STATE OF WISCONSIN | CIRCUIT COURT BRANCH I | BROWN COUNTY

TINA FRITSCH,

Plaintiff,

Case No. 13-CV-1065
Case Code: 30303

vs.

GENERATION CLEAN FUELS, LLC,
f/k/a ARLAND CLEAN FUELS, LLC,

Defendant.

FILED
MAR 2
CLERK OF COURTS
BROWN COUNTY, WI

PLAINTIFF'S REPLY BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

NOW COMES the plaintiff, Tina Fritsch ("Mrs. Fritsch"), by and through her attorneys, Andre Law Offices, LLC, and respectfully submits the following Reply Brief in Support of her Motion Summary Judgment.

ARGUMENT

I. THE DEFENDANT HAS CLEARLY BREACHED THE PARTIES' AGREEMENT.

As Mrs. Fritsch established a *prima facia* case for summary judgment, the burden shifted to the defendant, Generation Clean Fuels, LLC, to set forth facts sufficient, in the form of affidavits, to establish a genuine issue of material fact for trial. *Bantz v. Montgomery Estates, Inc.*, 163 Wis. 2d 973, 984 (Ct. App. 1991). The only Affidavit submitted by the defendant is that of Eric R. Decator. Unfortunately for the defendant, this Affidavit sets forth a series of facts which are immaterial to the present action.

The Agreement executed by the parties is straightforward, and in clear and unambiguous terms, required the defendant to repay Mrs. Fritsch $250,000.00 in four equal installments, commencing September 15, 2012, with the last installment due December 15, 2012. As Mrs. Fritsch did not receive any of these installment payments from the defendant, she is entitled to judgment for the unpaid

balance. The only payment Mrs. Fritsch has received to date is a minimal payment of $5,000.00, wired to her counsel's trust account well after the final installment payment was due from the defendant, whereby the defendant itself reaffirmed its obligation to repay Mrs. Fritsch. In short, there was a contractual relationship between the parties, which required the defendant to repay the funds advanced by Mrs. Fritsch.

Apparently abandoning nearly all of the affirmative defenses actually raised in its Answer to the Complaint, the defendant now argues that it should be excused from repaying Mrs. Fritsch because she has some sort of "equity interest" in Generation Clean Fuels. However, the defendant failed to raise this affirmative defense in its Answer, and the defense has therefore been waived. *Oetzman v. Ahrens*, 145 Wis. 2d 560, 571, 427 N.W.2d 421 (Ct. App. 1988)(affirmative defenses are deemed waived if not raised in the pleadings); *see also* Section 802.02(3), Stats.

Even if the Court were to entertain this defense, it is at best a red herring raised by the defendant to avoid the real issue in this case, namely its breach of the parties' Agreement. Simply put, the Agreement required the defendant to repay Mrs. Fritsch on an agreed-upon schedule; the defendant failed to do so, and is therefore in breach of the Agreement. The Agreement itself conclusively establishes the defendant's obligation to repay Mrs. Fritsch, and the defense raised by the defendant for the first time in its Brief is therefore immaterial to this case.

The defendant cites a number of federal cases originating in bankruptcy proceedings, none of which are binding precedent, in support of its contention that Mrs. Fritsch "invested" in Generation Clean Fuels. Even assuming that the Court finds these cases persuasive, a closer reading of them establishes that under the standard applied in those cases, the funds advanced by Mrs. Fritsch are clearly a debt of the defendant, as opposed to equity. For example, in *Indmar Products, Co., Inc. v. Comm'r*, 444 F.3d 771 (6th Cir. 2006), the Court noted that in determining whether an advance to a company is debt or equity courts consider "whether the objective facts establish an intention to create an unconditional obligation to repay the advance." *Indmar*, 444 F.3d at 776 (citations omitted).

In the present case, the Agreement states that "The principal amount of Two Hundred Fifty Thousand Dollars ($250,000.00) ***will be paid back to*** [Mrs. Fritsch] on the following schedule...". [Royalty Agreement, Exhibit A, p. 2, emphasis added] There are no conditions or contingencies related to this repayment of the funds under the Agreement. Thus, the Agreement creates an unconditional obligation on the part of the defendant to repay the advance, i.e. the funds advanced by Mrs. Fritsch are a debt of the defendant, and not equity, making her a creditor of the defendant. Like any other creditor, Mrs. Fritsch is entitled to seek collection of the debt owed to her by the defendant.

