STATE OF WISCONSIN CIRCUIT COURT MILWAUKEE COUNTY

WISCONSIN INTERNATIONAL ELECTRIC POWER, LTD., a Cayman Islands corporation,

Plaintiffs,

Case No. 98-CV-002281

WISCONSIN ELECTRIC POWER COMPANY, a Wisconsin corporation,

Defendant,

and,

WISCONSIN ELECTRIC POWER COMPANY, a Wisconsin corporation,

Plaintiff,

WISCONSIN INTERNATIONAL ELECTRIC POWER, LTD., a Cayman Islands corporation, and GEORGE ZAFEROS,

Defendants.

Wisconsin Electric Power Company's Brief in Support of its Motion for Summary Judgment

INTRODUCTION

These consolidated cases arise, respectively, from the contemplated development of an electrical power plant facility at Subic Bay in the Philippines (Wisconsin International Electric Power, Ltd. -- "WIEP" -- v. Wisconsin Electric Power Company -- "WEPCO"), and from

WEPCO's loans of money to WIEP in connection with WIEP's efforts to market certain equipment which WEPCO desired to sell (WEPCO v. WIEP).

The central theme of WIEP's claim against WEPCO is that the parties were allegedly involved in a joint venture to develop the Subic Bay facility. As demonstrated below, there was no such joint venture. Accordingly, WEPCO is entitled to summary judgment dismissing Count I ("Breach of Joint Venture Agreement") and Count II ("Breach of Fiduciary Duty"), which is premised on the existence of the alleged joint venture.

For the reasons shown below, WEPCO is also entitled to dismissal of WIEP's Count III ("Unjust Enrichment"), Count IV ("Breach of Implied Contract") and Count VI ("Intentional Misrepresentation").

WEPCO is also entitled to summary judgment on its own claim that WIEP and Zaferos are presently obligated to WEPCO for principal and accrued interest, for debts currently due and payable. These debts are evidenced by eight promissory notes given to WEPCO by WIEP, George Zaferos International, Ltd. and George Zaferos ("Zaferos")[1]. WEPCO has fully performed its only contractual obligation under the eight notes and correspondent agreements (the loan of money to WIEP), and is now entitled to summary judgment on its claims of dishonor against WIEP and Zaferos and its claim of breach of contract of guaranty against Zaferos.

FACTUAL BACKGROUND

[1] The promissory notes and supplements thereto are attached to the Affidavit of David Porter as Exhibit 1.

Wisconsin Electric Power Company ("WEPCO") is a Wisconsin corporation engaged in the public utilities business in the states of Wisconsin and Michigan. (Porter Aff. at ¶ 3).[2] Wisconsin International Electric Power, Ltd. ("WIEP") is a Cayman Islands corporation that is allegedly in the business of selling electric power generation equipment and developing electric power generation plant projects. (WIEP Answer at ¶ 2).[3] George Zaferos is a principal of WIEP.

In 1994, WEPCO had certain electric power generating equipment for which it had no use ("the Kimberly equipment"). (Porter Aff. at ¶ 4). Originally, the Kimberly equipment was to have been installed at a cogeneration facility in Kimberly, Wisconsin. (Porter Aff. at ¶ 5). Eventually, however, WEPCO learned that the Public Service Commission of Wisconsin was not going to approve the Kimberly cogeneration facility and, therefore, the Kimberly equipment could not be used at that facility. (Porter Aff. at ¶ 6). George Zaferos ("Zaferos"), among hundreds of other equipment brokers, approached WEPCO about the possibility of arranging to sell the Kimberly equipment. (Porter Aff. at ¶¶ 7-8). Zaferos and WIEP were fully aware that WEPCO's concern was the sale of the Kimberly equipment.

Zaferos presented many proposals to WEPCO respecting the sale of the Kimberly equipment; however, none of them materialized. Some of these involved the development of power plant projects in various places, including Togo, Benin, U.S. Virgin Islands, Pakistan, Malaysia, and Singapore. (Porter Aff. at ¶ 9). Ultimately, one of Zaferos' many proposals emerged as the most viable way to sell the Kimberly equipment—a power plant project in Subic Bay, Philippines.

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[2] The affidavit of David Porter is attached to this brief as Exhibit A.

[3] See, WIEP's Answer to WEPCO's Complaint, Case No. 98-CV-006333.

Zaferos assured WEPCO that his efforts to market the Kimberly equipment were viable, but that he needed additional cash to continue his efforts. From December 14, 1994 through April 24, 1996, WEPCO loaned WIEP a total of $1,285,808 as evidenced by eight promissory notes made and delivered by George Zaferos International, Ltd., WIEP and Zaferos. (Porter Aff. Exh. A). The first note imposed an annual interest rate, compounded monthly, equal to the prime interest rate as published in the *Wall Street Journal* on the first day of each month of compounding. (Id.) The seven subsequent notes imposed an annual interest rate, compounded monthly, equal to the prime interest rate as published in the *Wall Street Journal* plus 3 percent as published on the first business day of the month being compounded. (Id.) Zaferos personally guaranteed each of the notes. (Id.)

