STATE OF MAINE
SAGADAHOC, ss.

BUSINESS AND CONSUMER DOCKET
Location: West Bath
Consolidated Doc. Nos. BCD-CV-07-35
BCD-CV-07-36
BCD-CV-08-05

CAMELOT POWER, LLC,

Plaintiff

v.

DECISION AND ORDER

WORCESTER ENERGY CO., INC.,

Defendant

This matter was tried before the court without a jury on the consolidated claims of Plaintiff Camelot Power, LLC ("Camelot"): (a) against Worcester Energy Company Inc., ("WECO") in BCD-CV-07-36 for Unjust Enrichment (Count I), Quantum Meruit (Count II), Promissory Estoppel (Count III) and Breach of Contract (Count IV); (b) against Worcester Energy Partners, Inc. ("WEPI") in BCD-CV-08-05 for Avoidance of Fraudulent Transfers; and (c) against WECO in BCD-CV-07-35 for Judicial Dissolution. The facts, below, are based on evidence that this court finds credible.

FINDINGS OF FACT

Robert E. Cleaves IV ("Cleaves") was and is an attorney with extensive experience and expertise as a consultant for energy and power generation companies, including biomass facilities. At all times relevant to this matter, he also did contract analysis and negotiations for those companies, and was familiar with the various legal and regulatory processes

regarding the energy industry, including the then–burgeoning area of Renewable Energy Credits ("RECs").[1]

In 2003, Cleaves was doing consulting work in the name of Environmental Solutions Group ("ESG"). He learned that a number of biomass power plants in Maine were not operating, but believed that some of those plants might qualify for REC certification by the State of Massachusetts. One such power plant located in Deblois, Maine, was owned by WECO, a subchapter S corporation. At the time, Morrill Worcester ("Worcester") was its sole shareholder.

The WECO plant was capable of producing electricity by burning wood. It had a biomass boiler that used a process called a Bubbling Fluidized Bed, which was recognized under the Massachusetts REC program.

Cleaves first contacted Worcester in the Fall of 2003 to discuss the plant and its potential to qualify for the REC program. Later, in October 2003, Cleaves, acting through ESG, entered into a contract to provide consulting services to WECO. It was a performance-based contract, under which ESG was to be paid a percentage (10%) of WECO's revenues over a baseline of 4.5¢ per kilowatt-hour ("Original Agreement"). Pursuant to the agreement, Cleaves helped WECO qualify for plant certification compliance under the Massachusetts REC program and he worked to find buyers for WECO's power and RECs. As a result of his efforts, WECO received REC certification in February 2004 and by March 2004 the plant had entered into contracts to sell its RECs and power to other companies.

[1] Cleaves described an REC as the environmental equivalent of an energy credit for every megawatt–hour (1,000 kilowatt–hours) of "green" energy produced – that is, electricity generated from an eligible renewable energy source. In certain states, REC certificates are issued by certifying agencies. Those certificates are tradable environmental commodities on the open market. According to Cleaves, the renewable energy field was quite new in 2001, and he was among a small number of people who understood and were involved in that field and assisted energy companies to obtain REC certificates.

In late Summer or Fall of 2004, WECO needed financing and sought it through the Finance Authority of Maine ("FAME"). In December of that year, in conjunction with WECO's financing efforts, Worcester asked Cleaves to renegotiate his fee arrangement under the Original Agreement. As a result, in January 2005, a replacement agreement was created under which the fees remained performance-based, but were reduced, and ESG was supplanted under the new agreement by Camelot, a limited liability company newly created by Cleaves ("Second Agreement"). That same month, WECO received the financing it needed to restart the plant from United Kingfield Bank ("UKB"). The UKB loan was guaranteed by FAME. However, the Deblois plant only operated intermittently for one or two months after that loan closing and WECO did not make any payments to Camelot under the Second Agreement. Shortly thereafter, Camelot had little involvement with WECO and Cleaves considered the relationship with Worcester and WECO to be adversarial.

In May 2005, Cleaves first learned that UKB was going to foreclose upon the Deblois plant. In June 2005, the foreclosure process was begun. That summer, Worcester determined that WECO again needed new financing and he began discussions with Prospect Energy Company, now known as Prospect Capital Corporation ("Prospect"). Prospect's business included providing financing to entities that were unable to secure loans from conventional funding sources.

On July 29, 2005, pursuant to UKB's motion in the foreclosure action, the Superior Court appointed James Ebbert as a receiver for WECO. Among other things, the receiver was tasked with taking charge of WECO's assets and operations, including the Deblois plant; dealing with the plant's creditors; and investigating and developing a schedule of the company's liabilities. Mr. Ebbert determined that WECO had $5.2 million of secured debt,

which did not include WECO's indebtedness to Camelot under the Second Agreement. The receiver was also aware of the ongoing financing discussions between WECO and Prospect.

In August 2005, Worcester once again contacted Cleaves seeking to further renegotiate the terms of the fees owed by WECO to Camelot under the Second Agreement. Worcester told Cleaves that it was necessary to reduce those fees if WECO was to obtain new financing from Prospect.

In September 2005, Cleaves agreed in principle to enter into a new fee agreement with WECO that would change and reduce Camelot's remuneration from a performance-based commission to a flat fee of $1,155,624.24 ("Fee Agreement"). The Fee Agreement was to be part of a larger transaction in which Prospect would loan money to WECO. However, for tax reasons, Prospect decided it could not loan money directly to WECO because the latter was a subchapter S corporation. For that reason, another corporation, Worcester Energy Partners, Inc. ("WEPI"), was created. Under that arrangement, Prospect agreed to loan money to WEPI and avoid the adverse tax consequences it believed would have flowed from a loan made directly to WECO. WEPI was structured in such a way that it had two classes of stock: common and preferred.

