IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

AVANTIX LABORATORIES, INC., a Delaware corporation,	)	
Plaintiff,	)	C.A. No. N10C-01-010 MMJ
v.	)	
PHARMION, LLC, a Delaware corporation,	)	
Defendant.	)	

Submitted: April 30, 2012
Decided: June 18, 2012

On Cross-Motions for Summary Judgment
GRANTED IN PART; DENIED IN PART

OPINION

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JOHNSTON, J.

INTRODUCTION

Plaintiff Avantix Laboratories, Inc. ("Avantix") filed suit against Defendant Pharmion, LLC ("Pharmion"), alleging breach of contract, unjust enrichment, *quantum meruit*, and promissory estoppel. Avantix claims that Pharmion breached its agreement to pay Avantix for all actual goods, services, labor, costs, fees, and expenses in connection with the Azacitidine ("AZA") Assay Study.

The parties filed Cross-Motions for Summary Judgment. The Court heard oral argument on the motions on April 12, 2012. For the following reasons, Pharmion's Motion for Summary Judgment is granted in part and denied in part, and Avantix's Motion for Summary Judgment is granted in part and denied in part.

FACTUAL BACKGROUND

FDA Approval

On May 19, 2004, Pharmion Corporation ("Pharmion") received FDA approval for Vidaza (azacitidine for injectable suspension), a drug used for the treatment of all subtypes of myelodysplastic syndromes. Because azacitidine ("AZA") is primarily excreted by the kidneys, Pharmion proposed, and the FDA agreed, that certain post-marketing studies be conducted on a sub-set of patients with varying degrees of renal impairment.

Master Services Agreement

In order to complete these post-marketing studies, Pharmion hired Avantix Laboratories, Inc. ("Avantix") to develop testing methods called bioanalytical assays. On July 28, 2004, Pharmion and Avantix entered into a Master Services Agreement ("MSA"), which provided that Avantix would perform services reasonably required for the successful completion of future "Work Orders."

Section 1.2 of the MSA, which addressed Work Orders, provides, in relevant part:

> Services provided by [Avantix] shall be subject to the terms and conditions of this Agreement. All such services shall be the subject of a work order …. After a work order … is agreed upon and executed by the parties hereto, the same shall be attached to this Agreement … and the Work Order shall then be part of this Agreement …. Services shall only be commenced after the execution of a Work Order.

The MSA states that each Work Order must set forth the appropriate budget and payment schedule.

The MSA also includes a provision for "Change Orders." Section 1.3 of the MSA provides:

> In the event that [Avantix] is requested or required to perform Services that are not provided for in the applicable Work Order, such services and a compensation schedule therefore [sic] must be mutually agreed upon by the parties in a written change order ("Change Order") prior to the provision of said services. The Change Order constitutes an amendment to the applicable

> Work Order and the services set forth therein shall be deemed to be Services part [sic] of such Work Order.

Of particular relevance to the instant action is Section 3 of the MSA, which addresses compensation. Section 3 provides, in pertinent part:

> Unless otherwise agreed in the Work Order, invoices shall be submitted by [Avantix] to Pharmion on a monthly basis and, except with respect to amounts subject to a bona fide dispute, payment will be made within thirty (30) days after Pharmion's receipt of [Avantix's] monthly invoice.

Work Order 44-0401

At some point in time,[1] Pharmion and Avantix executed Work Order 44-0401 ("SOW 44-0401"). Pursuant to SOW 44-0401, Avantix was to develop and validate an assay to detect AZA in human urine. In a July 15, 2004[2] letter from Avantix to Pharmion, Avantix stated that the projected costs for SOW 44-0401 – $111,000 – were based on the current scope of work. The letter further provided:

> In the event that we encounter unexpected physicochemical issues with your compounds or you request a modification to the current scope of work, the project will be put on hold and a change order will be submitted for your approval. Work will recommence upon receipt of a signed change order at Avantix.

[1] Work Order 44-0401 is not in the record.

[2] It is unclear to the Court why correspondence regarding Work Order 44-0401 predates the MSA.

At the completion of SOW 44-0401, Avantix had exceeded the budget by $140,000. It is undisputed that no Change Order was submitted by either party before the additional costs were accrued. In a September 24, 2004 email from Avantix to Pharmion, Avantix assured Pharmion that similar budget overages would not occur on future projects because Avantix was "now intimately familiar with the challenges [of] AZA." The email further declared that if budget issues arose in the future, Avantix would contact Pharmion before extending work.

Pharmion paid Avantix,[3] but requested that it be notified in the future of any out-of-scope projected costs prior to Avantix extending work.

