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THINKEQUITY PARTNERS LLC

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

OAKLAND DIVISION

THINKEQUITY PARTNERS, LLC, a Delaware limited liability company,

Plaintiff,

v.

DATATEL, INC., a Virginia Corporation,

Defendant.

Case No. C 05-02810 SBA

PLAINTIFF THINKEQUITY PARTNERS, LLC'S NOTICE OF MOTION, MOTION AND MEMORANDUM OF POINTS AND AUTHORITITES IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT OR IN THE ALTERNATIVE PARTIAL SUMMARY JUDGMENT

Date: June 6, 2006
Time: 1:00 p.m.
Courtroom: 3
Hon. Saundra B. Armstrong
Trial Date: July 24, 2006

TO ALL PARTIES AND TO THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that at 1:00 p.m. on June 6, 2006 in Courtroom 3 of the above Court, located at 1301 Clay Street in Oakland, California, or as soon thereafter as the matter may be heard, plaintiff THINKEQUITY PARTNERS, LLC ("THINKEQUITY") will and hereby does move this Court for an order granting summary judgment in plaintiff's favor on its cause of action for breach of contract, and entering judgment against defendant DATATEL, INC. ("DATATEL") in the sum of $1,943,594.44, plus prejudgment interest thereon from and after April 5, 2005. Plaintiff brings this motion pursuant to Rule 56 of the Federal Rules of Civil Procedure, on the ground that there is no genuine issue as to any material fact and that THINKEQUITY is entitled to a judgment as a matter of law. In the alternative, plaintiff will and hereby does move the Court for an order granting partial summary judgment against DATATEL on the issue of liability alone under Rule 56(c) and/or on any issues of contract interpretation, as well as for such other orders as may be appropriate under Rule 56(d).

The motion will based on this notice of motion and memorandum of points and authorities, the Plaintiff's Documentary Evidence filed herewith, the Declarations of Michael Moe, Brian Endres, Wade Davis and Dwight Donovan in support of the motion, the pleadings and papers on file in this action, and on such additional evidence and oral argument as may be submitted prior to or at the hearing on the motion.

DATED: February 7, 2008 MBV LAW LLP

By: /s/
DWIGHT C. DONOVAN
Attorneys for Plaintiff
THINKEQUITY PARTNERS, LLC

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

This action is brought by THINKEQUITY PARTNERS, a San Francisco investment banking firm, to recover a long overdue fee for services rendered to defendant DATATEL as its exclusive financial advisor between July, 2003 and July, 2004. THINKEQUITY dedicated a six member team to DATATEL's account to assist the company in its search for a buyer or a merger/acquisition target. THINKEQUITY leveraged its contacts in the education field, and heavily canvassed the market in hopes of finding a strategic buyer for DATATEL. THINKEQUITY virtually exhausted the field of strategic buyers during the course of its engagement.

THINKEQUITY assisted the company with financial valuation models, board presentations and the provision of general financial advice. THINKEQUITY was unable to close a transaction despite its best efforts over the course and scope of a year, as no strategic buyers were willing to pay the price for the company that DATATEL's controlling shareholders were seeking.

DATATEL terminated the engagement after one year, as was its right under the parties' agreement. The agreement contained a tail provision under which DATATEL agreed to pay THINKEQUITY a fee if a sale of the company occurred within eighteen months after termination of the engagement.

Approximately two months after termination of the engagement, DATATEL's principals began direct negotiations to sell the company to an equity firm, Thoma Cressey Partners. Thoma Cressey Partners was among the pool of equity firms with whom THINKEQUITY had personal relationships, and whom THINKEQUITY had identified during the engagement. DATATEL did not authorize THINKEQUITY to solicit offers from equity firms during much of the engagement, as DATATEL believed that strategic buyers would pay a higher price for the company than an equity firm. In April, 2005 – eight months after the engagement was terminated – DATATEL was sold to Thoma Cressey Partners for $265 million.

THINKEQUITY learned of the sale through various wire services, including a posting on Thoma Cressey's website announcing its "acquisition" of DATATEL. While DATATEL's sale agreement with Thoma Cressey acknowledges the existence of the THINKEQUITY engagement

letter, DATATEL did nothing to notify THINKEQUITY of the sale. When THINKEQUITY invoiced DATATEL for its fee (3/4% of the sale consideration of $265 million, or approximately $1.9 million), DATATEL refused to pay.

