IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

IN RE:	)	Chapter 11
	)	
CYCH, INC., f/k/a CyberCash, Inc.,	)	Case Nos. 01-622 (MFW) through 01-624 (MFW)
	)	
Debtors.	)	(Jointly Administered Under Case No. 01-622 (MFW))
	)	
CYCH, INC., f/k/a CyberCash, Inc.,	)	
	)	
Plaintiff,	)	
	)	Adversary No. 01-8856 (MFW)
v.	)	
	)	
EVS HOLDING COMPANY, INC.,	)	
	)	
Defendant.	)	

MEMORANDUM OPINION[1]

Before the Court is the Complaint of CYCH, Inc. ("the Debtor") against EVS Holding Company, Inc. ("EVS") seeking judgment in the amount of $60,000 for breach of contract, plus prejudgment interest and attorney's fees. For the reasons set forth below, we grant the requested relief in part.

I. FACTUAL BACKGROUND

On March 2, 2001, the Debtor filed a voluntary petition under chapter 11 of the Bankruptcy Code. On April 17, 2001, the Court entered an Order approving the asset purchase agreement by

[1] This Memorandum Opinion constitutes the findings of fact and conclusions of law of the Court pursuant to Federal Rule of Bankruptcy Procedure 7052.

which the Debtor sold substantially all of its assets to VeriSign, Inc. On November 7, 2001, the Court confirmed the Debtor's First Amended Liquidating Plan of Reorganization, which became effective on November 19, 2001 ("the Plan").

Prior to filing its bankruptcy petition, the Debtor provided e-commerce services in both the business-to-consumer and business-to-business markets. On or about April 1, 2000, the Debtor and EVS entered into a one year CyberCash Payment Card Service Reseller Agreement ("the Agreement") that allowed EVS to resell the Debtor's payment card services. As provided in the Agreement, EVS paid a service fee based on the number of EVS's customers utilizing the Debtor's services, subject to a minimum monthly fee of $15,000.

On November 26, 2001, the Debtor filed this Complaint asserting that EVS did not pay the Debtor for services rendered from January to April 2001. In response, EVS filed a Motion for Summary Judgment asserting that no amounts were due because it had terminated the Agreement on January 10, 2001.

On April 4, 2003, we denied EVS's Motion for Summary Judgment finding that a genuine issue of material fact existed as to whether EVS had terminated the Agreement. On October 29, 2003, a trial was held on the Complaint. Following the trial, a post-hearing trial deposition was conducted and filed on December 12, 2003.

II. JURISDICTION

This Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 1334 & 157(b)(2)(A), (E) & (O).

III. DISCUSSION

A. Applicable State Law

A federal district court sitting in diversity must apply the choice of law rules of the state in which it sits to determine which state's law governs the controversy before it. Hionis Int'l Enter., Inc. v. Tandy Corp., 867 F. Supp. 268, 271 (D. Del. 1994). Thus, we must apply Delaware's choice of law rule, which relies on the Second Restatement of Conflicts. The Second Restatement of Conflicts provides that "the parties' choice of law, as expressed in their agreement, will be upheld unless that state whose law would control in the absence of a choice has a materially greater interest in the subject matter." Restatement (Second) of Conflicts § 187.

Here, paragraph 13(d) of the Agreement provides that Virginia law governs the application and interpretation of the Agreement. Accordingly, Virginia state law applies unless Delaware has a materially greater interest in having its law applied. See Hionis, 867 F. Supp. at 271. We find no reason to disturb the parties' choice of law because it does not conflict with Delaware law nor does Delaware have a materially greater

interest in the subject matter.

Virginia courts adhere to the "plain meaning" rule of contract interpretation. See Globe Iron Const. Co. v. First Nat'l Bank of Boston, 140 S.E.2d 629 (Va. 1965). "[W]here an agreement is complete on its face, is plain and unambiguous in its terms, the court is not at liberty to search for its meaning beyond the instrument itself. Only where the language of a contract is ambiguous and uncertain may a court interfere to reach a certain construction of the contract." See Allstate Ins. Co. v. Eaton, 448 S.E.2d 652, 655 (Va. 1994).

B. Termination

The parties dispute whether EVS properly terminated the Agreement. The Debtor contends that EVS did not provide notice of the termination to its General Counsel as required. EVS contends that notifying the Debtor's General Counsel was not required by the plain language of the Agreement.

Paragraph 12(c) of the Agreement provides that "EVS shall have the right to terminate this Agreement for any reason after August 31, 2000." The Agreement's only termination requirement is that "[a]ll notices from either party . . . shall be by Internet electronic mail with a contemporaneous confirming written copy sent to the address on the cover to this Agreement." The cover page specifies that e-mails and written communications must be sent to the Debtor's legal department, Attn: General

Counsel.

