**COMMONWEALTH OF KENTUCKY**
**JOHNSON CIRCUIT COURT**
**CIVIL ACTION NO. 09-CI-00157**

**JAMES LAUFFER** **PLANTIFF**

**VS.** **FINDINGS OF FACTS, CONCLUSIONS OF LAW, AND JUDGMENT**



**THORO-GRAPH, INC. and JERRY BROWN** **DEFENDANTS**

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The above styled action was called for trial before the Court on April 6th, 2010, with the Plaintiff being present and represented by counsel, and Defendants being present and represented by counsel. Having heard the testimony presented by the parties, and having reviewed the exhibits introduced into evidence, the Court makes the following Findings of Fact and Conclusions of Law, and does enter the following Judgment:

## FINDINGS OF FACT

1) The Plaintiff filed a complaint for declaratory relief, asking that the Court determine that no contract existed between the Plaintiff and Defendants with respect to the sale of a racehorse known as Rachel Alexandra, and that the Plaintiff was not required to make any payment by way of commission or any other fee relating to the purchase of the filly by the Plaintiff.

2) The Defendants filed an answer and counterclaim. In the counterclaim, the Defendants claimed that they provided proprietary data and analysis concerning racehorse Rachel Alexandra to the Plaintiff, and are entitled to a fee of five percent of the purchase price, five percent of any earnings, and five percent of any increase in the value of the horse from the time of the purchase until resale or other events. The Defendants claimed as causes of action against the Plaintiff breach of contract, quantum meruit or unjust enrichment, promissory estoppel, conversion, fraud, and punitive damages. The Defendant subsequently filed an amended counterclaim, in which the Defendants made additional claims for relief relating to the Kentucky Uniform Trade Secrets Act and disgorgement of profits. The Defendants subsequently voluntarily dismissed the portions of their counterclaim relating to the Kentucky Uniform Trade Secrets Act, promissory estoppel and conversion. The Defendants further dismissed without prejudice Count 1 of the counterclaim relating to breach of contract. The remaining issues on Defendants' counterclaim relate to quantum meruit or unjust enrichment, as well as disgorgement of profit, fraud, and punitive damages.

3) The Plaintiff James M. Lauffer testified on his own behalf. He had been in the oil and gas business for thirty years, and owned twenty-two thoroughbred horses, most of them in partnership with someone else. He owned part of a farm in central Kentucky which is

leased to a man named Marty Takacs. With respect to the first horse that he owned, Mr. Lauffer testified that Mr. Takacs prepped the horse for sale, and that he paid Takacs a five percent fee for handling the sale, which he said was an industry standard fee. He also testified that he had a woman named Chris Welker assisted him in purchasing horses at Saratoga and charged a fee of two and a half percent of the purchase price. He testified that he had purchased two horses through Welker. He also testified that Cooper Sawyer had provided advice to him concerning horses, and had made offers on his behalf concerning horses. This was pursuant to a written agreement whereby Mr. Sawyer was to receive a five percent fee. He did not buy the horse recommended by Mr. Sawyer. He testified that he had never heard of the Defendant Jerry Brown until sometime in July or August of 2008. He learned of the Defendant from a man named Ron Kirk. Mr. Kirk advised him that Mr. Brown had picked a horse called Kiss with a Twist. He stated that Kirk gave a description of the services that the Defendant provided which consisted of ratings of horses. He saw some of the charts of the Defendants, but did not know how to interpret them. He did not see a chart on Rachel Alexandra. He testified that other services have speed ratings, including the daily racing form, Equiline and Ragozin. He testified that Kirk never told him what fee the Defendant wanted to be paid. There was some discussion about the horse. The Plaintiff testified that he and two partners planned to offer $300,000.00 for the horse,

$100,000.00 each. He does not know if the offer was actually made, but they apparently did not buy the horse. He testified that, at a later time, he, Ron Kirk and Greg McDonald were at McDonald's farm, where Kirk discussed Rachel Alexandra and said that the Defendant recommended that horse. He testified that he had seen Rachel Alexandra race at Keeneland. He wanted to research the horse, including viewing videotapes of the races, the horse's record, and the horse's pedigree. He stated that he was very interested in Rachel Alexandra. He testified that he talked to Kirk on November 7, 2008, and said that he was very interested in the horse. He said he called the Defendant Jerry Brown on November 7, 2008. He was not familiar with the Defendant's fee, and not aware of any fee that might be owed to bloodstock agent Donald Brauer. He had not agreed to pay a commission or fee to anyone involved with the horse. He said he expected to pay a commission of five percent of the purchase price if Rachel Alexandra was purchased. He introduced as Exhibit 2 and 3 his phone bills. He said the phone call to the Defendant lasted eight minutes. He testified the Defendant stated that he liked Rachel Alexandra, and stated that the horse was a good prospect for the Kentucky Oaks. He testified the Defendant did not explain the process he used to rate horses. He said the Defendant discussed management of the horse after the purchase, and recommended running one prep race, the Ashland Stakes, and the Kentucky Oaks in 2009. The Plaintiff asked what fee the Defendant charged, and the Defendant quoted a fee of five