As a result of DATATEL's stonewalling, the instant litigation ensued. DATATEL has engaged in a shifting defense pattern, vainly attempting to avoid its clear payment obligations.[1] As discussed below, there are no genuine issues of material fact that stand in the way of a judgment immediately entitling THINKEQUITY to its fee. THINKEQUITY performed as required of it under the Agreement for a full year. The Agreement contains a tail provision entitling THINKEQUITY to a fee of ¾% of consideration paid if a sale occurred within 18 months of termination of the engagement. DATATEL was sold to Thoma Cressey well within that period, for $265 million. THINKEQUITY is therefore entitled to judgment in its favor in an amount that now exceeds $2 million, including interest, as a matter of law.

II. STATEMENT OF FACTS

A. The Parties and Their Written Agreement.

Plaintiff THINKEQUITY is an investment bank headquartered in San Francisco. THINKEQUITY conducts research and assists businesses in obtaining financing, securing investment sources, identifying merger candidates, and facilitating other business opportunities. Its clients include many companies located in the education, media and technology sectors. Declaration of Michael Moe ("Moe Decl."), ¶ 2. Defendant DATATEL is a privately held company based in Virginia that provides software and technology platforms to universities and other higher education institutions.

In 2003 DATATEL was interested in either selling the company, or merging with or acquiring another company. DATATEL and THINKEQUITY negotiated a written fee agreement, with the assistance of their counsel, over a period of several months. The parties eventually signed a detailed

[1] Among the other aspects of the Agreement that DATATEL now attempts to disavow is the parties' knowing and voluntary waiver of a jury trial. Because this case can be summarily adjudicated without a trial, DATATEL's gamesmanship on that issue is essentially moot.

agreement dated July 18, 2003 ("the Agreement"), which is attached to the Moe Decl. as Exhibit A.[2] DATATEL's President and CEO, H. Russell Griffith, signed the Agreement for DATATEL. DATATEL Answer, PDE, Ex. B, ¶ 8.

THINKEQUITY agreed to act as "exclusive financial advisor" to DATATEL in connection with any "Sale Transaction" or "Acquisition Transaction." Agreement, p.1. The compensation terms are found at page 2 of the Agreement. DATATEL agreed to pay THINKEQUITY a fee based on the amount paid to DATATEL on any sale occurring during THINKEQUITY's engagement or within 18 months thereafter. The Agreement states:

> "The Company agrees to pay the following fees to THINKEQUITY for its advisory services: . . .
>
> (2) If, during the period ThinkEquity is retained by the Company or within 18 months thereafter, (a) a Sale Transaction is consummated, or (b) the Company enters into an agreement providing for a Sale Transaction which subsequently results in a Transaction, the Company shall pay to ThinkEquity a fee equal to ¾ % of the consideration ('Consideration') payable in connection with the Sale Transaction."

Agreement, p. 2. The Agreement defines "Sale Transaction" as "any sale, merger, joint venture, lease, license or other transaction in which 50% or more of the voting power of the Company or all or a substantial portion of its business or assets are combined with or transferred to another company." Agreement, p. 1.

The Agreement remained in effect from July 18, 2003 to July 28, 2004, at which time DATATEL terminated it. Moe Decl., ¶ 5 and Ex. B. The Agreement gave either party the right to terminate any time after six months from its inception. It also clearly stated that "the provisions relating to the payment of fees and expenses . . . will survive any such termination." Agreement, p. 6.

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[2] Citations to declarations, all of which accompany this motion, are by the declarant's last name and a paragraph number or exhibit number. Deposition testimony is cited by the deponent's name and the transcript page. Deposition testimony is in Plaintiff's Documentary Evidence ("PDE"), filed herewith.

B. The Work Performed By THINKEQUITY As DATATEL's Exclusive Financial Advisor.

THINKEQUITY performed an extensive amount of work for DATATEL during the year that it acted as its exclusive financial advisor. Among the services performed by THINKEQUITY were the following:

- THINKEQUITY collected financial information from DATATEL, and performed valuation analyses for the company;
- THINKEQUITY prepared and refined presentation materials, and coached DATATEL management on ways to use these materials to present to potential transaction partners;
- THINKEQUITY consulted with DATATEL's CEO and CFO, providing them with presentation materials and advising them on recommendations to make to DATATEL's Board of Directors regarding acquisition or sale strategies;
- THINKEQUITY identified potential transaction partners, and orchestrated and participated in meetings with potential transaction prospects;
- THINKEQUITY's team members made themselves available to meet with DATATEL's CEO and CFO upon request, and were in regular communication by email and telephone to address the company's ongoing needs;
- THINKEQUITY prepared lists of potential acquisition targets or buyers, communicated with those individuals and entities, and updated those lists as matters evolved; and
- THINKEQUITY provided DATATEL access to Knowledge Notes, a publication which provided DATATEL with regular updates on evolving developments in the higher education field.