On September 19, 2005 WEPI's Board of Directors agreed to acquire all of WECO's assets, real and personal, pursuant to a Contribution and Assignment Agreement, and authorized the issuance of 1600 shares of WEPI's common stock to WECO.

On September 20, 2005, WECO and WEPI entered into the Contribution and Assignment Agreement. As part of that agreement, WECO "contribute[d], assign[ed], and transfer[red] to [WEPI] all of its right, title and interest in all of its assets, tangible and intangible, real and personal, wherever located." Prior to receiving WECO's assets, WEPI

had no assets of its own, other than business records, and had no liabilities. That same day, both WECO and WEPI executed an Open-End Mortgage, Assignment of Rents, Security Agreement and Fixture Filing in favor of Prospect.

The next day, September 21, 2005, several other related transactions occurred. WECO was issued 1600 shares of WEPI common stock, which was all of the outstanding common stock of WEPI at the time. In that same transaction, WEPI also issued all of its preferred stock (1,000 shares) to Prospect. No other shares of WEPI common or preferred stock were issued.

That same day, Camelot and WECO executed the Fee Agreement. The Fee Agreement was created only to encompass payment for past services that Camelot had provided to WECO before the execution of the Fee Agreement. It did not contemplate or require Camelot to provide any new services to WECO. Among other things, the Fee Agreement required WECO to make an initial $100,000 payment to Camelot on the amended indebtedness and, thereafter, 83 monthly payments beginning in October 2005. In addition, WECO and Camelot entered into a Mortgage, Security Agreement, Lease Assignment and Financing Statement (collectively, "Camelot Mortgage") to secure WECO's payments under the Fee Agreement.

Also on September 21, 2005, WECO, WEPI and Biochips, LLC ("Biochips")[2] entered into a financing arrangement with Prospect, in which Prospect loaned $10,750,000 at 12.5% per annum to WECO, WEPI and Biochips, as joint borrowers, on a term note issued to Prospect ("Prospect Loan"). That financing arrangement was memorialized, at least in part,

[2] In an entwined relationship, WECO owned 100% of WEPI's common stock; WEPI owned the Deblois biomass power plant; and Biochips provided 100% of the wood fuel product for WECO's plant.

in a Credit Agreement dated September 21, 2005 between WECO, WEPI, Biochips and Prospect.[3]

That same day, Camelot and Prospect entered into a document titled "Third Party Consent."[4] In addition, WECO, Camelot and Prospect entered into a Subordination Agreement, which subordinated the Camelot Mortgage to the Prospect Loan and defined the relative rights of Prospect and Camelot with respect to WECO's indebtedness to each of them.

In all of this, although Cleaves knew about the transfer of WECO's property to WEPI, he was not privy to most of the details of and played no role in the loan transaction between WECO, WEPI and Prospect, other than to negotiate the Fee Agreement with Worcester and execute the documents relating to that agreement, which included the Third Party Consent and the Subordination Agreement, which subordinated the Fee Agreement to the Prospect Loan. In particular, he did not know about the issuance of 1,000 shares of WEPI's preferred stock to Prospect.

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[3] Under the terms of the Credit Agreement, the proceeds of the Prospect Loan were to be disbursed, as follows:

Secured Debt	$ 5,760,108
Unsecured Debt	$ 1,357,491
Contingency Reserve	$ 201,527
WECO Working Capital	$ 1,000,000
Maintenance Reserve	$ 250,000
Transmission Line Reserve	$ 500,000
Biochips Working Capital	$ 600,000
Debt Reserve	$ 500,000
PSEC Upfront Fee	$ 265,000
Transaction and Other Costs	$ 297,874
TOTAL	$10,750,000

Def's Exh. 14, Schedule 5.1.8.2.

[4] Defendants have characterized the Third Party Consent as Camelot's acknowledgement that WECO's assets were being transferred to WEPI. Although the actual language of the Consent document does not expressly support that characterization, it may be inferred from the reference in the Consent to the Credit Agreement, which does expressly refer to the asset transfer. In addition, Cleaves testified at trial that he knew about the transfer.

On September 23, 2005, the Superior Court entered an order approving the receiver's final report and, thereafter, entered an order terminating the receivership on October 9, 2005.[5] During the receivership, other than the assets acquired at the beginning of the receivership and the receipt of payments on two accounts receivable, Mr. Ebbert did not acquire any other proceeds or assets on behalf of WECO. In addition, during this period, the plant was not operating because it had no raw materials – i.e., wood fuel – to generate power and Mr. Ebbert was unable to make payments to WECO's creditors. In sum, during the period of the receivership, which included the dates of the closing transactions in September 2005, WECO was unable to pay its debts as they came due.

From the proceeds of the Prospect Loan, WECO paid Camelot the initial $100,000 required by the Fee Agreement. Since that loan closing, however, WECO has made only four monthly payments under to the Fee Agreement. The first three were for the months of October, November and December 2005. The last was made in February 2006. No payments have been made to Camelot since that time.

Not long after the closing, WECO also defaulted in its obligations under the Prospect Loan, including the interest payments due on September 30, 2005 and December 31, 2005. In early January 2006, John F. Barry, III ("Barry"), who was the chairman and CEO of Prospect, an officer and director of WECO and an officer of WEPI, called Worcester about WECO's defaults regarding its December payment, minimum working capital requirements and other obligations under the Prospect Loan. In that conversation, Barry was told that the Deblois power plant could not be operated on a sustained basis because it did not have sufficient funds to purchase enough wood fuel. Worcester told Barry that, if Prospect could

[5] The court's orders followed the motion of United Kingfield Bank to terminate the receivership because UKB's loan to WECO was being satisfied by the proceeds of the Prospect Loan.

loan WECO an additional $1 million, the plant "could get on its feet". Barry agreed but required that Prospect get enhanced oversight of the plant's operation. In January 2006 Prospect wired the money to WECO. In return, Prospect acquired 51% of WECO's common stock. Cleaves and Camelot were not aware of WECO's default of the Prospect Loan, nor were they privy to the remedial arrangements discussed by Barry and Worcester.

