

**UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT**

KUHNS BROTHERS, INC., KUHNS BROTHERS	:	
SECURITIES CORP., KUHNS BROTHERS	:	
& CO., INC.,	:	
Plaintiffs,	:	
	:	
v.	:	No. 3:06 cv 1917 (PCD)
	:	
FUSHI INTERNATIONAL, INC., DALIAN FUSHI	:	
BIMETALLIC MANUFACTURING, LTD.,	:	
Defendants.	:	

MEMORANDUM OF DECISION

Plaintiffs, who are engaged in providing financial and investment advisory services, bring this action seeking a declaratory judgment and damages based on a claim of a breach of contract. They claim Defendant Dalian Fushi Bimetallic Manufacturing, Ltd. (“Dalian Fushi”) contracted with Plaintiff Kuhns Brothers, Inc and its subsidiaries (“Kuhns”) by which Kuhns was engaged to render investment banking and advisory services. Defendant Fushi International, Inc. (“Fushi” or “Fushi International”) is claimed by Plaintiffs to be a successor to Dalian Fushi and thus also liable for the losses claimed to have resulted from the alleged breach. Kuhns’ first and third claims for damages from Dalian Fushi and, as successor, from Fushi International are sustained as set forth below. As this decision determines the basis of Kuhns’ second and fourth claims for relief, they are denied as moot. Kuhns’ fifth claim is also moot in view of the ruling on defendants’ purported agreement termination. Defendants allege Kuhns’ failure to perform, that the contract was properly terminated, and they counterclaim seeking confirmation of the termination and return of payments made. Defendants’ counterclaim is dismissed as without merit.

Plaintiffs are Delaware corporations headquartered in Connecticut. Fushi International is a Nevada corporation and Dalian Fushi is a corporation organized under the law of the People's Republic of China. Both defendants have their principal places of business and headquarters in Dalian, China. Jurisdiction is properly based on diversity between the parties. 28 U.S.C. § 1332.

After a full trial to the court, the facts are found as follows:

After an initial meeting of Mr. Kuhns and representatives of Dalian Fushi, further contacts led to negotiations which were reflected in the exchange of several drafts, which culminated in the final "Agreement Providing for Investment Banking Services" dated May 27, 2005, Ex. 1. Dalian Fushi was then seeking financing to enable it to expand its manufacturing and marketing capacity for its major product, bimetallic cable. It had no prior experience arranging financing and sought outside expertise to obtain same, including from its financial advisor, Chief Capital, Ltd., while avoiding the Chinese bar on foreign ownership of entities such as Dalian Fushi. Kuhns participated in contract discussions through Mr. Bickel of Redwood Capital, Inc., the conduit for Kuhns' communications with respect to an agreement but who was not actually, implicitly nor apparently authorized to speak for Kuhns except as he was specifically directed. From communications with Dalian Fushi representatives, Bickel prepared and sent to Kuhns a counter proposal dated May 19, 2005, Ex. 7, which included the language discussed below and which defendants would now ignore.

The parties offered extrinsic evidence to buttress their respective views of the agreement. However, the respective rights and obligations of contracting parties are defined by the words of the agreement. Absent ambiguity, the words control. Tallmadge Bros., Inc. v. Iroquois Transmission System L.P., 252 Conn. 479, 498 (2000). Kuhns contends that the agreement has

two segments. First is an “engagement” of Kuhns to assist Dalian Fushi with its immediate investment banking needs, specifically an initial “Equity Financing.” Upon successfully achieving that, including formalizing a closing and a “Public Shell” to achieve a “reverse merger” by means of an entity listed on a United States stock exchange, the “agreement” would continue for two years, Ex. 1, Appendix B, p. 6-7, during which Kuhns would render investment banking assistance not specified as applicable to particular further financing. During the two years, Kuhns was to be paid a “non-refundable retainer” of \$10,000 per month for past services and for unspecified “strategic and financial advisory services.” The continuation was contingent on Kuhns fulfilling the engagement to arrange and close the initial financing. The contingency was fulfilled by Kuhns, triggering the agreement continuation for two years. The monthly payments retained Kuhns’ availability to render services for subsequent financing and acquisitions, subject to its fees. *Id.* p. 10. Its obligation, for the two years after fulfilling its obligations with respect to the initial financing, was to be able and to render services when and if requested. Defendants’ claim that Kuhns was not entitled to any monthly payments because it did not render any services is not only incorrect factually but is without merit as there was no evidence offered to the effect that Kuhns failed or refused to render requested services. Defendants requested no further services.