Declaration of Wade Davis ("Davis Decl."), ¶¶ 10-21; Deposition of Susan Cates ("Cates Depo."), pp. 56-83, 101-103 and Depo. Ex. 10 and 11; Deposition of Deborah Quazzo ("Quazzo Depo."), pp. 149-151, 164 and Depo. Ex. 42. From July 2003 to July 2004 THINKEQUITY prepared numerous reports for DATATEL, participated in face-to-face meetings with DATATEL's senior management, and communicated by phone and email on a regular basis. Cates Depo., p. 72 and Depo. Ex. 11; Davis Decl., ¶ 7.

Initially, DATATEL was primarily interested in finding a "strategic buyer," to wit, another entity in the education field, or one whose business would fit well with DATATEL's business. Davis Decl., ¶¶ 8-13; Cates Depo., pp. 56-60. THINKEQUITY identified and contacted logical strategic buyers, distributed presentation materials to them, and solicited input regarding market interest.

THINKEQUITY also arranged meetings between DATATEL and strategic buyers. Cates Depo., pp. 101-103. None of these buyers, however, were willing to acquire DATATEL at the price that DATATEL's founders were demanding – $300 million or more. Cates Depo., pp. 82-83.

As the assignment progressed, THINKEQUITY recommended to DATATEL that it should broaden the pool of potential purchasers to include financial buyers (i.e. private equity or investment firms). In February 2004, THINKEQUITY prepared a detailed report identifying Thoma Cressey Equity Partners and several other financial buyer candidates. Davis Decl., ¶¶ 15-16 and Ex. WD-2; Cates Depo., pp. 74-75 and Depo Ex. 11 (p. TE 03511). THINKEQUITY recommended that DATATEL solicit offers from financial buyers. DATATEL, however, would not authorize THINKEQUITY to contact Thoma Cressey or other financial buyers, apparently preferring to seek a combination with a strategic buyer. Cates Depo., p. 78; Quazzo Depo., pp. 124-132, 147-151, 171. Over the course of a year, despite THINKEQUITY's efforts, nobody was willing to purchase DATATEL at the higher valuation levels that DATATEL was seeking. For that reason, and because DATATEL elected not to solicit offers from financial buyers such as Thoma Cressey, THINKEQUITY's work for DATATEL did not result in a completed transaction while the engagement letter was in effect.

THINKEQUITY provided a team of professionals to act as DATATEL's financial advisor. THINKEQUITY's team numbered at least six individuals. It was led by Susan Cates and Wade Davis. Davis Decl., ¶¶ 3-4; Cates Depo., pp. 61-63. Ms. Cates left THINKEQUITY in March 2004. Cates Depo., p. 83. Mr. Davis left THINKEQUITY at the end of July, 2004. Davis Decl., ¶ 2. Even though THINKEQUITY was ready, willing and able to continue to perform the Agreement utilizing other senior personnel, DATATEL elected to terminate the Agreement in July 2004. Moe Decl., Ex. B.

DATATEL was well aware of the fact that its obligation to pay THINKEQUITY's fee would survive the termination of the agreement. In fact, Ms. Cates reminded DATATEL shortly before DATATEL terminated the engagement that the Agreement contained an 18-month tail provision, and warned DATATEL that it may thereafter become obligated to pay THINKEQUITY a fee. Cates Depo., pp. 92, 107.

C. DATATEL's Sale to Thoma Cressey.

Within two months of terminating the Agreement with THINKEQUITY, DATATEL began to negotiate with Thoma Cressey Equity Partners regarding a potential sale. Deposition of Orlando Bravo ("Bravo Depo."), pp. 28-31. DATATEL's principals met with Orlando Bravo of Thoma Cressey in or around September, 2004. In January 2005, the companies signed a letter of intent for Thoma Cressey to "acquire the Company." Bravo Depo., pp. 28-31 and Ex. 41. The companies announced their agreement in March 2005, and closed the transaction on April 5, 2005. Bravo Depo., Ex. 39 and 40; Moe Decl., Ex. C; DATATEL Answer ¶ 11.

