UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

STEPHEN CARLESON and	§	
PRODUCERS CREDIT	§	
PROTECTION GROUP, INC.	§	
	§	**CASE NO. 4:16-CV-841-BSM**
v.	§	
	§	
MIDCON GATHERING, LLC	§	

MIDCON GATHERING, LLC'S
BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

Respectfully submitted,

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CERTIFICATE OF SERVICE

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Pursuant to Rule 56 of the Federal Rules of Civil Procedure, Defendant MidCon Gathering, LLC ("MidCon") hereby submits its Brief in Support of Motion for Summary Judgment against Plaintiffs Stephen Carleson ("Carleson") and Producers Credit Protection Group ("PCPG") (collectively, "Plaintiffs"). As set forth more fully below, MidCon is entitled to judgment as a matter of law on all Counts of Plaintiffs' First Amended Complaint.

I. INTRODUCTION

This lawsuit concerns Plaintiffs' allegations that they entered into a binding oral contract with MidCon during a telephone call on November 19, 2014, for the purpose of providing a "Credit Facility" to MidCon. The Credit Facility was allegedly consummated by virtue of a standard credit insurance policy that MidCon itself ultimately obtained and paid for.

Nonetheless, to support the existence of an alleged agreement, Plaintiffs claim the oral agreement was memorialized by an unsigned "draft" agreement provided to MidCon by Plaintiffs on November 25, 2014. There is no dispute the draft agreement was never signed by either party. Furthermore, there is no dispute the draft agreement went through at least three (3) different draft versions modifying material terms of the alleged agreement *after* the agreement was allegedly

formed. Moreover, there is no dispute Plaintiffs failed to pay the premium or post the funds to cover the substantial deductible associated with the credit insurance policy sold to MidCon, or perform any meaningful duties on behalf of MidCon after the policy was sold to MidCon. Finally, there is no dispute Plaintiffs held no insurance-related licenses from the State of Arkansas.

Plaintiffs nevertheless allege an enforceable agreement was formed with MidCon to sell MidCon credit insurance as part of a "credit enhancement" program. As consideration for Plaintiffs' alleged work, Plaintiffs contend they are entitled to at least $1,620,000. Plaintiffs have asserted a claim for breach of contract, or in the alternative, unjust enrichment and/or quantum meruit.

MidCon is entitled to summary judgment on Plaintiffs' breach of contract claim for three independent reasons:

- **First**, to establish a binding contract under Arkansas law, Plaintiffs must show mutual assent among the parties, based on "objective indicators of agreement." Plaintiffs cannot establish this element because MidCon never unconditionally accepted the terms proposed by Plaintiffs. Further, the various discussions among the parties after the alleged agreement was formed only confirm a lack of mutual agreement as to all material terms of a binding agreement.

- **Second,** the alleged agreement fails for lack of consideration because it imposes no mutual obligations upon Plaintiffs. Other than vaguely calling for the creation of a Credit Facility, the alleged agreement fixed no real liability or obligations upon Plaintiffs.

- **Third**, even if a binding agreement existed, the agreement is unenforceable as a matter of strong public policy because Plaintiffs lack the requisite licensing under the Arkansas Insurance Code.

Plaintiffs' unjust enrichment and/or quantum meruit claim also fails as a matter of law. Plaintiffs did not confer any economic benefit upon MidCon, let alone any benefit to which MidCon was not otherwise entitled. MidCon purchased the credit insurance policy and paid the policy premium – not Plaintiffs. MidCon negotiated the policy with a commercial broker and a

representative of the credit insurer Euler Hermes – not Plaintiffs. Because MidCon was not unjustly enriched by exercising its own contractual rights, Plaintiffs' equitable theory fails. Additionally, Plaintiffs' quantum meruit claim fails because Plaintiffs had no *reasonable* expectation of payment.