percent of the purchase price, five percent of all earnings, and five percent in the increase in the value of the horse from the time of purchase until sale. The Plaintiff stated that he objected to that fee arrangement, and said that he would get back to the Defendant. He testified there were significant expenses in raising a horse. The daily rate for the training ranged from $50 to $100 a day. There were veterinary bills, transportation bills, farrier fees, entry fees, jockey fees, and a trainer's fee. He said the jockey's fee was around ten percent of earnings, and the trainer's fee ranged from ten to thirteen percent of the winnings. He testified he did not agree to pay the Defendant's fee, particularly since it applied to gross earnings, rather than net earnings. He stated that Donald Brauer suggested that he call trainer Hal Wiggins. He agreed to look at the horse, but did not discuss any fee that Brauer might charge, and he contacted Cooper Sawyer who got the race records for the horse. He talked to Greg McDonald and Ron Kirk, and went to Churchill Downs on November 9, 2008. He spoke with Mr. Wiggins, and asked him about the horse. He formed the opinion the horse was in good racing condition. He stated McDonald had his manager with him, and that they liked the horse also. They agreed to offer a total five percent commission to Brown and Brauer and offer one million dollars for the horse. He testified that he called the Defendant on November 9, 2008, and spoke for three minutes. He asked the Defendant if he could amend his fee schedule. The Defendant declined to do so, and the conversation

apparently abruptly terminated. He has not spoken with the Defendant since that time. He later called Brauer, and talked about the Defendants' fee, indicating that he and his partners, Kirk and McDonald, were no longer interested in purchasing the horse. He denied discussing buying the horse without paying the Defendant his fee. Brauer indicated that Overbrook Farm was interested in the horse. He talked to Brauer again the next day who advised him that Overbrook was looking at the horse. On November 11, 2008, Brauer called, and said that Overbrook did not want the horse, and that they had a good vet report. He wanted the Plaintiff to talk to Kirk and McDonald to see if they were interested. He called Kirk that day who said he was not interested, but was going to look at another horse. He called Brauer back, and told him that there was no deal. On the next day, the Plaintiff called Rachel Alexandra's owner, Dolphus Morrison. He told Morrison that he wanted to buy part of the horse. Morrison advised him to meet trainer Hal Wiggins at the barn at 7:00 the next day. Lauffer testified that he saw the horse run, and spent about two hours watching the horse. He made an agreement with Morrison to pay him $500,000.00 for a half interest in the horse. The bill of sale for the horse was introduced into evidence as Plaintiff's Exhibit 4. He testified that he had no discussions with Morrison concerning any fees. He testified that he did not believe any fees were owed to Brauer or to the Defendant. He stated that Brauer did nothing in completing the deal with Morrison. He stated that Brauer called

Morrison and asked for five percent. He said that he thought that Brauer seemed to be working for Morrison, but that Brauer was also working for Overbrook Farm. He did not believe that Brauer was entitled to any fee, but later agreed to pay Brauer $15,000.00 to resolve the dispute, which he did. He testified that he bought a half interest in Rachel Alexandra because of the research that he did on the horse, including the horse's pedigree, watching the videos, talking to the trainer, inspecting the horse, having the horse inspected by a veterinarian, and discussing the horse's confirmation with Cooper Sawyer. He testified that he also relied upon the opinion of trainer Hal Wiggins and the opinion of John Haggin, Greg McDonald's farm manager. He testified that Rachel Alexandra had racing success. He testified that the Defendant did not participate in the management of the horse. In fact Mr. Morrison, who managed the horse, did not follow the Defendant's recommendations in racing the horse. He did not believe the Defendant was entitled to any fee, but thought that if any fee was due, the industry standard fee of five percent should be paid to both Brauer and Brown, leaving $10,000.00 to be paid to Brown.

4) On cross-examination, the Plaintiff admitted he had not purchased a racehorse before Rachel Alexandra. He stated that he was at Saratoga with Kirk and McDonald in August, 2008, where they talked about some horses. The Defendant introduced as Exhibits 1 through 6 a series of emails which mostly involved the Defendant and Ron Kirk.

Kirk, the Plaintiff and Greg McDonald discussed making an offer on a horse called Kiss with a Twist. They ultimately made an offer of $300,000.00 for the horse, which was apparently not accepted. The Plaintiff testified that Kirk had stated that the Defendant had recommended that horse. The Plaintiff testified that he assumed that if the horse had been purchased, that the purchaser would owe a commission, which he believed would be five percent of the purchase price. He testified that no one told him what the commission would otherwise be. The Plaintiff was shown some charts that were prepared by the Defendant relating to Rachel Alexandra. He believed that he had seen the charts but was unable to interpret what the charts meant. He testified that in October, 2008, Brown emailed Kirk with a discussion of three horses at Keeneland which were horses that Brown had picked from Keeneland's catalog. He testified that he assumed that the Defendant would want five percent of the purchase price if any of these horses were purchased. He testified that at auction, Keeneland receives five percent of the sale price of the horse, and that the consignor also gets five percent of the sale price. He also states that an agent gets a commission which he understood was ordinarily five percent. He testified that the buyer generally pays a bloodstock agent five percent. With respect to Rachel Alexandra, he stated that he and Kirk had discussed two or three fillies. He said that Kirk mentioned Rachel Alexandra around November 5, 2008, and said that the Defendant