The transaction resulted in the sale of 100% of DATATEL's stock for $265 million. The sellers included DATATEL's two founders, Ken Kendrick and Tom Davidson, who owned 80% of DATATEL's stock prior to the transaction. See, Stock Purchase Agreement, Schedule of Sellers (Bravo Depo., Ex. 38, p. DATA 2345); DATATEL Response to RFA (2nd Set) B.2 (PDE, Ex. D). The buyers included several investors led by Thoma Cressey. Thoma Cressey purchased 60% of the stock for itself. Bravo Depo., pp. 18, 20-24. When the transaction was completed, Thoma Cressey published a report on its website announcing that it had closed on its "acquisition of software company DATATEL, Inc. for $265 million." Moe Decl., Ex. C; Bravo Depo., Ex. 40.

Upon learning of the sale transaction, THINKEQUITY sent DATATEL an invoice on April 28, 2005, requesting payment of its fee. Moe Decl., Ex. D. DATATEL never paid the invoice. *Id*., ¶ 10. This litigation ensued. As discussed below, there are no triable issues of material fact. By law, THINKEQUITY is entitled to judgment in its favor on its fee claim.

III. APPLICABLE LEGAL STANDARDS

THINKEQUITY seeks summary judgment, or alternatively partial summary judgment, pursuant to Rule 56(a), (c) and (d) of the Federal Rules of Civil Procedure. Summary judgment is not a disfavored remedy. "Summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed 'to secure the just, speedy and inexpensive determination of every action.'" *Celotex Corp. v. Catrett* (1986) 477 U.S. 317, 106 S.Ct. 2548, 2555.

IV. ARGUMENT

The terms of the Agreement relating to DATATEL's obligation to pay THINKEQUITY a fee are unambiguous, simple, and straightforward. In consideration for THINKEQUITY's acting as DATATEL's exclusive financial advisor, THINKEQUITY was entitled to a fee if a Sale Transaction was consummated during a specified time period. This is precisely what occurred.

A. THINKEQUITY Performed Its Obligations Under the Agreement.

THINKEQUITY's responsibility under the Agreement was to "assist [DATATEL] in analyzing, structuring, negotiating and effecting a transaction." Agreement, p.1. That is what THINKEQUITY did. THINKEQUITY assembled a six member team – led by two senior bankers, Wade Davis and Susan Cates – to work with DATATEL on potential transactions. The team members were in regular contact with DATATEL for a full year. Davis Decl., ¶ 7. THINKEQUITY's team assisted DATATEL "in its determination of appropriate values to be received or paid in a Transaction." THINKEQUITY obtained financial information from DATATEL, and ran various valuation models based on this information. Davis Decl., ¶ 14. The models were updated as the assignment progressed. *Id.* THINKEQUITY also canvassed the market to ascertain values that other parties attributed to DATATEL. THINKEQUITY identified and evaluated companies in higher education that would be appropriate "strategic buyers" of DATATEL, such as Oracle and PeopleSoft, and made contact with those companies to gauge their interest in acquiring DATATEL. Davis Decl., ¶¶ 9, 13. THINKEQUITY also arranged meetings between DATATEL and prospective buyers, including Warburg and SunGard.

When it became clear that the small group of companies that offered a strategic fit were not interested in acquiring DATATEL (at least at the valuation levels sought by DATATEL), THINKEQUITY advised DATATEL that it should pursue "financial buyers." It provided to DATATEL a list of such prospects, including Thoma Cressey, whom THINKEQUITY was willing to contact on DATATEL's behalf. Quazzo Depo., p. 32; Davis Decl., ¶15, Ex. WD-2. Unfortunately, DATATEL never gave THINKEQUITY the go ahead to pursue all financial buyers recommended by THINKEQUITY.

It is beyond dispute that THINKEQUITY performed a substantial amount of work in its role as DATATEL's exclusive financial advisor. During the engagement, DATATEL was satisfied with THINKEQUITY's work. DATATEL never complained to anyone at THINKEQUITY. Cates Depo., pp. 113-114. While the agreement was terminable at will by either party after the first six months, DATATEL continued to engage THINKEQUITY for a full twelve months. DATATEL kept THINKEQUITY on the job until July 2004, terminating the engagement only after both Mr. Davis and Ms. Cates had left THINKEQUITY.

DATATEL advanced the proposition in July 2004 that THINKEQUITY was purportedly no longer able to perform its obligations. DATATEL's termination letter does not fault THINKEQUITY's past performance. Moe Decl., Ex. B. Nor is there any other record of any dissatisfaction by DATATEL with regard to THINKEQUITY's performance between July 2003 and July 2004. There is simply no evidence to dispute the fact that THINKEQUITY performed its obligations as DATATEL's financial advisor during the period of its engagement.

