**UNITED STATES DISTRICT COURT**
**DISTRICT OF CONNECTICUT**

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| BROOKRIDGE FUNDING CORP., | : | |
| Plaintiff, | : | |
| | : | |
| v. | : | Civil Action No. |
| | : | 3:99 CV 2339(CFD) |
| NORTHWESTERN HUMAN SERVICES, INC., | : | |
| Defendant. | : | |

**MEMORANDUM OF DECISION**

This case arises out of a financing transaction to fund the construction of a minor league baseball stadium in the Lehigh Valley in Pennsylvania. Jurisdiction exists in this Court pursuant to 28 U.S.C. § 1332, as there is complete diversity of citizenship between the parties[1] and the amount in controversy is in excess of $75,000.[2]

After a bench trial, the Court makes the following findings of fact and conclusions of law. **I.**

**Findings of Fact**

A. "Factoring" as Non-Debt Financing

The plaintiff, Brookridge Funding Corp. ("Brookridge") is a factoring firm located in Danbury, Connecticut. "Factoring" is a form of non-debt financing based on the transfers of accounts receivable. In a typical factoring transaction, Brookridge advances between seventy and eighty percent of the face

[1]The plaintiff, Brookridge Funding Corp. is incorporated in Delaware and has a principal place of business in Connecticut. The defendant, Northwestern Human Services, Inc., is incorporated in, and has its principal place of business in, Pennsylvania.

[2]The Second Amended Complaint contains three counts: 1) breach of contract, 2) account stated; and 3) unjust enrichment.

amount of receivables purchased from its client. Upon receipt of payment of the receivables from the client's debtors, Brookridge then pays over the remaining balance to the client, less its "factoring fee," which increases based on the amount of time between when Brookridge advanced the money and when it received payment of the receivables from the debtors.[3]

It is Brookridge's practice in factoring involving construction contracts to require an "acknowledgment" or "notice of purchase of accounts receivable" ("Acknowledgment") to be executed by Brookridge, the debtor, and Brookridge's client prior to funding to confirm that the debtor does in fact owe the account receivable or invoice to the client and that there is no dispute as to the amount owed or the liability of the debtor. The Acknowledgment asks the debtor to verify that it owes the amount to the client, that it owes the debt absolutely (or that any defenses have been waived), and that the debtor will pay Brookridge directly.

B. The Stadium Project

The defendant, Northwestern Human Services, Inc. ("NHS") is a non-profit corporation in Pennsylvania. Its original purpose was to provide mental health services to adults and children suffering from mental illnesses, mental retardation, and behavioral disorders. However, at some point NHS began to expand its operations to many other fields. According to its 1998 annual report, NHS operates a residential complex for delinquent youths, provides adoption services, offers temporary staffing services to its subsidiaries and to other non-profits and hospitals, arranges automobile, furniture,

[3]The purchase agreement between Brookridge and its clients also provides that in the event Brookridge is ultimately unsuccessful in collecting payment on the purchased receivables, the clients are responsible for payment. See Brookridge v. Contracting Systems, Inc., Civil No. 3:00cv2252(CFD) (D. Conn. filed November 27, 2000).

and equipment leasing, and develops real estate projects. By the end of 1998, NHS had gross annual revenues of over $183 million and operated programs in forty-six Pennsylvania counties, as well as in New Jersey and Washington, D.C. In that year it had 6,435 staff members and 336 program sites.

In 1998, as part of the expansion of NHS into other areas of operation, Robert Panaccio, then the President and Chief Executive Officer of NHS, and Thomas X. Flaherty, at the time a real estate developer and member of NHS's Board of Trustees, devised a plan for NHS to sponsor the construction of a minor league baseball stadium in Williams Township, part of the Lehigh Valley, in Pennsylvania (the "Stadium Project"). The principal benefit of the involvement of NHS was that, as a non-profit entity, it qualified for a $5,000,000 development grant from the State of Pennsylvania. NHS also pursued the project to raise its profile in the community and showcase its programs.