Through extensions of time, the due dates of the eight notes were extended to May 12, 1998. As of March 1, 1999, WIEP and Zaferos have not paid any amount on the notes. (Porter Aff. at ¶ 12).

On November 24, 1995, WEPCO, WIEP and the Subic Bay Metropolitan Authority ("SBMA"), a government controlled corporation that manages the Subic Bay Freeport Zone, entered into a Preliminary Memorandum of Agreement ("PMOA").[4] The PMOA said that WIEP was responsible, among other things, for constructing the Subic Bay power station ("Subic Bay Project") and sourcing the financing of it. (Porter Aff. Exh. 2 at ¶ 1). WEPCO's role under the PMOA was the eventual sale of two 46 MW simple cycle combustion turbines as well as fuel

[4] The Preliminary Memorandum of Agreement is attached to the Affidavit of David Porter as Exhibit 2.

and operating and maintenance ("O&M") services for the project, and the provision of a performance guaranty on such terms as it would agree to. (Id. at ¶ 2).

In March of 1996, WEPCO and WIEP executed an Equipment Sales Agreement ("ESA") which contemplated the sale of the Kimberly equipment from WEPCO to WIEP or WIEP's assignee.[5] The ESA called for the phased sale of two single cycle 46 MW combustion turbines on deferred payment terms, and contained other provisions which are discussed below.

In paragraph 28 of the ESA the parties agreed that the "**relationship of the parties hereto is that of independent contractors and is not, and shall not be deemed or implied to be, one of agency, partnership or joint venture. . . [n]o party has the authority to bind the others in any manner and shall not hold itself out or make any representation or statement to the contrary**." (emphasis added) (Porter Aff. Exh. 3 at ¶ 28). This provision manifests the intent of WEPCO and WIEP to define their relationship, and was negotiated by the parties and their attorneys—Whyte Hirschboeck Dudek and Quarles & Brady. (Diaz Aff. at ¶¶2-3).[6] This provision was not included in the original drafts of the ESA, but was added during the course of negotiations. (Diaz Aff. at ¶ 3).

Paragraph 24 of the ESA is an integration or merger clause, providing "[t]his Agreement, and the other documents referred to herein contain the entire understanding of the parties with respect to the subject matter hereof . . . [t]here are no restrictions, promises, warranties, covenants or undertakings concerning the subject matter hereof other than those expressly set

[5] The final Equipment Sales Agreement is attached to the Affidavit of David Porter as Exhibit 3.

[6] The Affidavit of Robert Diaz is attached to this brief as Exhibit B.

forth in this Agreement . . . [t]his agreement supersedes all prior negotiations, agreements and undertakings between the parties with respect to the subject matter." (Porter Aff. Exh. 3 at ¶ 24). This provision, too, was inserted during the course of the parties' negotiation of the ESA. (Diaz Aff. at ¶ 4).

Paragraph 3 of the ESA contains fourteen conditions precedent to WEPCO's obligation to sell the equipment to WIEP. (Porter Aff. Exh. 3 at ¶ 3). These conditions included, among others: (1) a final Power Sales Agreement between WIEP and SBMA providing for the sale and purchase of power over the term of twenty-five years, certain performance guarantees by WEPCO, and other matters contemplated in the PMOA; (2) an operation and maintenance agreement between WEPCO and WIEP, including arrangement for WEPCO's compensation therefor; (3) a fuel supply agreement between WEPCO and WIEP; (4) a standby power agreement between WIEP and National Power Corporation of the Philippines, a government owned utility; (5) environmental certification of the Subic Bay Project, including all related approvals necessary to operate the equipment; (6) all necessary Governmental approvals; and, (7) adequate financing for the development and construction of the Subic Bay project. (Id.).

The conditions precedent to the ESA were included for the benefit and protection of WEPCO, to shield it from precisely the situation that evolved—the failure of WIEP to plan and develop a feasible project that would generate sufficient income to enable WIEP to pay WEPCO for the equipment. The issues concerning these conditions precedent and their non-performance by WIEP are not material to this motion, but are central to WIEP's remaining claim for alleged breach of contract.