II. LEGAL STANDARD

Summary judgment is appropriate when there is no genuine dispute as to any material fact, meaning the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a); *Anderson v. Liberty Lobby Inc.,* 477 U.S. 242, 249-50 (1986). Summary judgment is an "integral part of the Federal Rules… which are designed to 'secure the just, speedy and inexpensive determination of every action.'" *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986) (citing Fed. R. Civ. P. 1). "The moving party must identify each claim or defense – or the part of each claim or defense – on which summary judgment is sought." Fed. R. Civ. P. 56(a). Once the moving party demonstrates there is no genuine dispute of material fact, the burden shifts to the non-moving party to produce admissible evidence demonstrating a genuine factual dispute requiring trial. *Holden v. Hirner*, 663 F.3d 336, 340 (8th Cir. 2011). To withstand a motion for summary judgment, the nonmoving party must present evidence so that a reasonable jury could return a verdict in his favor. *Anderson*¸ 477 U.S. at 252. Reasonable inferences must be drawn in a light most favorable to the non-moving party. *Holland v. Sam's Club*, 487 F.3d 651, 643 (8th Cir. 2007).

In applying this standard, MidCon meets its burden in demonstrating that no genuine issue of material fact exists with respect to each of Plaintiffs' claims. Plaintiffs cannot meet proof with proof to establish a genuine issue on either of their claims. Therefore, MidCon is entitled to summary judgment.

III. ARGUMENT AND AUTHORITIES

A. Plaintiffs' breach of contract claim fails for three independent reasons.

1. The alleged agreement is not binding because it lacks the objective indicators of agreement.

As described by the Supreme Court of Arkansas, a contract does not exist unless both parties "manifest assent to the particular terms of a contract." *Pine Hills Health & Rehab., LLC v. Matthews*, 2014 Ark. 109, 7, 431 S.W.3d 910, 915 (2014) (citing *DIRECTV, Inc. v. Murray,* 2012 Ark. 366, 9, 423 S.W.3d 555, 562 (2012)). To that end, Arkansas law requires "an objective test for determining mutual assent, by which we mean objective indicators of agreement and not subjective opinions." *Id.*

To accept an offer under this objective analysis, a party must unequivocally and unconditionally "agree to the particular terms" of an offer. *See id.; see also Anaya v. Ford*, 2012 Ark. App. 8, 6 (2012) ("an acceptance must unconditionally agree to all material terms of the offer."). Agreeing to only some material terms of an agreement is not sufficient. *Rubber & Gasket Co. of Am. v. Zimmerman*, 2011 Ark. App. 273, 6 (2011) ("Additionally, while the August letters demonstrate that the parties agreed on some aspects of the settlement, they did not necessarily assent to all material terms, as would be required to form a contract."). Therefore, when an alleged agreement only contains some material terms contemplated by the parties, the parties have not entered into a binding contract. *Zimmerman*, 2011 Ark. App. at 4.

Additionally, when a party requests the inclusion of additional terms to a proposed agreement, the request is not an acceptance of the proposed agreement. *Rounsaville v. Van Zandt Realtors, Inc.*, 247 Ark. 749, 751, 447 S.W.2d 655, 656 (1969). If a party identifies additional "steps that must be taken" before a contract is finalized, the objective indicators of assent are

lacking and the contact is not formed. *See, e.g., Rounsaville,* 247 Ark. At 751 (no acceptance to purchase real property where prospective purchaser changed proposed terms of offer by requesting a roof repair); *Shea v. Riley*, 59 Ark. App. 203, 954 S.W.2d 951, 953 (1997) (no acceptance where alleged purchaser of neighboring land informed seller that re-plotting of land was necessary to consummate sale).