At its Board of Directors meeting of July 30, 1998, NHS approved a plan under which NHS was to become the owner of the stadium after its development by Federal Development Corp. ("Federal"), an entity owned by Flaherty. In October 1998, NHS purchased the land for the project. However, as a result of a dispute with its primary lender, First Union National Bank, NHS was forced to reduce its role in the project.[4] The resulting agreement with Federal purported to release NHS from any obligations pursuant to the Stadium Project. See Def. Ex. 39. However, it is clear that NHS never completely removed itself from the Stadium Project. For example, on December 15, 1998, Federal

[4]NHS secured a loan from an entity other than First Union and purchased the land on which the partially completed stadium currently rests. First Union, upon learning of this transaction, informed NHS that the purchase of the land violated the loan covenants between NHS and First Union. By an agreement dated December 1998, First Union prohibited NHS from continuing in its role as the developer of the Stadium Project.

executed a contract with Contracting Systems, Inc. II ("CSI") for the construction of the baseball stadium (the "Stadium Contract") in which Federal indicated that it was an "agent" for NHS. While there was insufficient evidence presented at trial that the NHS Board of Trustees authorized Federal to act as its agent in executing the Stadium Contract, NHS still apparently believed it would qualify for the $5,000,000 state grant upon completion of the Stadium Project, it still owned the land on which the Stadium was being constructed, and wished to benefit from the completion of the Stadium Project in many indirect ways. In any event, Federal proceeded as the developer of the project, but NHS still had a significant, although at times unclear, role.

C. Brookridge Financing

The Stadium Project stalled in 1999 because of Federal's difficulty in obtaining financing. As a means of keeping the project moving while Federal sought "permanent" financing, CSI sought factoring services from Brookridge concerning outstanding invoices it claimed should be paid by NHS. CSI first contacted Brookridge sometime in the first half of 1999. On June 17, 1999, Brookridge sent a factoring application form to CSI. The same day, CSI faxed Brookridge the completed application form, including background information about NHS. On June 18, 1999, Brookridge's President, John McNiff, forwarded a Purchase Agreement to CSI's president John Clarke for his signature. That Purchase Agreement, among other things, stated that the maximum amount Brookridge would advance to CSI for purchased receivables was one million dollars. On June 21, 1999 CSI paid Brookridge's application fee and sent Brookridge the executed Agreement along with a copies of the invoices[5] that

[5]The invoices were identified as invoices five and six and totaled $2,759,024.43. Invoice five was for $1,425,112.60 and invoice six was for $1,333,911.83. The invoices are completed American

CSI proposed Brookridge purchase. The records provided by CSI to Brookridge indicated that all the previous invoices for the Stadium Project had been paid directly by NHS to CSI. Brookridge completed due diligence reviews of both CSI and NHS. In particular, the review of NHS by Brookridge confirmed that NHS had a substantial net worth, had a favorable rating from Standard and Poor's, and owned the land on which the baseball stadium was being built.

Brookridge was aware that the Stadium Contract was between Federal and CSI. However, it also was presented with documents and other information that indicated that although Federal was the developer of the stadium project, it appeared to be acting as an agent for NHS. This included the contract between Federal and CSI which stated Federal was acting as the agent for NHS, statements made to McNiff by Flaherty and Panaccio, by Flaherty's status as a trustee of NHS, the unpaid invoices which recited that they are due from NHS to CSI, and NHS's apparent direct payment to CSI for previous invoices related to the Stadium Project.[6]

On July 2, 1999, at a meeting of the Executive and Finance Committees of the NHS Board of Trustees, Panaccio reviewed the status of the Stadium Project, noting that it had "all but stopped" because of unpaid invoices of subcontractors and because of the inability to obtain further financing. He then outlined the plan to acquire factoring financing from Brookridge. After reviewing the Acknowledgment, the Committees authorized Panaccio to sign it, which he did on July 6, 1999. The

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Institute of Architects Application and Certificate for Payment forms. While invoices five and six were both signed by CSI, they were not signed by any representative of either NHS or Federal. See Ex. 5 (invoices five and six).

[6]It was not clear whether NHS actually funded the payments for invoices one through four or whether Federal made those payments. However, it was reasonable for McNiff and Brookridge to conclude that NHS had provided that funding, based on the information provided to Brookridge.

