

**UNITED STATES DISTRICT COURT**  
**DISTRICT OF MAINE**

<b>JAMES R. HART,</b>	)	
	)	
<i>Plaintiff</i>	)	
	)	
<b>v.</b>	)	<b><i>Docket No. 99-126-B</i></b>
	)	
<b>AKZO NOBEL CHEMICALS, INC.,</b>	)	
	)	
<i>Defendant</i>	)	

***MEMORANDUM DECISION ON MOTION TO STRIKE AND  
RECOMMENDED DECISION ON MOTION FOR SUMMARY JUDGMENT***

The defendant seeks summary judgment on all claims brought by the plaintiff, its former employee, in this removed action alleging breach of contract and violation of 26 M.R.S.A. § 626. The defendant has moved to strike one paragraph of the statement of material facts submitted by the plaintiff in opposition to the motion. I deny the motion to strike and recommend that the court grant the motion for summary judgment in part and deny it in part.

**I. Summary Judgment Standard**

Summary judgment is appropriate only if “the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” Fed. R. Civ. P. 56(c). “In this regard, ‘material’ means that a contested fact has the potential to change the outcome of the suit under the governing law if the dispute is resolved

favorably to the nonmovant. By like token, ‘genuine’ means that ‘the evidence about the fact is such that a reasonable jury could resolve the point in favor of the nonmoving party . . . .’” *McCarthy v. Northwest Airlines, Inc.*, 56 F.3d 313, 315 (1st Cir. 1995) (citations omitted). The party moving for summary judgment must demonstrate an absence of evidence to support the nonmoving party’s case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). In determining whether this burden is met, the court must view the record in the light most favorable to the nonmoving party and give that party the benefit of all reasonable inferences in its favor. *Cadle Co. v. Hayes*, 116 F.3d 957, 959 (1st Cir. 1997). Once the moving party has made a preliminary showing that no genuine issue of material fact exists, “the nonmovant must contradict the showing by pointing to specific facts demonstrating that there is, indeed, a trialworthy issue.” *National Amusements, Inc. v. Town of Dedham*, 43 F.3d 731, 735 (1st Cir. 1995) (citing *Celotex*, 477 U.S. at 324); Fed. R. Civ. P. 56(e). “This is especially true in respect to claims or issues on which the nonmovant bears the burden of proof.” *International Ass’n of Machinists & Aerospace Workers v. Winship Green Nursing Ctr.*, 103 F.3d 196, 200 (1st Cir. 1996) (citations omitted).

## **II. Factual Background**

The summary judgment record includes the following appropriately supported material facts that are not in dispute.

The defendant, Akzo Nobel Chemicals, Inc., is a Delaware corporation. Statement of Material Facts in Support of Defendant Akzo Nobel Chemical, Inc.’s Motion for Summary Judgment (“Defendant’s SMF”) (Docket No. 8) ¶ 1; Statement of Material Facts in Opposition to Defendant Akzo Nobel Chemicals, Inc.’s Motion for Summary Judgment (“Plaintiff’s Responsive SMF”)

(Docket No. 10) ¶ 1. EKA Nobel, Inc. (“EKA”),<sup>1</sup> North American Paper Chemicals Division of Akzo Nobel Chemicals, Inc., hired the plaintiff in January 1990 to work as an account manager for its Maine market. Defendant’s SMF ¶¶ 1-2; Plaintiff’s Responsive SMF ¶¶ 1-2; Affidavit of Eric Padovani (“Padovani Aff.”), Exh. I to Defendant’s SMF, ¶ 1. Chemtronics was a 100% owned subsidiary of EKA. Padovani Aff. ¶ 1. EKA is in the business of selling chemicals and equipment to pulp and paper companies throughout North America. Defendant’s SMF ¶ 3; Plaintiff’s Responsive SMF ¶ 3. In 1993, Chemtronics was in the business of developing and marketing process control instrumentation systems to be used in the paper manufacturing process. Padovani Aff. ¶ 1.