In late March 1996, WEPCO and WIEP executed a supplement to the ESA,[7] which established payment priorities respecting the possible income stream from the Subic Bay project; i.e., the manner in which WIEP would pay back WEPCO for the equipment. The supplement to the ESA declared "***if the conditions precedent to the [ESA] are satisfied and the transaction as contemplated is implemented*, all outstanding loans by WEPCO to WIEP, and all accrued and unpaid interest, shall be capitalized and evidenced by a single Note providing for equal monthly payments of principal and interest to be capitalized over a 25 year period including interest calculated at 10.5% interest per annum**." (emphasis added) (Porter Aff. Exh. 4 at ¶ 4). The conditions precedent contained in the ESA were, however, never satisfied and WIEP did not implement the transaction as contemplated. As such, the loans made by WEPCO to WIEP were never consolidated into a single note payable over twenty-five years, and currently remain overdue and unpaid.

On March 20, 1996, WEPCO and WIEP executed a Memorandum of Agreement ("MOA")[8]. The MOA stated that WIEP required an additional sixty days to complete the conditions precedent contemplated by the ESA and provided such additional time. (Porter Aff. Exh. 5 at p. 1). Pursuant to the MOA, WIEP remained responsible for obtaining the financing for the development of the Subic Bay Project, procuring the necessary permits, and constructing the power station. (Id. at ¶ 1). The MOA clearly states, "WIEP shall be responsible for procuring building, operating and other permits, licenses and other approvals for the Project, . . .

[7] The Supplement to the final Equipment Sales Agreement is attached to the Affidavit of David Porter as Exhibit 4.

[8] The Memorandum of Agreement is attached to the Affidavit of David Porter as Exhibit 5.

sourcing the financing for the project to the extent not provided by WEPCO under the [ESA], . . . constructing a power station according to such specifications as may be agreed between SBMA and WIEP and in compliance with applicable laws and regulations. . . . " (Id.).

On several occasions after executing the ESA and its supplement, WEPCO explicitly told WIEP that time was of the essence and that WIEP had a discrete and definite period in which to satisfy the necessary conditions precedent under the ESA. A corollary agreement to the last promissory note[9], dated April 24, 1996, states that WEPCO was giving WIEP sixty days to conclude "financing and other essential arrangements." (Porter Aff. Exh. 6 at pp. 2-3). During that period, WIEP satisfied neither the condition concerning financing, nor various other conditions precedent. WEPCO, however, remained hopeful that it could sell the Kimberly Equipment to WIEP for use in its Subic Bay project.

In April, 1998, WEPCO sold to Wisvest, an affiliate, the two combustion turbines that were the subject of the ESA. (Finke Aff. at ¶ 3). The equipment sold to Wisvest included a third combustion turbine as well as other equipment, and the purchase price was $36.6 million. If WIEP had purchased just two of the turbines, the purchase price under the ESA in 1996 would have been in excess of $35 million. (Id.)

ARGUMENT

I. WIEP'S CLAIM FOR BREACH OF FIDUCIARY DUTY, COUNT I OF ITS COMPLAINT, SHOULD BE DISMISSED BECAUSE WEPCO AND WIEP WERE NOT ENGAGED IN A JOINT VENTURE

[9] The Supplemental Agreement to the Promissory Note, dated April 26, 1996, is attached to the Affidavit of David Porter as Exhibit 6.

A. Standard for Summary Judgment

Summary judgment must be granted "where there is no factual dispute or where no competing inferences arise from undisputed facts and the law resolving the issues is clear." Tomlin v. State Farm Mutual Automobile Liability Insurance Company, 95 Wis.2d 215, 290 N.W.2d 285, 287 (1980). "The purpose of summary judgment procedure is not to try issues of fact but to avoid trials where there is nothing to try." Rollins Burdick Hunter v. Hamilton, 101 Wis.2d 460. 304 N.W.2d 752, 757 (1981).

The procedure the Court should follow in evaluating a motion for summary judgment is well established. The Court should examine the pleadings, depositions, answers to interrogatories and affidavits to determine if there are any disputed issues of material fact. Green Spring Farms v. Kersten, 136 Wis.2d 304, 315, 401 N.W.2d 816 (1987). If there are no disputed issues of fact, and the moving party is entitled to judgment as a matter of law, summary judgment must be entered. Id.

The party opposing summary judgment may not rest upon mere averments in his or her pleadings, nor may he or she oppose the motion merely by submitting counter affidavits containing only argumentative conclusions of law, hearsay, statements of ultimate fact, or assertions based on information and belief. Board of Regents v. Mussallem, 94 Wis.2d 657, 672, 289 N.W.2d 801 (1980) (resting on pleadings); Krieg v. Dayton-Hudson co., 104 Wis.2d 455, 465, 311 N.W.2d 641 (1981) (conclusions of law and ultimate fact); West Side Bank v. Marine Nat. Ex. Bank, 37 Wis.2d 661, 666, 155 N.W.2d 587 (1968) (information and belief).

