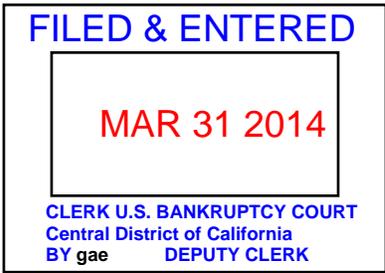


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UNITED STATES BANKRUPTCY COURT
CENTRAL DISTRICT OF CALIFORNIA
LOS ANGELES DIVISION

In re:
GSM WIRELESS, INC.,
a California corporation,

Debtor.

GSM WIRELESS, INC.,

Plaintiff,
vs.
MOHAMMAD HONARKAR,

Defendant.

GSM WIRELESS, INC.,

Plaintiff,
vs.
JOSEPH FERNANDEZ DE CASTRO, an
individual, and DOES 1 THROUGH 10

Defendants.

MOHAMMAD HONARKAR,

Cross-Complainant,
vs.

Case No. 2:12-bk-16456 RK
Chapter 11
Adv. No. 2:12-ap-01350 RK

SUPPLEMENTAL MEMORANDUM
DECISION ON TRUSTEE'S CLAIM FOR
COMMON COUNTS

1 JOSEPH FERNANDEZ DE CASTRO, an
2 individual, and DOES 1 through 20,
3
4 Cross-Defendants.

4 After trial, the court issued a Memorandum Decision on April 5, 2013
5 (“Memorandum Decision”) in which the court dismissed all but one claim in the adversary
6 complaint with prejudice, finding that Plaintiff, the Chapter 11 Trustee for the Bankruptcy
7 Estate of Debtor GSM Wireless, Inc. (“Trustee”), had failed to prove claims for relief by a
8 preponderance of the evidence. However, with respect to the remaining claim for
9 “Common Count – Claim for Money” against Defendant, Mohammad Honarkar
10 (“Honarkar”), the court requested additional briefing from the parties. The Trustee filed
11 on behalf of GSM Wireless, Inc, a Supplemental Brief on May 3, 2013 (Docket No. 186)
12 (“Trustee’s Brief”). Honarkar filed his Supplemental Brief on May 6, 2013 (Docket Nos.
13 187 and 188) (“Honarkar Brief”). The Trustee then filed a Brief in Response to
14 Honarkar’s Brief on May 20, 2013 (Docket No. 190) (“Trustee’s Responsive Brief”).
15 Honarkar filed a Supplemental Brief in Response to GSM’s Brief on May 20, 2013
16 (Docket No. 1041 in Bankruptcy Case No. 2:12-bk-16456-RK) (“Honarkar Responsive
17 Brief”).

18 Having reviewed and considered the parties’ supplemental briefing, the court
19 concludes that the Trustee’s claims for “Common Count – Claim for Money” should be
20 denied and dismissed with prejudice.

21 The elements of a common count are: “(1) the statement of indebtedness in a
22 certain sum, (2) the consideration, i.e., goods sold, work done, etc., and (3) nonpayment.”
23 *Farmers Ins. Exchange v. Zerín*, 53 Cal. App. 4th 445, 460 (1997). A cause of action for
24 money had and received is stated if it is alleged the defendant “is indebted to the plaintiff
25 in a certain sum for money had and received by the defendant for the use of the plaintiff.”
26 *Id.* (internal citations omitted). “A common count is proper whenever the plaintiff claims
27 a sum of money due . . . as an indebtedness in a sum certain.” *Utility Audit Co. v. City of*
28 *Los Angeles*, 112 Cal.App.4th 950, 958 (2003)(citation omitted).

1 **I. Elements of a Common Count for Money Had and Received**

2 **A. Statement of Indebtedness in a Certain Sum**

3 It is undisputed that Honarkar signed a promissory note obligating himself to pay
4 GSM \$3 million on March 1, 2003 (the “Promissory Note”) in connection with the buyout
5 of Joseph Fernandez de Castro (the “Transaction”), and that the funds were advanced by
6 GSM. *Memorandum Decision* at 18:8-14, 77:12-13 (citing to page:line); *Trial Exhibit 31,*
7 *Promissory Note*. The statement of indebtedness was in a sum certain, i.e., \$3 million.
8 *Id.* Therefore, the court finds that the first element of the common count claim is
9 satisfied.

10 **B. Consideration**

11 It is also undisputed that the \$3 million paid by GSM on behalf of Honarkar was
12 consideration for the note payable to GSM. *Memorandum Decision* at 12:5-19:27, 77:13-
13 14. Thus, the court finds that the second element of a common count is satisfied.