Acknowledgment indicated that the subject "invoice" (totaling $2,759,024.43) was accurate and was owed by NHS to CSI. Although NHS claims that the Committees authorized the execution of the Acknowledgment only because Panaccio assured them at the July 2, 1999 meeting that its purpose was solely to verify that the amounts owed from Federal to CSI were correctly stated–not to either indicate that NHS owed the amounts stated to CSI or to agree that NHS would pay those amounts to Brookridge–the Court finds that the language of the document, though ambiguous in some respects, was made clear as to its essential terms by the surrounding circumstances and the evidence of the parties' intent presented at trial.[7] Thus, the Court finds that the Acknowledgment obligated NHS to pay Brookridge up to $2,759,024.43 in amounts owed to CSI. On July 29, 1999, the full Board of Trustees approved the actions taken by the Executive and Finance Committees at the July 2, 1999 meeting.

After receiving the Acknowledgment from NHS and before funding CSI, McNiff spoke with Panaccio on July 7, 1999 to confirm that it was his signature that appeared on the Acknowledgment and that Panaccio–and NHS–understood the significance of the document. Panaccio confirmed that he had signed the Acknowledgment on behalf of NHS, that the invoices were owed by NHS, and that NHS would pay them to Brookridge within 90 days of Brookridge's purchase of amounts owed to CSI. Panaccio did not mention any dispute over NHS's liability for invoices five or six or over the quality of CSI's work.

On July 7, 1999, after receiving the Acknowledgment and after McNiff's conversation with

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[7]See Part II.A.1., infra. See also Brookridge Funding Corp. v. Northwestern Human Servs., 175 F. Supp. 2d 355, 365-67 (D. Conn. 2001) (discussing ambiguity).

Panaccio, Brookridge purchased a portion of the two outstanding invoices from CSI in the amount of $1,428,571.43[8] and sent wire transfers to CSI totaling $1,000,000.

On December 1, 1999, Brookridge made an unsuccessful demand upon NHS for full payment of $2,759,024.43 and this action followed.

**II. Conclusions of Law**

Brookridge claims that the Acknowledgment constitutes a contract between the parties, through which NHS agreed to pay the amounts owed to CSI to Brookridge. In the alternative, Brookridge claims that NHS was unjustly enriched by Brookridge's reliance upon the executed Acknowledgment. NHS claims that the Acknowledgment did not constitute a contract because 1) the was no meeting of the minds and 2) there was no consideration. As to Brookridge's claim of unjust enrichment, NHS argues that 1) Brookridge's reliance on the representations in the Acknowledgment was not reasonable and 2) there was no benefit to NHS.

A. Contract

"The existence of a contract is a question of fact to be determined by the trier on the basis of all evidence." See Fortier v. Newington Group, Inc., 30 Conn. App. 505, 509 (1993).

1. Meeting of the Minds

Under Connecticut law,[9] "in order for an enforceable contract to exist, the Court must find that

[8]Apparently, the amount of $1,428,571.43 was based on a funding amount of $1,000,000, the maximum permitted under the Brookridge/CSI contract. See Pl.'s Ex. 18. The funding amount was seventy percent of $1,428,571.43. The Acknowledgment recited that Brookridge "purchased" $2,759,024.43 (which would have been the total of invoices five and six), but Brookridge only forwarded $1 million in funds to CSI. See also Section II.C., infra (discussing damages).

[9]The parties agree that the applicable law is Connecticut substantive law.

the parties' minds had truly met." Fortier, 30 Conn. App. at 510. NHS claims that there was no "meeting of the minds" between NHS and Brookridge regarding the Acknowledgment because the document itself was ambiguous and because of testimony that suggests the parties had differing interpretations of its meaning. For example, NHS notes that McNiff testified that the Acknowledgment form is "pretty confusing," that the invoices that were purportedly being purchased were not attached to the Acknowledgment, and that Panaccio testified that NHS believed that it was simply verifying that CSI had performed its construction work.