THINKEQUITY anticipates DATATEL will argue that there is a dispute as to whether THINKEQUITY could have performed its obligations after July 2004. While DATATEL's argument on this issue has no legitimate factual support, the point is legally irrelevant. THINKEQUITY earned its fee by performing under the Agreement during the time THINKEQUITY was engaged. Even if THINKEQUITY had performed for only six months, and DATATEL had terminated the Agreement in January 2004, THINKEQUITY would be owed a fee under the Agreement for any sale that occurred within 18 months thereafter.

Equally inapt is DATATEL's anticipated argument that it doesn't owe THINKEQUITY a fee because THINKEQUITY purportedly did not effect a transaction during the course of the engagement. The Agreement did not obligate THINKEQUITY to effect a transaction. It required THINKEQUITY to provide financial advice. It was up to DATATEL to decide whether or not to pursue any potential transaction presented by THINKEQUITY.

Further, if DATATEL had authorized THINKEQUITY to pursue a broader spectrum of financial buyers, there is every reason to expect that THINKEQUITY would have arranged the sale to Thoma Cressey. Not only did THINKEQUITY identify Thoma Cressey to DATATEL as a

prospective buyer, but THINKEQUITY has a close relationship with Thoma Cressey and Orlando Bravo, the person who ultimately negotiated Thoma Cressey's acquisition of DATATEL. Moe Decl., ¶ 9, Davis Decl., ¶ 16. Had DATATEL authorized THINKEQUITY to do so, it is virtually certain that THINKEQUITY would have arranged a meeting between Thoma Cressey and DATATEL. Having in effect prevented THINKEQUITY from pursuing discussions with financial buyers such as Thoma Cressey during the period of its engagement, DATATEL cannot now complain that THINKEQUITY was not responsible for the ultimate sale transaction.

THINKEQUITY performed its obligations under the Agreement during the period required of it. DATATEL is obligated to pay THINKEQUITY its agreed-upon fee for that performance.

B. The Contract Provisions Requiring DATATEL to Pay THINKEQUITY Its Fee Are Clear and Unambiguous.

DATATEL admits that the payment terms in the Agreement are clear and unambiguous. See, DATATEL Response to THINKEQUITY Interrogatory No. 20, PDE, Ex. C. The interpretation of clear and unambiguous provisions of a contract is a question of law for the court, and thus is properly adjudicated on summary judgment. See *Yang Ming Marine Transport Corp. v. Okamoto Freighters Ltd.* (9th Cir. 2001) 259 F.3d 1086, 1095-1097; Schwarzer et al., *California Practice Guide: Federal Civil Procedure Before Trial*, § 14:271 (Rutter Group 2006). Under the terms of the Agreement, THINKEQUITY is entitled to its fee as a matter of law.

1. Thoma Cressey's Acquisition Of DATATEL Was A "Sale Transaction" As Defined In The Agreement.

DATATEL hired THINKEQUITY, in part, to find a buyer for the company. Cates Depo., pp. 10, 29-30. The parties intended for THINKEQUITY to be paid a fee on any sale transaction, regardless of how it was structured. The Agreement defines "Sale Transaction" in extremely broad terms. Specifically, a sale transaction includes "any sale, merger, joint venture, lease, license or other transaction in which 50% or more of the voting power of the Company or all or a substantial portion

of its business or assets are combined with or transferred to another company." Agreement, p. 1.[3] This expansive definition covers both a stock sale ("50% or more of the voting power of the Company") and a business or asset sale ("all or a substantial portion of its business or assets"). Cates Depo., pp. 30-33, 39-41.

The Thoma Cressey transaction involved the sale of not 50%, but 100% of DATATEL's voting capital stock. Stock Purchase Agreement, Bravo Depo., Ex. 38, preamble (p. 1 – DATA 1942) and Article 2.1 (p. 8 – DATA 1949).[4] Voting control of DATATEL was transferred from the Company's two founders (who had owned 80% of the stock) to Thomas Cressey and affiliates (who acquired a majority interest in the stock). See, DATATEL Responses to THINKEQUITY Requests for Admissions, Set Two, PDE, Ex. D, Admissions B(1), B(2) and B(3). See, also, Bravo Depo., 20:7-22:20; Hollidge Depo., 12-14. The transaction clearly falls within the broad "Sale Transaction" definition in the Agreement.