recommended Rachel Alexandra. This apparently occurred in a conversation at Greg McDonald's farm. He told Kirk that he would do some research. He had not been planning to buy Rachel Alexandra. He called Kirk again on November 7, 2008. Introduced into evidence was an email of November 6, 2008, from the Defendant to Ron Kirk quoting a price of $1,200,000.00 for Rachel Alexandra. The second page included a chart prepared by the Defendant on Rachel Alexandra. He testified that Kirk gave him the Defendant's number, and that he called the Defendant on November 7, 2008, asking the Defendant about the horse. He testified that he talked no more than eight minutes to the Defendant. He stated that Brown recommended the horse, and said the horse was a good prospect for the Kentucky Oaks. He testified that he asked the Defendant about his commission after Defendant made his recommendations. He knew that the Defendant expected to be paid. He admitted that the Defendant's evaluation was of some value; but he objected to the totality of the commission requested by the Defendant. He testified that he did not know that the Defendant had given Kirk an evaluation of the horse. On November 9, 2008, he inspected the horse. Greg McDonald was apparently there for the inspection, and stated that he liked the horse, but did not want to pay the Defendant's fee. He thought that fee structure would be giving the Defendant five percent ownership of the horse with no expenses to be paid by the Defendant. He testified that on November 7, 2008, he spoke with Brauer about the

fee, and later called Brauer a second time after he spoke with the Defendant. On the second phone call to the Defendant, he asked the Defendant to lower his fee structure. The Defendant declined to do so, and that conversation terminated. After speaking with the Defendant, he spoke with Brauer, and told him that McDonald said that he was out of the deal so that the deal could not go forward. Brauer told him that the horse had passed the vet's test, and told him that Overbrook Farm had decided not to buy the horse. The Plaintiff told him he was not interested in the horse. Introduced into evidence as Defendant' s Exhibit 15 was the race record of Rachel Alexandra. The horse was a very successful racehorse, and earned a considerable sum of money. He testified that he and Morrison later sold the horse, and that his profit, after his investment and his expenses, was $4,500,000.00. He testified that he believed that when he purchased the horse, he was acting as a separate entity from the joint venture he had with Kirk and McDonald with respect to purchasing the horse, and believed that he had no obligation to the Defendant. He viewed an email introduced into evidence as Defendant' Exhibit 10, an email between the Defendant and Ron Kirk, which occurred shortly after the second phone call between Plaintiff and Defendant.

5) The Plaintiff called as a witness Price Headley Bell, whose grandfather helped establish Keeneland Racetrack. He now operates Mill Ridge Farm and Nicoma Bloodstock Agency. He is the managing partner

for Mill Ridge Farm. He has been in the horse business for decades. He stated that when he sells horses he charges a commission based upon the price. He charges five percent for the first $100,000.00, four percent between $100,000.00 and $250,000.00 and three percent over $250,000.00 on the purchase price. He said that five percent is the maximum price that he charges relating to the sale of a horse. He stated that he had sold twenty-five grade one winners. He testified that he had bought and sold for clients in his bloodstock agency. He has sold about one hundred fifty yearlings, forty weanlings, ninety brood mares, and twelve to fifteen horses in training for clients. He testified that you can purchase Ragozin numbers for $25.00 per sheet. He testified that he had never bought any performance sheets from the Defendant. He thought that his service was similar to the Ragozin service. He testified that he generally discussed the rate for his services prior to buying a horse. If two representatives are involved in the sale, representing the same client, they share the commission. In order to earn a fee, he indicated that an agent would negotiate the price, look at the horse, look at the races, have the horse vetted, look at the paperwork, take care of the payment arrangements, transportation, and selection of trainer. He testified that he was not aware of any representatives of agents who charged more than five percent, except one or two who had a somewhat different situation.

6) The Plaintiff called as a witness Cooper Sawyer. Mr. Sawyer was the yearling manager at Lane's End Farm. He had also worked at Mill Ridge Farm for four and a half years. He testified that he worked with the Plaintiff concerning horses that the Plaintiff liked. He has been paid for some of his services. His commission involving any sale was five percent of the purchase price, which he believed was standard. He testified that the Plaintiff called him about Rachel Alexandra in October, 2008. He went to see the horse the next day. He talked about the pedigree of the horse, and believed that it was a good value. He was at Churchill Downs on November 9, 2008, where he saw the horse, and discussed it with the trainer Hal Wiggins. He looked at the horse's confirmation, and discussed that with the Plaintiff. He told the Plaintiff the horse was worth about $800,000.00. He was not sure if Donald Brauer was involved in the situation, and stated that he had never heard of the Defendant. He testified the Plaintiff told him that he was not interested in the horse because his joint venturers were not interested in the horse. He testified that he had not heard of a commission greater than five percent for anyone involved in the sale of a horse.