In its ruling of December 4, 2001 on the cross motions for summary judgment, the Court held that certain language of the Acknowledgment was ambiguous. In particular, the Court noted that the wording on the form did not clearly indicate whether Brookridge had already purchased the invoices in question when it asked NHS to execute the Acknowledgment, or whether Brookridge would rely on the Acknowledgment in deciding whether to purchase the invoices. Also, while the Acknowledgment form indicated only one "account" and one "invoice," the total amount referred to–$2,759,024.43–appeared to be a combination of two invoices, which may not have accompanied the Acknowledgment. The Court held that these issues were material in addressing summary judgment because they related both to the issue of consideration and to the amount of NHS's obligation. The Court concluded: "While some of the extrinsic evidence presented by the parties appears to clarify these issues, evidence of the intent of the parties is not undisputed, and thus the Court must reserve its consideration of extrinsic evidence for trial." Brookridge Funding Corp. v. Northwestern Human Servs., 175 F. Supp. 2d 355, 366 (D. Conn. 2001)

After considering the testimony and other extrinsic evidence of intent, the Court concludes that

there was a meeting of the minds of the parties. As to whether Brookridge relied on the Acknowledgment to fund CSI, the Court credits McNiff's testimony that Brookridge decided to provide $1,000,000 to CSI on the basis that the Acknowledgment had been executed by NHS with full knowledge of its implications. With regard to Panaccio's testimony that in signing the Acknowledgment he was merely "verifying" that CSI had performed $2.7 million in construction, the Court finds that his testimony is not credible. First, the plain language of the document conflicts with that interpretation. As noted above, the Acknowledgment states, in relevant part, that "the amount to be paid to Brookridge pursuant to the obligations of the Undersigned is $2,759,024.43. Such sum is owed absolutely and the Undersigned has no right of counterclaim, contraclaim, setoff or any other right of deduction from such sum." In signing the form in his capacity as CEO of NHS, it was clear to Panaccio that he was both confirming that NHS had an obligation to pay $2,759,024.43 to CSI and that he was agreeing that such amounts would now be owed by NHS to Brookridge. Moreover, Panaccio told McNiff several times–both immediately after Panaccio signed the form and months later–that Panaccio understood NHS had an obligation to pay Brookridge. In assessing the contradictory assertions of the parties, the Court credits McNiff, and finds that when Panaccio signed the Acknowledgment on behalf of NHS, his understanding of its essential terms mirrored the understanding of Brookridge. He also had the authority to sign the Acknowledgment on behalf of NHS. The Court finds that the Executive and Finance Committees and the NHS Board of Directors authorized Panaccio to sign the Acknowledgment understanding the obligations of NHS under the Acknowledgment.

2. Consideration

NHS claims that there is no evidence that NHS received any benefit from signing the

Acknowledgment. "Consideration consists of a benefit to the party promising, or a loss or detriment to the party to whom the promise is made." Benedetto v. Wanat, 79 Conn. App. 139, 150 (2003) (citations and internal quotation marks omitted). Brookridge asserts that NHS received a benefit in that CSI received funds from Brookridge to keep the Stadium Project moving forward, while NHS claims that it did not receive a benefit because there is no evidence that the Brookridge funds "ever went to the stadium project." However, even assuming, without deciding, that NHS did not receive a benefit from executing the Acknowledgment, the Court finds that the alternative definition of consideration described above–as "a loss or detriment to the party to whom the promise is made"–was satisfied here. In reliance upon the promise made by NHS, Brookridge incurred a significant detriment by advancing $1 million to CSI. The Acknowledgment itself states that NHS signed it "[t]o induce [Brookridge] to provide financial services to Assignor [CSI]," and McNiff's testimony established that Brookridge proceeded with the transaction on the basis of NHS's promise.[10]

Accordingly, the Court finds in favor of Brookridge on its breach of contract claim.[11]

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[10]The Court previously held that the explicit waiver of defenses in the Acknowledgment would be enforceable if supported by consideration. See Brookridge Funding Corp. v. Northwestern Human Servs., 175 F. Supp. 2d 355, 364 (D. Conn. 2001). Thus, because the Court holds that Brookridge established at trial that the Acknowledgment was supported by consideration, see Section II.A.2., supra, the waiver of defenses is enforceable.