There is a Wisconsin case that is also instructive on this issue. In *Mader's Store for Men, Inc., et al. v. DeDakis*, 77 Wis. 2d 578, 254 N.W.2d 171 (1977), a creditor challenged the appointment of a receiver for the debtor corporation's assets. One of the issues raised was whether advances of funds made by one of the debtor corporation's shareholders were loaned to the corporation or a "capital contribution." In making its determination, the Wisconsin Supreme Court considered whether the circumstances indicated that the advance was to be repaid in the ordinary course of the corporation's business, or was instead expected to remain outstanding as a permanent part of the corporation's financial structure. *Id.*, 77 Wis. 2d at 605. Even though it reiterated that loans from shareholders to corporations may be viewed with skepticism (given the shareholder's ability to classify them to his advantage), the Court concluded that the advances were loans based on the shareholder's own uncontroverted testimony that the funds would have been repaid had the company survived. *Id.*, 77 Wis. 2d at 610-11.

In this case, there is no need to resort to anyone's testimony, which would likely be precluded in any event by the Parole Evidence Rule. Instead, the Court need only look to the clear and unambiguous terms of the Agreement itself, which states that the funds advanced by Mrs. Fritsch were to be repaid by the defendant, without any conditions or contingencies. In fact, the Agreement makes no reference whatsoever to any "equity" or "equity interest", let alone one granted to Mrs. Fritsch in exchange for her funds, or that she is a member of the defendant LLC or any other

entity. In addition, the defendant's position begs the question as to why it previously repaid $5,000.00 to Mrs. Fritsch if she was not entitled to be repaid in the first place.

The defendant proceeds to argue that it is prohibited from making any payment to Mrs. Fritsch because its liabilities exceed the fair market value of its assets. In support of this assertion, it cites Colorado and Delaware statutes, as well as a Wisconsin Statute, Section 183.0607(1)(a), which precludes a limited liability company from making distribution to its ***members*** (not holders of "equity interests" as referenced by the defendant) if doing so would cause the company to be unable to pay its debts. Assuming for the sake of argument that any of these statutes apply to this case, the defendant fails to establish how they would preclude the Court from granting judgment in favor of Mrs. Fritsch, a creditor of the defendant, just as the Court could grant judgment to any other creditor, regardless of the alleged inability of the defendant to satisfy the judgment.

In any event, as Mrs. Fritsch is not a member of Generation Clean Fuels, these statutes are clearly irrelevant. The defendant has presented no facts to support the conclusion that Mrs. Fritsch is a member of Generation Clean Fuels, under the law of Colorado, Delaware, or Wisconsin for that matter, such as copies of Schedule K-1's provided to her for purposes of preparing her taxes for 2012 and 2013, a copy of the company record book memorializing her membership in the company (as required under Section 183.0801, Wis. Stats.), or her voting record on such matters as the June 4, 2012 merger referenced in Mr. DeCator's Affidavit.

The defendant breached its contractual obligation to Mrs. Fritsch by failing to repay her under the terms of the parties' Agreement, and she is therefore entitled to judgment against the defendant for $245,000.00, plus interest at the statutory pre-judgment rate of 5%.

II. MRS. FRITSCH IS ALSO ENTITLED TO RECOVER HER $245,000.00 BASED ON HER CAUSE OF ACTION FOR UNJUST ENRICHMENT.

In response to Mrs. Fritsch's unjust enrichment cause of action, the defendant concedes that it received a benefit from Mrs. Fritsch, i.e. the $250,000.00, and that it had knowledge and appreciation of this benefit. However, the defendant argues that the unjust enrichment cause of action fails because Mrs. Fritsch has received "adequate value" for the benefit she provided to the defendant, specifically an "equity interest" in the defendant.

The defendant has failed to set forth any evidence that would create a genuine issue of fact requiring a trial on the issue of unjust enrichment. It is undisputed that to date, Mrs. Fritsch has received no monetary benefit whatsoever as a result of advancing $250,000.00 to the defendant. In fact, all that she has received to date is the return of $5,000.00, a miniscule portion of the principal she advanced. Furthermore, the defendant argues in its Brief that no royalty payments are due to Mrs. Fritsch because the machine was never built, and provides no hint or evidence that it will ever be built. Unfortunately for the defendant, it cannot have its cake and eat it too. The defendant cannot argue on one hand that Mrs. Fritsch has no right to receive royalty payments, and on the other hand, assert that she has received a benefit in the form of royalty payments.