Work Order 44-0403

On August 24, 2004, Avantix submitted a proposed draft of Work Order 44-0403 ("SOW 44-0403") to Pharmion. Under SOW 44-0403, Avantix was to: (1) use or modify the existing LC-MS/MS analytical assay for urine (SOW 44-0401) for the determination of AZA in human plasma; (2) evaluate any potential degradants or metabolites presented in the plasma; and (3) perform a full assay validation for AZA in human plasma by LC-MS/MS. In achieving the first objective – modification of SOW 44-0401 –

[3] Avantix absorbed 30% of the cost, resulting in Pharmion paying a total of $209,000 ($111,000 + 70% of $140,000).

Avantix was to ensure that the assay had "sufficient sensitivity[4] and selective[ity] for clinical samples."

The SOW 44-0403 reflected that the proposed budget for the project was $64,000, plus a 10% pass through cost, for a total budget of $70,400. According to the SOW 44-0403's "Pricing Amendment" page, Pharmion was to make three "milestone" payments: (1) Payment 1 – $32,000 due at initiation of signed statement of work; (2) Payment 2 – $22,400 due at completion of validation and submission of draft data; and (3) Payment 3 – $9,600 due at submission of final validation report or 45 days following submission of draft report, whichever comes first. Pursuant to SOW 44-0403's "General Terms and Conditions," payment was due "thirty days after invoice date."

According to Avantix's projected timeline for SOW 44-0403, Pharmion was to receive a preliminary update on October 8, 2004 regarding the method development for AZA in human plasma. On October 22, 2004, method validation for AZA in human plasma was to be complete, and on November 1, 2004, Avantix's draft report for the method validation was to be completed.

[4] "Sensitivity" refers to the ability to detect the presence of a drug in a blood sample.

On September 1, 2004, Avantix and Pharmion executed SOW 44-0403. Pursuant to the terms of the Work Order and the MSA, SOW 44-0403 was governed by, and became a part of, the MSA.

Delays in Completion of SOW 44-0403

In November 2004, Avantix notified Pharmion that completion of the plasma validation process would be postponed until November 18, 2004, with the draft report furnished December 15, 2004. Pharmion was told to expect to receive the final plasma method validation report on January 19, 2004.

Increasing Sensitivity of Plasma Assay

On December 8, 2004, Pharmion contacted Avantix, inquiring as to whether the lower level of quantification ("LLOQ")[5] of the plasma assay was 10ng/mL. Pharmion requested that if the LLOQ was, in fact, 10ng/mL, that it be decreased to 5ng/mL. Lowering the LLOQ would result in increased assay sensitivity, which would enable Pharmion to determine assay levels in patient samples for a longer period of time and at a lower dosage.

[5] A LLOQ is the lowest amount of a compound – here, AZA – that can be quantitatively determined with suitable precision and accuracy.

That same day, Avantix responded to Pharmion's inquiry, stating that the LLOQ of the plasma assay was 10ng/mL. Avantix stated that it could increase the sensitivity of the current method with "some creativity and time," but that work would need to be redirected to accommodate this "change of plan."

By email dated December 14, 2004, Pharmion directed Avantix to "proceed with trying to get the sensitivity of the assay down to the lowest level possible (below 5[ng/mL] would be even better)." Pharmion requested that Avantix provide a cost estimate for this task. Avantix did not provide a cost estimate. Pharmion did not follow up on its request for a cost estimate.

Delays in Providing the Report

On February 9, 2005, Avantix informed Pharmion that it had successfully validated the AZA assay with a sensitivity of 1ng/mL. Pharmion, in turn, requested that Avantix provide its draft report of the AZA method validation.

On February 25, 2005, Avantix agreed to provide the AZA method validation report by March 18, 2005, noting that "all key components of the validation [we]re done." Pharmion did not receive the report on March 18, 2005.

Pharmion contacted Avantix in May 2005, July 2005, August 2005, September 2005, and December 2005, in an attempt to obtain a draft of the AZA method validation report. Avantix neither provided the report nor offered any reason for the delay.

On February 27, 2006, representatives from Pharmion and Avantix met. The parties, however, dispute what occurred at this meeting. Pharmion contends that Avantix complained about needing to repair equipment and the total amount of scientist hours devoted to the project since November 2005. Avantix claims that it was instructed by Pharmion to continue working on SOW 44-0403 because Pharmion needed the assay to support the clinical studies in order to fulfill the FDA's request for additional testing.

Continued Efforts to Increase Sensitivity of Assay

On March 28, 2006, Avantix once again informed Pharmion that the AZA method was finalized and ready to be validated. According to Avantix, it was able to increase assay sensitivity to .5ng/mL.

By email dated April 24, 2006, Avantix submitted to Pharmion the additional costs associated with the AZA assay development, which totaled $552,605. These charges purportedly covered the time period from November 2004 through February 2006. Avantix acknowledged that the costs of the project had "greatly increased," but contended that substantial

time had been expended to get the assay "under control[] with an acceptable robustness." That same day, in response to Avantix's email, Pharmion stated that it would review the costs and reply to Avantix.

On May 23, 2006, Pharmion sent a follow-up email, stating that it was reviewing the additional costs and was surprised at the significance of the added charges.