7) The Plaintiff called as a witness Marcus Takacs, who had been in the horse business for thirty years. He had leased a farm from the Plaintiff's group of individuals. He had provided advice to the Plaintiff concerning horses. He managed Big Sink Farm until 1996. He had bought and sold horses for other people. He charged a fee of five percent

to the buyer when he arranged a sale. He had never heard of a fee greater than five percent. He reviewed Plaintiff's Exhibit 1, which involved four sales for Belvedere Farm, and stated that he received a five percent commission on those sales. He stated that this was agreed to in advance of the sales. He had heard of Thoro-graph, but does not use speed ratings because he generally buys brood mares.

8) On cross-examination, he said that the standard fee for representing a buyer was between five and ten percent. He said he had not used the Defendant to buy any horses since 2002, and had not bought any racing horses since that time. He testified that he always had an understanding with the Defendant about his fee before looking at buying a horse.

9) The Plaintiff called as a witness John Haggin, who managed Poplar Hill Equine for Greg McDonald. He also advised Mr. McDonald about horse buying. He said he had been in the horse buying business all his life. He had acted as a buyer's representative, and had always charged a five percent commission, which was agreed upon in advance. He said he had never heard of a fee greater than five percent. He stated that in November, 2008, he was at a poker game, probably at Greg McDonald's farm when some discussion was had about Rachel Alexandra. On November 9, 2008, he went to Churchill Downs where he looked at Rachel Alexandra, and talked to the trainer. He told Greg McDonald to buy the horse. He was not familiar with the Defendant, and

had never talked about the Defendant's recommendations. He was not sure the Defendant had anything to offer. He was in on a telephone conversation where the Defendant had apparently spoken with someone at the poker game, but he was of the opinion that the Defendant had little understanding of pedigree, which he thought was important in racehorses. On cross-examination, he stated he was not familiar with the fee for an analyst.

10) The Plaintiff introduced into evidence the deposition of Dolphus Morrison. Mr. Morrison resided in Missouri, and had been in the thoroughbred horse business since 1978. He was the original owner of Rachel Alexandra. He testified that Donald Brauer called him on several occasions, and kept trying to put together a package to buy the horse. He never quoted a price to Mr. Brauer. He said that at one point Brauer called him and said that he could get a group together that would pay $1.2 million dollars for the horse. He testified he told Brauer that they could do business on that basis. He said the group included the Plaintiff, a man named McDonald, and Ron Kirk. He never got an offer on paper, and for some reason the transaction was never concluded. He also testified that Brauer told him he would try to get Overbrook Farm interested in the horse. He testified that he had talked with Brauer a lot about purchasing horses, but that Brauer had never successfully put together a sale for him. He stated that after he last spoke with Brauer, he received a phone call from the Plaintiff who wanted to buy fifty

percent ownership in the horse. He agreed to take $500,000.00 for fifty percent interest, and said that Lauffer paid him that figure. He introduced into evidence as Plaintiff's Exhibit 4 the horse bill of sale dated November 13, 2008. He testified that Donald Brauer later called him and wanted a commission for selling the horse. He said Brauer wanted five percent of the sale price. He told Brauer that he did not believe he owed him anything, and that he could contact somebody else if he wanted a commission. He testified he had never heard of Jerry Brown or Thoro-graph. He testified that Rachel Alexandra was ultimately sold to Stone Street Farm.

11) The Plaintiff called as a witness Greg McDonald, who testified by deposition. He testified that he owned approximately thirty horses, although he is involved in other businesses. He did not consider himself an expert in evaluating bloodstock. He testified that he had paid commissions for purchasing horses for him. He testified that he owned some mares with the Plaintiff, and also owned mares with other individuals. He testified that he first heard of the Defendants about a year earlier when he had a conference call with his farm manager, himself and Jerry Brown. He testified that Jerry Brown described the type of work that he did in evaluating horses. He testified that he had six to eight horses in training at the time of his deposition. He did not recall that Ron Kirk had provided to him any recommendations that Thoro-graph had made to Ron Kirk on certain fillies. With respect to an

arrangement between himself, the Plaintiff, and Ron Kirk as far as buying horses, he did not think that they ever actually had an arrangement. They talked about one particular horse, and thought that they might buy a third of it each, but that did not develop. He did not recall if Ron Kirk had provided him information about the Defendant's fee structure. They first heard about the fees the day before he looked at Rachel Alexandra. He said Ron Kirk never explained the fee structure of the Defendant to him. He was asked to look at the email of August 29, 2008, but said that he could not recall reviewing that email. He denied authorizing Ron Kirk to make an offer of $300,000.00 on the horse Kiss with a Twist. He did not recall any conversation with Ron Kirk about purchasing any mares in the November sale that had been recommended by the Defendant. He did not recall the first time that Ron Kirk mentioned about buying Rachel Alexandra, but recalled that it was Ron Kirk who mentioned the horse to him. He stated that Kirk told him that she was nice horse, and thought that she could be bought. He did not recall any projection as to whether she might win the Oaks. He did not recall the first time he spoke with the Plaintiff about purchasing the horse. He did recall going to Churchill Downs to see Rachel Alexandra. He testified that he and the Plaintiff watched races on the computer involving Rachel Alexandra, but thought it was in his office. He testified that when they looked at the horse, he was aware of the Defendant's fees, but had already told the Plaintiff that he would not do the deal because