On February 3, 2006, Camelot sent a Notice of Default to WECO. One of Camelot's reasons for sending the Notice was "to trigger the running of the 270-day clock" set by section 3.7 of the Subordination, the expiration of which was one of the conditions precedent to Camelot exercising its legal rights as a secured creditor of WECO.

On February 6, 2006, Cleaves received a telephone call from Barry regarding Camelot's Notice of Default. The two men had never talked before. During their conversation, they discussed the problems WECO, WEPI and Prospect were experiencing with the power plant, which was significantly underperforming.

Cleaves said Camelot was owed money under the Fee Agreement and wanted to get paid. Barry replied that, if Camelot withdrew its Notice of Default, Barry would show Cleaves everything that Prospect was doing to protect its investment and get WECO[6] back on track so that its creditors, including Camelot, could get paid.

Barry said that, if Cleaves and Camelot joined the "team" and worked with Prospect to fix WECO's problems, "I'll see that you get paid out of early cash flows." This conversation was confirmed in a later email sent by Barry to Cleaves on May 20, 2006.

> Based on what I'm seeing here, it looks like we could start to cash flow pretty soon. Bob, you have worked hard on this and we intend to get you current out of early cash flows. We appreciate your efforts and will reward them (maybe

[6] Although WECO had transferred ownership of its assets to WEPI, at trial Barry sometimes referred to WECO when speaking of the plant.

> just getting paid all you're owed is reward enough?) … I do want you to stay involved and believe it is only fair that we pay you for that.

Def's. Trial Exh. 28. The men did not discuss or define what was meant by "cash flows" or "early cash flows."[7]

On February 7, 2006, Camelot withdrew its Notice of Default. Cleaves and Camelot agreed to work with Barry, Prospect, WECO and WEPI to try to fix the problems with the power plant. Over the course of the next four months, Cleaves participated in conference calls; worked to return WECO to compliance with Massachusetts' regulatory requirements for REC certification; assisted with the negotiations and restructuring of the plant's various contracts regarding fuel costs and other operating costs; and also assisted in the search for new buyers for the plant's power and RECs. During this entire period, neither Barry, nor anyone at Prospect or WECO ever criticized the work that Cleaves and Camelot were doing. To the contrary, their emails and communications were very complimentary of Cleaves' ideas and his efforts.[8]

On several occasions, Barry told Cleaves that WECO and WEPI were not paying their debt service and, in late May 2006, Barry said that Prospect was threatening foreclosure and bankruptcy against both companies. By the summer of 2006, Cleaves understood that WECO's debt had been approximately $15 million and was growing and approaching $40 million. He was also aware that energy and capacity markets had not improved in 2006. In spite of this, Cleaves believed that WECO was beginning to generate some cash flow. Based

[7] At trial, Cleaves testified that he understood Barry's words to mean that Camelot would begin getting payments due it under the Fee Agreement when WECO began to realize cash flows from its operations.

[8] The court finds incredible Barry's testimony at trial that he was merely "kidding" Cleaves when he, Barry, expressed words of praise and appreciation to Cleaves for the latter's expertise, ideas and efforts in connection with the 2006 Services. *See e.g.,* Trial Transcript, Volume III, Testimony of John F. Barry, p. 142, l. 11-18; p. 145, l. 14-25; and p. 156, l. 7.

on this belief, he was concerned that WECO was not making any payments under the Fee Agreement. As a result, by June 2006, he stopped doing any significant work on WECO's recovery.[9]

Essentially, between February and May 2006, Cleaves and Camelot provided services to WECO in an attempt to make the power plant operationally and financially sound ("2006 Services") so that WECO could come current in its payment obligations under the Fee Agreement. Cleaves did not maintain a log or otherwise keep records of the time he actually spent in the performance of the 2006 Services. However, he estimates that those services consumed approximately 441 hours of his time over a four–month period. That estimate is not unreasonable based on Cleaves' description of the 2006 Services he provided.

DISCUSSION

I. Breach of Contract (Count IV: BCD–WB–CV–07–36)

Camelot's claim for breach of contract is not directed to the Fee Agreement, presumably because any such action is barred by the terms of the Subordination Agreement. Instead, Camelot's contract claim is grounded upon an alleged agreement for the 2006 Services in which WECO promised to make current its outstanding and ongoing payment obligations under the Fee Agreement in exchange for Camelot providing the 2006 Services. According to Camelot, Cleaves' conversations with Barry in February 2006 resulted in a binding and enforceable contract and WECO's failure to resume payments under the Fee Agreement constitutes a breach for which WECO is liable.

WECO counters that Camelot's breach of contract claim fails because (1) the Subordination Agreement between Prospect and Camelot prohibited Camelot and WECO

[9] Cleaves did continue to provide some services for WECO through November 2006, including reviewing contracts.

from entering into any contracts post-dating the Fee Agreement without the prior written consent of Prospect; (2) Prospect did not give the requisite consent; and (3) irrespective of the Subordination Agreement, Barry's conversations with Cleaves in February 2006 did not give rise to an enforceable contract because the terms of the agreement were not sufficiently definite. WECO's last point challenges the very existence of a contract for the 2006 Services and the court will begin its analysis there.