AZA Plasma Validation Report

On August 11, 2006, Avantix provided Pharmion with a draft of the "Assay Validation Report," which, according to Avantix, actually had been prepared in early 2005.

Thomas Walker, Pharmion's outside AZA study consultant, reviewed the draft report and noted several issues. Among other things, Walker noted that the report omitted critical information which Avantix deemed "confidential." According to Walker, without this information, no laboratory could carry out the methodology in clinical studies.

On September 22, 2006, Avantix provided Pharmion with the final "Assay Validation Report." The report referenced an LLOQ of 1ng/mL[6] and contained graphs dated from early 2005.

[6] Pharmion contends that Avantix prepared a separate report using an internal standard with a stable isotope (N15) as an alternate method. According to Pharmion, this report referenced an LLOQ of .5ng/mL. This report is not in the record.

The Final Invoice

On September 19, 2006,[7] Avantix sent Pharmion a "Final Invoice," itemizing the additional costs associated with the AZA project, which totaled $531,165. The invoice reflected the following charges:

Charges	Amount
Scientist and Instrument Time	$376,950
Quintiles Assay Cross-Validation- SOW 44-0406	$39,000
Plasma Assay Validations With and Without Using Stable Isotope- SOW 44-0403 & SOW 44-0602	$64,000
Scientist Time: Support the Dose Proportional Study	$7,625
Pass-Through Costs	$43,590
Total	$531,165

These charges purportedly covered the time period from November 2004 through May 2006. The invoice stated that payment was due upon receipt.

Avantix contacted Pharmion on September 27, 2006, October 28, 2006 and November 15, 2006, inquiring about the outstanding September

[7] On September 19, 2006, Avantix also submitted, via email, a breakdown of the additional costs associated with the AZA project. The spreadsheet itemizes the charges and reflects that Avantix reduced its costs by approximately $132,000.

2006 invoice. Avantix requested that the invoice be paid or else legal action would be initiated.

In December 2006, Pharmion advised that the invoices had been referred to Pharmion's Legal Department and that a response was forthcoming.[8]

By letter dated January 5, 2007, Pharmion informed Avantix that it was not obligated to pay the additional costs accrued during the AZA project. Pointing to SOW 44-0403's terms, Pharmion stated that the total budget for the project was $64,000. Because Avantix did not submit a Change Order for the additional work, Pharmion contended that Avantix "chose to go at risk for the additional costs it generated."

Revised Final Invoice

During litigation, Avantix amended the total amount due under the September 2006 invoice to reflect the following payments made by Pharmion:

Invoice Date	Payment Date	Amount	Description
10/05/04	11/08/04	$32,000	SOW 44-0403 Payment 1
12/15/04	01/15/05	$22,400	SOW 44-0403 Payment 2
08/22/06	09/14/06	$39,000	SOW 44-0406 Payment

[8] There is no documentary record evidence to corroborate this claim.

10/04/06	10/20/06	$7,625	Technical Support
10/04/06	10/20/06	$9,600	SOW 44-0403 Payment 3
10/04/06	10/20/06	$43,590	SOW 44-0403 Pass-Through Costs

After accounting for these payments, Avantix recalculated the outstanding principal sum to be $376,950. This figure represents the charges attributable to scientist and instrument time for the work performed in connection with SOW 44-0403 and Pharmion's December 2004 request.

Pharmion Hires Covance

In June 2006, Pharmion hired another research laboratory, Covance Laboratories, Inc. ("Covance"), to develop a validated AZA plasma method. In less than a month, Covance developed a plasma method suitable to Pharmion. The total costs for this project were $30,000.

Pharmion contends that Covance was not provided with copies of Avantix's "Assay Validation Report." Rather, Covance developed its own method "from scratch," which was utilized by Pharmion in its post-marketing studies on renal-impaired patients.

PROCEDURAL CONTEXT

On January 4, 2010, Avantix filed suit in this Court against Pharmion,[9] alleging breach of contract, *quantum meruit*, unjust enrichment, and promissory estoppel. Avantix's claims stem from Pharmion's non-payment of the September 19, 2006 invoice.

On March 12, 2010, Pharmion filed a Motion to Dismiss, claiming that Avantix's claims were barred by the statute of limitations. By Order dated May 13, 2010, the Court granted Avantix leave to amend the Complaint. Thereafter, on June 14, 2010, Avantix filed an amended Complaint.[10]

On February 21, 2012, Pharmion filed a Motion for Summary Judgment, arguing that: (1) Avantix's claims are barred by the statute of limitations; (2) the contract between the parties provided a fixed fee for Avantix's services; (3) Avantix's quasi-contract claims should be dismissed because a contract governs the parties' relationship; and (4) even if the Court

[9] Avantix's Complaint also named Celgene Corporation ("Celgene") and numerous fictitious persons and entities as defendants. By Order dated May 13, 2010, the Court dismissed the "fictitious" defendants named in Avantix's Complaint. All subsequent pleadings, however, also omitted reference to Celgene as a defendant.