Between 1991 and 1997 the plaintiff was employed as a senior technical sales representative for EKA. Defendant’s SMF ¶ 6; Plaintiff’s Responsive SMF ¶ 6. The plaintiff’s duties as an in-house sales representative included selling EKA’s chemical product line to all potential users in his territory, servicing existing accounts, keeping informed about customers’ potential needs, adhering to EKA’s organizational procedures and policies, and following established regional sales strategies and plans. Defendant’s SMF ¶ 7; Plaintiff’s Responsive SMF ¶ 7.

Prior to 1995 Chemtronics equipment was sold by independent sales representatives who

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<sup>1</sup> The defendant’s statement of material facts refers to an entity called “Eka Chemicals, Inc.” as a subsidiary of Akzo Nobel Chemicals, Inc. Defendant’s SMF ¶ 1. The affidavits submitted by the defendant in support of its motion for summary judgment refer to “EKA Nobel, Inc.” as a subsidiary of Akzo Nobel Chemicals, Inc., Padovani Aff. ¶ 1; Affidavit of Wilfred Stein (“Stein Aff.”), Exh. II to Defendant’s SMF, ¶¶ 1-3, 6, 8; to “Eka Chemicals,” Padovani Aff. ¶ 7; to “EKA Chemicals, Inc.,” Affidavit of Stephen M. Shiflet (“Shiflet Aff.”), Exh. III to Defendant’s SMF, ¶ 1; and to “EKA Nobel Chemicals, Inc.,” Padovani Aff. ¶ 8, all apparently interchangeably. The possibility that these may in fact be separate entities has no bearing, as far as I can determine, on the outcome of the motion for summary judgment, and my reference to “EKA Nobel, Inc.” should therefore be taken as a reference to each of the corporate names mentioned here.

were not employees of Chemtronics and were compensated on a commission basis. Padovani Aff. ¶ 4. Beginning in 1995 Chemtronics equipment was sold by EKA employees on a non-commissioned basis. *Id.* ¶ 5. The plaintiff does not contend that his duties included selling Chemtronics equipment before 1993. Defendant’s SMF ¶ 11; Plaintiff’s Responsive SMF ¶ 11.

In 1993 Wilfred Stein was general manager of Chemtronics. Defendant’s SMF ¶ 12; Plaintiff’s Responsive SMF ¶ 12. In April 1993 the plaintiff and Stein had a breakfast meeting while attending a pulp and paper conference at the University of Maine in Orono, Maine. Defendant’s SMF ¶¶ 13-14; Plaintiff’s Responsive SMF ¶¶ 13-14. The plaintiff claims that Stein asked him at this meeting if he would “sell his Chemtronics for him in the State of Maine” and that he replied “I would be interested in doing that.” Deposition of James R. Hart (“Plaintiff’s Dep.”), Exh. A to Plaintiff James R. Hart’s Opposition to Defendant’s Motion for Summary Judgment, etc. (“Plaintiff’s Opposition”) (Docket No. 9), at 28. The plaintiff also claims that Stein told him that Stein “would pay [him] a commission, commensurate with what he was paying his independent contractors” on such sales. *Id.* Stein did not have unilateral authority to enter into an agreement with EKA sales staff to sell Chemtronics equipment for a commission nor did he hold himself out as being so authorized. Affidavit of Wilfred Stein, Exh. II to Defendant’s SMF, ¶ 8.<sup>2</sup> The plaintiff knew that Stein needed approval from EKA to undertake this arrangement with the plaintiff. Plaintiff’s Dep. at 79. The plaintiff claims that the arrangement he made with Stein was subsequently confirmed by Michael Kiehl, Eastern Regional Sales Manager of EKA, Plaintiff’s Additional Facts

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<sup>2</sup> The plaintiff denies this factual assertion, Plaintiff’s Responsive SMF ¶ 17, but the portions of the record cited by the plaintiff in support of his denial do not contradict Stein’s affidavit on this point. *See* Affidavit of Michael Kiehl, Exh. B to Plaintiff’s Opposition, ¶¶ 3, 4, 7, 8 and Affidavit of Frank Girardi (“Girardi Aff.”), Exh. C to Plaintiff’s Opposition, ¶¶ 3, 5.