Well after the lawsuit was filed, DATATEL's litigation attorneys concocted a myopic, strained interpretation of the term "Sale Transaction" in a desperate attempt to justify DATATEL's brazen refusal to honor the contract. Despite the fact that they never raised the issue when they answered the lawsuit and communicated with THINKEQUITY's counsel shortly thereafter, DATATEL's attorneys now contend that the term "voting power of the Company" refers not to DATATEL's voting stock (which was sold), but to DATATEL's "voting power" (whatever that means) in unnamed subsidiaries that hold title to the building occupied by DATATEL in Virginia. This sham interpretation is absurd, contrary to common sense, and inconsistent with the Agreement as a whole.

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[3] Webster's New Collegiate Dictionary defines "sale" as "the transfer of ownership of and title to property from one person to another for a price." The definition in the Agreement encompassed not only a "sale," but also a "merger, joint venture, lease, license or other transaction."

[4] The transaction was structured as follows. A company called Datatel Acquisition was formed to purchase all of the stock of DATATEL's shareholders. Datatel Acquisition is a wholly owned subsidiary of another company formed for the transaction, Datatel Holdings, Inc. The owners of Datatel Holdings, Inc. – who are essentially the new owners of DATATEL, INC. – are Thoma Cressey Partners and its affiliates, and the other purchasers of the company. Hollidge, 12-14; Griffith (DATATEL 30(b)(6) designee), Ex. 69, p. DATA 1535-1536, 1836-1838.

The flawed interpretation fabricated by DATATEL's counsel (which even DATATEL's Chief Executive Officer cannot articulate on his own) makes absolutely no sense in the context of the Agreement. THINKEQUITY was retained to sell DATATEL, not any "voting power" DATATEL may have had in unspecified "subsidiaries." The Agreement makes no mention of any circumstances in which DATATEL might have had "voting power" in anything, nor does it identify any subsidiaries.

Further, the strained interpretation of DATATEL's counsel makes no sense in the context of the sentence in which the term "voting power of the Company" appears. Why would the parties define "Sale Transaction" to include the sale of DATATEL's "voting power" in an unspecified entity and the sale of "all or a substantial portion of DATATEL's business or assets," but exclude the sale of a majority of DATATEL's voting capital stock? The definition of Sale Transaction makes sense only if it includes both stock sales and business or asset sales.[5]

The Agreement states that it "shall be governed by, and construed in accordance with, the laws of the State of New York applicable to contracts executed in and to be performed in that state." Agreement, p. 6. DATATEL would like this Court to consider these five words – "voting power of the Company" in isolation, and in confused isolation, at that. New York law, however, requires that the Court consider the entire Agreement in interpreting it:

> When interpreting a written contract, the court should give effect to the intent of the parties as revealed by the language and structure of the contract and should ascertain such intent by examining the document as a whole. Effect and meaning must be given to every term of the contract and reasonable effort must be made to harmonize all of its terms. Moreover, the contract must be interpreted so as to give effect to, not nullify, its general or primary purpose.

Village of Hamburg v. American Ref-Fuel Co. of Niagara, L.P., 727 N.Y.S.2d 843, 846, 284 A.D.2d 85, 89 (2001) (emphasis added, citations omitted). The Agreement's general or primary purpose was

[5] DATATEL's interpretation is equally inexplicable if one looks at the term "voting power" in the definition of an Acquisition Transaction, which is found in the sentence immediately following the definition of Sale Transaction. Under the view of DATATEL's counsel, an acquisition occurs only when DATATEL either acquires all or a substantial part of the business or assets of another company, or acquires 50% or more of the target company's "voting power" in an unspecified entity or entities. There would be no acquisition, however, if DATATEL acquired a controlling interest in another company's voting capital stock. This is absurd.

clearly not for THINKEQUITY to arrange the sale of DATATEL's "voting power" in unspecified DATATEL subsidiaries.

When the contract language "is clear and unambiguous, the court is required 'to ascertain the intent of the parties . . . from within the four corners of the instrument, and not from extrinsic evidence.'" *Van Buren v. Van Buren,* 675 N.Y.S.2d 739, 252 A.D.2d 950 (1998) (citations omitted); see also *Vermont Teddy Bear Co. v. 538 Madison Realty Co*., 1 N.Y.3d 470, 475, 775 N.Y.S. 2d 765 (2004) ("In the absence of any ambiguity, we look solely to the language used by the parties to discern the contract's meaning").[6]

The Agreement here is clear and unambiguous. The definition of "Sale Transaction" encompasses the transfer of DATATEL's stock, its business, or its assets. As a corporation, DATATEL's "voting power" is contained in its voting capital stock. It is undisputed that 100% of DATATEL's stock was sold in the transaction. It is equally undisputed that the voting control of the company (e.g., the ownership interest held by the majority of the Company's stockholders) changed hands. As such, a Sale Transaction occurred.