An initial \$12,000,000 financing was arranged by Kuhns and accepted by Dalian Fushi, the closing of which Kuhns arranged within seven months of the agreement date, a reasonable time given the complexities involved. Defendants’ contention that the closing was not compliant with the required six months for closing the initial financing is not credited for several reasons. First, the Agreement contains no language which specifies or supports an inferred time limit for

closing the initial financing. Secondly, defendants received and accepted the \$12,000,000 financing arranged by Kuhns without reservation, thereby belying any claim of a time deadline not complied with and/or waiving any claim of an unfulfilled deadline. Fushi International admittedly received at least \$7,000,000 of the initial financing. Additionally, the monthly \$10,000 was paid for eight months after the initial financing was arranged, closed and received, leaving \$160,000 unpaid. Mr. Kuhns was called upon to serve on Fushi International's board in fulfillment of an Agreement provision. Warrants were attached to the initial financing shares, holders of which would buy up to 2,112,051 shares, at \$3.67 per share, the proceeds of which would be received by Dalian Fushi. The warrants were called and executed and the proceeds were received by Fushi International. In its December 13, 2005 SEC filing, Parallel Technologies, Inc. (predecessor of Fushi International) acknowledged the warrant fee due to Kuhns. Ex. 41, p. 71.

The Agreement has two segments, the first being an "engagement" of Kuhns to obtain initial financing. When that was obtained and closed, the second continued the agreement for two years. In the two years, Kuhns was obliged to provide financial advisory, merger and acquisition and strategic planning services, as described on pages 8-9 of Appendix A to the Agreement, Ex. 1. No transactions were specified and Kuhns was therefore obliged to make itself available to render such services as might be requested of it and as would be called for by whatever transaction might be presented in accordance with the services described in Appendix A to the Agreement, Ex. 1.

The terms "engagement" and "agreement" are not used interchangeably. "Engagement" refers to Kuhns' undertaking to arrange the initial financing of \$11.75 million. It is referred to as

an “initial engagement,” which if successfully performed results in the “agreement” remaining in force for two years. Ex. 1, p. 6-7. The distinction thus articulated cannot be ignored. This construction is buttressed by the language which pertains to the extension for two years of the “term of this agreement.” Id. at p. 14. Further, the right to terminate refers to termination of an “engagement.” Id. at p. 15. The successful arranging of the initial financing leads to the provision that “this Agreement will remain in force for a period of two years...” Ex. 1, p. 6-7. Couched in terms of “will remain in force,” the provision is mandatory. Finnucane v. Dandio, CV 0366182, 1997 WL 306739 at 5 (Conn. Super. Ct., May 28, 1997). Thus, for payment to Kuhns of a fee of \$50,000, defendants obtained services to realize the initial financing, and only if that was arranged would the two year extension arise. The argument that by the extension, Kuhns obtained something for nothing is without merit. For the two years, Kuhns was required to be available and to render financial consulting services for additional financing endeavors on behalf of defendants.

On August 29, 2006, Dalian Fushi, on Fushi International letterhead, purported to terminate the “Engagement Letter,” Ex. 33, invoking the third paragraph of Article VII of the Agreement. Ex. 1. No reason was cited. That provision permitted Dalian Fushi to terminate “Kuhns Brothers’ engagement hereunder” on ten days notice. In an earlier ruling on defendants’ motion, see Doc. No. 53, it was held that “engagement” was not used interchangeably with “agreement.” For the reasons therein set forth, the right to terminate invoked by defendants applied only to Kuhns’ engagement to obtain the initial financing and not to the agreement as a whole, thus establishing the rule of the case. Belatedly, to no avail, defendants assert Kuhns’ noncompliance with the agreement in the alleged failure to provide any services. That claim is

without merit as there was no evidence of any unfulfilled requested services, see Ex. 1, Appendix B, p.14, nor any complaint made to Kuhns as to its services or availability. By the asserted termination, Fushi sought to avoid paying any fee to Kuhns for the execution of the warrants. However, having obtained the financing, Kuhns fulfilled its obligation and thereby earned its fee specified in the Agreement, which represents an obligation of the party receiving the fruit of what Kuhns arranged. Ex. 1, p. 10; Ex. 41, p. 75. Terminating Kuhns was intended to avoid further payments to Kuhns, in response to Fushi's investors' wishes.

If defendants were to prevail in this claim, they would retain the fruits of Kuhns fulfillment of its contractual obligations with no concomitant obligation to compensate Kuhns for its performance of the contract. The claim is without factual merit and is totally at odds with the terms of the agreement, which may not be re-written by the court. O'Connor v. City of Waterbury, 286 Conn. 732, 746-47 (2008); Tallmadge Bros., 252 Conn. 496-97. Defendants' recognition of the obligation to Kuhns in Fushi's SEC filing belies their claims. See Ex. 41, p. 75.