The evidence establishes that on January 10, 2001, EVS sent a termination e-mail headed "cancel deal between parties" to Jake Elig, the Director of Merchant and Re-Seller Channels at the Debtor. Shortly thereafter, a paper print-out of this e-mail was sent via first-class mail to the Debtor at the address provided on the cover of the Agreement. The evidence presented, however, did not establish that either the electronic notice of termination or the written confirmation was sent to the Debtor's legal department or to the attention of its General Counsel as specified on the cover page of the Agreement. Accordingly, we conclude that the termination was not effective and that EVS remained liable for the minimum payment due under the Agreement for the period from January through April 2001.

C. Quantum Meruit

Even if EVS properly terminated the Agreement, we would, nonetheless, conclude that EVS is liable to the Debtor under the theory of quantum meruit. The Debtor asserts that EVS is liable under this theory because EVS continued to enjoy the benefits of the Debtor's services following termination. EVS contends that the Debtor cannot assert a claim for quantum meruit because it was not pled in the Complaint and an implied contractual relationship cannot be found where there is an express agreement.

We disagree with EVS's position. If EVS is correct that the

contract termination was effective, then there was no longer an express agreement between the parties and quantum meruit may apply. Further, since the Debtor did contend in its Complaint that EVS improperly used its services, we find that EVS had sufficient notice of a quantum meruit claim. "A party can certainly plead alternative theories of recovery." The Packaging Store, Inc. v. Bouchard, 1992 WL 884573, *2 (Va. Cir. Ct. 1992).

Quantum meruit is an equitable doctrine based on the premise that one who benefits from the labor of another should not be unjustly enriched. Raymond, Colesar, Glaspy & Huss, P.C. v. Allied Capital Corp., 961 F.2d 489, 490-91 (4th Cir. 1992). To recover under quantum meruit, the claimant must establish that (i) he rendered valuable services, (ii) to the defendant, (iii) which were requested and accepted by the defendant, (iv) under such circumstances as reasonably notified the defendant that the claimant, in performing the work, expected to be paid by the defendant. Id. at 491.

In this case, the Debtor rendered, and EVS accepted, valuable e-commerce services following the attempted termination. In fact, both parties performed as if the Agreement had not been terminated. The Debtor provided EVS with e-commerce services and EVS accepted these services by signing up new customers to use the Debtor's services. Further, EVS knew that the Debtor expected to be paid for the services since the Debtor continued

to bill EVS each month. Accordingly, even if EVS's termination of the Agreement was proper, EVS is still liable for the services rendered to it by the Debtor.

D. Prejudgment Interest

Virginia law provides that "[i]n any action at law or suit in equity, the verdict of the jury, or if no jury the judgement or decree of the court, may provide for interest on any principal sum awarded, or any part thereof, and fix the period at which the interest shall commence." Hitachi Credit Am. Corp. v. Signet Bank, 166 F.3d 614, 633 (4th Cir. 1999). However, whether prejudgment interest should be awarded "is a matter within the sound discretion of the . . . court." Id. (internal citations omitted).

In this case, we find that granting the Debtor prejudgment interest is improper. EVS believed that it properly terminated the Agreement and did not owe the Debtor the disputed amounts. Since there was an honest dispute regarding the termination, we will not impose pre-judgment interest.

E. Attorney's Fees

According to paragraph 13(i) of the Agreement, "the prevailing party [in a legal action] shall be entitled to receive its attorney's fees, court costs and other collection expenses, in addition to any other relief that it may receive." However, under the circumstances of this case, we find it improper and

inequitable to grant the Debtor its requested attorney's fees. In fact, we question why the parties spent an entire day litigating this breach of contract case (with only $60,000 in controversy). It would have been more prudent to settle and save the costs. Accordingly, as we stated at the hearing, we will not "reward" the successful party for continuing this litigation by awarding its legal fees.

IV. CONCLUSION

For the foregoing reasons, judgment will be entered in favor of the Debtor on its Complaint to recover $60,000 in unpaid services rendered to EVS.

An appropriate Order is attached.

BY THE COURT

Mary F. Walrath
United States Bankruptcy Judge

Dated: April 29, 2004

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FOR THE DISTRICT OF DELAWARE

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Debtors.	)	(Jointly Administered Under Case No. 01-622 (MFW))
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CYCH, INC., f/k/a CyberCash, Inc.,	)	
	)	
Plaintiff,	)	
	)	Adversary No. 01-8856 (MFW)
v.	)	
	)	
EVS HOLDING COMPANY, INC.,	)	
	)	
Defendant.	)	
	)	

O R D E R

AND NOW, this 29th day of April, **2004**, upon consideration of the Complaint filed by the Debtor and Answer thereto and after trial on the merits, it is hereby

ORDERED that judgment is entered in favor of the Debtors against EVS in the amount of $60,000.

BY THE COURT:

Mary F. Walrath
United States Bankruptcy Judge

cc: See attached

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