of the fee structure. He stated that under no circumstance would he pay the type of fee the Defendant requested. He stated while driving home, he had a phone conversation with the Plaintiff about buying Rachel Alexandra, but that they did not agree on the price. He stated that he would not have bought the horse subject to the Defendant's fee structure, regardless of the price at which the horse had been offered. He stated that he went to look at the horse because he thought that they could negotiate a different deal. He believed that the Defendant's fee structure was unrealistic in the horse industry. He testified that Ron Kirk told him that he was not interested in buying the horse, probably on the day that they looked at the horse, because Mr. Kirk thought that the horse was overpriced. He said if he, Kirk and Lauffer had bought the horse he would have been obligated to pay a ten percent commission because that was what he was willing to do.

12) The Defendant called as a witness William Elliott Walden, who had worked twenty-two years as a trainer. He was vice-president and racing manager of Wind Star Farm which had produced a number of grade one winners. He met the Defendant in 1996, and recommended him to the owners of Prestonwood Farm. He believed that the farm's performance had improved by using the Defendant's information and advice. He believed that the Defendant's identification of a good horse had made him a more successful trainer. He was familiar with the Defendant's rates of five percent of the purchase price, five percent of

earnings, and five percent of increase in value of the during the horse's life. He testified that he had sent people to the Defendant. He said that the Defendant was not a bloodstock agent, but was a consultant. He testified that he used a bloodstock agent in making purchases in addition to the Defendant's recommendations. He said that there was no one else who does the work that Thoro-graph does.

13) Defendant called as a witness Christopher Young whose family had been in the horse business since the 1970's. He is general manager of Overbrook Farm where they have sixteen horses in training. He testified that the Defendant's services with respect to race management are unique as is his speed ratings of horses. He is aware of the Defendant's rates for his services, and has paid those rates for two horses. He testified that the Defendant specializes in finding horses which are concealed, that is, whose value has not become known generally in the horse business. He stated that a bloodstock agent such as Donald Brauer would receive a separate fee from the Defendant. He stated that the Defendant called him concerning Rachel Alexandra, and said that she was a favorite for the Kentucky Oaks. On cross-examination, the Plaintiff introduced Exhibits 5 through 8 which were four emails between Defendant and Christopher Young that documented an attempt on the part of the Defendant to market the horse to Mr. Young. He testified that the committee at Overbrook Farm decided not to buy the horse because of questions about her pedigree.

14) The Defendant read into evidence the deposition of Donald Brauer, the bloodstock agent. He testified that he had been a bloodstock agent for approximately twenty-two years. He had twenty-five to thirty clients. He testified that he charges a fee separate from that charged by the Defendant. He said that five to ten percent was the usual fee for a bloodstock agent. He testified that the Defendant was not a bloodstock agent, and that the Defendant is never involved in bills of sale for horses. He testified that on November 7, 2008, the Plaintiff called him, and wanted to proceed with buying Rachel Alexandra without paying the Defendant. He declined to do so. He testified that he was in contact with Christopher Young, who had Rachel Alexandra examined on a Monday. He said Young had problems with the horse's pedigree. He testified the Plaintiff called again on Tuesday, but he never heard back from him. He claimed a fee from Dolphus Morrison, but Mr. Morrison refused to pay him. He then claimed a fee from the Plaintiff. He said he agreed to accept a fee of $15,000.00 in order to get the matter resolved and cut his losses. He states that he generally gets a written agreement with new clients. He stated that he asked Morrison to pay a commission, but did not have any agency agreement with him. He introduced into evidence as Defendant's Exhibit 8 an email from the Defendant to Donald Brauer. Exhibit 11 is the affidavit of Donald Brauer dated October 14, 2009. Exhibit 12 is a bill from Donald Brauer and a commission receipt for his fee in the sale of Rachel Alexandra.

15) The Defendant introduced into evidence the testimony of Ro Parra by deposition. He testified that he had been involved in technology work for about twenty-five years. He bought a horse farm in Kentucky in 1999, and became more involved in racing and breeding of racehorses. He owned a farm called Millennium Farms at which he had five stallions in 2010. He had a racing stable of eighteen or nineteen horses. He testified that he began a relationship with the Defendant five or six years ago, and since taking advice from the Defendant, had had a dramatic change in the success of his racing stable. He testified that the financial performance of his farm had improved considerably since he had been consulting with the Defendant. He testified that he was familiar with the Defendant's rate structure, and paid that on the horses that he bought pursuant to the recommendation of the Defendant. He testified that if the bloodstock agent was involved in the transaction, the bloodstock agent would receive a separate fee. He testified that the Defendant discussed purchasing Rachel Alexandra with him. He said that Brown told him that Rachel Alexandra was the best filly he had seen in twenty years. He testified that he looked at her residual value, and that the risk-reward equation did not work so he passed on the horse. On cross-examination, he testified that he agreed to Defendant's fee structure before Defendant recommended a horse to him. He said it took him a while to assimilate the fee structure because he had never seen anything like it.