Consistent with these principles, this District granted summary judgment (affirmed by the Eight Circuit) under a set of facts similar to those here. *See generally, FutureFuel Chem. Co. v. Lonza, Inc.*, No. 1:11CV00061 SWW, 2012 WL 4049267 (E.D. Ark. Sept. 13, 2012), *aff'd sub nom. FutureFuel Chem. Co. v. Lonza, Inc.*, 756 F.3d 641 (8th Cir. 2014). In *FutureFuel*, a chemical manufacturer sued a supplier for breach of contract under a letter of intent ("LOI"), which called for the supplier's reoccurring purchase of a solvent component from the manufacturer. The parties executed a final LOI after negotiating preliminary terms and exchanging prior drafts. *Id.* at *3-5. While the final LOI contained the principal terms of the deal, it also stated the parties contemplated further negotiations to execute a long-term supply contract with additional terms, including a price adjustment formula. *Id.* at *8-9. When the business relationship stalled, the manufacturer sued to recover under the LOI. Judge Susan Webber Wright ultimately dismissed the manufacturer's breach of contract claim for two reasons. First, in the absence of a price adjustment formula, the LOI lacked all material terms. *Id.* at *9. Second, because the parties continued to negotiate a final long-term supply contract (as called for in the LOI), "objective indicators" demonstrated the parties did *not* intend for the LOI to serve as a binding agreement. *Id.* at *10. Hence, in reaching its conclusion, the Court gave significant attention to the actions taken by the parties after the LOI was executed. *Id.* at *9 ("The parties' actions taken after they

signed the LOI provide further evidence that they did not intend that preliminary agreement to serve as a binding contract.").

For the same reasons illustrated in *FutureFuel*, the objective indicators of agreement are entirely absent here. Although Carleson testified that an oral agreement was reached on November 13, 2014, the parties' conduct thereafter confirms no binding agreement was reached:

- On November 19, 2014, David Hill (at the direction of Carleson) sent Draft 1, which included various duties and obligations for PGPG. Specifically, PCPG was required to *finance* – meaning pay the funds for – the Facility. Consistent with PCPG's obligation to finance the Facility, the "Administrative Agent Duties" imposed on PCPG required PCGP to pay the premium for any credit insurance policy. (*See* Exs. I-J).

- On November 20, 2014, Hill (at the direction of Carleson) sent Draft 2 to MidCon, which was labeled as a "draft" and contained various changes. Most notably, Draft 2 reduced the number of "administrative duties" that would be owed by Plaintiffs. Further, Draft 2 omitted a termination clause that was present in Draft 1. (*See* Exs. K-L).

- On November 21, 2014, a third draft of the agreement was sent ("Draft 3"). Draft 3 contained extensive edits, deletions, and redlined changes to material terms. This included the **complete elimination** of the "Administrative Agent Duties," including the obligation for PCPG to finance the Facility by paying the premium on any credit insurance policy. In other words, Draft 3 entirely eliminated Plaintiffs' specific obligations under any proposed agreement. Further, the term of the agreement was changed to one year. Moreover, PGPG's compensation of $0.30 per barrel of oil produced was altered to include a daily minimum of 15,000 barrels. (*See* Ex. M).

- On November 25, 2014, Gary Jackson emailed Carleson and explained any potential agreement would necessitate the term requiring PCPG to pay the premium on a credit insurance policy and cover the deductible. That same day, Carleson responded with the last draft of the proposed agreement. As with prior drafts, several red-lined edits and changes were present. The "Administrative Agent Duties" section was still deleted, including the requirement that PCPG pay any policy insurance premium or cover any deductible. MidCon never manifested its assent to the final version (or prior drafts) of the alleged agreement. (*See* Exs. N-O).

In short, Plaintiffs contend a valid contract exists simply because Plaintiffs propounded a series of one-sided "Draft" agreements to MidCon. But under an objective analysis, this conduct only shows the parties never reached a mutual agreement as to all terms of the proposed agreement.

On behalf of Plaintiffs, David Hill began the contract negotiations on November 19, 2014 by describing the first draft of the agreement as **"a start,"** which clearly conveyed to MidCon that there would be substantive negotiations before a contract would be entered into. (*See* Exs. I-J).