Camelot's primary theory of recovery for breach of contract is based on its assertion that it would provide the 2006 Services in exchange for the resumption by WECO of payments due under the Fee Agreement. Based on the evidence adduced at trial, including the precipitating phone conversation between Barry and Cleaves, the court finds that there was an agreement for the 2006 Services, which included the following terms: (1) Camelot would withdraw its Notice of Default and provide assistance to WECO aimed at getting the plant "back on track" and, (2) in exchange, WECO would "start paying Camelot" under the Fee Agreement "once the project started cash-flowing." Trial Transcript, Testimony of Robert E. Cleaves, Vol. I, 109:2-9. *See also id.* Vol. III, at 43:2-24.

Under Maine law, in order "[t]o establish a legally binding agreement between parties, the mutual assent to be bound by all of its material terms must be reflected and manifested either expressly or impliedly in the contract and the contract must be sufficiently definite to enable a court to determine its exact meaning and fix any legal liability of the parties." *Pepperell Trust Co. v. Mountain Heir Fin. Corp.*, 1998 ME 46, ¶ 13, 708 A.2d 651, 655 (internal quotation marks and citations omitted).

In this case, there is no real dispute that WECO agreed to resume payments under the Fee Agreement in exchange for the withdrawal of the Notice of Default and Camelot's

rendition of the 2006 Services, and that this agreement was conditioned on the Deblois power plant starting to "cash flow." However, Barry and Cleaves each had a fundamentally different understanding of what "cash flow" meant at the time they discussed the 2006 Services in February 2006.

At trial, Cleaves testified that he understood "cash flow" to mean the point at which WECO was able to restore its certification under the Massachusetts REC program, restructure and renegotiate the various contracts it was unable to fulfill in February 2006, and get the power plant to a place where it could "at least generate enough cash . . . to both justify operating the plant, and to meet its non-debt . . . obligations, meaning payroll, fuel . . . keeping the lights on, and also significantly, for me, paying . . . vendors like myself, or people that were providing services."[10] Trial Tr., Vol. II at 118:18-119:12. Cleaves denies that he understood "cash-flow" status to also include WECO's ability to service debt.

Barry, on the other hand, interpreted "cash-flow" to mean not just that WECO was able to meet its operating costs and perform under its existing contracts, but that it was profitable and able to pay dividends, service its senior debt and begin servicing its subordinated debt. *Id.* Vol. III at 43:2-24.

These differing interpretations of the term "cash flow" are significant because, according to Cleaves, the project began cash-flowing under his definition after June 2006. *Id*., Vol. II at 119-121. However, Cleaves also acknowledges that it never began cash-flowing under Barry's interpretation. *Id*. Notwithstanding their differing understandings of the meaning of "cash flow," understandings that were not articulated by either man at the

[10] The court does not agree with Cleaves characterization of Camelot as a "vendor." As of February 2006, Camelot was a creditor of WECO.

time the contract was formed, the court concludes that while the term may be ambiguous[11] it is sufficiently definite under the circumstances of this case and that the diverse understandings each described at trial do not render the agreement for 2006 Services unenforceable.

When a contract term is not sufficiently definite to clearly fix the liabilities of the parties "the law invokes the standard of reasonableness, and courts will supply the needed term." *Fitzgerald v. Hutchins*, 2009 ME 115, ¶ 19, ___ A.2d ___ (internal citations omitted). *See also* RESTATEMENT (SECOND) OF CONTRACTS § 33 cmt. a ("An offer which appears to be indefinite may be given precision by usage of trade or course of dealing between the parties."). In doing so, the court may look to evidence of the parties' own understanding of the terms of their agreement. *Ault v. Pakulski*, 520 A.2d 703, 706 (Me. 1987) (Glassman, J., dissenting).

Accordingly, in order to determine the scope of WECO's duty under the agreement for 2006 Services and the extent to which WECO did or did not perform, the court must first establish what "cash flow" means in the context of that agreement. After a review of the evidence, the court concludes that Barry's definition for the most part is the more precise and, more importantly, is consistent with the parties' own conduct following formation of the agreement for the 2006 Services.[12]

In light of the fact that the power plant was not meeting any of its obligations, including those to Prospect, prior to the formation of the agreement for the 2006 Services and given that Cleaves was aware of that fact, the court concludes that the more reasonable

[11] "Contract language is ambiguous when it is reasonably susceptible of different interpretations." *Guilford Transp. Indus. v. PUC*, 2000 ME 31, ¶ 13, 746 A.2d 910, 914 (citations omitted).

[12] The court does not agree with that part of Barry's definition of "cash flow" that includes the ability "to pay dividends".

interpretation of "cash flow" as the benchmark WECO needed to meet before it could resume payments to Camelot under the Fee Agreement is one that contemplates WECO not only having *some* income but also being in a position where it is able to meet its financial obligations in a sustainable sense. In the court's view, such a position must include being able to service its debt. Significantly, and contrary to Cleaves' testimony at trial, a review of the record reveals that while Camelot was providing the 2006 Services, Cleaves himself believed that "cash flow" status contemplated debt service. For example, the record reveals that: (1) Cleaves believed that the plant would start "cash-flowing" when it received twelve cents per kilowatt hour;[13] and (2) that as of at least April 16, 2006, Cleaves himself expressed his belief that the twelve cent, "cash flow" benchmark "includes servicing the debt."[14] Accordingly, based on the evidence, and contrary to Cleaves' urging, the court concludes that the reasonable meaning of "cash flow" and the meaning assigned to that term by the parties from and after February 2006 is that WECO was not required to resume payments to Camelot until WECO was not only able to meet its operating expenses but was also able to service its debt.

The court also concludes that Camelot has failed to meet its burden of establishing that the "cash flow" condition was met by WECO. *See* RESTATEMENT (SECOND) OF CONTRACTS § 225 (1981) ("Performance of a duty subject to a condition cannot become due unless the condition occurs or its non-occurrence is excused.") Indeed, Cleaves conceded at trial that WECO had not, to his knowledge, ever reached a point where it was "cash flowing" in the sense that WECO was able to service its debt. Trial Tr. Vol. II at 120:22-121:24.