16) Defendant introduced the testimony of Rich Decker by deposition. He had been in the thoroughbred business since 1980. He had served as assistant manager at Sycamore Hill and then at Bellerive as manager. He went to Prestonwood Farm, and stayed for sixteen years. He testified that he was now doing consulting work for the Japanese Bloodstock Breeders Association. He was general manager at Prestonwood for eighteen years. He testified the Defendant would flag potential racehorses for that farm. This time frame was from approximately 1995 to 2000. He testified that he was familiar with the Defendant's fee structure, did not pay it on a horse named Distorted Humor, but paid it on other horses. He thought that Defendant had advised Prestonwood on the purchases of approximately twenty horses. He introduced into evidence a spreadsheet which showed the purchase prices, commissions, racing expenses, and other information on horses purchased at the Defendant's recommendation. That was introduced into evidence as Defendant's Exhibit 13. He said the results from Brown's recommendations were very good, that the stable made a profit, and that most stables are not profitable. On cross-examination, he stated that there was a specific agreement with the Defendant as to the fees the Defendant would receive for his services prior to advising Mr. Decker on which horses to purchase.

17) Defendant Jerry Brown testified on his own behalf. He

testified that out of school he began working for Ragozin, and was a professional gambler making a living betting on racehorses. He developed a formulaic way of doing performance figures for horses. He stated he obtained some experience in managing a racing stable, and made a profit doing that. He began Thoro-graph, Inc. a short time later. He testified that his office is in Manhattan, and that he has ten full-time employees and fifteen part-time track employees. He uses performance figures that he has developed over a period of time which he sells to bettors as well as doing consulting services. He played into evidence a video which was a brief explanation of the various factors he uses in evaluating horses. Suffice it to say that methods that he uses are complicated and sophisticated. They involve analysis of literally thousand of horse races which he has studied over a considerable period of time. He studies speed, weight, track variance, ground loss, wind speed and direction, as well as a variety of other factors involved in racing. He prepares Thoro-graph sheets for horses on which he contains a great variety of information which tracts the horse's success in racing. He testified that his rate structure was five percent of the purchase price, five percent of the earnings, and five percent of the increase in value which he had used since the 1990's. He last compromised on a fee in 1997, but has not done so since that time. He testified that he had never been a bloodstock agent. He said he had advised on the purchase of about two hundred and fifty horses, but had

talked people out of purchasing thousands of other horses. He testified that in all of North America, race purses total about one billion dollars per year, and that expenses total about two billion per year, excluding the cost of the horses, so less than ten percent of the horse owners make money. He has a number of long-term clients who have been very successful. He first met Ron Kirk in the summer of 2008, although the two had spoken on the telephone many times previously. He probably discussed his fee schedule with Ron Kirk. He stated that Kirk had a conference call involving Kirk, Greg McDonald and John Haggin. He said Kirk emailed him information concerning various horses in late July. His rates were as set out in Defendant's Exhibit 2. He never talked to McDonald except during the conference call, and never talked to the Plaintiff prior to their two telephone conversations. Concerning the transaction on Kiss with a Twist, which did not end up being finalized, he testified that he believed that he would get his five percent/five percent/five percent commission if the sale went through. He said he thought the Plaintiff and McDonald knew his fees. He testified that he first noticed Rachel Alexandra after her second start when she ran second in the stakes race. He said she ran two weeks later, and ran very well. He told Ronald Kirk that she was a very good horse. Apparently other farms are not interested in her. Kirk told him on November 7, 2008, that he was too busy at the sales to take the lead on buying the horse, but told him that the Plaintiff would call him. He testified that the

Plaintiff called, that he explained to the Plaintiff that the horse compared very favorably to Stardom Bound, she could run on dirt, and that she would most likely run well or win the Ashland Stakes and the Oaks. He testified that he spoke to the Plaintiff after advising him of the quality of the horse about his fee structure. The Plaintiff was not agreeable to the fee structure. The next thing he knew was that Donald Brauer had called him, and said that the Plaintiff did not like the fee structure. He was not happy about that point. The Plaintiff later called for the second time, and said he did not like the commissions. Defendant told the Plaintiff he would not reduce his commissions. He said he told the Plaintiff he was going to show the horse to Overbrook, and the Plaintiff said that he was out of the deal. He spoke with Chris Young about the horse. Brauer later called him, and said that the Plaintiff was trying to cut him out of the deal. He said he emailed and called Kirk which email was introduced into evidence as Defendant's Exhibit 10. He proceeded to try to sell the horse to Overbrook Farms, but that Overbrook decided not to buy the horse. He sent the Plaintiff a bill, and never got paid. He said that the Plaintiff initially offered him five percent of $1,200,000.00, which was $60,000.00. He said that his fees would be based on half the value of the horse. He said that he did not base his fees on the net, but always based his fees on the gross, before expenses.