in Opposition to Defendant's Motion for Summary Judgment ("Plaintiff's SMF"), included in Plaintiff's Responsive SMF, ¶ 1; Defendant's Reply to Plaintiff's Additional Facts in Opposition to Defendant's Motion for Summary Judgment ("Defendant's Reply SMF") (Docket No. 12), ¶ 1, when Kiehl told the plaintiff that Kiehl "was informed that [the plaintiff] was to assume part-time responsibilities for selling Chemtronics," Plaintiff's Dep. at 31. The plaintiff began marketing Chemtronics equipment in 1993-94. Girardi Aff. ¶ 8.<sup>3</sup>

The policy, beginning in 1995, of using in-house EKA sales staff to sell Chemtronics equipment was relayed to the sales staff by word-of-mouth. Defendant's SMF ¶¶ 24, 28; Plaintiff's Responsive SMF ¶¶ 24, 28. The decision to award end-of-year bonuses to the sales staff and the amount of any such bonuses were entirely discretionary. Defendant's SMF ¶ 27; Plaintiff's Responsive SMF ¶ 27. The plaintiff was recommended for a bonus for his work performance in 1996 by EKA manager Joe Massida. Defendant's SMF ¶ 34; Plaintiff's Responsive SMF ¶ 34. The plaintiff suggested that a fair figure for this bonus would be \$400,000. Defendant's SMF ¶ 35; Plaintiff's Responsive SMF ¶ 35. The plaintiff was told that \$400,000 was an unreasonable figure and was asked to suggest another figure. Defendant's SMF ¶ 36; Plaintiff's Responsive SMF ¶ 36. The plaintiff then said that he would settle for his commission on his sales of Chemtronics equipment and a \$10,000 bonus. *Id.*; Plaintiff's Dep. at 58. The plaintiff was told that this was also unreasonable. Defendant's SMF ¶ 36; Plaintiff's Responsive SMF ¶ 36 (no response; *see* Local Rule 56(e)). In 1996 the plaintiff's salary was \$65,000. Defendant's SMF ¶ 47; Plaintiff's Responsive SMF ¶ 47. In 1992 his salary was \$53,000. Defendant's SMF ¶ 48; Plaintiff's Responsive SMF ¶

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<sup>3</sup> The defendant denies this factual assertion, Reply SMF ¶ 10, but the citations to the record provided in support of that denial do not contradict the statement made in Girardi's affidavit.

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Assuming that the plaintiff's claims concerning the arrangement with Stein are correct, he was in a unique role with respect to the sales of Chemtronics equipment. Defendant's SMF ¶ 44; Plaintiff's Responsive SMF ¶ 44. No one else was on salary plus commissions. Defendant's SMF ¶ 46; Plaintiff's Responsive SMF ¶ 46.

The plaintiff sold several units of Chemtronics equipment in 1995-96. Plaintiff's SMF ¶ 11.<sup>4</sup>

The plaintiff's employment was terminated in January 1997. Defendant's SMF ¶ 33; Plaintiff's Responsive SMF ¶ 33.<sup>5</sup>

### **III. Discussion**

#### **A. Counts I and II**

Count I of the complaint alleges a violation of 26 M.R.S.A. § 626, which provides, in relevant part:

An employee leaving employment must be paid in full within a reasonable time after demand at the office of the employer where payrolls are kept and wages are paid . . . .

For purposes of this section, the term "employee" means any person who preforms services for another in return for compensation, but does not include an independent contractor.

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<sup>4</sup> The defendant does not respond to this paragraph of the plaintiff's statement of material facts. Accordingly, to the extent that it is supported by the citations to the record given by the plaintiff, it is admitted. Local Rule 56(e). The record cited by the plaintiff establishes that his first sale of such equipment was in 1995. Plaintiff's Dep. at 34.