At no point in time did MidCon ever accept the terms of any of the proposed agreements. Ex. A. Without MidCon's unequivocal acceptance of all material terms, no enforceable contract exists. *See, e.g., Anaya*, 2012 Ark. App. at 6. An objective analysis further shows the draft proposed agreements continued to change material terms, including: (a) term of the alleged agreement changed from three years to one; (b) PCPG's compensation changed to include a daily oil barrel requirement; and (c) PCPG entirely removed its obligation to "finance" the Facility, including the payment of premiums or the posting of a deductible for any credit insurance policy. (*See* Exs. J, L, M, and O).

Indeed, aside from never manifesting its assent to any proposed agreement, the only action taken by anyone connected to MidCon in response to the draft proposals was for Gary Jackson to insist on the inclusion of additional material terms in any proposed agreement, including a term requiring PCPG to pay the premium for the credit insurance policy and posting of the deductible. (*See* Ex. N). In requesting the inclusion of such material terms – which never surfaced in any version of the proposed agreement – MidCon affirmatively rejected Plaintiffs' proposed agreements. *See, e.g., Rounsaville,* 247 Ark. At 751.

Plaintiffs may not unilaterally transform a set of draft agreements into binding contractual obligations imposed upon MidCon. Plaintiffs' subjective belief as to the existence of a contract is irrelevant under Arkansas law. Under the objective analysis applicable here, Plaintiffs' breach of contract claim fails because the objective indicators of agreement are absent. The parties never entered into a binding agreement.

2. The alleged agreement fails for lack of consideration because it does not impose mutual obligations upon Plaintiffs.

Not only does the alleged agreement fail for lack of mutual assent, but the alleged agreement also fails because it lacks consideration and/or mutual obligations. For valid consideration to exist, both parties must undertake mutual obligations. *Keith v. City of Cave Springs*, 233 Ark. 363, 374, 344 S.W.2d 591, 596 (1961) (mutuality of obligations means there must be valid consideration for a contract). If the alleged promises made by a party do not fix a "real liability" upon the party, then such promises do not qualify as consideration for the promises. *Townsend v. Standard Indus., Inc.*, 235 Ark. 951, 954, 363 S.W.2d 535, 537 (1962). Accordingly, a mere "plan of operation" conferring vague obligations does not amount to a binding contract. *Id.; City of Dardanelle v. City of Russellville*, 372 Ark. 486, 491, 277 S.W.3d 562, 566 (2008) (joint resolution to plan to generally fund a proposed municipal sewer line failed for lack of consideration/mutuality).

The final "Draft" of the alleged agreement vaguely required PCPG to "arrange a credit enhancement finance program," but spelled out no specific duties required of PCPG. (*See* Ex. O). All material "Administrative Agent Duties" were removed from the final version of the proposed agreement relied on by Plaintiffs. (*See* Ex. O). No real liability was fixed upon PCPG. The alleged agreement was only an amorphous "plan" for PCPG to arrange a credit enhancement facility, without conferring any specific obligations. And ultimately, the credit insurance policy obtained by MidCon was a traditional and standard credit insurance policy, and not reflective of anything unique to an amorphous "Credit Facility." (Ex. F at 19:13-22). The alleged agreement, therefore, fails for lack of consideration.

3. The alleged agreement is void and unenforceable under the Arkansas Insurance Code.

Even if the alleged agreement does noes not fail for lack of mutual agreement, and does not fail for lack of mutual obligations, then summary judgment is still appropriate because Plaintiffs acted as unauthorized insurance consultants in violation of the Arkansas Insurance Code.