[10] Avantix previously amended its Complaint on February 9, 2010 before the filing of Pharmion's Motion to Dismiss. Therefore, the June 2010 Complaint was Avantix's Second Amended Complaint.

finds that no express contract governs the parties' relationship, Avantix is not entitled to recover under any quasi-contractual theory.

Avantix filed a Cross-Motion for Summary Judgment, arguing that: (1) Avantix's claims are not time-barred; and (2) Avantix is entitled to recover under quasi-contract theories because no express contract governs the additional work performed by Avantix.[11]

STANDARD OF REVIEW

Summary judgment is granted only if the moving party establishes that there are no genuine issues of material fact in dispute and judgment may be granted as a matter of law.[12] All facts are viewed in a light most favorable to the non-moving party.[13] Summary judgment may not be granted if the record indicates that a material fact is in dispute, or if there is a need to clarify the application of law to the specific circumstances.[14] When the facts permit a reasonable person to draw only one inference, the question becomes one for decision as a matter of law.[15] If the non-moving party

[11] It appears to the Court that at this point in the litigation, Avantix has abandoned its breach of contract claim.

[12] Super. Ct. Civ. R. 56(c).

[13] *Hammond v. Colt Indus. Operating Corp.*, 565 A.2d 558, 560 (Del. Super. 1989).

[14] Super. Ct. Civ. R. 56(c).

[15] *Wootten v. Kiger*, 226 A.2d 238, 239 (Del. 1967).

bears the burden of proof at trial, yet "fails to make a showing sufficient to establish the existence of an element essential to that party's case," then summary judgment may be granted against that party.[16]

Where the parties have filed cross motions for summary judgment, and have not argued that there are genuine issues of material fact, "the Court shall deem the motions to be the equivalent of a stipulation for decision on the merits based on the record submitted with the motions."[17] Neither party's motion will be granted unless no genuine issue of material fact exists and one of the parties is entitled to judgment as a matter of law.[18]

PARTIES' CONTENTIONS

Pharmion's Arguments

Pharmion contends that Avantix's claims are time-barred because Avantix filed its Complaint more than three years after Pharmion's cause of action accrued. Pharmion argues that pursuant to SOW 44-0403, payment of the September 19, 2006 invoice was due thirty days after issuance of the invoice. Therefore, the alleged wrongful act occurred on October 20, 2006 – the 31st day after which payment was to be tendered. Because Avantix's

[16] *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

[17] Super. Ct. Civ. R. 56(h).

[18] *Emmons v. Hartford Underwriters Ins. Co.,* 697 A.2d 742, 744-45 (Del. 1997).

Complaint was filed on January 4, 2010, more than three years after the alleged breach, Pharmion argues that this action must be dismissed.

Pharmion next claims that Avantix is not entitled to damages because the contract between the parties established a "fixed fee" for the project – a fee which Pharmion already paid. Pharmion further argues that Avantix's non-compliance with the MSA's Change Order provision precludes it from recovering for the alleged additional work.

Finally, Pharmion contends that because the parties' relationship is governed by an express agreement, Avantix may not recover under theories of unjust enrichment, *quantum meruit* or promissory estoppel. Alternatively, Pharmion claims that even if the Court finds that no express contract governs the matter at hand, Avantix is still not entitled to recover under any quasi-contract theory. According to Pharmion, because it received no benefit from the services provided by Avantix, Avantix's unjust enrichment and *quantum meruit* claims are without merit. Pharmion further argues that Avantix's promissory estoppel claim should be dismissed because it was unreasonable for Avantix to expect Pharmion to pay nearly ten times the contract price.

Avantix's Arguments

Avantix argues that the Complaint was timely filed. According to Avantix, because there was a bona fide dispute as to the amount of the September 19, 2006 invoice, the MSA provides that payment is not due within 30 days of issuance of the invoice. The breach did not occur until January 5, 2007, when Pharmion denied that it was obligated to pay the full amount of the September 2006 invoice. Because the Complaint was filed within three years of the breach, Avantix contends that it is not time-barred.

Avantix next contends that Pharmion's December 2004 request to achieve the lowest sensitivity level possible was additional work, not contemplated by either party at the time of SOW 44-0403's execution. Because no Change Order was submitted for this additional work, Avantix argues that it has a valid claim for unjust enrichment or *quantum meruit*.

Finally, Avantix claims that it is entitled to recover under a theory of promissory estoppel because it proceeded with achieving the lowest sensitivity level possible in reliance on Pharmion's promise to pay for the work.