<sup>5</sup> Neither party includes in their respective statements of material fact the fact that the plaintiff has not been paid commissions and a bonus to which he claims in the complaint to be entitled. Since all of the factual statements that are provided by the parties are relevant and make sense only if the plaintiff has not been paid, my analysis of the motion for summary judgment will proceed on that necessary inference. Obviously, it would be better practice for the parties to include every necessary fact, however obvious, in their Rule 56 statements.

\* \* \*

An action for unpaid wages under this section may be brought by the affected employee . . . .

Count II alleges breach of an oral contract. The counts are intertwined; if there was no contract as alleged by the plaintiff, there can be no claim for payment of the commissions under the statute, because no commissions would be “unpaid.” As discussed in detail below, the plaintiff has no claim for a bonus under either theory in any event.

The “unpaid wages” to which the statute refers includes commissions. *Purdy v. Community Telecomm. Corp.*, 663 A.2d 25, 29 (Me. 1995). The plaintiff also claims entitlement to a \$3,000 bonus under the statute, Complaint (attached to Notice of Removal (Docket No. 1)) ¶ 27, although his defense of that claim in his opposition to the motion for summary judgment is half-hearted at best. Plaintiff’s Opposition at 12 (“While lack of definiteness may preclude recovery under contract theory,” he can recover a bonus under a *quantum meruit* theory.). The plaintiff cites no authority suggesting that an annual bonus, admittedly “entirely discretionary” on the part of the employer, can be an element of “unpaid wages” under the statute. There is no evidence in the summary judgment record from which a reasonable inference could be drawn to the effect that the plaintiff had a contractual entitlement to a bonus for 1996. Indeed, the only evidence is to the contrary. Plaintiff’s Dep. at 54. Accordingly, the plaintiff may not recover on Count II of his complaint for any bonus.

This conclusion is determinative as well as to any claim under the statute for payment of a bonus. *See Rowell v. Jones & Vining, Inc.*, 524 A.2d 1208, 1210-11 (Me. 1987) (§ 626 applies only to entitlement to payment that is established by terms of employment). While it is unnecessary for resolution of this issue, I note that other courts interpreting similar state statutes in which the term “wages” is undefined, or in which the definition of the term does not itself clearly exclude bonuses,

have consistently held that the term does not include discretionary bonuses. *E.g.*, *Compass v. American Mirrex Corp.*, 72 F.Supp.2d 462, \_\_\_, 1999 WL 988528 (D. Del. Oct. 27, 1999) at \*6-\*7; *Herremans v. Carrera Designs, Inc.*, 24 F.Supp.2d 904, 908 (N.D.Ind. 1997), *aff'd* 157 F.3d 1118, 1121 (7th Cir. 1998); *International Paper Co. v. Suwyn*, 978 F. Supp. 506, 514 (S.D.N.Y. 1997). The plaintiff may not recover any bonus under Count I.

With respect to the claimed commissions, it is necessary to resolve the question whether the evidence in the summary judgment record would allow a jury to conclude that an oral contract to pay such commissions did exist.<sup>6</sup> On this point, there is no disputed evidence. The defendant maintains that the evidence submitted by the plaintiff is insufficient as a matter of law to establish the existence of a binding agreement. The plaintiff claims that Stein asked him if he would “sell . . . Chemtronics for him in the State of Maine,” that he replied “I would be interested in doing that,” that Stein then told the plaintiff he would pay him a commission “commensurate with what he was paying his independent contractors,” and that the plaintiff subsequently sold some Chemtronics equipment. Plaintiff’s Dep. at 28, 47-48. In *Zamore v. Whitten*, 395 A.2d 435 (Me. 1978), *rev’d on other grounds*, *Bahre v. Pearl*, 595 A.2d 1027, 1035 (Me. 1991), the alleged offer was “[w]hen [the corporation] gets on its feet within a year your third interest will be worth \$20,000 and I will see you get that or more as things get straightened out,” and the acceptance was “the arrangement is