18) On cross-examination, he admitted that on a couple

occasions, he had not charged fees concerning horse transactions. He said that the sheets that he prepares with his performance numbers are available for $25.00 per sheet. He admitted that he had agreements with various customers with whom he worked, and that he had reached those agreements in advance of providing any advice or information. He stated that his performance figures differ from those of Ragozin because he believed the track conditions change during the course of the day, whereas the Ragozin figures did not take that into account. He said that Ron Kirk specifically agreed to his fees. He did not have any information that Mr. Kirk told the fees to the Plaintiff. He said that he did not do anything other than give the advice he did to the Plaintiff to facilitate the sale of Rachel Alexandra. He also did nothing to stop the Plaintiff from buying the horse. He admitted he had no written agreement with the Plaintiff concerning any fees. He also admitted that the horse was not run in races as he had suggested. He said he had done situations where he did not receive any up front fee, but received ten percent of earnings and ten percent of the increase in the value of the horse. This was always done by an agreement in advance of giving advice.

19) The Defendant called as his next witness Ron Kirk who was in the horse business, and had been writing horse insurance, for thirty years. He was friends with Greg McDonald, Plaintiff and Defendant. On Derby Day 2008, he referred Chris Young to the Defendant. He said that in late July, 2008, McDonald and the Plaintiff wanted to buy a racing

filly. He said that there were some experts that could evaluate racehorses. He mentioned the Defendant and a man named Len Freedman. He put them in touch with the Defendant. He talked with the Defendant while he was at Saratoga. He received advice from the Defendant on some horses. He made a joint offer of $300,000.00 on Kiss with a Twist, the recommendation to buy the horse having come from the Defendant. He knew that the Defendant would need to be compensated if they purchased that horse. He said the agreement involving himself with McDonald and Lauffer was that they had a joint venture. He said the Defendant sent him a chart on Rachel Alexandra, and recommended Rachel Alexandra. He said that they were interested. He told them that he was too busy to take the lead on getting the horse, and suggested that the Plaintiff contact the Defendant. Everybody knew that the Defendant was to be paid, but he was not sure what it was the Defendant expected to be paid. He had not given the information to McDonald or the Plaintiff as to the amount that the Defendant expected to be paid if the horse was purchased. He stated that it was his best recollection that he did not tell McDonald or the Plaintiff about the Defendant's rates. He stated that he realized he had not completely understood the Defendant's terms. He said that McDonald would not agree with those figures at all, and that he would not buy the horse under those circumstances. He made the same decision about purchasing the horse. He said that the Plaintiff thought he could work something out. He thought the deal was dead, and that

the Defendant was going to try to market the horse to someone else. On cross-examination, he admitted he had never paid a commission to the Defendant, and never agreed to pay the Defendant's fees as stated. He had problems with the fee being based on gross rather than net. He said he never gave the email that he received from the Defendant concerning his rates to the Plaintiff. He never explained the Defendant's rates because he did not know exactly what they were. He made an offer on Kiss with a Twist without knowing exactly what the terms were. He said the Plaintiff would not have agreed to the Defendant's fees had he known what they were. He did not ask Brauer to represent his group on the Rachel Alexandra purchase. He said the thought that Brauer was working for the seller. He said the Defendant showed the horse to three other groups who had some interest in it, but those groups did not buy Rachel Alexandra. He thought that five percent would be a fair compensation for the Defendant, although as of the day of the trial he was not sure if it would actually be fair. He said he had never paid more than a five percent fee to a representative, and that five percent was the standard commission.

20) The Defendant introduced into evidence as Exhibit 16 his claim for damages relating to Rachel Alexandra. This was based on five percent of the fifty percent of the purchase price, five percent of the fifty percent of earnings, five percent of the fifty percent of increase in the sale

value of horse, accrued interest, triple damages under KRS 230.357, and disgorgement of profit, all of which total $4,928,451.00.

21) Based upon the evidence, the Court finds that the Plaintiff and the Defendant never reached an agreement concerning any fee to be paid to the Defendant for services rendered in the sale of Rachel Alexandra.

22) The Court finds that the Plaintiff was not made aware of the fee structure requested by the Defendant prior to the time that he sought advice from the Defendant concerning Rachel Alexandra.

23) The Court finds from the evidence that the Defendant provided advice to the Plaintiff concerning Rachel Alexandra before discussing his fee structure with him.

24) The Court finds that the Defendant provided valuable information and advice to the Plaintiff concerning the purchase of Rachel Alexandra. The Court finds that the Defendant expected to be paid by the Plaintiff for the advice given to the Plaintiff about Rachel Alexandra.

25) The Court finds that the Plaintiff relied at least in part upon the Defendant's advice in purchasing Rachel Alexandra, but also relied upon the other information and advice that he received from various parties and sources relating to Rachel Alexandra.

## CONCLUSIONS OF LAW

1) The Defendant claims that he is entitled to recover monies from the

Plaintiff relating to the sale of Rachel Alexandra, even in the absence of a binding contract, under the theory of quantum meruit. In *Quadrille Business v. Kentucky Cattleman's Association, Inc.*, 242 S.W. 3rd 359 (Ky. App. 2007), the court held that a party proceeding under a theory of quantum meruit must establish the following elements: 1) that valuable services were rendered, or materials furnished; 2) to the person from whom recovery is sought; 3) which services were accepted by that person or at least were received by that person or were rendered with the knowledge and consent of that person; and 4) under such circumstances as reasonably notified the person that the Plaintiff expected to be paid by that person. The Court concludes as a matter of law that all of the elements of quantum meruit have been met by this case. The Plaintiff in this case received valuable services in the form of specific advice as to the merit of Rachel Alexandra, and a recommendation that the horse be purchased. This advice was rendered under circumstances such that the Defendant expected to be paid for giving that advice.

