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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re ENRON CORP, *et al.*, Debtors.	Chapter 11 Case No. 01-16034 (AJG) Jointly Administered
JPMORGAN CHASE BANK, Plaintiff, -against- GREEN COUNTRY ENERGY, LLC, COGENTRIX OF OKLAHOMA, INC., and COGENTRIX ENERGY, INC., Defendants.	**ORDER** Adv. Pro. No. 03-8151
JPMORGAN CHASE BANK, as Issuing Bank under a $500,000,000 Letter of Credit and Reimbursement Agreement dated as of May 14, 2001 among Enron Corp., the Banks named therein and each eligible assignee thereof that became or becomes a party thereto, JPMorgan Chase Bank and Citibank, N.A., as Co-Administrative Agents, and JPMorgan Chase Bank, as Paying Agent and as Issuing Bank, Plaintiff, -against- QUACHITA POWER, LLC, COGENTRIX OUACHITA HOLDINGS, INC., and COGENTRIX ENERGY, INC., Defendants.	Adv. Pro. No. 03-8150

ORDER GRANTING IN PART AND DENYING IN PART THE MOTIONS TO DISMISS THE COMPLAINTS

WHEREAS, on or about February 23, 2003, Plaintiff JPMorgan Chase Bank ("JPMorgan") filed an Amended Complaint in the United States District Court for the Southern District of New York against Defendants Green Country Energy, LLC, Cogentrix of Oklahoma, Inc., and Cogentrix Energy, Inc.;

WHEREAS, on or about February 23, 2003, Plaintiff JPMorgan Chase Bank filed an Amended Complaint in the United States District Court for the Southern District of New York against Quachita Power, LLC, Cogentrix Quachita Holdings, Inc. and Cogentrix Energy, Inc.;

WHEREAS, on March 18, 2003, the United States District Court (Kaplan, J.) issued an Order granting Defendants' motions to refer both of the aforementioned actions to the United States Bankruptcy Court for the Southern District of New York, where they have been docketed as, respectively, Adversary Proceeding Nos. 03-8151 (the "Green Country Proceeding") and 03-8150 (the "Quachita Proceeding");

WHEREAS, on May 23, 2003, the Defendants moved this Court pursuant to Rule 12(b)(6), Fed. R. Civ. P., made applicable herein by Bankruptcy Rule 7012(b), to dismiss both Amended Complaints in their entirety and filed memoranda of law in support of their motions;

WHEREAS, on July 11, 2003, the Plaintiff filed a memorandum of law in opposition to the Defendants' motions;

WHEREAS, on January 14, 2004, after briefing by the parties, the Court heard oral arguments on the motions to dismiss the Amended Complaints;

WHEREAS, on February 9, 2006, the Court issued a ruling on the record - attached as exhibit "A" to this Order;

WHEREAS, the Court has considered the Proposed Order submitted by the Defendants and the Counter-Proposed Order submitted by the Plaintiff;

WHEREAS, the Court has determined that the Plaintiff has not established that it should be permitted to replead any of its claims; it is hereby

ORDERED that, as to the Green Country Proceeding, Adversary Proceeding No. 03-8151, the Defendants' motion to dismiss JPMorgan's Amended Complaint is granted as to Counts One, Two, Four and Five, and denied as to Count Three; and it is further

ORDERED that, as to the Quachita Proceeding, Adversary Proceeding No. 03-8150, the Defendants' motion to dismiss JPMorgan's Amended Complaint is granted as to Counts Four and Five, and denied as to Counts One, Two and Three.

Dated: New York, New York
March 27, 2006

s/Arthur J. Gonzalez
Arthur J. Gonzalez
United States Bankruptcy Judge

EXHIBIT "A"

Before the Court are the motions filed by Green Country Energy, LLC ("Green Country") and Quachita Power, LLC ("Quachita") to dismiss the complaints (the "Complaints") filed in adversary proceedings 03-8150 and 03-8151. In addition, Cogentrix of Oklahoma, Inc., Cogentrix Energy, Inc and Cogentrix Quachita Holdings, Inc. (the "Cogentrix Defendants") filed motions to dismiss these Complaints. JPMorgan Chase Bank ("Chase") opposes their dismissal.

The claims in the Complaints stem from certain draws made by Green Country and Quachita on various letters of credit (the "Letters of Credit") issued to Green Country and Quachita by Chase, pursuant to a Master Letter of Credit and Reimbursement Agreement with Enron Corp (the "Master Agreement"). The letters of credit were issued to secure the performance by National Energy Production Company, NEPCO Power Procurement Company, and NEPCO Procurement Company (the "NEPCO Entities") with respect to two separate construction projects involving, respectively, Green Country and Quachita. Pursuant to the Master Agreement, Enron was obligated to reimburse Chase for any draws on the Letters of Credit.