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<sup>6</sup> The plaintiff’s argument that the question whether a contract existed must always go to the factfinder and cannot be resolved on summary judgment, Plaintiff’s Opposition at 6-7, misperceives the very nature of summary judgment. It is most decidedly the role of the court when a motion for summary judgment is brought to determine whether there is sufficient evidence to allow a jury to determine whether a contract, of whatever nature, did exist as claimed by the plaintiff. *Hinchey v. NYNEX Corp.*, 144 F.3d 134, 140 (1st Cir. 1998). And it is the plaintiff’s burden to show the existence of that evidence in accordance with applicable procedural rules. *National Amusements*, 43 F.3d at 735.

satisfactory.” 395 A.2d at 440. The Law Court held that the alleged acceptance was insufficient to establish an oral contract as a matter of law, because it “lacked positive and distinct language or action of binding effect,” *id.*, characterizing the statement as “a mere acknowledgment . . . of appreciation for [the defendant’s] efforts in seeing that the appellants get \$20,000 or more for their interest in the corporation,” *id.* at 443. The Law Court held that the record “furnishes no basis, either expressly or by inferential proof, that any binding mutual obligation was ever intended.” *Id.* The defendant here contends that the plaintiff’s statement “I would be interested in doing that” is and can be no more effective as a matter of law than the statement in *Zamore* that “the arrangement is satisfactory.” Defendant Azko Nobel Chemicals, Inc.’s Motion for Summary Judgment, etc. (“Motion”) (Docket No. 7) at 8-9.

I agree. At most, the plaintiff indicated during the breakfast conversation an interest in entering into an agreement in the future. Under *Zamore*, the plaintiff has not produced sufficient evidence of his alleged acceptance of Stein’s offer in order to allow a jury to determine whether a contract was created. Under these circumstances, it is not necessary to consider the defendant’s alternate argument, that even if a contract was created the plaintiff was an independent contractor and therefore not entitled to recover under section 626. Motion at 12-14.

Accordingly, the defendant is entitled to summary judgment on Counts I and II.

### **B. Counts III and IV**

The remaining counts of the complaint allege entitlement to recovery on theories of *quantum meruit* and unjust enrichment. Again, I will treat the claims for commissions and a bonus separately.

Under Maine law, the elements of a claim based on *quantum meruit* are: “(1) services [that] were rendered to the defendant by the plaintiff; (2) with the knowledge and consent of the defendant;

and (3) under circumstances that make it reasonable for the plaintiff to expect payment.” *Carvel Co. v. Spencer Press, Inc.*, 708 A.2d 1033, 1036 (Me. 1998). Although *quantum meruit* involves an implied rather than an express contract, recovery on this theory requires a plaintiff to prove that he had a “reasonable expectation that his work was not gratuitous and that [the defendant] by [its] words or conduct justified this expectation.” *Paffhausen v. Balano*, 708 A.2d 269, 272 (Me. 1998) (emphasis omitted). The doctrine of unjust enrichment, in contrast, “describes recovery for the value of the benefit retained when there is no contractual relationship, but when, on the grounds of fairness and justice, the law compels performance of a legal and moral duty to pay.” *Id.* at 271. Thus, in contrast to the *quantum meruit* analysis, the focus in determining whether the plaintiff may recover is not on whether there was an express or implied contract providing for commissions or a bonus but on whether the defendant conferred a benefit on the defendant for which justice compels the defendant to pay. Jury trial is not available on an unjust enrichment claim. *Bowden v. Grindle*, 651 A.2d 347, 351 (Me. 1994).