[13] Trial Tr. Vol. II at 86:3-9; and Defs.' Exh. 35.
[14] Pl.'s Exh. 36 at 2.

Further, as to WECO's related argument that the Subordination Agreement prohibited Camelot and WECO from entering into an agreement for the 2006 Services, and notwithstanding the attorneys' thorough and skillful treatment of the scope and applicability of the Subordination Agreement, the court concludes that it need not be addressed here because Camelot has failed to prove a necessary element of its claim for breach of contract. Even if the court were to accept Camelot's argument and assume that the Subordination Agreement is not a bar to the enforcement of the agreement for 2006 Services, Camelot has failed to establish a breach of that agreement – that is, it has not established that the "cash flow" condition was met.

Finally, to the extent that Camelot alternatively seeks payment for the "value" of the 2006 Services under a breach of contract theory, the court similarly rejects that claim. In his testimony at trial, Cleaves expressly stated that he had not been promised, nor did he expect, payment for the 2006 Services themselves. Rather, as noted above, Cleaves provided the 2006 Services in an effort to help WECO become profitable so that it could resume payments already owed under the Fee Agreement. *Id.* at 75-77:5. Because there was no promise by WECO to pay Camelot for the value of the 2006 Services, WECO's failure to pay for those services does not constitute a breach of contract.

II. Unjust Enrichment (Count I: BCD–WB–CV–07–36)

Camelot contends that, to the extent a binding contract for the 2006 Services did not exist or its contractual claims are otherwise barred, it is nevertheless entitled to payment for the 2006 Services under the doctrine of Unjust Enrichment.

Because the court has found that there was a binding contract between Camelot and WECO for the 2006 Services, application of the unjust enrichment doctrine is barred.

Nadeau v. Pitman, 1999 ME 104, ¶ 1, 731 A.2d 863, 864. The Law Court has explained that unjust enrichment "describes recovery for the value of the benefit *retained* when there is *no contractual relationship*, but when, on the grounds of fairness and justice, the law compels performance of a legal and moral duty to pay." *Id.*, 1999 ME 104, ¶ 14, 731 A.2d 863, 866-67 (emphasis added).

However, even if there was no underlying contract, the court concludes that Camelot could not prevail under a theory of unjust enrichment. Under Maine law, in order "[t]o establish unjust enrichment, the complaining party must show that: (1) it conferred a benefit on the other party; (2) the other party had appreciation or knowledge of the benefit; and (3) the acceptance or retention of the benefit was under such circumstances as to make it inequitable for it to retain the benefit without payment of its value." *Maine Eye Care Assocs. v. Gorman*, 2008 ME 36, ¶ 17, 942 A.2d 707, 712 (citation omitted).

At trial, Camelot presented testimony from Cleaves, as well as Camelot's expert A.J. Goulding, President of London Economics International, LLC, ("Goulding") regarding the value of the 2006 Services conferred by Camelot. Their testimony was directed to the reasonable hourly fee someone with Cleaves' training might charge for those services. Notwithstanding Camelot's evidence, the court concludes that Cleaves' hourly rate (or some other rate he might reasonably have charged) is not precisely the proper measure of damages. In Maine, unjust enrichment recovery is calculated by "the value of the benefit *retained*". *See Paffhausen v. Balano*, 1998 ME 47, ¶ 6, 708 A.2d at 271 (emphasis added)[15]; s*ee also A.F.A.B., Inc. v. Town of Old Orchard Beach*, 657 A.2d 323, 325 (Me. 1995); and *Simpson v. Central Maine Motors, Inc.* 669 A.2d 1324, 1326 (Me. 1996). That is, while Cleaves' hourly

[15] Whereas, quantum meruit recovery focuses on "the value of the services *provided* by the plaintiff." *See id*. ¶ 7, 708 A.2d at 271 (emphasis added).

rate constitutes the value of the service he conferred, those fees are not necessarily representative of the value of any benefit WECO retained. Rather, in this case, any benefit WECO may have retained as a result of Cleaves' efforts may have included the reinstatement of WECO's REC certification or renegotiated contracts with WECO's wood fuel supplier.

In this case, there is no evidence demonstrating how the 2006 Services benefited WECO or the other defendants in any quantifiable way. Although Cleaves was certainly praised for his "good work," Camelot has failed to demonstrate that it resulted in a quantifiable benefit to WECO, what the value of that benefit was, or that WECO unfairly retained that benefit. Rather, given that Cleaves himself conceded that the project never reached a point where it was able to meet its financial obligations and service its debt, the contrary appears to be true. Therefore, because the credible evidence does not support a conclusion that WECO retained a benefit from which it derived some quantifiable value, Camelot is not entitled to recover under a theory of unjust enrichment. *See Forrest Assocs. v. Passamaquoddy Tribe*, 2000 ME 195, ¶ 15, 760 A.2d 1041, 1046 ("Although Forrest created the comprehensive plan and presented it to the Tribe, there is no evidence that the Tribe benefited from either the presentation or the information contained in the plan. To the contrary, the evidence demonstrates that Forrest made an elaborate marketing proposal to the Tribe that was ultimately rejected. Such evidence fails to satisfy the central element of proving a benefit conferred.") In this case, the court concludes Cleaves' hourly rate does not represent the value of any benefit retained by WECO but rather is simply indicative of the value of the service Cleaves performed. Accordingly, even if Camelot's unjust enrichment claim is not barred by the court's determination that a binding contract governed the terms of

the parties' relationship, Camelot has nevertheless failed to prove its alleged damages and its claim fails on that basis.