The mere existence of an alleged factual dispute between parties will not defeat an otherwise properly submitted motion for summary judgment; there must be a genuine issue of

material fact. Baxter v. Wisconsin Dept. Of Natural Resources, 165 Wis.2d 298, 477 N.W.2d 648 (Ct.App. 1991). A factual issue is only a "genuine issue of material fact" if the evidence is such that a reasonable jury could return a verdict for the non-moving party. Id.

Where the facts are undisputed in an unambiguous contract, whether a joint venture exists is a question of law appropriate for summary judgment. See, Reserve Life Ins. Co. v. LaFollette, 108 Wis.2d 637, 645-46, 323 N.W.2d 173, 177 (Ct.App. 1982).

B. WIEP Cannot Establish the Four Requisites to the Existence of a Joint Venture Between the Parties

Under well established Wisconsin law, four "requisites" are "essential" to the existence of a joint venture:

> (1) contribution of money or services but not necessarily in equal proportion by each of the parties;
>
> (2) joint proprietorship and mutual control over the subject matter of the venture;
>
> (3) an agreement to share profits though not necessarily the losses, and;
>
> (4) a contract express or implies establishing the relationship.

Edlebeck v. Hooten, 20 Wis. 2d 83, 88, 121 N.W.2d 240, 243 (1963); See also, Mortgage Associates, Inc. v. Monona Shores, Inc., 47 Wis.2d 171, 183, 177 N.W.2d 340, 348 (1970); Ruppa v. American States Insurance Co., 91 Wis.2d 628, 284 N.W.2d 318.

The four elements of this test are expressed in the conjunctive, and all four must therefore be present in order for a joint venture to exist. Accordingly, in Ruppa, *supra* at 91 Wis.2d at 645, 284 N.W.2d at 325, the Supreme Court cited the four Edlebeck elements in determining whether

a joint venture existed, and based its holding of no joint venture solely on the absence of the third element.

A joint venture is a voluntary relationship based wholly on contract. Employee Mutual Liberty Insurance Co. of Wausau v. Parker, 266 Wis.2d 179, 181, 63 N.W.2d 101, 102 (1954). Because it is voluntary, "there must be intent on the part of all of the parties to create [the] joint venture." Mortgage Associates, Inc. v. Monona Shores, Inc., 47 Wis.2d 171, 183, 177 N.W.2d 340, 348 (1970). That is, each party "must agree expressly or impliedly to a community of interest as to the purpose of the undertaking and to stand in relation of agent as well as principal to the other co-adventurers with equal right of control." Edlebeck, 20 Wis.2d at 87. Thus, the pooling of property, money, assets, skill, or knowledge does not by itself create the relationship of a joint venture. 46 Am. Jur. 2d Joint Ventures, §12. "Actual intent to form a joint venture is essential." Id.

C. The Relationship Between WEPCO and WIEP was Contractual, and Meets None of the Four Edlebeck Tests

WEPCO and WIEP expressly agreed that their relationship was not a joint venture, that neither of them was the other's agent or partner, and that neither of them had the authority to bind the other. The final ESA of March 14, 1996 states at paragraph 28:

> The relationship of the parties hereto is that of independent contractors and is not, and shall not be deemed or implied to be, one of agency, partnership or joint venture. No party has the authority to bind the others in any manner and shall not hold itself out or make any representations to the contrary.

(Porter Aff. Exh. 3 at ¶ 28). The parties intended this to be the entire delineation of their relationship. Paragraph 24 of the ESA is an integration clause which states, among other things, that "there are no promises . . . or undertakings concerning the subject matter hereof other than those expressly set forth in this Agreement,"

and that the ESA "supersedes all prior negotiations, agreements and undertakings between the parties with respect to the subject matter." Id.

WEPCO and WIEP were both represented by counsel during the arms-length negotiation of the ESA. There were successive drafts of the ESA. Significantly, paragraph 28 was not in the earliest draft of the agreement, but was inserted by agreement of the parties during the course of their negotiations.

The ESA's essential terms are that WEPCO would sell, and WIEP or its assignee would buy, parts of the Kimberly equipment as well as fuel supply and O&M services, all subject to WIEP's performance of numerous conditions precedent (see above). Neither the parties' conduct nor any subsequent agreement between them ever altered those essential terms, or their agreed-upon definition of their relationship and its limits.

1. WEPCO Made no Contribution of Money or Services to the Subic Bay Project

To establish the first element of the Edlebeck test for the existence of a joint venture, WIEP would have to show that each party made a contribution of money or services. WEPCO's agreement, however, was to sell—not to contribute in exchange for anything except payment—the equipment and services described in the ESA. Even if the ESA's terms of deferred payment for the equipment were to be characterized as a form of financing for a portion of that sale, the Wisconsin Supreme Court has held that a joint venture contribution does not arise simply because a party provides financing for a project. Mortgage Associates, Inc. v. Monona Shores, Inc., 47 Wis.2d 171, 177 N.W.2d 340 (1970).