With respect to the claimed bonus, there is no evidence in the summary judgment record that demonstrates, or could support an inference, that the circumstances made it reasonable for the plaintiff to expect a bonus of \$3,000, or any other amount, for his EKA sales in 1996. Again, the only evidence is that payment of bonuses by the defendant was entirely discretionary.<sup>7</sup> Therefore,

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<sup>7</sup> In his memorandum, the plaintiff, citing *Bragdon v. Shapiro*, 146 Me. 83 (1951), contends that his expectation of a bonus of \$3,000 for 1996 was reasonable, based on his total sales of EKA products for that year and bonuses that he had received in prior years when his total sales were lower. Plaintiff’s Opposition at 13. Even if the evidence in the summary judgment record were to show the payment of a certain bonus every year, as was the case in *Bragdon*, 146 Me. at 85-86 (but the court also found that the plaintiff had been promised a bonus, with only the amount undetermined at the time the promise was made, *id.* at 87), the plaintiff has failed to place any facts about his previous sales and bonuses or his total 1996 sales before the court by way of his statement of material facts, (continued...)

the plaintiff may not recover the claimed bonus on a theory of *quantum meruit* under Count III. The plaintiff argues only that he is entitled to a bonus on the *quantum meruit* theory, but not on the theory of unjust enrichment. Plaintiff's Opposition at 12-13, 15-16. Accordingly, the defendant is entitled to summary judgment on Counts III and IV to the extent that they encompass claims by the plaintiff for a bonus for 1996.

With respect to the claimed commissions, the defendant contends that it is entitled to summary judgment on the *quantum meruit* claim because there is no evidence that it actually intended to pay the plaintiff commissions at the time Stein made the alleged offer. Defendant Akzo Nobel Chemicals, Inc.'s Reply to Plaintiff's Opposition to Defendant's Motion for Summary Judgment, etc. (Docket No. 11) at 6. This argument is without merit under Maine law. The Law Court has specifically held that the plaintiff raising a *quantum meruit* claim need not prove an actual intention on the part of the defendant to compensate him, but rather that his own expectation of compensation was reasonable given the words or conduct of the defendant. *Paffhausen*, 708 A.2d at 272.

Here, the evidence would allow a jury to find that the plaintiff reasonably expected a commission on his sales of Chemtronics equipment following the 1993 conversation with Stein and the subsequent confirmation by EKA's regional sales manager that he was to undertake such sales. *See generally Danforth v. Ruotolo*, 650 A.2d 1334, 1336 (Me. 1994). The "confirming"

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<sup>7</sup>(...continued)

as required by Local Rule 56. The court cannot deny a motion for summary judgment on the basis of facts that a plaintiff might be able to prove, or a hypothetical situation that might have occurred. In the absence of any evidence to support the plaintiff's argument, the defendant is entitled to summary judgment on the claim for a bonus asserted in Count III. *Medina-Munoz v. R. J. Reynolds Tobacco Co.*, 896 F.2d 5, 8 (1st Cir. 1990).

conversation took place in 1993, Plaintiff's Dep. at 31, however, so the question arises whether the plaintiff's expectation remained reasonable after the defendant in 1995 changed its sales approach for Chemtronics equipment from offering commissions to independent contractors to conducting all sales activity through its salaried sales employees without payment of commission. This question is critical because the plaintiff offers no evidence that he made any sales of Chemtronics equipment until 1995.<sup>8</sup> The summary judgment record contains no evidence relevant to the question whether the plaintiff himself was informed of this change in policy. Even if he had been so informed, it is possible that the "unique" nature of his arrangement, in effect since 1993, would be sufficient to overcome any change in the circumstances of other EKA sales representatives that occurred in 1995. It is possible that a reasonable person, in the plaintiff's unique position, might conclude that the unique nature of his relationship with the defendant survived any changes in the relationships of others, not entirely similarly situated, with the defendant. On the basis of the summary judgment record, it is not possible to find that a jury could not conclude that the plaintiff is entitled to recover commissions on a theory of *quantum meruit*. Accordingly, the defendant is not entitled to summary judgment on Count III to the extent that it seeks recovery for the plaintiff's commissions on sales of Chemtronics equipment.