The voting control of the Company was transferred from the Company's founders (who previously owned over 80% of the voting capital stock – see Schedule of Sellers, Bravo Depo., Ex. 38, p. DATA 2345) to Thoma Cressey and its affiliates, who now possess voting control of the Company. (Bravo Depo., p. 22) "Voting power" cannot possibly mean anything else in the context of the Agreement, when it is read as a whole, all of its terms are harmonized, and it is construed so as to effect, not nullify, its primary purpose.

Notwithstanding DATATEL's desperate attempt to have five words of the Agreement viewed out of context, the Court should determine as a matter of law based on the undisputed facts of record that a Sale Transaction occurred here.

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[6] The Agreement includes an integration clause as follows: "This Agreement constitutes the entire agreement, and supersedes all prior agreements and understandings (both written and oral) of the parties hereto with respect to the subject matter hereof . . . ." Agreement, p. 6.

2. DATATEL's Fee is Payable To THINKEQUITY Under The Agreement As A Matter Of Law And Undisputed Fact.

The Agreement entitles THINKEQUITY to its fee if a Sale Transaction occurs within 18 months of the Agreement's termination. Period. To quote the Agreement:

> "If, during the period ThinkEquity is retained by the Company **or within 18 months thereafter**, (a) a Sale Transaction is consummated, or (b) the Company enters into an agreement providing for a Sale Transaction which subsequently results in a Transaction, the Company shall pay to ThinkEquity a fee equal to ¾ % of the consideration payable in connection with the Sale Transaction."

Agreement, p. 2 (emphasis added).

No further conditions are attached. It is undisputed that the Thoma Cressey sale occurred well within 18 months of the period during which DATATEL utilized THINKEQUITY as its exclusive financial advisor. DATATEL terminated THINKEQUITY's engagement in late July 2004. The sale to Thoma Cressey was announced in March 2005, and closed in early April 2005. Bravo Depo., Exs. 39 and 40; Answer to Complaint ¶ 11. The sale transaction occurred only eight months after DATATEL terminated its engagement with THINKEQUITY.

The parties' Agreement did not require THINKEQUITY to continue to advise DATATEL after termination. Nor did the Agreement require THINKEQUITY to play any specific role in the eventual Sale Transaction. Rather, the 18-month "tail" provision recognized THINKEQUITY's efforts during the Agreement's term to position DATATEL for sale, and required DATATEL to compensate THINKEQUITY once DATATEL achieved its goals. Such tail provisions are common in the investment banking industry. Moe Decl., ¶ 4; Quazzo Depo., pp. 66, 152-153. Here, DATATEL's stockholders received a payout of $265 million, of which ¾ % is payable to THINKEQUITY.

DATATEL cannot argue now that it did not understand what it was agreeing to. DATATEL is a sophisticated party that was represented by sophisticated counsel (the same firm that is acting as DATATEL's litigation counsel in this action) during the contract negotiations. The Agreement was signed by its Chief Executive Officer. DATATEL aggressively negotiated other terms of the

Agreement – including the percentage amount that would be due on completion of a sale[7] – without objecting to the unconditional 18-month tail provision on "Sale Transactions."

DATATEL could have insisted upon a fee structure for a Sale Transaction that conditioned payment upon some involvement by THINKEQUITY, such as THINKEQUITY's procuring the eventual buyer. But, DATATEL requested no such thing when negotiating the Agreement.

By contrast, DATATEL insisted on imposing conditions for the payment of any fee relating to an Acquisition Transaction, which is a transaction in which DATATEL may have bought another company. The provision for fees payable on an Acquisition Transaction expressly conditions payment as follows:

> "(3) The Company shall pay ThinkEquity a fee . . . if during the period ThinkEquity is retained by the Company or within 18 months thereafter, (a) any Acquisition Transaction is consummated (excluding transactions with companies listed on the attached Exhibit A which the Company has already identified as targets) or (b) a definitive agreement with respect thereto is entered into **(i) with one or more parties which ThinkEquity identified or with which the Company or ThinkEquity had discussions regarding an Acquisition Transaction, or (ii) with respect to which ThinkEquity advised the Company**, in any such case during the term of ThinkEquity's engagement hereunder and which subsequently results in an Acquisition Transaction."

Agreement, p. 2 (emphasis added).