In Mortgage Associates, contractors involved in litigation regarding an apartment complex attempted to establish that the plaintiff mortgage corporation which financed the project was, in fact, part of a joint adventure with the owner of the property and other contractors.

Id. at 173-75, 344-45. The Supreme Court rejected that argument, and held that the provision of financing for the project did not create a joint venture. Id at 183, 348.

2. WEPCO did not Exercise, and had no Right to Exercise, Proprietorship and Control Over the Subic Bay Project

In order to establish the second element of a joint venture, WIEP would have to show that each party had a right to exercise control over the joint venture. That is, each of the parties must have had an equal voice in the manner of the performance of the subject of the venture, and each must have had equal control over the agencies used in the performance the venture. Bowers v. Treuthardt, 5 Wis.2d 271, 280-81, 92 N.W.2d 878, 883 (1958).

The ESA, however, made WIEP solely responsible for developing the Subic Bay Project. WIEP was to form and organize the Philippine corporation which would own and operate the project; WIEP was to lease land for the project and obtain a power supply agreement with SBMA; WIEP was to obtain financing for the project; WIEP was to obtain a standby power agreement and environmental and governmental approvals. (Porter Aff. Exh. 3 at ¶ 3). WEPCO, on the other hand, was to sell its equipment and charge interest on the purchase price (Id at ¶¶ 2, 4, 5); was to provide O&M services "as a contractor to WIEP or its assignee," and to be paid for doing so (Id at ¶ 9); and was to sell fuel to the project at prices that would cover its costs, risk and profit (Id at ¶ 10).

Nothing in the ESA gave WEPCO any right of control over WIEP and, as shown above, the parties expressly agreed that neither had the right to bind the other "in any manner." (Id at ¶ 28). To the extent that the parties' agreements placed restrictions on WIEP's use of hoped-for project revenues, these merely reflect WEPCO's interests as an anticipated substantial creditor. Compare, Monona Shores, *supra*, in which the Supreme Court held that a lender's exercise of

financial control over a project did not constitute "joint mutual control" under the Edlebeck test. 47 Wis.2d at 183-84, 177 N.W.2d at 349.

Zaferos has in fact conceded that WEPCO did not have any control over WIEP's business other than the provision of equipment. (Zaferos Dep. at p. 153).[10] WIEP ran its own business, including its wholly-owned subsidiary in the Philippines, WIEP Philippines, Ltd. WIEP had its own offices, had its own attorney, handled its own personnel, paid its employees salaries and handled its own business expenses.

That there may have been some coordination and cooperation between the two corporations is not tantamount to an equal right to control all of the particulars involved in the Subic Bay Project. See, Mortgage Associates, 47 Wis.2d at 183, 177 N.W.2d at 348-49 (1970).

3. The Parties had no Agreement to Share Profits

To establish the third Edlebeck element, WIEP would have to show more than a mere profit motive on WEPCO's part. There would have to be an actual "agreement to share profits" of the project. There was no such agreement.

The anticipated repayment of principal and interest to WEPCO for its equipment is not an agreement to share profits. The Supreme Court has expressly held that in the joint venture context, loan fees and interest are not profits, but merely expenses. In its discussion in Monona Shores, *supra*, it rejected the assertion that such payments could be characterized as a sharing of profits under the Edlebeck test:

[10] Page 153 of the deposition transcript of George Zaferos, dated February 5, 1999, attached to the Affidavit of Matthew J. Kading as Exhibit 1.

> There is no agreement to share any profits of this project. Loan fees and interest were paid but these are not profits but rather from a joint-venture standpoint such items are expenses.

Monona Shores, 47 Wis.2d at 183-84, 177 N.W.2d at 349.

Nor is there any significance in the obvious fact that contemplated repayments to WEPCO would depend upon the project's relative success. In Estate of Starer, 20 Wis. 2d 268, 121 N.W. 2d 872, the Supreme Court considered a relationship in which a party advanced money to a business, with repayment to be made upon the business' collection of its accounts receivable and with the amount of interest "dependent on the profit" from the business' transactions. Id at 270, 874. The Court held that this arrangement did not constitute "an agreement to share profits" under Edlebeck, and therefore did not give rise to a joint venture. Id. at 273-74, 875-76.