Chase alleges that Green Country and Quachita had paid certain sums to the NEPCO Entities which would have been used for the payment of vendors and subcontractors with respect to the construction projects. Chase further alleges that because Enron "swept" this cash just prior to its bankruptcy filing, the result was that, at the time of the filing, the funds became unavailable to the NEPCO Entities and the construction projects were not completed. Consequently, Green Country and Quachita drew on their respective Letters of Credit. Chase

paid the draws. Chase alleges that the draws were wrongful because both construction projects were "completed substantially on time" or, alternatively, with respect to only the Quachita project, it was "deliberately delayed" by Quachita to allow for its draw on the Letter of Credit. Chase alleges that the draws on the Letters of Credit breached the two underlying contracts between the NEPCO entities and Green Country and between the NEPCO Entities and Quachita, respectively, because the conditions for a proper draw had not been met. Chase has not been reimbursed for the draws.

Chase argues that both Enron and the NEPCO Entities were "applicants" on the Letters of Credit. As a result of Chase paying the draws on the Letters of Credit, Chase contends that it is subrogated to Enron's and the NEPCO's Entities rights against Green Country and Quachita. As a purported subrogee of the NEPCO Entities, it brings claims for relief against Green Country and Quachita for their alleged breach of contract and breach of warranty under UCC § 5-110(a)(2), as well as a claim for relief premised upon Green Country and Quachita having induced such breaches. As a purported subrogee of Enron, Chase brings claims for relief against Green Country and Quachita for breach of warranty under UCC § 5-110(a)(2) and for inducing such breach. In addition, Chase brings a claim, in its own behalf, against Green Country and Quachita for unjust enrichment.

The hierarchy of the Cogentrix Entities is as follows: Cogentrix Energy, Inc. owns both Cogentrix of Oklahoma, Inc. and Cogentrix Quachita Holdings, Inc. In turn, Cogentrix of Oklahoma, Inc. owns Green Country. Further, Cogentrix Quachita Holdings, Inc. owns Quachita. The Cogentrix Entities were not parties to the Letters of Credit. In the adversary proceeding filed against the Cogentrix Entitites, Chase asserts claims against them for unjust

enrichment and, as an alleged subrogee of Enron and the NEPCO Entities, for inducing breaches of contract and warranty by Green Country and Quachita.

Fed. R. Civ. P. 12(b)(6) is incorporated into bankruptcy procedure by Fed. R. Bankr. P. 7012(b). In considering a 12(b)(6) motion to dismiss for failure to state a claim for relief, the court accepts as true all material facts alleged in the complaint and draws all reasonable inferences in favor of the plaintiff. *Bolt Elec., Inc. v. City of New York* , 53 F.3d 465 (2d Cir. 1995). The motion to dismiss is granted only if no set of facts can be established to entitle the plaintiff to relief. *Walker v. City of New York*, 974 F.2d 293, 298 (2d Cir. 1992).

In considering such a motion, although the Court accepts all the factual allegations in the complaint as true, the Court is "not bound to accept as true a legal conclusion couched as a factual allegation." *Papasan v. Allain*, 478 U.S. 265, 286 106 S. Ct. 2932, 2944 92 L. Ed. 2d 209 (1986). Rather, to withstand a motion to dismiss, there must be specific and detailed factual allegations to support the claim. *Friedl v. City of New York*, 210 F.3d 79, 85-86 (2d Cir. 2000).

"Although bald assertions and conclusions of law are insufficient, the pleading standard is nonetheless a liberal one." *Cooper v. Parsky*, 140 F.3d 433, 440 (2d Cir. 1998). Pursuant to Fed. R. Civ. P. 8(a), which is made applicable to adversary proceedings by Fed. R. Bankr. P. 7008, in asserting a claim, the pleader need only set forth a short and plain statement of the claim showing that the pleader is entitled to relief. The purpose of the statement is to provide "fair notice" of the claim and "the grounds upon which it rests." *Conley v. Gibson*, 355 U.S. 41, 47, 78 S. Ct. 99,103, 2 L. Ed. 2d 80 (1957). The simplicity required by the rule recognizes the ample opportunity afforded for discovery and other pre-trial procedures which permit the parties to obtain more detail as to the basis of the claim and as to the disputed facts and issues. *Conley*,

355 U.S. at 47-48, 78 S. Ct. at 103. Based upon the liberal pleading standard established by Rule 8(a), even the failure to cite a statute, or to cite the correct statute, will not affect the merits of the claim. *Northrop v. Hoffman of Simsbury, Inc.*, 134 F.3d 41, 46 (2d Cir. 1997). In considering a motion to dismiss, it is not the legal theory but, rather, the factual allegations that matter. *Id.*, *citing, Flickinger v. Harold C. Brown & Co.*, 947 F.2d 595, 600 (2d Cir. 1991) (other citations omitted).