In addition, the defendant has failed to even specify exactly what Mrs. Fritsch's "equity interest" may be, let alone that it is adequate compensation for her "investment" in Generation Clean Fuels. At one point in its Brief, the defendant asserts she is a member of Generation Clean Fuels (at least based on the statutes cited by the defendant) and at other points, argues that she merely has some undefined "equitable interest" in Generation Clean Fuels or its profits. Aside from the right to "royalty payments" which will likely never be paid voluntarily by the defendant, Mrs. Fritsch's "equity interest" remains conveniently undefined. For example, exactly what benefit has she received from this "equity interest", and how does her interest compare, in terms of her "investment", with the interests held by the members of Generation Clean Fuels in relation to their own contributions to the company? What

voting rights, if any, does she enjoy, and is she entitled, by virtue of her "membership" or "equity interest", to a share of the profits and losses of the company, or simply to the royalty payments? The fact that these questions remain unanswered by the defendant should not be surprising, as Mrs. Fritsch is not, nor has she ever been, a member of Generation Clean Fuels. Instead, she is a creditor of the defendant who is entitled to judgment based on the defendant's breach of contract, or in the alternative, on her cause of action for unjust enrichment.

The defendant has retained almost $250,000.00 of Mrs. Fritsch's money for close to two years, without any compensation or benefit to her. Clearly, the defendant has been unjustly enriched in this case, and at a minimum, should be required to repay Mrs. Fritsch.

III. MRS. FRITSCH IS ENTITLED TO ROYALTY PAYMENTS.

The Agreement also calls for the defendant to make royalty payments to Mrs. Fritsch in the amount of $250,000.00 per year. Under Section 4.02(b) of the Agreement, she has the right to declare immediately due and payable all sums payable under the Agreement, including royalties, in the event of a breach by the defendant. [Ex. A, p. 4]

Mrs. Fritsch has previously addressed the defendant's argument that she is not entitled to payment under the Agreement because she has an "equity interest" in, or is a "member" of ,Generation Clean Fuels. With respect to that portion of the Agreement addressing the royalty payments, there is again no reference to any "equity" or "membership" interest in the defendant entity. Black's Law Dictionary has defined "royalty" as "compensation for the use of property." *Black's Law Dictionary,* Sixth Addition, 1991. In the present case, the document in question, entitled "Royalty Agreement", provided that Mrs. Fritsch would be compensated for the defendant's use of her money in the form of royalty payments, rather than membership or an equity interest in the defendant LLC. In fact, the Agreement specifically states that Mrs. Fritsch "may choose to invest any or all of [her] royalty payments with the Company under terms to be mutually agreed by the Parties." [Ex. A, p. 3]

If Mrs. Fritsch had already "invested" in the company, such language would have been unnecessary and superfluous.

In an attempt to create a genuine issue of material fact where none exists, the defendant asserts that no royalty payments are owed to Mrs. Fritsch because the oil producing machine was never built. The defendant claims that under the Agreement, the payment of royalties is conditioned upon that machine being built. However, as the defendant concedes, the "P20 Agreement" was not specifically incorporated into the Royalty Agreement.

In any event, by its own terms, the Agreement provides under Section 4.02(b) that upon default, all sums payable under the Agreement are payable in full, without reference to any "machine" whatsoever. Even assuming that the defendant could find a way around this provision of the Agreement, Mrs. Fritsch would be entitled to a declaratory judgment ordering that she be paid royalties pursuant to the Agreement if the oil producing equipment is built by the defendant.

CONCLUSION

The plaintiff, Tina Fritsch, respectfully requests that the Court grant her Motion for Summary Judgment and enter judgment in her favor from and against the defendant as prayed for in her Complaint.

Dated this 5TH day of March, 2014.

Andre Law Offices, LLC
Attorneys for Plaintiff, Tina Fritsch

By: ______________________
Deron J. Andre
~~State Bar~~ No. 1031894

Andre Law Offices, LLC
1251 Scheuring Rd. Unit B
DePere, WI 54115
(920) 632-4461