DISCUSSION

I. Statute of Limitations

Pursuant to 10 *Del. C.* § 8106, no action based on a promise "shall be brought after the expiration of 3 years from the accruing of the cause of such action." A cause of action accrues, and thus triggers the running of the statute of limitations, at the time of the alleged wrongful act or breach.[19]

In the instant action, the parties agree that Section 8106's three-year period of limitations governs Avantix's breach of contract, unjust enrichment, *quantum meruit*, and promissory estoppel claims. The parties further agree that the alleged wrongful act or breach occurred when Pharmion failed to remit payment for the September 19, 2006 invoice at the time it was contractually obligated to do so. The parties, however, dispute the date on which Pharmion was obligated to tender payment.

Pharmion contends that pursuant to SOW 44-0403's compensation provision, payment was due 30 days after issuance of the September 19, 2006 invoice. Therefore, according to Pharmion, any alleged breach would have occurred on October 20, 2006 – the 31st day after issuance of the invoice.

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[19] *Council of Wilmington Condo. v. Wilmington Ave. Assocs*., 1996 WL 527392, at *2 (Del. Super.); *see also Whittington v. Dragon Group L.L.C.,* 2008 WL 4419075, at *5 (Del. Ch.).

Avantix urges the Court to find that the instant matter is governed by the MSA. According to Avantix, because the work requested by Pharmion in December 2004 was additional work, outside the scope of SOW 44-0403, the MSA's compensation provision controls. Relying on Section 3 of the MSA, Avantix contends that payment of the September 2006 invoice was not due within 30 days because there was a bona fide dispute regarding the amount of the invoice. Avantix argues that the alleged breach did not occur until January 5, 2007, when Pharmion unequivocally denied that payment was due to Avantix.

In order to resolve this factual dispute, the Court must determine whether the compensation provisions of the MSA or SOW 44-0403 govern payment of the September 19, 2006 invoice. This determination necessarily hinges on whether the work requested in December 2004 fell within the scope the SOW 44-0403.

A. Increasing Sensitivity Not Within Scope of SOW 44-0403

Pursuant to SOW 44-0403, Avantix was to develop an assay for the detection of AZA in human plasma that had "sufficient sensitivity and selective[ity] for clinical samples." However, neither party specified what constituted "sufficient sensitivity." In fact, Pharmion acknowledged that at

the time SOW 44-0403 was executed, it did not know what sensitivity level it wanted to achieve.

On December 8, 2004, approximately three months after SOW 44-0403 was executed, Pharmion requested that Avantix increase the sensitivity level by decreasing the LLOQ from 10ng/mL to 5ng/mL or below. Although Avantix acknowledged that the work requested would entail additional "creativity and time," Avantix informed Pharmion that this "change of plan" could be accommodated. In response, Pharmion advised Avantix to proceed with trying to get the sensitivity level of the assay down to the lowest level possible and to provide a cost estimate for the work.

The Court finds that the work requested by Pharmion on December 8, 2004 was additional work, outside the scope of SOW 44-0403. The record establishes that per SOW 44-0403, Avantix was to achieve a "sufficient" sensitivity level. It was not until December 2004, nearly three months after SOW 44-0403 was executed, that Pharmion indicated that it wanted Avantix to achieve the lowest sensitivity level possible. Plainly, achieving a *sufficient* sensitivity level is not the same as achieving the *lowest* sensitivity level possible.

Moreover, the record establishes that both parties believed that Pharmion's December 2004 request would necessitate additional time and

expense, beyond that identified in SOW 44-0403. Avantix explicitly advised Pharmion that the work would require some "creativity and time," and Pharmion, in turn, requested a cost estimate for the work. It was evident to both Pharmion and Avantix that this "additional" work would carry additional costs. Therefore, the Court finds that the services performed in connection with Pharmion's December 2004 request were additional work, outside the scope of SOW 44-0403.

B. MSA Governs Parties' Relationship

Despite the fact that both Pharmion and Avantix believed that the December 2004 request would require additional time and resources, it is undisputed that neither party drafted nor submitted a Change Order in accordance with the MSA. The parties' relationship, nonetheless, is governed by the MSA. Section 1.2 of the MSA states: "Services provided by [Avantix] shall be subject to the terms and conditions of this Agreement." The Court finds that the parties intended the MSA to serve as a comprehensive agreement, covering all matters relating to Avantix's ongoing provision of research services.[20] Therefore, the Court will focus on

[20] *See* discussion *infra* at "II.B. Failure to Submit Change Order Does Not Bar Recovery Under a Quasi-Contract Theory" (parties' course of dealing involved prior waiver of MSA Change Order requirement).

the MSA's compensation provision to determine when payment of the September 19, 2006 invoice was due.

C. Bona Fide Dispute Regarding September 19, 2006 Invoice

Section 3 of the MSA provides that all invoices shall be paid within thirty days after Pharmion's receipt, except with respect to amounts subject to a bona fide dispute. The Court finds undisputed evidence of a bona fide dispute regarding the amount of the September 19, 2006 invoice.[21] The September 2006 invoice, which purportedly covered the period from November 2004 to May 2006, totaled $531,165. Avantix subsequently revised the total to $376,950 to reflect payments made by Pharmion. Notwithstanding this recalculation, the September 2006 invoice was $306,550 more than what the parties had agreed to in SOW 44-0403.