Finally, to survive a motion to dismiss, a plaintiff only has to allege sufficient facts, not prove them. *Koppel v. 4987 Corp.*, 167 F.3d 125, 133 (2d Cir. 1999). A court's role in ruling on a motion to dismiss is to evaluate the legal feasibility of the complaint, not to undertake to weigh the evidence which may be offered to support it. *Cooper v. Parsky*, 140 F.3d 433, 440 (2d Cir. 1998).

With respect to the counts in the adversary proceedings brought against the Cogentrix Entities, the Complaints do not contain any specific facts or circumstances to support Chase's conclusory allegation that the Cogentrix Entities directed or caused the actions of Green Country or Quachita. Nor are there any allegations that Green Country or Quachita were merely shell corporations. As a result, and for the additional reasons advanced by the Cogentrix Entities, their motion to dismiss those counts as brought against them is granted.

With respect to the counts as brought against Green Country and Quachita, the parties acknowledge that, pursuant to the terms of the relevant Letters of Credit, the provisions of the Uniform Customs and Practice for Documentary Credits, International Chamber of Commerce Publication Brochure No. 500 (the "UCP"), Int'l Chamber Comm., *Unif. Customs and Practice for Documentary Credits* (Pub. No. 500 1993) apply. However, the parties also agree that even

though the UCP provisions apply, the provisions of the New York Uniform Commercial Code (the "UCC") apply, pursuant to both the Letters of Credit and state law, where the UCC provisions are not in conflict with the UCP. As the UCP does not have any provision relating to subrogation, Chase contends that section 5-117 of the UCC governs this dispute.

While Green Country and Quachita do not dispute that non-conflicting sections of the UCC apply, they contend that there is a conflict between the UCP and the UCC because the term "applicant," which is used in section 5-117, is defined differently in the UCP and the UCC. Green Country and Quachita argue that under the UCP definition of applicant, which is a "customer," it is clear that the only customer in this transaction who qualifies as an applicant is Enron and that, therefore, none of the NEPCO Entities qualify as "applicants" to whose position Chase may subrogate.

As section 5-117 appears in the UCC, Chase utilizes the UCC definition of applicant in its analysis. Chase argues that, pursuant to the UCC definition, an applicant is the party who requests issuance of a letter of credit and takes on the reimbursement obligation and the party for whose account it is issued. Chase contends that both Enron and the NEPCO Entities are applicants for the Letters of Credit because Enron was the requestor who took on an obligation to reimburse and the Letters of Credit were issued for the NEPCO Entities accounts.

Green Country insists that the UCP definition of applicant applies as it is in conflict with the UCC definition but, alteratively, argues that even if the UCC definition is applicable, then an applicant is a party who requests a letter of credit and takes on the reimbursement obligation, which in its letter of credit transaction was Enron, or the party for whose account it is obtained, but that because the term "or" is used in the statute, only one of the parties can be the applicant.

As Enron requested the issuance of the Letter of Credit and took on the reimbursement obligation in the Green Country transaction, Green Country maintains that under the UCC definition, Enron is the one permissible applicant. Quachita acknowledges that if the UCC definition of applicant governs, that it is not moving to dismiss the counts as against it premised upon the NEPCO Entities being applicants because the Letters of Credit issued relevant to its construction contract are not clear concerning the identity of the applicant, as it lists the NEPCO Entitites as applicant in one part but lists Enron in another and, therefore, evidence must be presented on the parties intent.

Finally, with respect to the applicant issue, Chase, alternatively, argues that Enron acted as the NEPCO Entities' agent and, therefore, the NEPCO Entities were the parties that requested the Letters of Credit via Enron. Chase contends that this scenario is further evidenced with respect to the Quachita Letters of Credit by the listing of Quachita as applicant and the reference on the Letter of Credit to Enron having requested it "on behalf of NEPCO." Chase argues that Enron's request, as an agent, was an act that can bind a disclosed principal, like the NEPCO Entities. Thus, Chase contends that, as a principal to Enron, the NEPCO Entities were in privity with Chase concerning the issuance of the Letters of Credit.