For the initial financing, Kuhns earned a fee of \$1,200,000, but at the request of Mr. Fu, who was then the head of Fushi, the fee was reduced to \$978,000. On the execution of the warrants, over \$7,000,000 was realized by issuance of Fushi shares, for which Fushi received \$7,055,252.90 (Ex. 48, p. 38; Ex. 49, p. 23; Tr. 5/27, 89:25 - 90:4), with a resulting earned fee of \$705,252, which was not paid, although Fushi acknowledged its obligation for Kuhns' fee to the SEC. Ex. 41, p. 75.

The right to terminate Kuhns on which defendants rely requires cause, 15 days notice and the opportunity to correct the cause. See Ex. 1, Appendix B, p.15. Exhibit 33 does not comply

with these requirements. No cause was cited and no opportunity to correct was provided. Even if defendants' claim of a right to terminate had any merit, defendants' failure to cite cause for the purported termination, and to provide the opportunity to correct the cause complained of, invalidates the purported termination.

Fushi's claim that no services were rendered is belied by Exhibit 52. See Defendants' TPO compliance, ¶ 89. The views of the witnesses Bickel and Wang that the agreement was terminable on 10 days notice is irrelevant as the Agreement language is to the contrary and their testimony that Fushi was so advised is not credited. Wang admitted that it did not make sense that the agreement could be terminated and Kuhns deprived of its fee for the initial financing, including the warrants, when it had arranged the initial financing in accordance with the agreement which specified the fee claimed. Tr. 5/29, 29:8-15. Wang further, as an officer of Fushi, had engaged in discourse focused on avoiding the obligation to Kuhns for further financing, without raising any suggestion regarding the now purported right to terminate. See Exs. 53, 31, 55, 57.

Defendants' claim of *contra preferentum* has previously been considered in this case, and was rejected in the denial of its Motion to Dismiss. Doc. No. 53, p. 17, n. 11. This rule of construction against the drafter of a document is a last resort when all other construction aids "have failed to resolve the ambiguity." Royal Ins. Co. of Am. v. Zygo Corp., 349 F. Supp. 2d 295, 310 (D. Conn. 2004); United Techs. Corp. v. American Home Assur. Co., 989 F. Supp. 128, 145 n. 19 (D. Conn. 1997). There is no ambiguity in the agreement, the wording of which is plain in its meaning and import. Furthermore, negotiation of the agreement by sophisticated, counseled parties makes the doctrine inapplicable. Schering Corp. v. Home Ins. Co., 712 F.2d 4,

10 n. 2 (2d Cir. 1983).

Dalian Fushi purchased 90% of the shares of Parallel Technologies, Inc., whose shareholders formed two corporations, Diversified Product Inspections, Inc. (“DPI”), and Dalian DPI, a Chinese corporation, the stock of which is owned by DPI. The stock of DPI is owned by Fushi. Parallel Technologies, Inc. changed its name to Fushi International, Inc., which acquired Dalian Fushi’s assets and business, which were reassigned to Dalian DPI. Dalian Fushi has ceased operations but its assets and any business is controlled by Fushi through Dalian DPI. No financial records for it have been shown.

The agreement specified Kuhns’ fee, 10%, with respect to third party financing obtained by or for Dalian Fushi from a party introduced by Kuhns during the two years that the agreement continued. The fee was to be 5% if Kuhns did not introduce the source. Ex. 1, p. 10. A sliding scale fee for mergers and acquisitions is provided, 5% for a \$5,000,000 transaction, 4% on the second \$5,000,000, 3% on the third \$5,000,000, 2% on the fourth \$5,000,000 and 1% on the fifth \$5,000,000. If Kuhns does not introduce the party, the fee is 50% of the foregoing. Id. p.12.

A company named Copperweld was acquired by Fushi International. After Kuhns initially contacted Mr. Levy of Copperweld, Fushi International had directed Kuhns to discontinue further communication with Copperweld. Copperweld was subsequently acquired by Fushi for \$22,500,000 within the two year agreement continuation period, without Kuhns’ further involvement. Kuhns claims a fee of \$725,000, but in view of Kuhns’ noninvolvement after the initial communication and the lack of a showing by Kuhns that it had “introduced” Levy to Fushi, as defined in the Agreement, the fee owed is found to be \$362,500.