III. Quantum Meruit (Count II: BCD–WB–CV–07–36)

Camelot also seeks recovery for value of the 2006 Services it provided to WECO under the theory of Quantum Meruit. "A valid claim for *quantum meruit* requires: that (1) services were rendered to the defendant by the plaintiff; (2) with the knowledge and consent of the defendant; and (3) under circumstances that make it reasonable for the plaintiff to expect payment." *Paffhausen v. Balano*, 1998 ME 47, ¶ 8, 708 A.2d 269, 271 (citations omitted). To pursue a claim under a theory of quantum meruit, a plaintiff "seeks recovery for services or materials provided under an implied contract." *Paffhausen v. Balano*, 1998 ME 47, ¶ 6, 708 A.2d at 271.

WECO correctly argues that it was unreasonable as a matter of law for Camelot to expect payment for the value of the 2006 Services. Cleaves himself recognized that he did not expect to be compensated for those services. Instead, his understanding, and the clear import of the discussions between Cleaves and Barry, was that payments already owed to Camelot under the Fee Agreement would be resumed when WECO reached "cash flow" status.

Therefore, because the court has found that there was a contract between Camelot and WECO regarding the 2006 Services and because Cleaves did not expect to be paid any consideration for those services other than what was already owed to him under the Fee Agreement, Camelot did not have a reasonable expectation of payment until such time as WECO/WEPI began "cash flowing." As noted above, given the failure of that condition, Camelot cannot prevail on its *quantum meruit* claim.

IV. Promissory Estoppel (Count III: BCD–WB–CV–07–36)

In Count III, Camelot seeks to recover for the 2006 Services under a theory of promissory estoppel. As the parties correctly note, Maine has adopted the Restatement's definition of promissory estoppel:

> A promise which the promissor should reasonably expect to induce action or forbearance on the part of the promissee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise. The remedy granted for breach may be limited as justice requires.

Bracale v. Gibbs, 2007 ME 7, ¶ 14, 914 A.2d 1112, 1115 (quoting RESTATEMENT (SECOND) OF CONTRACTS § 90 (1981)).

Similar to the court's analysis of Camelot's *quantum meruit* claim, the court concludes that Camelot has failed to demonstrate that WECO ever promised to pay Camelot for the value of the 2006 Services that were provided. Accordingly, Camelot may not recover for the value of those services under the doctrine of promissory estoppel.

V. Avoidance of Fraudulent Transfer (BCD–WB–CV–08–05)

Camelot claims that the September 2005 transfer of assets by WECO to WEPI and the obligations incurred by WECO under the Prospect Loan were fraudulent under Maine's Uniform Fraudulent Transfers Act, 14 M.R.S. §§ 3571-3582 ("UFTA"). In particular, Camelot alleges that the WECO/WEPI/Prospect transactions violated Section 3576(1), which provides as follows:

> A transfer made or obligation incurred by a debtor is fraudulent as to a creditor whose claim arose before the transfer was made or the obligation was incurred if the debtor made the transfer or incurred the obligation *without receiving a reasonably equivalent value in exchange for the transfer or obligation* and the debtor was insolvent at that time or the debtor became insolvent as a result of the transfer or obligation.

Id. (emphasis added)

WEPI contends that Camelot has failed to prove[16] any element of these claims under the Act.

A. Transfer of Assets

As to Camelot's allegation that the transfer of WECO's asset to WEPI was fraudulent, the court concludes that it need not reach the merits of the parties' arguments on each and every statutory element in Section 3576(1) because Camelot has failed to satisfy its burden on an issue of critical importance to this UFTA claim, to wit: the value of either the property transferred or of the consideration received.

Section 3576(1) is directed to "transfer[s] made or obligation[s] incurred" if the debtor did not receive "reasonably equivalent value in exchange for the transfer or obligation . . .." *Id.* Under this law, "transfer" means "every mode, direct or indirect, absolute or conditional, voluntary or involuntary, or disposing of or parting with an asset or an interest in an asset, and includes payment of money, release, lease or creation of a lien or other encumbrance." 14 M.R.S. § 3572(12). The term "asset," in turn, is defined to mean "property of a debtor, but . . . not [p]roperty to the extent that it is encumbered by a valid lien . . .." 14 M.R.S. § 3573(2)(A). Accordingly, the parties agree that in order for Camelot to

[16] WEPI asserts that Camelot's burden is to prove a fraudulent transfer by clear and convincing evidence. However, the case it cites in support, *Federal Deposit Ins. Corp. v. Proia*, 663 A.2d 1252, 1254 fn. 2 (Me. 1995), does not relate to the constructive fraud provision of the UFTA at issue in this case. Although Maine has not yet had occasion to consider the burden of proof standard applicable to fraudulent transfer claims under 14 M.R.S. § 3576(1), the constructive fraud provision, this court concludes that the Law Court would likely adopt the preponderance of the evidence standard, rather than proof by clear and convincing evidence because constructive fraud does not require proof of intent to defraud. *See In Re: Stanley W. Jackson*, 459 F.3d 117 (2006 1st Cir.). In *Jackson*, Judge Lipez analyzed the comparable provision of New Hampshire's Fraudulent Transfers law and noted that the lesser evidentiary burden is appropriate because the law "permits creditors to prove a fraudulent transfer without proving the debtor's 'actual intent' to defraud." *In Re: Jackson*, 459 F.3d at 121. From this premise, he persuasively observed that "[t]he elements of constructive fraud aim at assessing the injury to the creditor, not the intent of the debtor." Id. at 122.

succeed in its effort to void the transfer of assets by WECO to WEPI, it must prove that WECO transferred property that was not encumbered by a lien.