Under the Arkansas Insurance Code, an "insurance consultant" includes any individual who, "for a fee, in any manner advises or counsels anyone as to his or her insurance needs and coverages under any insurance policy or contract." Ark Code Ann. § 23-64-102(5)(A) (West). No individual may act as an insurance consultant without the proper license from the State of Arkansas. Ark Code Ann. § 23-64-201(b)(1) (West) ("Unless he or she has complied with the Producer Licensing Model Act § 23-64-501 et seq., a person shall not consult, counsel, or advise others on matters of insurance needs or coverages under any insurance policy or contract of insurance unless licensed under this section."). Any individual seeking a license as an insurance consultant must submit an application to the Arkansas Insurance Commissioner, and thereafter pass a written examination covering "the kinds of insurance as to which the applicant is to be licensed." Ark. Code Ann. § 23-64-204 (Wes); Ark. Code Ann. § 23-64-205 (West).

The consequence of acting without the statutorily-required license is clear: "The law is well established that where a statute prohibits engaging in a business or calling without having procured a required license . . . a contract made by one who has no license is invalid, and cannot be enforced." *Savo v. Miller*, 224 Ark. 799, 804, 276 S.W.2d 67, 69 (1954) (emphasis added) (holding that unlicensed broker could not recover commission allegedly due for services rendered in connection with sale of property) (citing *Stiewel v. Lally,* 89 Ark. 195, 115 S.W. 1134, 1140 (1909)). While parties may contract freely, they may not do so in terms that "violate public policy

or Arkansas statutes." *Conway Commercial Warehousing, LLC v. FedEx Freight, Inc.,* 2011 Ark. App. 51, 7, 381 S.W.3d 94, 99 (2011).

Notably, public policy considerations are of "*greater magnitude* for insurance activities." *E.H. Crump & Co. v. Gatewood,* 497 F. Supp. 549, 552 (E.D. Ark. 1980). Accordingly, any contract entered into in violation of the Arkansas Insurance Code is void and unenforceable as a matter of public policy:

> Any contract entered into by an unlicensed [consultant] is void and unenforceable even though the statute does not expressly declare such contracts to be void. Such statutes are adopted as a matter of public policy to further the public interest and their benefits cannot be waived.

Dunn v. Phoenix Vill., Inc., 213 F. Supp. 936, 947 (W.D. Ark. 1963) (analyzing prior version of Arkansas Insurance Code in case involving unlicensed insurance agent). Even if a solicited party "accepts" a contract involving compensation for an unlicensed insurance consultant, the contract remains unenforceable. *See id.* ("The acceptance by the person solicited does not render the contract providing for compensation enforceable.").

To the extent Plaintiffs rendered any services to MidCon, those services would necessarily relate to assisting MidCon with the procurement of a credit insurance policy. But in advising or counseling MidCon on insurance needs, Plaintiffs' alleged services would involve the functions of an insurance consultant under the Arkansas Insurance Code. Plaintiffs, however, did not possess the requisite license required by the Arkansas Insurance Commissioner. (*See* Ex. C at 25:10-14; 43:1-3).

Consequently, even if the parties executed a binding agreement – which they did not – the agreement is void and unenforceable as a matter of public policy. Plaintiffs cannot recover for services rendered under the alleged agreement in direct contravention of the Arkansas Insurance

Code. For this independent reason, MidCon is entitled to summary judgment on Plaintiffs' breach of contract claim.

B. Plaintiffs cannot alternatively recover in equity through quantum meruit.

Quantum meruit is an equitable remedy. *Sparks Reg'l Med. Ctr. v. Blatt*, 55 Ark. App. 311, 317, 935 S.W.2d 304, 307 (1996). Under Arkansas law, "a claim for quantum meruit is generally made under the legal theory of unjust enrichment and does not involve the enforcement of a contract." *Sanders v. Bradley Cty. Human Servs. Pub. Facilities Bd.*, 330 Ark. 675, 682, 956 S.W.2d 187, 190 (1997). Thus, to the extent a contract is unenforceable, a court may award quantum meruit by measuring "the value of the benefit conferred upon the party unjustly enriched." *Id.* (citing *City of Damascus v. Bivens*, 291 Ark. 600 (1987)). Quantum meruit does not allow a plaintiff to merely recover the value of a contract as if it were enforceable, and instead involves a "weighing of equities and a determination of the value unjustly received." *Cent. Arkansas Found. Homes, LLC v. Choate*, 2011 Ark. App. 260, 12, 383 S.W.3d 418, 426 (2011). A party is not unjustly enriched if the benefit conferred is "so fundamentally at odds with [] contractual expectations."