In support of its holding, the Starer Court found "applicable" to its joint venture analysis a provision of Wisconsin's partnership statute which provided that "no inference of a partnership can be drawn because one of the parties shares in the profits of a business venture in the payment of a debt as interest on a loan even though the amount he is paid varies with the profits of the business." Id. at 272-73, 875-76. The analogous statutory provision today is found in § 178.04 (4), Wis. Stats., which provides in relevant part that:

> The receipt by a person of a share of the profits of a business is prima facie evidence that the person is a partner in the business, but no such inference shall be drawn if profits were received in payment of a debt by installments or otherwise . . . [or] as interest on a loan, though the amount of payment vary with the profits of the business . . . .

(emphasis added).

Under Starer, the "trial court could draw no inference of a joint adventure from the fact that the [party] was to share in the profits . . . of the business in the payment of debt as interest on

the loan." Starer, 20 Wis.2d at 274-74, 121 N.W.2d at 875. Exactly the same is true with regard to WEPCO's contemplated extension of credit in its equipment sale to WIEP.

4. WEPCO and WIEP had no Express or Implied Contract to Form a Joint Venture

In order to establish the fourth Edlebeck element, WIEP would have to prove that an express or implied contract exists establishing the joint venture. Insurance Company of North America v. I.L.H.R. Dept., 45 Wis.2d 361, 366, 173 N.W.2d 192, 195 (1970).

These parties, however, expressly considered the nature of their relationship during negotiations of the ESA, and expressly agreed that their relationship was not a joint venture. (Porter Aff. Exh. 3 at ¶ 28; see discussion *supra*). Their agreement, which is further circumscribed by the ESA's integration clause (Id. at ¶ 24; see discussion *supra*), was reached in the course of extensive negotiations in which each part was represented by counsel (Diaz affidavit at ¶ 3), and did not appear until after the initial draft of the ESA (Id. at ¶ 4).

It is black letter law that a court is to determine the intent of the parties to a contract from the written words they chose to use. Here, there is nothing remotely ambiguous about the parties' words, which they negotiated with the assistance of their respective attorneys: They agreed their relationship was one of "independent contractors;" they disclaimed any agency or joint venture; and it cannot reasonably be claimed that they intended otherwise.

D. WEPCO Owes no Fiduciary Duty to WIEP as Alleged in Count II of WIEP'S Complaint Because their Arms-Length Business Transaction does not Rise to the Level of a Joint Venture

WIEP bases its claim for breach of fiduciary duty upon its assertion that it and WEPCO were parties to a joint venture. Because, as shown above, there was no joint venture, WEPCO did not owe WIEP any such fiduciary duties.

II. WEPCO HAS NOT BEEN UNJUSTLY ENRICHED BY WIEP, AS ALLEGED IN COUNT III OF WIEP'S COMPLAINT.

In order to show unjust enrichment under Wisconsin law, WIEP would have to establish: (1) that it conferred a benefit on WEPCO; (2) appreciation or knowledge by WEPCO of the benefit, and (3) acceptance or retention of the benefit by WEPCO under circumstances making it inequitable for WEPCO to retain the benefit. Ward v. Jahnke, 220 Wis. 539, 545-46, 583 N.W.2d 656, 659 (1998); Dunnebacke v. Pitmann, 216 Wis. 305, 257 N.W. 30 (1934).

A. WIEP did not Confer a Benefit on WEPCO

In order to establish the first element of an unjust enrichment claim, WIEP would have to show that it conferred some benefit on WEPCO. WIEP conferred no such benefit.

The Supreme Court has held that unjust enrichment does not result where, because of an unfulfilled agreement requiring a vendor to retain property, the vendor is later allowed to sell the property to some third party -- even if the sale represents a gain. Estate of Lade v. Ketter, 82 Wis.2d 80, 85, 260 N.W.2d 665, 668 (1978). In Lade, a neighbor claimed that Lade had promised to sell him property for $8,000. Id. at 83. Lade subsequently died, and his estate sold the farm to a third party for $29,500. Id. at 85. The neighbor argued that because the property was not sold to him as contemplated by the parties' agreement, the estate was allowed to later sell the property at much greater price. Id. Therefore, the neighbor argued, the estate was unjustly enriched in the amount of $21,500, the contract price difference. Id.

The Supreme Court rejected the neighbor's argument, stating:

> This is not unjust enrichment. For unjust enrichment to apply, the estate . . . would have to have received valuable consideration from [the neighbor]: Down payments, full payment, or substantial improvements to the [property]. Under unjust enrichment a person is seeking the return of money actually expended; there must be a benefit conferred upon the defendant.

Id. (citing Arjay Investment Co. V. Kolmetz, 9 Wis.2d 535, 538, 101 N.W.2d 700 (1960); Don Ganser & Associates, Inc. v. MHI, Inc., 31 Wis.2d 212, 216, 142 N.W.2d 781 (1966)).

