

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS**

BRITVIC SOFT DRINKS LTD.,)	
)	
Plaintiff,)	
)	
v.)	Case No. 01-2243-CM
)	
ACSIS TECHNOLOGIES, INC.,)	
)	
Defendant.)	

MEMORANDUM AND ORDER

I. Background

NOW ON the 2nd day of September, 2003, the above case came on for trial. Plaintiff appeared by its attorneys, Teresa A. Woody and Patrick J. Whalen; defendant appeared by its attorneys, Joseph G. Matye and Kevin Mason. The court previously entered judgment pursuant to a jury verdict in favor of plaintiff on plaintiff's claims of breach of contract and breach of contract of good faith and fair dealing claims, and against plaintiff on its promissory estoppel claim. Having heard the evidence and testimony and considered the statements, arguments, and submissions of counsel, the court makes its ruling on plaintiff's unjust enrichment claim. For the reasons set forth below, the court finds that plaintiff is not entitled to recover on its unjust enrichment claim.

Pursuant to Fed. R. Civ. P. 52(a), the court makes the following findings of fact and conclusions of law on plaintiff's unjust enrichment claim.

II. Findings of Fact

1. Plaintiff Britvic Soft Drinks, Ltd. is a United Kingdom corporation with its principal place of business in Essex, England.
2. Defendant ACSIS Technologies, Inc. is a Georgia corporation with its principal place of business in Charlotte, North Carolina.
3. Defendant sells computer software applications to customers under a license arrangement.
4. A software key "unlocks" and enables a purchaser to use the software. Without a software key to the specific version of the software loaded on a purchaser's computer system, a

purchaser cannot use the software.

5. Defendant periodically made changes, enhancements, or other alterations to the Field Service 400 Software and released the enhanced software as a new version.

6. Plaintiff first and since has continuously used version 3.281 of the Field Service 400 Software (“the Software”).

7. In the “packages” required for plaintiff’s continued use of the Software, defendant included various extra items other than the software key, including source code.

8. Defendant insisted that its “package” be taken with all components.

9. In order to continue use of the Software, Britvic made payments in excess of \$595,000.02 demanded by defendant.

10. Defendant received and retained the monies paid by plaintiff.

11. On September 8, 2003, the jury in this case returned its verdict on plaintiff’s breach of contract and breach of covenant of good faith and fair dealing claims.

12. The jury found in favor of plaintiff on its claims of breach of contract and breach of the covenant of good faith and fair dealing and found against defendants on its affirmative defenses of accord and satisfaction and waiver.

13. On plaintiff’s claim of promissory estoppel the jury found in favor of plaintiff but found in favor of defendant on defendant’s affirmative defenses of accord and satisfaction and waiver.

14. On plaintiff’s claim of misrepresentation the jury found against plaintiff and found in favor of defendant on its affirmative defense of waiver.

15. The jury awarded plaintiff damages in the amount of \$595,000.02.

16. The same day, the court entered judgment on the jury’s verdict.

III. Conclusions of Law

1. The court has jurisdiction over the parties and the subject matter of this action. Pretrial

Order Stipulation at § 3.1 and 3.2.

2. Venue is proper in the District of Kansas. *Id.* at § 3.3.

3. To prevail on its claim of breach of contract, plaintiff must have established (a) the existence of a contract between the parties, (b) sufficient consideration to support the contract, (c) plaintiff's performance or willingness to perform in compliance with the contract, (d) defendant's breach of the agreement, and (e) damages to plaintiff. Pretrial Order, § 7.1(A).

4. In order to prevail on a claim of unjust enrichment, plaintiff must prove that a benefit was conferred upon defendant by plaintiff, that there was an appreciation or knowledge of the benefit by defendant, and that acceptance or retention by defendant of the benefits under the circumstances make it inequitable for defendant to retain the benefit. Pretrial Order at § 7.3A; *Haz-Mat Response v. Certified Waste Serv.*, 910 P.2d 839, 847 (Kan. 1996); *Kephart v. Data Systems International, Inc.*, 243 F.Supp.2d 1205, 1231 (D. Kan. 2003).

5. However, "where a person . . . breaks the contract, the other party either may sue upon his contract and recover so far as he has performed, as well as for loss of profits, or he may waive the contract, sue upon a quantum meruit and recover the value of his labor. But he cannot pursue both remedies." *Whan v. Smith*, 285 P. 589, 591 (Kan. 1930). Quasi-contractual remedies, such as unjust enrichment, "are not to be created when an enforceable express contract regulates the relations of the partes with respect to the disputed issue." *Member Svcs. Life Ins. Co. v. Am. Nat. Bank and Trust Co.*, 130 F.3d 950, 957 (10th Cir. 1997) (citing 1 JOSEPH M. PERILLO, CORBIN ON CONTRACTS § 1.20, at 64-65 (rev. ed. 1993)). Moreover, "courts applying Kansas law have concluded that quantum meruit and restitution are not available theories of recovery when a valid, written contract addressing the issue exists." *Fusion, Inc. v. Neb. Aluminum Castings, Inc.*, 934 F. Supp. 1270, 1275 (D. Kan. 1996); 66 Am. Jur. 2d *Restitution and Implied Contracts* § 24 ("an express contract precludes the existence of a contract implied by law or a quasi-contract [and] an action for unjust enrichment cannot lie in the face of an express contract.").

6. As reflected in the jury's verdict finding in favor of plaintiff on its breach of contract claim, plaintiff established the existence of an express contract. Consequently, the equitable theory of unjust enrichment is unavailable to plaintiff.

IT IS THEREFORE ORDERED that judgment be entered in favor of defendant on plaintiff's unjust enrichment claim.

IT IS SO ORDERED.

Dated this 8th day of June 2004, at Kansas City, Kansas.

s/ Carlos Murguia
CARLOS MURGUIA
United States District Judge