Importantly, to find unjust enrichment, "a party must have received something of value to which he *was not entitled* and which he should restore." *Duckworth v. Poland*, 30 Ark. App. 281, 283, 785 S.W.2d 472, 473 (1990) (emphasis added). In other words, a party must receive something of value that it would not have received on its own. One is not unjustly enriched "merely because he has chosen to exercise a legal or contract right." *Blatt*, 55 Ark. App. at 317; *see also Wells v. Paddock*, 2013 WL 6009909, at *4 (W.D. Ark. Nov. 13, 2013) (party not entitled to quantum meruit where construction work improvements were made pursuant to contract between defendant and third-party. Moreover, a quantum meruit claim is not viable where a plaintiff has

no "reasonable expectation of [] payment." *Dews v. Halliburton Indus., Inc.*, 288 Ark. 532, 536, 708 S.W.2d 67, 69 (1986).

Here, equity does not bestow any quantum meruit recovery to Plaintiffs. Plaintiffs did not confer any benefit to MidCon to which MidCon was not otherwise entitled. To the extent Plaintiffs allege they conferred any benefit to MidCon, that benefit would be the issuance of a standard credit insurance policy from Euler Hermes. The standard credit insurance policy was not reflective of any unique benefits. (Ex. F at 19:13-22).

Nonetheless, the undisputed facts show MidCon obtained the credit insurance policy by exercising its own, independent contractual rights. MidCon purchased from Euler Hermes the credit insurance policy. Negotiations concerning the particular terms of the credit insurance policy were solely between MidCon agents and Furio (a commercial broker) and Rose (a representative of Euler Hermes). (*See, e.g.,* Ex. G at 26:3-14). MidCon agents did not communicate with Plaintiffs during said negotiations. (*See* Ex. G at 100:7-8). Further, MidCon paid the entirety of the $500,000.00 premium for the policy, even though Plaintiffs were required to do so under the alleged agreement. (Ex. C at 221:10-15; Ex. F at 23:2-15). MidCon was not unjustly enriched by rightfully purchasing the standard credit insurance policy on its own.

Plaintiffs' quantum meruit claim also fails because Plaintiffs had no reasonable expectation of payment. The summary judgment record shows that Plaintiffs propounded a series of one-sided "Draft" agreements, none of which were ever accepted by MidCon. Plaintiffs changed their proposed compensation throughout these draft agreements. (*See* Exs. J, L, M, and O). These two facts show that any expectation of payment held by Plaintiffs was entirely unreasonable.

IV. CONCLUSION

The undisputed facts show MidCon is entitled to summary judgment. Plaintiffs' breach of contract claim fails for multiple independent reasons. Under an objective analysis, no binding contract exists between the parties due to a lack of mutual assent. Further, the alleged agreement also fails for lack of consideration because it imposed no mutual obligations upon Plaintiffs. To the extent the alleged agreement is binding, the alleged agreement is void as a matter of public policy under the Arkansas Insurance Code.

Additionally, Plaintiffs' alternative request for quantum meruit and/or unjust enrichment is precluded because Plaintiffs failed to confer any benefit upon MidCon to which MidCon was not otherwise entitled, and Plaintiffs had no reasonable expectation of payment.

Defendant MidCon Gathering, LLC respectfully requests the Court grant its Motion for Summary Judgment, dismiss Plaintiffs' claims in their entirety with prejudice, award MidCon its reasonable and necessary attorneys' fees pursuant to Ark. Code Ann. § 16-22-308, and award all other relief to which MidCon may be entitled.