The contractual language could not be more clear with respect to the distinction between a Sale Transaction and an Acquisition Transaction on this issue. DATATEL's payment of a fee on an Acquisition Transaction was conditioned upon THINKEQUITY's performing a specified role in the ultimate acquisition. By contrast, payment of a fee on a Sale Transaction had no such condition attached.[8]

In sum, the language of the Agreement plainly requires DATATEL to pay THINKEQUITY a fee in connection with the Sale Transaction involving Thoma Cressey. In fact, Thoma Cressey was

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[7] DATATEL negotiated a reduction in the fee payable on Sale Transactions from 1% to ¾% before signing the Agreement, which yielded a discount in this case of $662,500 off THINKEQUITY's usual fees. Cates 43-46, 49 and Ex. 4.

[8] While it was not a condition to THINKEQUITY's entitlement to a fee, it bears repeating that THINKEQUITY did identify Thoma Cressey as a prospective financial buyer for DATATEL in February, 2004, while performing services under the Agreement. See Quazzo Depo. Ex. 32, p. 14.

so concerned with THINKEQUITY's entitlement to a fee that it insisted that DATATEL indemnify it for any and all claims stemming from the Agreement. See, Stock Purchase Agreement, Bravo Depo., Ex. 38, p. DATA 2011 (Indemnification Schedule) and pp. DATA 1986-1987 (Section 9.2). The contract language is not ambiguous, and leaves no room for "creative lawyering" now by DATATEL's counsel.

C. THINKEQUITY Is Entitled to Damages of $2,145,429.24 As A Matter Of Law.

THINKEQUITY's damages in this case are easy to calculate. The Agreement requires that DATATEL "pay to THINKEQUITY a fee equal to ¾ % of the consideration payable in connection with the Sale Transaction." Agreement, p. 2, ¶ (2). The "consideration" paid in connection with Thoma Cressey's acquisition of DATATEL was $265 million. *See* DATATEL Answer ¶ 13; Moe Decl., Ex. C; Bravo Depo., Ex. 40; Bravo Depo., pp. 17-18; 47-48. Three quarters of one percent of $265 million equals $1,987,500.

DATATEL previously paid THINKEQUITY a $50,000 retainer, which reduces the fee amount to $1,937,500. DATATEL also owes THINKEQUITY for $6,094.44 in authorized reimbursable expenses, which remain unpaid. Endres Decl., ¶ 4, Ex. B. THINKEQUITY is thus entitled to collect **$1,943,594.44** in fees and expenses, the same amount for which THINKEQUITY invoiced DATATEL in April 2005. Moe Decl., Ex. D.

THINKEQUITY is also entitled to prejudgment interest under New York law, at a statutory rate of 9%, that is computed "from the earliest ascertainable date the cause of action existed." NY Civil Practice Law & Rules §§ 5001 and 5004. The Thoma Cressey sale closed on April 5, 2005. DATATEL Answer ¶ 11. Multiplying the principal amount ($1,943,594.44) times 9% results in accrued interest of **$174,923.50** as of the sale's first anniversary (April 5, 2006). An additional **$26,911.30** of interest will accrue for the eight-week period concluding on May 31, 2006, plus $479.24 in daily interest thereafter until judgment is entered.[9]

[9] The result under California law is substantially the same as New York, except that California's statutory rate for prejudgment interest is 10%. *See* California Civil Code §§ 3287(a) and 3289(b).

The Court should therefore enter judgment against DATATEL in the amount of **$2,145,429.24**, plus $479.24 per day from June 1, 2006, until the date of entry.

V. CONCLUSION

As a matter of law and undisputed fact, THINKEQUITY is entitled to recover its fee from DATATEL. The parties entered into a clear, unambiguous agreement under which DATATEL retained THINKEQUITY as its exclusive financial advisor for one full year. DATATEL received the benefit of THINKEQUITY's expertise in the industry. By virtue of THINKEQUITY's research, models, contacts, and efforts, DATATEL was positioned to pursue its sale to Thoma Cressey Partners knowing that the strategic partners upon whom it originally preferred to focus were not interested in buying the company.

DATATEL concluded a Sale Transaction within the tail period negotiated by the parties. Under the clear, unambiguous terms of the agreement – specious, nonsensical "interpretations" of its counsel notwithstanding – THINKEQUITY is entitled to a fee of over $2 million, including interest.

THINKEQUITY respectfully requests that the Court enter summary judgment against DATATEL in the principal amount of $1,943,594.44, plus prejudgment interest thereon from and after April 5, 2005. In the alternative, the Court should grant partial summary judgment against DATATEL on the issue of liability alone, or on the contract interpretation issues set forth above.

DATED: February 7, 2008 MBV LAW LLP

By: /s/
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Attorneys for Plaintiff
THINKEQUITY PARTNERS, LLC

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