The "transfer" of property at issue in this case[17] is the assignment and transfer by WECO of all of its property to WEPI. That transfer is embodied in the Assignment Agreement. *See* Defs.' Exh. 8. Pursuant to that agreement WECO received 1600 shares of common stock in WEPI as consideration for the transfer of its property.[18]

WEPI claims that Camelot has failed to establish that the transfer was fraudulent under Section 3576(1) because, according to WEPI, (a) Camelot has failed to prove that, at the time of the transfer, WECO's property had any value over and above any valid liens and, therefore, the property was not an "asset" under the statutory definition; and (b) Camelot has failed to prove that WECO did not receive "reasonably equivalent value" in exchange for the transfer. The court agrees.

There is no credible evidence of the fair market value[19] of WECO's property prior to or at the time of the Assignment Agreement. At best, the property's book value is noted on a balance sheet prepared as of December 31, 2005, nearly three months after the "transfer" took place. *See* Defs.' Exh. 23 p. 3. The balance sheet indicates that certain "Property, Plant and Equipment" had a net value of $6,873,637. *Id.* However, the property is listed as an

[17] As will be discussed in more detail below, the court distinguishes between the "transfer" of property and the incurrence of an "obligation."

[18] Although the Assignment Agreement states that the WEPI stock was to be issued to Morrill Worcester, the evidence indicates, and this court has previously determined in its summary judgment order, that the shares of common stock were in fact issued to WECO.

[19] Under the UFTA, except in situations involving foreclosure sale, "reasonably equivalent value" is generally understood to have a meaning "similar to fair market value[.]" *See Asarco LLC*, 396 B.R. at 338 (quoting BFP v. Resolution Trust Co., 511 U.S. 531, 545, 114 S. Ct. 1757, 128 L. Ed. 2d 556 (1994). *See also* 14 M.R.S. 3573(1) (referring to the "fair valuation" of assets in the context of determining insolvency).

asset of WEPI, not WECO, and, again, its book value, not its fair market value, is as of December 31, 2005 not September 20, 2005.

When analyzing what constitutes "reasonably equivalent value" under the UFTA courts look to the value of the property *at the time* of the transfer, rather than at some later point in time. *See In re Brown*, 265 B.R. 167 (E.D. Ark. 2001); and *Asarco LLC v. Ams. Mining Corp*., 396 B.R. 278, 336-37 (S.D. Tex. 2008) ("All jurisdictions agree that courts should measure the value of the property transferred and the consideration received at the time of the transfer.") Further, the property was identified on the balance sheet as belonging to WEPI not WECO. Quite simply, the December 31, 2005 Balance Sheet is not evidence of the value of WECO's property at the time of the "transfer" on September 20, 2005.

Although Camelot contends that this court can extrapolate the value of WECO's property based on the amount of the Prospect Loan,[20] the court disagrees. The UFTA distinguishes between "transfers" and "obligations," and, when analyzing claims under the UFTA, courts generally focus on each discrete "transfer" or "obligation" when determining whether reasonably equivalent value was exchanged. *See In re All-Type Printing, Inc.*, 274 B.R. 316, 324 (Conn. 2002) ("In analyzing the voidability of the Payments as 'transfers' under C.G.S. [Connecticut's Uniform Fraudulent Transfers Act], the Court must focus on the nature of the discrete 'exchange' which took place at the time of each of those transfers.") Here, the "transfer" with which Camelot takes issue is that embodied by the Assignment Agreement. The consideration WECO received for that "transfer," as distinct from the "obligation" it undertook to Prospect, was 1600 shares of WEPI common stock. Under the

[20] In Camelot's words "we know beyond any question that there was unencumbered property transferred, because the sale proceeds satisfied all of the secured debt (between secured debt assumed and paid in cash) and then there were sufficient proceeds to satisfy some, if not all, of the unsecured debt." Pl.'s Reply Br. at 4.

terms of that agreement, WECO received stock in WEPI, not cash or payment of its debts. Therefore, any money or other consideration WECO may have received as consideration for another, distinct, "transfer" or "obligation" does not bear on the value of the property it transferred to WEPI under the Assignment Agreement.

It seems axiomatic that in order to establish whether the fair market value of WECO's property at the time of its transfer to WEPI was greater than the amount of any valid liens against it, it is necessary to start with the property's value. However, there is no direct evidence of that value on September 20, 2005. Rather, the evidence focuses on WECO's secured debt (i.e. "valid liens") of $5,760,108 and other debt in the amount of $1,357,491. While that information, particularly the amount of the secured debt, may be important in determining whether the transferred property was an "asset" within the meaning of Section of 3576(1), it is not sufficient indirect evidence of the property's value. In particular, it is not sufficient to enable the court to conclude that the value of that property was greater than the amount of the debt that it secured.

Similarly, the record in this case is devoid of evidence tending to prove the fair market value of the WEPI common stock issued to WECO.[21] As a result, Camelot has not

[21] Section 4.01 of the IRS's Revenue Ruling 59-60 emphasizes that in valuing the stock of a closely held corporation, all available financial data as well as all relevant factors affecting the fair market value, should be considered, including the following:

(a) The nature of the business and the history of the enterprise from its inception.
(b) The economic outlook in general and the condition and outlook of the specific industry in particular.
(c) The book value of the stock and the financial condition of the business.
(d) The earning capacity of the company.
(e) The dividend-paying capacity.
(f) Whether or not the enterprise has goodwill or other intangible value.
(g) Sales of the stock and the size of the block of stock to be valued.
(h) The market price of stocks of corporations engaged in the same or a similar line of business having their stocks actively traded in a free and open market, either on an exchange or over-the-counter.

established the value of the property WECO received "in exchange" in the transaction with WEPI.

Based on the foregoing, Camelot has not sustained its burden of proving that WECO did not receive a reasonably equivalent value in exchange for the property it transferred to WEPI. However, the court's analysis does not end here.

B. Obligation (Prospect Loan) Incurred

Although Camelot has not distinguished between the "transfer" of WECO's assets and the "obligation" Camelot undertook in connection with the Prospect loan, the court understands Camelot's UFTA claim to include an allegation that the joint and several "obligation" WECO undertook on September 21, 2005 (i.e. the Prospect Loan) was also fraudulent under Section 3576(1). Here again, concludes that Camelot has failed to meet its burden.