As Lade indicates, the fact that WEPCO was able to sell its equipment to a third party is not sufficient to give rise to liability for unjust enrichment. WIEP has conferred no benefit upon WEPCO, either in the form of money or substantial improvements to the Kimberly equipment. Nor did WEPCO sell the Kimberly to a third party for a gain, as occurred in Lade. On the contrary, it eventually sold the equipment for millions of dollars less that the purchase price provided in its ESA with WIEP.

Aside from expenditures related to their Subic Bay project, WIEP did not make down payments or full payments to WEPCO, nor did WIEP improve the Kimberly equipment. There is no significance in the fact that WIEP expended money for its own benefit. See, Lawlis v. Thompson, 137 Wis.2d 490, 499 n. 1, 405 N.W.2d 317, 320 n. 1 (1987) (stating that "a loss to the plaintiff without an actual benefit to the defendant is not recoverable as unjust enrichment.").

B. WEPCO Received no Benefit From WIEP When it sold the Equipment to a Third Party.

Under Wisconsin law, WIEP must establish that WEPCO accepted or retained a benefit conferred upon it by WIEP. Ward, 220 Wis. at 539, 583 N.W.2d at 659. Even if WIEP could identify any arguable benefit it created in connection with the Kimberly equipment, WEPCO's sale of the equipment at a lower purchase price demonstrates that it received and retained no such benefits.

WEPCO eventually sold the Kimberly equipment to a third party. WIEP does not contend that it played any role in this sale; if it were to make such a claim, WEPCO is prepared to disprove it. Most importantly, the equipment's sale price was substantially less than the price specified in the ESA, and the sale thus conferred no benefit on WEPCO; therefore, WEPCO received no benefit from its dealings with WIEP.

III. THERE IS NO FACTUAL BASIS FOR THE IMPLIED CONTRACT CLAIM ALLEGED IN WIEP's COUNT IV.

WIEP's claim for breach of alleged implied contract is premised on the unexplained, and unsupportable, premise that "WEPCO sold the Kimberly equipment at a price greater than it would have had WIEP not created a 'buyer' for the equipment." (WIEP's Complaint, ¶ 72.)

As shown above, however, WEPCO actually sold the Kimberly equipment for less than the price specified in the ESA. There is, accordingly, no basis for this claim.

IV. WIEP HAS NOT ADEQUATELY ALLEGED, AND CANNOT PROVE, ANY ACTIONABLE MISREPRESENTATION OF FACT IN COUNT VI OF ITS COMPLAINT

It is well established in Wisconsin that, in order to prove intentional misrepresentation, WIEP would have to establish that: (1) WEPCO made a false representation of fact to WIEP; (2) the false representation was made with intent to defraud and for the purpose of inducing WIEP to

act upon it; and (3) WIEP relied on the representation and was thereby induced to act, to its own injury or damage. Lundin v. Shimanski, 124 Wis.2d 175, 184, 368 N.W.2d 676, 680-81 (1985) (internal citations omitted). The party alleging intentional misrepresentation has the burden of proving these elements by clear and convincing evidence. Williams v. Rank & Son Buick, Inc., 44, Wis.2d 239, 242, 170 N.W.2d 807 (1969).

WIEP was required to allege that WEPCO made representations with "intent to defraud and induce [WIEP] to act upon them." Ramsden v. Farm Credit Services of North Central Wisconsin ACA, 1998 WL 890443 (Wis.App. 1998) (citing Grube v. Daun, 173 Wis.2d 30, 53-54, 496 N.W.2d 106, 114 (Ct.App. 1992)). Ramsden and Grube held that a plaintiff attempting to establish intentional misrepresentation must allege this element in its complaint, and WIEP has not done so.

Nor can WIEP satisfy even the first element of its claim, because it has alleged no false "representation of fact." To be actionable, such a representation must relate to some present or pre-existing facts— "it cannot be merely unfulfilled promises or statements of future events." Chitwood v. A.O. Smith Harvestore Products, Inc., 170 Wis.2d 622, 631, 489 N.W.2d 697, 702 (Ct.App.1992) (citing D'Huyvetter v. A.O. Smith Harvestore Products, 164 Wis.2d 306, 320, 475 N.W.2d 587, 592 (Ct.App. 1991)); See also, Alropa Corp. V. Flatley, 226 Wis. 561, 565-66, 277 N.W. 108 (1938) (holding that in an intentional misrepresentation action the plaintiff must show that "the representations relate to present or preexisting facts. . . .").

In Alropa, the Wisconsin Supreme Court denied liability for intentional misrepresentation regarding public improvements to be made in the future. Representations were made by a vendor to the vendee that "a boat canal or water way from the ocean was to be constructed . . . along the

rear line [of the property at issue], so that the [vendee] might enjoy boating and fishing from his back yard." Alropa, 226 Wis. at 563, 277 N.W.2d at 110. The vendor also represented that future public improvements were to be made to the property "to make it a splendid residence property." Id.