In an effort to distinguish this matter from the circumstances present when the decision in *Kools v. Citibank*, 872 F.Supp. 67 (S.D.N.Y. 1996) was rendered, wherein the court in interpreting the UCP determined that you cannot sue a party if you do not have a direct relationship with it, Chase further argues that the revision of Article 5 replaced the term customer with that of applicant which was intended to broaden the definition to comprehensively cover a party that requests the letter of credit and, therefore, is in privity with the issuer, as well

as a party not in privity with the issuer but for whose account the letter of credit is issued at another party's request. With respect to this argument, the Court notes that the *Kools* court rendered its decision interpreting the UCP prior to the revision of Article 5, and asserted that even the then-prevailing UCC definition of customer was broader than the definition under the UCP. The *Kools* court further asserted that "[the UCC's] definition unlike the UCP's suggests that the customer can be someone other than the person who actually enters into the agreement with the bank. The UCP is, therefore, more restrictive in determining who may be considered a party to a letter-of-credit transaction." *Kools*, 872 F.Supp. at 71 n 1. While this suggests that under other circumstances, one of the NEPCO Entities could have been considered an applicant even in the absence of privity, under the circumstances present here, this Court finds, at least with respect to the Letter of Credit related to the Green Country construction project, that the NEPCO Entities are not "applicants" for the reasons that follow.

Pursuant to the definition of applicant in UCC § 5-102(a)(2), it is one who requests the issuance of a letter of credit and takes on a reimbursement obligation or the one for whose account it issues. As the term "or" is used, it implies that, absent a contrary agreement by the parties, the default provision would provide for only one applicant. Otherwise, an issuer may find itself subject to direction from two separate entities which could result in conflicting instruction on what documents were acceptable to permit draws on a letter of credit. While the parties might have the option of contracting for multiple applicants, any such agreement would, of necessity, have to set forth the respective parties' rights if their directives were ultimately to conflict. However, absent an agreement delineating the parties respective rights and powers, from a business perspective, it makes sense that there would be only one entity in control.

Chase argues that if only the party that requests a letter of credit is considered the applicant, then the section "or for whose account" would be superfluous. However, it is not superfluous if one accepts that there can only be one applicant and the party "for whose account a letter of credit is issued" is only considered the applicant if the requester does not take on an obligation to reimburse the issuer and is a party other than the party for whose account it is issued.

Therefore, the Court concludes that, absent a contrary agreement by the parties, section 5-102(a)(2) only provides for one applicant at a time, and because Enron requested the issuance of the Letter of Credit in the Green Country transaction and undertook the obligation to reimburse Chase in the event of a draw, Enron is the applicant. Therefore, even applying the UCC definition to applicants, the NEPCO Entities were not applicants with respect to the Green Country Letter of Credit.

As previously noted, non-conflicting sections of the UCC apply even where the Letter of Credit incorporates the terms of the UCP. The UCP does not address subrogation rights but the UCC has a provision concerning subrogation.

UCC § 5-117 provides that

> An issuer that honors a beneficiary's presentation is subrogated to the rights of the beneficiary to the same extent as if the issuer were a secondary obligor of the underlying obligation owed to the beneficiary and of the applicant to the same extent as if the issuer were the secondary obligor of the underlying obligation owed to the applicant.

In the Official Comment to UCC § 5-117, it is noted that the section does not grant subrogation rights. Rather, the section is intended "to remove an impediment that some courts have found to subrogation" related to the "independent" nature of the obligation under the letter

of credit. *See Tudor Development Group, Inc. v. United States Fidelity & Guaranty Co.*, 968 F.2d 357 (3d Cir. 1992). Indeed, the Official Comment notes that UCC § 5-117 endorses the dissenting opinion in the *Tudor* case and that the issuer of a letter of credit has the same rights of subrogation as would "a surety, guarantor, or other person against whom or whose property an obligee has recourse with respect to the obligation of a third party." Thus an issuer, who otherwise has rights of subrogation, may subrogate to the rights of a beneficiary or of an applicant notwithstanding the independent nature of a letter of credit. As the Court has found that Enron is the only applicant with respect to the Green Country Letter of Credit, if Chase has any right of subrogation, UCC § 5-117 removes any impediment to its asserting any such direct right to subrogate to the rights of the beneficiary, Green Country or the applicant, Enron.

With respect to the Quachita Letters of Credit, Quachita has asserted that it does not move to dismiss if the Court applies the UCC definition of applicant as it acknowledges that the terms of the Letter of Credit are "cloudy" on whether Enron or any of the NEPCO Entities is the applicant. Further, it is not clear whether the parties have "otherwise" contracted to have two applicants.