[11]It is not clear whether the facts of this case give rise to an action for account stated. "There must be a pre-existing indebtedness, or there is no account to state." Cooper v. Upton, 64 S.E. 523, 527 (W. Va. 1909). Here, there was not a pre-existing indebtedness between Brookridge and CSI that preceded the Acknowledgment and it is not clear whether an account stated can be asserted by a third party. See Zacarino v. Pallotti, 49 Conn. 36, 1881 WL 2136, at *2 (1881) ("An account stated is an agreement between persons who have had previous transactions, fixing the amount due in respect of such transactions and promising payment"). Brookridge has not cited any authority suggesting that a third party may assert an account stated cause of action and has not provided sufficient justification for application of the account stated doctrine to this case. Also, because the Court has found in favor of

B. Damages for Breach of Contract

The Acknowledgment, as discussed above, recited that NHS agreed to pay $2,759,024.43 to Brookridge. However, Brookridge only advanced $1,000,000 to CSI. Pursuant to its agreement with CSI, if Brookridge had received $2,759,024.43 from NHS, Brookridge would have forwarded the difference of $1,759,024.43–less its factoring fees–to CSI, the maximum permitted under the CSI/Brookridge Agreement. The question for the Court, then, is whether the appropriate measure of damages is the amount stated on the Acknowledgment ($2,759,024.43) or the amount that Brookridge was to receive as anticipated by Brookridge and CSI: Brookridge advanced to CSI the maximum under the Brookridge/CSI contract of $1,000,000, which was seventy percent of receivables then purchased from CSI of $1,428,571.43. NHS's obligation then would be to pay the $1,428,571.43 to Brookridge. Brookridge then would take its profit from the $428,571.43 difference between the amount previously provided to CSI ($1,000,000) and return the balance of the $428,571.43 to CSI.[12] The Court finds that the latter is the proper measure. In a breach of contract action "the measure of damages is that the award should place the injured party in the same position as he would have been in had the contract been fully performed." Zemmel v. SSHC, Inc., No. CV030102952, 2004 WL 237899, at *1 (Jan. 14, 2004 Conn. Super.) (citing Lar-Rob Bus Corporation v. Fairfield, 170 Conn.

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the plaintiff on its breach of contract claim, the Court will not reach the issue of whether the plaintiff could recover separately on its account stated cause of action.

The Court need not address Brookridge's alternative argument based on unjust enrichment because it has found an enforceable contract.

[12]The complaint in Brookridge v. Contracting Systems, Inc., Civil No. 3:00cv2252(CFD) (D. Conn. filed November 27, 2000) confirms that the amount upon which the $1,000,000 was advanced to CSI by Brookridge was $1,428,571,43.

397, 404-05, (365 A.2d 1086 (1976)). For Brookridge to receive over $2.7 million in damages would represent an unjustified windfall to Brookridge and would greatly exceed its expectation under its contract with CSI. Rather, to put Brookridge in the position it would have been in had the contract been performed, the appropriate damages amount is $1,428,571.43.

Therefore, the Court finds that the proper damages amount is $1,428,571.43, which is the amount Brookridge expected to receive when it entered into the factoring transaction with CSI and even when the Acknowledgment was signed by all the parties.[13]

C. Article Nine

Brookridge also asserts a claim under Article 9 of the Uniform Commercial Code, as adopted in Connecticut. See Conn. Gen. Stat. § 42a-9-101 et seq. Brookridge asserts it is an assignee entitled to payment of invoices five and six that were purchased from CSI and that NHS is the account debtor on those invoices. Apparently, it claims that the Accounts Receivable Purchase Agreement between CSI and Brookridge (Pl.'s Ex. 18) is the Security Agreement that encompassed the two invoices and that its security interest was perfected by the filing of a UCC-1 Financing Statement with the Pennsylvania Department of State. See Pl.'s Ex. 20.