The representations that WIEP alleges in its complaint—that WEPCO would cooperate with WIEP in its attempts to obtain financing and that WEPCO would specify replacement equipment after WIEP performed its conditions precedent—are not representations of fact; they are at best promises of future events or performance. Under Alropa, the statements cannot give rise to a cause of action for intentional misrepresentation.

V. WEPCO IS ENTITLED TO REPAYMENT OF THE MONEY LOANED TO WIEP, CURRENTLY DUE AND PAYABLE, AS PROVIDED BY THE PROMISSORY NOTES AND SUPPLEMENTS THERETO

WEPCO and WIEP have both acknowledged the existence of the eight notes and guarantees by Zaferos (WIEP Answer at ¶¶ 4-19). WIEP has conceded that it has not paid any amount under the terms of those notes. (WIEP Answer at ¶ 28). Also, Zaferos has acknowledged that he has not met the payment obligations imposed on him as guarantor of the notes. (WIEP Answer at ¶¶ 5, 7, 9, 11, 13, 15, 17, 19, 22). "The maker of a note is estopped from contradicting the plain language of his note" E.R. Beyer Lumber Co., Inc. v. Brooks, 45 Wis.2d 262, 269, 172 N.W.2d 654, 658 (1969) (quoting 12 Am.Jur.2d, Bills and Notes, § 1252).

Where the nature of the obligations set forth in a promissory note and accompanying guaranty are unequivocal, a court should conclude that there are no issues of material fact for trial and the plaintiff is entitled to summary judgment on the notes. See, Bd. Of Regents of the Univ.

Of Wisconsin v. Mussallem, 94 Wis.2d 657, 672-76, 289 N.W.2d 801, 808-10 (1980); U.S. v. Bachman, 601 F.Supp. 1537, 1541 (E.D.Wis. 1985).

The notes and guarantees made and given by George Zaferos Int'l, Ltd., WIEP and Zaferos are clear and unambiguous contracts for the loan and repayment of a sum certain of money. As such, WEPCO is entitled to summary judgment on its claims against WIEP for repayment under the notes.

These notes should not be considered in conjunction with the PMOA, ESA, Supplement to the ESA or the MOA, which were executed after most of the notes. Unless instruments are executed at the same time between the same contracting parties in the course of the same transaction, a court should not construe the instruments together. See, Harris v. Metropolitan Mall, 112 Wis.2d 487, 496, 334 N.W.2d 519, 523 (1983).

The first promissory note was executed on December 15, 1994, well before execution of the PMOA, ESA or supplement to the ESA. In 1995, three notes were executed—in February, April and August—but were not related in time to the PMOA, which was executed in November. In 1996, four notes were executed—January, February, March and April—with only the March note being proximal in time to the ESA and its supplement.

While the Supplement does reference "all outstanding loans," it does not specifically reference the notes. Even if the notes and related supplements are to be construed with the ESA and its supplement, WIEP is still currently obligated to WEPCO for the principal and interest due under the notes. The essential terms of the supplement to the ESA, negotiated by both parties with the assistance of their attorneys, specifically state that the outstanding loans from WEPCO to WIEP will be consolidated into a single note payable over 25 years:

> "***if the conditions precedent to the [ESA] are satisfied and the transaction as contemplated is implemented*, all outstanding loans by WEPCO to WIEP, and all accrued and unpaid interest, shall be capitalized and evidenced by a single Note providing for equal monthly payments of principal and interest to be capitalized over a 25 year period including interest calculated at 10.5% interest per annum**."

(emphasis added) (Porter Aff. Exh. D at ¶ 4).

There is no contention that the conditions precedent were satisfied, or that the project was implemented as contemplated by the ESA. The intent of the parties is clear: if the project was realized, WIEP was to repay WEPCO for the loans over 25 years. If not, WIEP's obligation to pay ensued after demand by WEPCO. Because the project was not implemented, WEPCO is entitled to the amount it loaned to WIEP under the notes, including interest thereon.

VI. ZAFEROS, AS GUARANTOR, IS LIABLE FOR PAYMENT OF THE AMOUNTS DUE UNDER THE NOTES

WIEP and Zaferos have admitted that WEPCO has made a demand for payment under the notes and that no such payment has been made (WIEP Answer at ¶ 28). Zaferos personally guaranteed the notes as evidenced by his execution of the guaranties attached to the eight notes. Therefore, Zaferos is personally liable for any debts due and owing that were not paid by WIEP.

CONCLUSION

For the reasons described above, WEPCO is entitled to entry of summary judgment dismissing Counts I, II, III, IV and VI of WIEP's Complaint, and granting judgment in its favor on its promissory notes.