Fushi International arranged equity financing in October, 2007, without involving Kuhns

nor seeking its services related to that transaction, and without Kuhns having introduced the investors. On the basis of \$6,184,500 received, per defendants' TPO compliance ¶¶ 36-38, and pursuant to the fee schedule noted above, Kuhns was owed a fee of \$309,225.

On the basis of Fushi's receipt of \$39,000,000 from sale of its stock in October, 2007, as Kuhns makes no claim of being the introducer, Kuhns was entitled to a fee of \$1,950,000.

Fushi International also arranged an equity transaction with a company called Citadel for \$20,000,000 in equity plus warrants for \$40,000,000 within the two year continuation of the agreement. Kuhns was not called upon to provide services for that transaction but was ready and able to do so. Under the same provision, Kuhns' fee was \$3,000,000, Fushi having received the \$60,000,000. Defendants' TPO compliance, ¶ 110.

The original, and then only, company, was Dalian Fushi Bimetallic Manufacturing Company, Inc., an operating company engaged in manufacturing. It contracted with Kuhns as it sought to expand its operation with an infusion of capital, see Ex. 1, and received the proceeds of the initial financing. Dalian Fushi's assets and business were acquired by Parallel Technologies, Inc., see Ex. 41, which changed its name to Fushi International, using the proceeds of the initial financing. Fushi became a continuation of Dalian Fushi until it passed all of the assets and business of Dalian Fushi on to its subsidiaries, while retaining and maintaining control thereof. The Dalian Fushi operations were, in turn, placed in a wholly owned Fushi International subsidiary, Dalian Diversified Product Inspections Bimetallic Cable Company, Ltd. ("Dalian DPI"). Dalian Fushi caused a Delaware corporation to be formed, Diversified Products Inspection, Inc. ("DPI"), which became the 100% owner of Dalian DPI. The transaction was described as a reverse merger. The directors, beneficial shareholders and officers of all four

entities were the same. Tr. 5/27, 116: 23-25. Mr. Wang became the CFO of Dalian Fushi and later President of Fushi International. Fushi International became the owner of all DPI's stock. Fushi International's indirect subsidiary, Dalian DPI, acquired or leased from Dalian Fushi all of the latter's assets, thus enabling it to conduct the operations previously conducted by Dalian Fushi. It also was empowered to control any of Dalian Fushi's remaining assets and operations. As a result of the several transactions and creation of the four entities, the assets of Dalian Fushi and the conduct of its business are interrelated and integrated. Fushi International, through its subsidiary, Dalian DPI, and its subsidiary DPI, is able to, and is found to control and direct the conduct of Dalian Fushi's business. Dalian Fushi's employees became Dalian DPI employees. Fushi International described itself as engaged in manufacture and sale of bimetallic composite wire products, the business of Dalian Fushi, through which Fushi International continued to conduct the business until it could be transferred to Dalian DPI. For all of its products, the trade name Fushi continues to be used.

Fushi was in fact a mere continuation of Dalian Fushi, albeit in the form of its use of subsidiaries intended to comply with Chinese law. Ex. 41, pp. 12, 54. Fushi assumed the rights of Dalian Fushi in the Agreement. Ex. 1. It received the benefits of the financing, both originally and on the execution of the warrants. It was a mere pass through of Dalian Fushi's assets and business operations to its subsidiaries. The business of Dalian Fushi was thus continued, as stated in Fushi's SEC filing, Ex. 41, pp. 11-15, in the form of the several entities created for the sole purpose of comporting with Chinese law. In its presentations to potential investors, Fushi treated its finances as an add-on to Dalian Fushi's history. See Tr. 5/29, 66:7-71:14; Ex. 39, pp. 5, 36. The financing arranged in 2005 and 2006 by Fushi funded the

expansion of the business of Dalian Fushi, to which Fushi, through Dalian DPI and DPI, succeeded. The obligations of Dalian Fushi's business have been assumed by Dalian DPI, which fulfilled the outstanding contracts of the business. Dalian Fushi thus came to exist in name only, none of the governance procedures of an independent entity being shown. Fushi, through DPI and Dalian DPI, has stepped into all aspects of Dalian Fushi's existence and conduct of its business, using in part the proceeds of the financing which Fushi received, partly as arranged by Kuhns. If Fushi's argument was to prevail, it would reap all the benefits of Kuhn's services and avoid any of the obligations to Kuhns provided by the agreement, Ex. 1.