Article 9 applies to factoring transactions, even when they are subject to full recourse against the debtor/seller of accounts. See 4 James J. White & Robert S. Summers, Uniform Commercial Code § 30-6 (5th ed. 2002); see also Conn. Gen. Stat. § 42a-9-109(a)(3). However, the evidence at

[13]Although it is not clear how much–if any–of the $1,428,571.43 should be remitted to CSI after Brookridge deducts its factoring fee and the $1,000,000 previously advanced, that matter can be addressed in the companion case of Brookridge v. Contracting Systems, Inc., Civil No. 3:00cv2252(CFD) (D. Conn. filed November 27, 2000).

trial showed that the amount of invoices five and six actually assigned by CSI to Brookridge was $1,428,571, which represented the maximum funding amount of $1,000,000 contained in the Brookridge/CSI contract and paid to CSI by Brookridge. Even if Article 9 permits partial assignment of accounts, that amount is less than either invoice five or six. If Brookridge were to recover the amount of invoices five and six actually assigned to it by CSI, that amount would be the same as the damages found above for the breach of contract count: $1,428,571. Accordingly, the Court need not resolve whether Article 9 provides a separate basis for relief.[14]

D. Prejudgment Interest

Brookridge claims that it is entitled to prejudgment interest pursuant to Conn. Gen. Stat. § 37-3a.[15] "When the court's jurisdiction is based upon diversity, an award of prejudgment interest is governed by state law." Brandewiede v. Emery Worldwide, 890 F. Supp. 79, 82 (D. Conn. 1994). "Conn.Gen.Stat. § 37-3a provides in relevant part, that 'interest at the rate of ten percent a year, and no more, may be recovered and allowed in civil actions ... as damages for the detention of money after it becomes payable." Id.

The determination of whether prejudgment interest is appropriate pursuant to the statute is

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[14]Conn. Gen. Stat. § 42a-9-109(d)(7) provides that Article 9 does not apply to the sale of a single account. The amount transferred to Brookridge was less than either invoice five or six. However, the Court need not resolve this issue, nor the issue of whether the assignment of a portion of an account is subject to Article 9, nor whether the absence of signatures by NHS on invoices five and six is of significance, nor whether one can claim "holder in due course" status on an amount which is less than the face amount of a transferred account..

[15]Conn. Gen. Stat. § 37-3a provides, in relevant part, that "interest at the rate of ten per cent a year, and no more, may be recovered an allowed in civil actions . . . as damages for the detention of money after it becomes payable."

within the Court's equitable discretion. See id. ("An award of prejudgment interest pursuant to Section 37-3a is an equitable determination within the discretion of the court."). "Factors for the court to consider when deciding whether to award prejudgment interest are: 1) whether the detention of money was wrongful under the circumstances; 2) whether the sum recovered was a liquidated amount; and 3) whether the party seeking prejudgment interest diligently presented its claim." Id. While bad faith is a factor that may be considered in determining whether the detention of monies was wrongful, it is not a required element: "Although bad faith is one factor that the court may look at when deciding whether to award interest under § 37-3a, we note that, in the context of the statute, 'wrongful' is not synonymous with bad faith conduct. Rather, wrongful means simply that the act is performed without the legal right to do so." Ferrato v. Webster Bank, 67 Conn. App. 588, 596 (2002). Moreover, "that this dispute is hotly contested does not impact on the [Court's] determination that the defendant wrongfully detained the money." Republic Ins. Co. v. Pat DiNardo Auto Sales, Inc., 44 Conn. Supp. 207, 220 (Conn. Super. 1995).

After applying the factors summarized in Brandewiede, the Court chooses not to exercise its discretion to award prejudgment interest pursuant to Conn. Gen. Stat. § 37-3a. While Brookridge presented its claim on a timely basis (the delay in asserting its claim was because of Panaccio's assurances that NHS was aware of its obligation to pay and planned to honor it), NHS's failure to pay was not "wrongful" as that term is defined in Ferrato. Among the significant factors is that the sum recovered was not a liquidated amount. See Section II.B (discussing damages). Thus, the Court will not award prejudgment interest.

## III. Conclusion

Judgment shall enter for the plaintiff, in the amount of $ 1,428,571.43.

SO ORDERED this 18th day of August 2004 at Hartford, Connecticut.

/s/ CFD

**CHRISTOPHER F. DRONEY**
**UNITED STATES DISTRICT JUDGE**