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<sup>8</sup> The plaintiff contends that the "sales [of Chemtronics equipment] took months or even years to consummate," and that his sales in 1995 and 1996 were "based upon sales promotions actively initiated in 1993 and 1994." Plaintiff's Opposition at 14. These factual contentions are without support in the plaintiff's statement of material facts and therefore may not be considered by the court. (The plaintiff's statement of material facts and supporting documents do provide that he "had active sales promotions" at several paper mills during 1993 and 1994, Girardi Aff. ¶ 8, but not the conclusion that these promotions led to the actual sales in 1995 or 1996.) In any event, there is no evidence in the summary judgment record that any commissions were ever paid by the defendant until sales of Chemtronics equipment actually were consummated. No inference to that effect is warranted by the summary judgment record. Accordingly, I can only conclude that the commissions were due, if at all, in 1995 and 1996.

The analysis for the unjust enrichment claim is somewhat different. Here, the fact that the defendant used only its in-house sales staff to sell Chemtronics equipment from 1995 on, without paying commissions on those sales, is dispositive. The plaintiff has not shown that any of his sales of Chemtronics equipment were consummated before 1995. Under these circumstances, if the defendant did not pay the plaintiff a commission on his sales of Chemtronics equipment, it could not be said to have retained a benefit for which justice compels it to pay, or that it had a legal or moral duty to pay the commission, because on other sales of the same equipment it made no such payments and had no duty to do so. The plaintiff conferred no benefit on the defendant by selling Chemtronics equipment in 1995 and 1996; the defendant acquired nothing different from what it acquired on every sale of Chemtronics equipment beginning in 1995. Accordingly, the defendant is entitled to summary judgment on Count IV.

### **C. The Motion to Strike**

The defendant has moved to strike Paragraph 8 of the plaintiff's Additional Facts in Opposition to Defendant's Motion for Summary Judgment on the ground that it is not based on personal knowledge as required by Fed. R. Civ. P. 56(e). Motion to Strike (Docket No. 13). The paragraph at issue reads as follows:

Michael Kiehl and Frank Girardi believed that Mr. Hart would receive commissions or bonuses based upon equipment he sold in addition to his base salary as a Senior Technical Sales Representative. Affidavit of Michael Kiehl at ¶ 7. Affidavit of Frank Girardi at ¶¶ 3, 4 and 5.

Paragraph 7 of Kiehl's affidavit provides:

Although I do not know the specific terms of James R. Hart's agreement with the Chemtronics Division and Mr. Stein, it was my understanding that Mr. Hart would receive commissions or bonuses based upon equipment he sold in addition to his base salary as a Senior Technical Sales

Representative.

Paragraph 5 of Girardi's affidavit, the only relevant paragraph, provides:

Although I do not know the specific terms of James R. Hart's agreement with the Chemtronics Division and Mr. Stein, it was my understanding that Mr. Hart would receive commissions or bonuses based upon equipment that he sold. This was in addition to his base salary as a Senior Technical Sales Representative.

I do not rely on paragraph 8 of the plaintiff's statement of material facts in reaching any conclusions in this recommended decision and the motion might therefore be regarded as moot. However, because my decision on the motion for summary judgment is a recommended one, it is possible that this paragraph might be involved in the court's review of my recommendation, if an objection is filed. Therefore, I will address the merits of the motion.

To the extent that the motion is based upon the fact that Kiehl and Girardi made their affidavits upon information and belief, rather than upon personal knowledge as required by Rule 56(e), it is somewhat curious, since the affidavits submitted by the defendant suffer from the same failure to comply with the rule. *Padovani Aff.* at [3]; *Stein Aff.* at [3]; *Shiflet Aff.* at [2]. In any event, paragraph 8 of the plaintiff's statement of material facts is in fact based on the personal knowledge of Kiehl and Girardi, since only they can know what they understood or believed. Whether those understandings or beliefs are based on speculation or are untrustworthy on some other basis goes to the weight to be given to the statements and is a question reserved to the finder of fact.

On the showing made, the motion to strike is denied.

#### **IV. Conclusion**

For the foregoing reasons, I recommend that the defendant's motion for summary judgment

be **DENIED** as to any claim for commissions asserted in Count III and otherwise **GRANTED**. The defendant's motion to strike is **DENIED**.

**NOTICE**

*A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.*

*Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.*

*Dated this 20th day of January, 2000.*

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*David M. Cohen  
United States Magistrate Judge*