for Raymark's failure to give notice of termination.

The Court is aware that an attorney is entitled to compensation for services rendered, but unpaid, when a client terminates his or her attorney. Under these circumstance, quantum meruit is the proper measure of damages to compensate the attorney for the services performed as of the date of termination. Novinger, 809 F.2d at 218. The rule was set forth in Sundheim as follows:

A client may terminate his relation with an attorney at any time, notwithstanding a contract for fees, but if he does so, thus making performance of the contract impossible, the attorney is not deprived of his right to recover on a

³²For example, in discussing the effect of termination of the agreement by Raymark with respect to the \$1 million retainer, Defendants argue that the Court should enforce the "clear and precise" language of paragraph 5 that "[a]ll fees paid as of the termination date shall be non-refundable." (Defs.' Opp. to Pl.'s Summ. J. Mot. at 13-14.)

quantum meruit a proper amount for the services which he has rendered.

Sundheim, 14 A.2d at 351.

Beausang cannot rely on a quantum meruit theory as a basis for recovery of \$168,000. The Court has found that the parties' fee agreement, including the termination provision, is enforceable. Because Raymark's termination of the agreement made it impossible for Beausang to continue his performance under the contract, in theory Beausang would be entitled to a quantum meruit measure of damages for legal services actually rendered on behalf of Raymark at the time of termination. However, because he did not render any services for Raymark during the period from January 1, 1997 through February 11, 1997, he cannot recover quantum meruit damages.

For the foregoing reasons, Beausang recovers nothing on Count II of his Counterclaims. Plaintiff is entitled to summary judgment on Count II of the Counterclaims.

IV. CONCLUSION

For the reasons set forth above, the Court will deny Raymark's Motion and grant Defendants' Motion as to the \$1 million retainer and will grant Raymark's Motion and deny Defendants' Motion as to Beausang's Counterclaims.

An appropriate Order follows.