The Fushi International directors, of which Mr. Kuhns was one, understood Fushi International to be the successor of Dalian Fushi. Fushi International received benefits of the Agreement. The business of Dalian Fushi has thus been continued and expanded by Fushi's subsidiaries, subject to Fushi's overall management and control. The main, if not sole, purpose of the creation, structure and interrelation of the several entities was to phase out Dalian Fushi but to continue its business, expanded by the financing subject to the Agreement in a form solely used to comply with Chinese law. The facts as to the several Fushi entities are within the factors on which successor liability may be premised. See Ricciardello v. J.W. Gant & Co., 717 F. Supp. 56, 58 (D. Conn. 1989); Collins v. Olin Corp., 434 F. Supp. 2d 97, 102 (D. Conn. 2006); Union Square Grill Hospitality Group, LLC v. Blue Smoke Am. Bar & Grill, LLC, 2007 WL 869024, at 2 (D. Conn. March 19, 2007). These include transfer of assets, employees, and business operations, identity of directors, officers and shareholders, and control of the conduct of the identical business originally conducted by Dalian Fushi, which ceased its business. Their headquarters share a single location. Fushi International fulfilled the Agreement provision by Mr.

Kuhn's appointment and service on its board of directors. The creation of the additional Fushi entities was characterized as a reverse merger. Ex. 26, p. 1; Ex. 1, p. 7. It was intended, and did, continue the business of Dalian Fushi in the form of Fushi International, its wholly owned subsidiary, DPI and in turn the sub-subsidiary Dalian DPI. To investors, it was the successor to Dalian Fushi. Tr. 5/27, 118:10-12, 174:12-21, 175: 12-21. That Fushi International accomplishes such through several levels of corporate entities, whose financial statements are consolidated, does not avoid the reality that the decision makers of one entity, Fushi International, though its subordinate Dalian DPI and in turn its subordinate DPI sufficiently control what originated as Dalian Fushi through a management agreement, to be regarded as successor to the Agreement the benefits of which enabled the corporate maneuvering of Fushi International, and warrant imposing successor liability under the Agreement on it. See Collins, 434 F. Supp. 2d at 102; Ricciardello, 717 F. Supp. at 58. The Fushi entities' interrelationships and the realities of their unification and singular control warrants the disregard of their separate legal entity. See Zaist v. Olson, 154 Conn. 563, 573-576 (Conn. 1967); Jacobs Vehicle Systems, Inc. v. Pacific Diesel Brake Co., 424 F. Supp 2d 388, 392-93 (D. Conn 2006). What has been demonstrated here is the passing of Dalian Fushi, its assets and business to Fushi with complete domination of the entire Fushi enterprise centered in Fushi International, and not countered by evidence, all of which warrants disregard as a myth the separate legal status of the several Fushi entities. See Carte Blanche (Singapore) Pte., Ltd. v. Diners Club Intern., Inc., 2 F.3d 24, 29 (2d Cir. 1993).

Kuhns is entitled to interest on the unpaid fees noted above at the annual rate of 10%. Conn. Gen. Stat. § 37-3a. The fees found unpaid and owed are all liquidated and wrongfully

withheld. Ceci Bros., Inc. v. Five Twenty-One Corp., 81 Conn. App. 419, 427 (2004); Shaw v. Greenwich Anesthesiology Assocs., 200 F. Supp. 2d 110, 118 (D. Conn. 2002). The amount due, calculated to July 1, 2008, is as follows:

<u>Transaction</u>	<u>Principal</u>	<u>Fee Owed</u>	<u>Date Due</u>	<u>Interest</u>
Warrants in Initial Financing	\$7,055,252	\$705,525	6/07	\$76,431.29
Unpaid monthly retainer		\$160,000	12/07	\$9,331
Copperweld	\$22,500,000	\$362,500	10/07	\$24,166.64
Equity Financing (3 investors)	\$6,184,500	\$309,225	10/07	\$20,615.04
Stock Sale	\$39,000,000	\$1,950,000	10/07	\$130,000
Citadel	\$60,000,000	\$3,000,000	1/07	\$450,000
	Total:	\$6,487,250		\$710,543.97

Accordingly, as of July 1, 2008, Kuhns is entitled to recover of Dalian Fushi and Fushi International, jointly and severally, \$6,487,250 plus \$710,543.97, for a total of \$7,197,793.97. Per diem interest from July 1, 2008 to the date of satisfaction of the judgment is \$1,947, which is \$710,543.97 divided by 365. Consistent with the ruling herein, Defendants' Oral Motion for Judgment as a Matter of Law [Doc. No. 189] is hereby **DENIED**.

SO ORDERED.

Dated at New Haven, Connecticut this 4th day of August, 2008.

/s/
PETER C. DORSEY
UNITED STATES DISTRICT JUDGE