2) The second question is the recovery the Defendant may receive under the theory of quantum meruit. In the case of *Baker v. Shapero,* 203 S.W. 2nd 697 (Ky. 2006), the court held that when quantum meruit is proved, the remedy consists of damages in an amount considered reasonable to compensate a person who has rendered the service in a quasi-contractual relationship. In this case, the Defendant testified that he always, or nearly always, charged a fee of five percent of the purchase

price, five percent of earnings, and five percent of the future increase of the value of the horse. The Defendant introduced testimony from Rich Decker, Christopher Young, and Ro Parra, who said that they had contracted with the Defendant for that amount for services rendered, and had paid those amounts. The Defendant offered no testimony to the effect that his charge for services rendered was any kind of industry standard. The Plaintiff offered testimony to the effect that five percent was the standard industry fee for services for any person representing someone in the sale of a horse. This was offered through the testimony of several witnesses, many of whom said that they had never heard of any fee that exceeded five percent. In fact, five percent seems to be a fee covering a wide variety of situations. Testimony was to the effect that Keeneland charges a five percent fee for selling horses, that consignors charge a five percent fee for their services, and that bloodstock agents charge a five percent fee for their services. Although the Defendant is not a bloodstock agent, he does provide services relating to the sale of horses. Considering all circumstances surrounding this particular transaction, including the relatively limited nature of the telephone conversation between Plaintiff and Defendant, the information Plaintiff received from other sources, the lack of understanding between the parties as to a fee arrangement, and the significant testimony to the effect that a five percent commission is a generally accepted standard, the Court find that a reasonable amount for the services rendered by the

Defendant to the Plaintiff in this case is the sum of five percent of the selling price or $25,000.00.

3) The Defendant has alleged fraud. As stated in *United Parcel Service v. Rickert*, 996 S.W. 2nd 464, (Ky. 1999), there are six elements of fraud which must be proved by clear and convincing evidence. They are that the person accused of fraud: (a) made a material representation; (b) which was false; (c) which was known to be false or made recklessly; (d) which was made with inducement to be act upon; (e) which the Plaintiff acted in reliance upon; and (f) which caused the Plaintiff injury. There was no representation by the Plaintiff in this case, and certainly not a false one. The Defendant did not act upon in reliance upon any representation made by the Plaintiff. It is clear that the elements of fraud do not exist in this case.

4) The Defendant also seeks punitive damages. KRS 411.184 (2), limits punitive damages where a party acts toward another with malice, fraud, or oppression. The Court finds as a matter of law that none of those elements are present in this case.

5) Defendant further seeks "disgorgement of profits". The Defendant candidly admits that there are no Kentucky cases which authorize disgorgement of profits as an element of damages. That being the case, the Court concludes as a matter of law that the Defendant is not entitled to such damages.

6) The Defendant's calculations of damages, Defendant's Exhibit 16, contains a claim for treble damages under KRS 230.357. The Court has previously determined that KRS 230.357 does not apply in this case. This was determined on the motion of the Plaintiff for summary judgment relating to the equine statute of frauds. The evidence clearly indicated that the Defendant did not act as an agent in the transaction relating to a horse. This was testified to by both Plaintiff's witnesses and Defendant's witnesses. That statute is simply not applicable to the situation involving the Plaintiff and the Defendant. The Court concludes as a matter of law that the Plaintiff is not entitled to recover treble damages or attorney's fees under that statute.

**JUDGMENT**

1) **IT IS NOW THEREFORE ORDERED AND ADJUDGED** that the Defendants Thoro-graph, Inc. and Jerry Brown shall recover of the Plaintiff James M. Lauffer the sum of $25,000.00, with interest at the legal rate from the date of the judgment until paid, and the Defendants are further entitled to recover court costs, for all of which execution may be issued.

2) There being no just cause for delay, **THIS IS A FINAL AND APPEALABLE ORDER.**

**DATED** this the 12 day of April, 2010.

**JUDGE JOHN DAVID PRESTON**
**JOHNSON CIRCUIT COURT**

**CERTIFICATION:**

I hereby certify that I have mailed and/or hand delivered a true copy of the foregoing order on this the 12th day of April, 2010, to the following:

Andre Regard
269 West Main Street, Suite 600
Lexington, Kentucky 40507

Thomas Miller
David T. Faughn
Miller, Griffin & Marks, P.S.C.
271 W. Short Street, Suite 600
Lexington, Kentucky 40507

Mike Schmitt
P.O. Drawer 1767
Paintsville, Kentucky 41240

**CLERK, JOHNSON CIRCUIT COURT**

**BY:** Sue Ann Gray **D.C.**