For the three months following issuance of the September 2006 invoice, a series of correspondence ensued between Avantix and Pharmion. Avantix made repeated requests for payment of the September 2006 invoice, eventually culminating in threats of litigation if Pharmion did not tender payment. Pharmion, meanwhile, advised Avantix that it was surprised at the significance of the additional costs and would need to review the invoice.

[21] Though the September 19, 2006 invoice references work performed on SOW 44-0402, SOW 44-0403, and SOW 44-0406, the parties only dispute the charges with respect to SOW 44-0403. Specifically, the parties dispute the charges attributable to the scientist and instrument time.

Pharmion later advised Avantix that the matter had been referred to its legal department.

On January 5, 2007, Pharmion advised Avantix, in no uncertain terms, that Pharmion was not obligated to remit payment for the additional costs. According to Pharmion, SOW 44-0403 established a fixed fee for all work performed for the project. Additionally, Pharmion pointed out that because Avantix did not submit a Change Order in connection with the additional work, Pharmion assumed that "Avantix chose to go at risk for the additional costs it generated."

The Court finds that the parties' communications clearly demonstrate that there was a bona fide dispute regarding the amount of the September 19, 2006 invoice. This dispute ultimately led to the initiation of litigation. Therefore, pursuant to the terms of the MSA, payment of the September 19, 2006 invoice was not due thirty days after its issuance. In reaching this conclusion, the Court rejects Pharmion's contention that the alleged breach occurred on October 20, 2006.

D. Statute of Limitations Accrued on January 5, 2007

The Court finds that the statute of limitations was triggered on January 5, 2007, when Pharmion unequivocally denied that it was obligated to tender payment for the additional costs in the September 2006 invoice.

Because the Complaint was filed on January 4, 2010, within three years of the alleged breach, the Court finds that this action was timely filed.

II. Contract and Quasi-Contract Claims

In its Complaint, Avantix raised a breach of contract claim, and alternatively, claims for unjust enrichment, *quantum meruit*, and promissory estoppel. Pharmion, however, argues that Avantix's quasi-contract claims must be dismissed because the parties' relationship is governed by an express contract. Pharmion further argues that Avantix's failure to submit a Change Order for the additional work precludes it from recovering under any quasi-contractual theory.

A. Avantix May Pursue Quasi-Contract Claims

As a general rule, recovery under a quasi-contract theory is unavailable where an express contract governs the subject matter at issue.[22] However, a quasi-contract claim may proceed where an express contract

[22] *See Palese v. Del. State Lottery Office*, 2006 WL 1875915, at *5 (Del. Ch.) ("A party cannot seek recovery under an unjust enrichment theory if a contract is the measure of the plaintiff's right."); *Ramone v. Lang*, 2006 WL 4762877, at *14 (Del. Ch.) ("[T]he doctrine of promissory estoppel … was designed specifically to address cases where the plaintiff has no legally enforceable rights but has suffered a loss due to reliance on the defendant's promises."); *Albert v. Alex Brown Mgmt. Servs., Inc*., 2005 WL 2130607, at *8 (Del. Ch.) ("Courts generally dismiss claims for *quantum meruit* on the pleadings when it is clear from the face of the complaint that there exists an express contract that controls.")

exists, so long as the rights and obligations that are the subject of that claim are not governed exclusively by the contract at issue.[23]

The Court finds that Avantix may pursue quasi-contract claims since the MSA does not adequately addresses the parties' rights and duties that are at issue in this litigation.[24]

B. Failure to Submit Change Order Does Not Bar Recovery Under a Quasi-Contract Theory

Pharmion contends that Avantix's failure to submit a Change Order, as required by the MSA, bars Avantix from recovering for the additional work under any quasi-contract theory. According to Pharmion, Avantix is only entitled to the agreed upon contract price - $70,400 – which already has been paid by Pharmion. Avantix acknowledges that no Change Order was submitted by either party, but contends that Pharmion requested the additional work with the understanding that it was obligated to compensate Avantix.

Avantix's non-compliance with the MSA's Change Order provision is not fatal to its quasi-contract claims. This Court previously has held that the parties' conduct may constitute a waiver of a contractual provision requiring

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[23] *Tolliver v. Christina School Dist.*, 564 F.Supp.2d 312, 315-16 (D. Del. 2008); *Fitzgerald v. Cantor*, 1998 WL 326686, at *6 (Del. Ch.).