14 **C. Non-Payment**

15 The court finds that Trustee has not satisfied the third element of the common
16 count claim of non-payment, i.e., this element has not been proven by a preponderance
17 of the evidence. A claim for money had and received can be based on money paid
18 pursuant to a void contract or performance by one party of an express contract. *Utility*
19 *Audit Co. v. City of Los Angeles*, 112 Cal. App. 4th 950, 958 (2003). The claimant must
20 only claim the money due, and it makes no difference whether the original transaction
21 was an express contract, a contract implied in fact, or a quasi-contract. *Id.* Under the
22 terms of the Promissory Note, Honarkar was not obligated to pay the debt unless and
23 until GSM issued dividends on his common stock. *Memorandum Decision* at 10:7-10,
24 18:8-14; *Trial Exhibit 31, Promissory Note*. Because GSM never paid a dividend, the
25 debt was never payable by Honarkar. Since the condition was not met to trigger
26 Honarkar’s obligation to repay the Promissory Note, there is an argument that Honarkar
27 is not legally obligated to pay the money at this time and there can be no non-payment.

28 In its Memorandum Decision, this court questioned whether that would be an

1 appropriate result because Honarkar was on both sides of the transaction as the
2 borrower and the 100-percent owner of the lender and he signed the note with a
3 condition very favorable to him personally, which limited his obligation to repay the loan
4 to any dividends from GSM. *Memorandum Decision* at 77:24-78:1. That is, only if GSM
5 turned out to be profitable in the future would he have to repay the obligation. *Id.* The
6 court specifically requested that the parties address the impact of the promissory note
7 language limiting Honarkar's obligation to repay the loan in light of GSM's financial
8 distress and the possibility of offset against Honarkar's post-petition loan to GSM. *Id.* at
9 78:24-79:4.

10 The Trustee argues that the Promissory Note is void because it is an illusory
11 contract. *Trustee's Brief* at 3:1-7. The Trustee argues that the Promissory Note is an
12 illusory contract because it contains a limiting condition that the loan principal and interest
13 would be due and payable by Honarkar only to the extent that Honarkar received
14 dividends from GSM. *Id.* According to the Trustee, since Honarkar (as the sole director
15 of GSM) is the only corporate officer who could decide whether GSM would issue
16 dividends, the Promissory Note was merely an illusory promise to pay. *Id.* at 4:3-4.

17 A contract is illusory under California law if one of the promises made by a party
18 leaves that "party free to perform or withdraw from the agreement at his own unrestricted
19 pleasure." *Chodos v. West Publishing Co., Inc.*, 292 F.3d 992, 996 (9th Cir.
20 2002)(citation omitted). Where one party is invested with a discretionary power that
21 affects the rights of the other, however, a court can read the implied covenant of good
22 faith and fair dealing to impose an obligation on each party and the contract will not be
23 illusory. *Id.* at 997. Therefore, this court can conclude that the Promissory Note is not
24 illusory because Honarkar is bound by the implied covenant of good faith and fair dealing
25 in exercising his power to cause GSM to issue dividends. *Id.*¹

26

27 ¹ Because the court concludes that the contract is not illusory, several of the cases cited by Trustee are
28 inapplicable. *Trustee's Brief* at 4:3-20, *citing*, *Alameda County v. Ross*, 32 Cal. App. 2d 135 (1939); *Snow*

1 The court has already concluded that GSM's corporate directors owed no fiduciary
2 duty to creditors. *Memorandum Decision* at 66:2-11. This is because GSM was not
3 insolvent at the time of the Transaction, it was not rendered insolvent by the Transaction,
4 and GSM's financial distress was caused by other post-Transaction supervening causes.
5 *Id.* at 66:5-8. As such, Honarkar and Fernandez de Castro were entitled to do as they
6 saw fit with the company and, under the business judgment rule, cannot be held liable for
7 their alleged failures as directors or shareholders. *Id.* at 68:25-69:14

8 The Trustee relies on *Hansen v. California Bank*, 17 Cal. App. 2d 80 (1936) in
9 support of his position that Honarkar is liable on a common count claim. *Trustee's*
10 *Responsive Brief* at 2:18 – 3:14. First, the court notes that *Hansen* did not involve a
11 common count claim, and the Trustee does not argue that it does. *Id.* The Trustee cites
12 *Hansen* for the statement in the opinion that “[i]t has been repeatedly held that a trustee
13 in bankruptcy may maintain an action on behalf of any and all creditors to recover a trust
14 fund belonging to the corporation which is created by *an illegal* purchase of its own stock
15 without the consent of the corporation commissioner and contrary to law, for the reason
16 the transaction is ultra vires and void.” *Trustee's Responsive Brief* at 2:21-27, quoting,
17 *Hansen v. California Bank*, 17 Cal. App. 2d at 96 (emphasis added). In *Hansen*, as in
18 this case, the parties challenging a stock purchase using the corporation's own money
19 argued that they were not estopped from bringing suit based on the California Supreme
20 Court's decision in *Sargent v. Palace Café Co.*, 175 Cal. 737 (1917) “for the reason that
21 the record fails to show that there were creditors of the corporation in existence at the
22 time of the purchase, and that subsequent creditors are not in a position to complain of
23 the transaction.” *Hansen v. California Bank*, 17 Cal. App. 2d at 95. The *Hansen* court
24 distinguished *Sargent v. Palace Café Co.*, and held that the parties challenging the stock
25 purchase could maintain suit against the parties which acquired the stock because under

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27 *v. BE&K Construction Co.*, 126 F. Supp. 2d 5 (D. Me. 2001); *Badie v. Bank of America*, 67 Cal. App. 4th
28 779 (1999).