Chase seeks to subrogate to the rights of the NEPCO Entities as the applicant in both its breach of contract claim and in its UCC § 5-110(a)(2) breach of warranty claim. Based upon the Court's conclusion that the NEPCO Entities are not applicants under the Green Country Letter of Credit, Green Country's motion to dismiss the count based upon breach of contract and that portion of the breach of warranty count where it seeks to subrogate to the rights of the NEPCO Entities is granted. However, because the Court has determined that UCC § 5-117 concerning subrogation does not conflict with the UCP which does not address the issue of subrogation, and

because the Court has further determined that in utilizing the UCC section, in must apply the definition of the term applicant in section 5-117 as set forth in the UCC, the ambiguity in the Quachita Letters of Credit requires evidence as to the parties intent, as recognized by Quachita in not moving to dismiss if the Court applied the UCC definition of applicant.

Pursuant to UCC § 5-110(a)(2), if a presentation on a letter of credit is honored, the beneficiary warrants

> (a) To the applicant that the drawing does not violate any agreement between the applicant and beneficiary or any other agreement intended by them to be augmented by the letter of credit.

With respect to the counts of the adversary proceedings where Chase, as issuer of the Letters of Credit, seeks to subrogate to the rights of Enron, as applicant, with respect to any UCC § 5-110(a) breach of warranty rights, the Court accepts the analysis set forth in James J. White, RIGHTS OF SUBROGATION IN LETTERS OF CREDIT TRANSACTION, 41 St. Louis U. L.J. 47, 61-64 (1996), where the author promotes the theory that warranty rights should be treated as the underlying obligation owed to the applicant to which the issuer is the secondary obligor. Moreover, the Court agrees that multi-level subrogation may be a possibility. Thus, at this juncture, the Court is not prepared to dismiss the counts of the adversary proceedings seeking to subrogate to Enron's right as applicant on the breach of warranty counts.

The Court, however, grants the portion of the motions by Green Country and Quachita seeking to dismiss the direct unjust enrichment counts brought against them by Chase. Under New York law, the existence of a valid contract precludes recovery in quasi-contract for events arising out of the same subject matter. *Valley Juice Ltd., Inc. v. Evian Waters of France, Inc*., 87 F.3d 604, 610 (2nd Cir. 1996). With respect to the unjust enrichment counts seeking a direct

claim against them, the Court finds that because the parties rights and obligations are set forth in the four corners of the documents and because the parties knowingly conduct their relationship pursuant to a statutory framework concerning letter of credit law that fills in any gaps, an action for unjust enrichment is not available. Chase argues that Letters of Credit are not contracts and, therefore, the contract interpretation principle that holds that a claim of unjust enrichment is not available when there is a contract should have no application to a letter of credit. While most regard letters of credit as "unique commercial instruments," nevertheless, it is acknowledged that traditional contract principles apply to the extent that they do "not interfere with the unique nature of credits." *Kools v. Citibank*, 872 F.Supp. 67, 70 (S.D.N.Y. 1996) (citing, John F. Dolan, The Law of Letters of Credit §2.02 at 2-5 (2d ed. 1990) (other citations omitted). Although a letter of credit is not considered a contract, nevertheless, it is a relationship that, like a contract, has well defined rights and obligations. *Id*. Therefore, the same analysis that precludes a direct claim for unjust enrichment under a contract that sets forth the relevant terms applies equally to a letter of credit relationship where the rights and obligations of the parties are delineated within the framework in which they relate. In the letter of credit context, this framework includes the terms of the instruments that they negotiate as well as the applicable UCC and UCP rules. Further, applying this contract interpretation principle will not interfere with a letter of credit's unique nature.

Moreover, if an issuer could always have availed itself of a direct action for unjust enrichment, there would have been no need to circumvent the independence principle to afford it rights of subrogation.

Therefore, the Motion filed by the Cogentrix Entities seeking to dismiss the Complaints

as filed against them is granted. The Motion filed by Green Country and Quachita to dismiss the Complaints as against them is granted, in part, and denied, in part. With respect to those counts filed against Green Country, other than the portion of the count where Chase seeks to subrogate to Enron's warranty rights under UCC § 5-110(a)(2), the Complaint as filed against Green Country is dismissed. With respect to the counts filed against Quachita, other than the counts where Chase seeks to subrogate to the rights of the NEPCO Entities, as applicants, and to the portion of the count where Chase seeks to subrogate to Enron's warranty rights under UCC § 5-110(a)(2), the Complaint is dismissed.

Counsel for Green Country and Quachita is to settle an order consistent with this Opinion.