[24] *Tolliver*, 564 F.Supp.2d at 316; *In re Quintus Corp.*, 353 B.R. 77, 85 (Bankr. D. Del. 2006).

written change orders.[25] For instance, in *R.E. Haight & Associates v. W. B. Venables & Sons, Inc*.,[26] this Court held that the plaintiff's performance of work at the behest of the defendant, and for promise of payment, effectively waived the provision of the contract requiring a written change order.[27] As such, the Court found that the plaintiff had a claim in *quantum meruit*.[28]

In the instant action, the parties' conduct waived the MSA's Change Order requirement. The record establishes that on December 8, 2004, Pharmion requested additional work, outside the scope of SOW 44-0403. On Pharmion's directive, Avantix commenced work on the additional assignment. It is clear from the record that both Avantix and Pharmion were well aware that this work would entail additional time and resources, beyond those identified in SOW 44-0403. Yet, neither party drafted nor submitted a Change Order for the additional work as required by the MSA. Avantix did not submit a cost estimate as requested by Pharmion. However, Pharmion did not repeat its request.

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[25] *Daystar Sills, Inc. v. Anchor Invs., Inc.,* 2007 WL 1098129, at *4 (Del. Super.).; *T.A. Tyre Contractor, Inc. v. Dean*, 2005 WL 1953036, at *3 (Del. Super.), *rev'd on other ground*s, 907 A.2d 146 (Del. 2006); *R.E. Haight & Assocs. v. W. B. Venables & Sons, Inc*., 1996 WL 658969, at *4 (Del. Super.).

[26] 1996 WL 658969 (Del. Super.).

[27] *Id.* at *4.

[28] *Id.*

Pharmion cannot disregard the MSA and at the same time use it as a shield. Both parties understood that a Change Order was required before the commencement of additional work, and both parties disregarded that provision. Therefore, the Court finds that based on the parties' conduct, the MSA's Change Order provision was waived. Because no express contractual Change Order governs the additional work, Avantix may seek recovery under quasi-contract theories.

C. *Quantum Meruit*, Promissory Estoppel, and Unjust Enrichment Claims

1. Avantix is Entitled to Recover Under Quantum Meruit

Avantix seeks recovery in *quantum meruit*, claiming that Avantix performed the additional work with the expectation that Pharmion would pay for the work and that Pharmion knew that it would need to pay Avantix. Pharmion argues that because it derived no benefit from Avantix's services, Avantix is precluded from recovery under *quantum meruit*.

Quantum meruit is a principle of restitution arising from a cause of action in quasi-contract.[29] This doctrine, which literally means, "as much as he deserves," is a basis for recovery to prevent unjust enrichment.[30] In order

[29] *Caldera Props.-Lewes/Rehoboth VII, LLC v. Ridings Dev., LLC*, 2009 WL 2231716, at *31 (Del. Super.).

[30] *Id.; J.A. Moore Const. Co. v. Sussex Assocs. Ltd*., 688 F.Supp. 982, 988 (D Del. 1988).

to recover in *quantum meruit*, "the performing party under a contract must establish that it performed services with an expectation that the receiving party would pay for them, and that the services were performed under circumstances that should have put the recipient on notice that the performing party expected the recipient to pay for those services."[31] Recovery under *quantum meruit* is limited to the reasonable value of the services provided, not the value of the benefit received.[32]

The Court finds that Avantix is entitled to recover under *quantum meruit*. There is no dispute that Avantix performed the additional work with the expectation that Pharmion would compensate Avantix. Pharmion would not have requested a cost estimate if it had not contemplated additional payment to Avantix.

A genuine issue of material fact arises, however, with respect to the proper measure of recovery. The parties dispute whether Avantix was advised to continue working on the assay at the February 27, 2006 meeting. Avantix claims that at this meeting, it was directed to continue working on the AZA assay study. Pharmion disputes Avantix's recollection of that

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[31] *Olsen v. T.A. Tyre Gen. Contractor, Inc*., 2006 WL 2661140, at *3 (Del.). (citing *Constr. Sys. Group, Inc. v. Council of Sea Colony, Phase I,* 1995 WL 622421, at *1 (Del.)).

[32] *Caldera*, 2009 WL 2231716, at *31 (citing *Hynansky v. 1492 Hospitality Group, Inc.*, 2007 WL 2319191, at *1 (Del. Super.)); *Griffin Dewatering Corp. v. B.W. Knox Constr. Corp*., 2001 WL 541476, at *7 (Del. Super.).

meeting, arguing instead that it did not direct Avantix to continue working on the assay. According to Pharmion, it believed that the assay was complete in January 2005, when Avantix advised that it had validated the plasma method. In support of this contention, Pharmion points to the AZA Plasma Validation Report and accompanying graphs, which reference work performed prior to November 2005. Accordingly, the Court finds a factual question as to the proper time frame for which Avantix is entitled to compensation under *quantum meruit*.

Further, it is unclear to the Court whether the September 19, 2006 invoice includes fees associated with the maintenance and repair of certain equipment. If the invoice does, in fact, include such fees, a genuine issue of material fact arises as to whether Pharmion is obligated to tender payment for such fees.