1 state law at the time, the sale and purchase of the stock was ultra vires and void for lack
2 of approval by the state commissioner of corporations. *Id.* at 90-94. The *Hansen* court
3 concluded that “the corporation in the present case was unauthorized to repurchase its
4 own stock, regardless of whether it was then bankrupt, and the money which was paid to
5 the bank therefor, with knowledge on its part of the inability of the corporation to purchase
6 the stock, became a trust fund, subject to recovery by the trustee of the corporation in a
7 proper suit.” *Id.* at 94. Thus, the representative of the creditors, i.e. the bankruptcy
8 trustee, was allowed to proceed with a “trust fund” doctrine claim against the parties
9 acquiring the stock purchased with the corporation’s money. *Id.*

10 In the case at bar, the court has already ruled upon such a “trust fund” doctrine
11 claim in Honarkar’s favor in its Memorandum Decision at 72:5 – 73:7, *citing inter alia*,
12 *Berg & Berg Enterprises, LLC v. Boyle*, 178 Cal. App. 4th 1020 (2009). As the court
13 stated in the Memorandum Decision, “Honarkar as 100% shareholder of GSM had the
14 right to dispose of its assets as long as it was not insolvent at the time of the Transaction
15 and was not rendered insolvent by the Transaction, which did not appear to be the case
16 at the time of the Transaction.” *Memorandum Decision* at 75:2-6. As stated in the
17 Memorandum Decision, the Trustee has not shown that Honarkar’s acquisition of the
18 remaining GSM stock was not an illegal purchase of GSM stock, and thus, *Hanson* is not
19 applicable here.

20 Therefore, the court concludes that the case law relied upon by the Trustee here is
21 misplaced. Because the Trustee has not established all of the elements required for a
22 common count for money had and received because he has not established Honarkar’s
23 nonpayment of an amount due, this cause of action should be denied and dismissed with
24 prejudice.

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1 before the court. *Kauai Scuba Center, Inc. v. PADI Americas, Inc.* at *5. Further, the court
2 in *Kauai Scuba Center* expressly dismissed the common count claim for relief because it
3 relied “on an untenable allegation that Plaintiff bought unlicensed insurance from PADI
4 rather than licensed insurance from Lexington” and did not base its decision on whether
5 unjust enrichment was alleged. *Id.* The court’s comment that unjust enrichment must be
6 alleged to support a common count claim is therefore dicta. Finally, the *Kauai Scuba*
7 *Center* decision is unpublished and as such, is not binding on this court, and the court
8 does not find it otherwise persuasive for the proposition argued by Honarkar.

9 A claim for money had and received requires only a “statement of indebtedness in
10 a certain sum.” *Farmers Ins. Exchange v. Zerlin*, 53 Cal. App. 4th at 460. While unjust
11 enrichment and conversion may be the basis for the indebtedness, a claim for money had
12 and received can also result from an express contract that is void or unenforceable, a
13 contract implied in fact, a quasi-contract, or where rescission is available. *Schultz v.*
14 *Harney*, 27 Cal. App. 4th 1611, 1623 (1994); *Utility Audit Co. v. City of Los Angeles*, 112
15 Cal. App. 4th at 958; *Crocker-Anglo Nat. Bank v. Kuchman*, 224 Cal. App. 2d 490, 492,
16 495-497 (1964); *see also, Philpott v. Superior Court in and for Los Angeles County*, 1
17 Cal. 2d 512, 518-526 (1934)(discussing the history of the common count in the common
18 law); 4 Witkin, *California Procedure*, Pleading, § 561 at 588 (Common Counts – Money
19 Had and Received)(5th ed. 2008 and 2013 Supp.); Joseph L. King, *The Use of the*
20 *Common Counts in California*, 14 S. Cal. L. Rev. 288 (1941). The court has already
21 found that Honarkar owes a debt of \$3 million to GSM under the Promissory Note.
22 *Memorandum Decision* at 77:12-13. This is sufficient to state an indebtedness in a
23 certain sum and the mere fact that the Trustee did not prevail on the claims for
24 conversion and unjust enrichment does not dictate the same result on this common count
25 for money had and received because it is a separate legal theory. The court rejects
26 Honarkar’s argument to the contrary.

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