First, as a threshold matter, it would appear that Prospect, as the obligee, is a necessary party to any action seeking to void the allegedly fraudulent obligation. Indeed, it would appear that, with respect to a claim under the UFTA directed at the Prospect Loan, Prospect is the only party against whom Camelot may obtain a judgment. *See* 14 M.R.S. §§ 3578(1) & 3579(2)(B) (explaining that when a creditor prevails on a claim seeking to avoid a fraudulent obligation, judgment may be entered against the obligee). In this case, Prospect is not a party to Camelot's UFTA claim and, for that reason, Camelot is not entitled to the relief it seeks.

Even if Camelot could seek avoidance of the Prospect Loan through a claim against WEPI, a co-obligor, Camelot's claim fails on the merits. As outlined above, under the

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Rev. Rul. 59-60, 1959-1 C.B. 237, 239

terms of the Prospect Loan, Prospect loaned $10,750.000 to WECO, WEPI, and Biochips as joint borrowers. According to the terms of the Credit Agreement, approximately $7,117,599 of the proceeds of that loan was allocated to WECO to pay off its debt. Approximately $562,874 went to various closing costs and financing fees associated with the loan. Another $1,000,000 was allotted for WECO working capital while $1,451,527 was kept in reserve for various purposes. Finally, $600,000 went to Biochips, a co-obligor, as "working capital." In sum, therefore, the "obligation" at issue here, liability on a $10,750,000 loan for which WECO, WEPI and Biochips were jointly and severally liable, was undertaken in exchange for $10,750,000 in loan proceeds actually given to and used by debtors, who had a common business purpose related to the viability of the Deblois power plant, for working capital and to pay off debt. Based on the foregoing, the court cannot conclude that WECO, for its part, incurred this obligation in exchange for less than "reasonably equivalent value."[22]

VI. Judicial Dissolution of WECO (BCD–WB–CV–07–35)

Finally, Camelot seeks the judicial dissolution of WECO pursuant to 13-C M.R.S. § 1430(3)(B), which provides in relevant part that "[a] corporation may be dissolved by a judicial dissolution in a proceeding by [a] creditor if it is established that [t]he corporation has admitted in writing that the creditor's claim is due and owing and the corporation is insolvent …". *Id*. Thus, in this case, Camelot must establish (a) that WECO has admitted in writing (b) that Camelot's claim under the Fee Agreement is due and owing and (c) that WECO is insolvent.

[22] In addition to the value of the loan proceeds themselves, the court also notes that "reasonably equivalent value" under the UFTA can also include "indirect benefits" such as the ability of a debtor to continue operating its business or, perhaps, the avoidance of foreclosure. *See e.g. In re Jumar's Castle Lodge, Inc.*, 329 B.R. 837, 843-45 (Bankr. C.D. Ill. 2005); and *In re Dayton Title Agency*, 292 B.R. 857, 875 (Bankr. S.D. Ohio 2003).

As to the first of these three factors, Camelot points to the Fee Agreement and the Camelot Mortgage as evidence of WECO's admissions in writing that it owes Camelot money. As to the second, Camelot asserts that WECO is in default of its obligation to pay Camelot under the Fee Agreement and that, therefore, the debt evidenced by that agreement is and remains "due and owing." The third requires little discussion. The evidence is clear that WECO is insolvent.

WECO counters that Camelot cannot prevail on its claim for judicial dissolution based on the Fee Agreement or the Camelot Mortgage because the debt reflected in those documents was effectively subordinated to the Prospect Loan and will not become "due and owing" until after WECO's debt to Prospect has been discharged. Since Prospect's debt has not been discharged, and likely never will be, WECO contends that, as a matter of law, Camelot debt is not due and owing and, therefore, those documents cannot stand as admissions of that critical element.

The evidence adduced at trial demonstrates that WECO, along with WEPI and Biochips, defaulted on the Prospect Loan. The court understands that Prospect has foreclosed on the Deblois plant and has acquired it as a result of the foreclosure sale. However, there is no evidence in this record demonstrating that the Prospect Loan was "paid in full in cash and the Loan Agreement … irrevocably terminated." See Defs. Exh. 11, Subordnation Agreement at 3–4, § 2.2(a)(d). By action of that loan default, the Subordination Agreement prohibits monthly payments to Camelot under the Fee Agreement. Indeed, had these preconditions to payment, outlined in the Subordination Agreement, been satisfied such that Camelot's claim under the Fee Agreement was, in fact, "due and owing," Camelot would presumably have sued on the Fee Agreement rather than attempted to collect

under the various alternative theories advanced in this case. Thus, Camelot does not have the right to enforce WECO's obligation to make those payments and they are not now due and owing.

Accordingly, Camelot has not established a critical element necessary for Judicial Dissolution under 13-C M.R.S. § 1430(3)(B).

DECISION

Based on the foregoing and pursuant to M.R. Civ. P. 79(a), the Clerk is directed to enter this Order on the Civil Docket by a notation incorporating it by reference, and the entry is

A. Judgment for Defendant Worcester Energy Company, Inc., on Counts I through IV of Plaintiff's Complaint in BCD-CV-07-36;

B. Judgment for Defendant Worcester Energy Partners, Inc., on Plaintiff's Complaint for Avoidance of Fraudulent Transfers in BCD-CV-08-05; and

C. Judgment for Defendant Worcester Energy Company, Inc., on Plaintiff's Complaint for Judicial Dissolution in BCD-CV-07-35.

C. Neither party is awarded its costs of this action.

Date: December 24, 2009

s/Thomas E. Hunphrey
Chief Justice, Superior Court