2. Avantix's Promissory Estoppel Claim Must Be Dismissed

Avantix also seeks to recover under a promissory estoppel theory, claiming that it performed the additional work in reliance on Pharmion's promise to pay for such work. Pharmion argues that it cannot reasonably be expected to pay ten times the contract price for the additional work.

In order to establish a claim for promissory estoppel, a plaintiff must show by clear and convincing evidence that: (i) a promise was made; (ii) it

was the reasonable expectation of the promisor to induce action or forbearance on the part of the promisee; (iii) the promisee reasonably relied on the promise and took action to his detriment; and (iv) such promise is binding because injustice can be avoided only by enforcement of the promise.[33]

The Court finds that Avantix may not pursue its claims under the doctrine of promissory estoppel. The Court already has determined that Avantix can proceed against Pharmion on the theory of *quantum meruit*. Therefore, invocation of the promissory estoppel doctrine is not necessary to avoid injustice in the instant action.[34] Avantix's promissory estoppel claim must be dismissed.

3. No Evidence that Pharmion Retained a Benefit from Avantix's Services.

Avantix also alleges that Pharmion enjoyed an enrichment as a result of Avantix's scientific services and laboratory work in achieving the lowest sensitivity level possible. Specifically, Avantix claims that Pharmion turned over Avantix's work product to Covance, who was able to complete the project in less than one month. Pharmion, however, denies that it was unjustly enriched by Avantix. According to Pharmion, it did not use the

[33] *Lord v. Souder*, 748 A.2d 393, 399 (Del. 2000).

[34] *See Hursey Porter & Assocs. v. Bounds,* 1994 WL 762670, at *18 (Del. Super.).

method developed by Avantix. Rather, Pharmion had to hire a second research company, Covance, to develop a suitable method for clinical trials.

Unjust enrichment is itself a cause of action based on the "unjust retention of a benefit to the loss of another, or the retention of money or property of another against the fundamental principles of justice or equity or good conscience."[35] In order to recover on a claim of unjust enrichment, a plaintiff must prove: (1) an enrichment; (2) an impoverishment; (3) a relation between the enrichment and impoverishment; (4) the absence of justification; and (5) the absence of a remedy provided by law.[36]

The record evidence refutes Avantix's argument that Pharmion retained a benefit from Avantix's services. Avantix does not dispute that when Pharmion received the AZA Assay Validation Report, information necessary for the implementation of the methods was missing. Avantix designated certain information "confidential." Pharmion claims, and Avantix does not dispute, that without this crucial information, the method developed by Avantix could not be utilized in clinical trials. Accordingly, Pharmion hired a second research company, Covance, to develop a suitable method.

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[35] *Nemec v. Shrader*, 991 A.2d 1120, 1130 (Del. 2010); *Caldera*, 2009 WL 2231716, at *31.

[36] *Nemec,* 991 A.2d at 1130.

Contrary to Avantix's assertion, there is no record evidence to suggest that Pharmion turned over Avantix's work product to Covance. Rather, the record reflects that Covance developed its own method "from scratch." Moreover, the record establishes that Pharmion used the method developed by Covance, and not Avantix, in the post-marketing studies on renal-impaired patients. As such, Pharmion's motion for summary judgment must be granted as to Avantix's claim based on unjust enrichment.

CONCLUSION

The Court finds that Avantix's September 2006 invoice resulted in a bona fide dispute. The three-year statute of limitations was not triggered until January 5, 2007, when Pharmion unequivocally denied that it was obligated to tender payment. **THEREFORE, this action was timely-filed and Pharmion's motion for summary judgment on the issue of the statute of limitations is hereby DENIED. Avantix's motion for summary judgment, that the statute of limitations does not bar this action, is hereby GRANTED.**

The Court finds that although an express contract governs the subject matter at issue, Avantix may pursue a quasi-contract claim because the contract does not adequately address the parties' rights and duties at issue in this litigation. Although the contract requires a change order procedure for

additional work, the conduct of the parties constituted a mutual waiver of that provision.

Avantix may recover under *quantum meruit* because it is undisputed that Avantix performed work with the expectation that Pharmion would compensate Avantix, and Pharmion was on notice of that expectation. However, a genuine issue of material fact exists as to the proper measure of recovery. Having found Avantix is entitled to pursue its *quantum meruit* claim, the promissory estoppel claim must be dismissed, as not necessary to avoid injustice. The undisputed evidence fails to demonstrate that Pharmion was unjustly enriched.

THEREFORE, Pharmion's motion for summary judgment is hereby granted in part and denied in part. Avantix's motion for summary judgment is hereby granted in part and denied in part. Avantix may recover under a *quantum meruit* theory, however the amount remains a genuine issue of material fact. Avantix's claims for promissory estoppel and unjust enrichment are dismissed.

IT IS SO ORDERED.

/s/ *Mary M. Johnston*
The Honorable Mary M. Johnston