

UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW HAMPSHIRE

In re

FELT MANUFACTURING CO., INC.,
f/k/a FOSS MANUFACTURING CO., INC.,

Debtor

Chapter 11

Case No. 05-13724-JMD

OFFICIAL COMMITTEE OF UNSECURED
CREDITORS, on behalf of the bankruptcy
estate of Felt Manufacturing Co., Inc.,
f/k/a Foss Manufacturing Co., Inc.,

Plaintiff

Adv. Pro. No. 06-1171-JMD

v.

STEPHEN FOSS, et al.

Defendants

Robert J. Feinstein, Esq.
PACHULSKI STANG ZIEHL YOUNG
JONES & WEINTRAUB LLP
New York, New York
Attorney for Plaintiff Official Committee

Sean T. Carnathan, Esq.
O'CONNOR, CARNATHAN AND MACK
Burlington, Massachusetts
Attorney for Defendant Stephen Foss

Joseph A. Foster, Esq.
MCLANE, GRAF, RAULERSON &
MIDDLETON, PROFESSIONAL
ASSOCIATION
Manchester, New Hampshire
Attorney for Plaintiff Official Committee

Bruce A. Harwood, Esq.
SHEEHAN, PHINNEY, BASS +
GREEN, PA
Manchester, New Hampshire
Attorney for Defendant Stephen Foss

Michael R. Gottfried, Esq.
Jeffrey D. Sternklar, Esq.
DUANE MORRIS LLP
Boston, Massachusetts
Attorneys for Defendant Patricia Foss

MEMORANDUM OPINION

I. INTRODUCTION

On July 6 and 7, 2006, the Court held an evidentiary hearing on: (a) the Official Committee of Unsecured Creditors', acting on behalf of the bankruptcy estate of Felt Manufacturing Co., Inc., f/k/a Foss Manufacturing Co., Inc. (the "Plaintiff"), motion for a preliminary injunction against Stephen Foss and Patricia Foss (Doc. No. 3) (the "Injunction Motion"); (b) Plaintiff's petition to attach certain real estate and bank accounts of Stephen Foss and Patricia Foss (Doc. No. 7) (the "Attachment Petition"); (c) the limited objections of Stephen Foss to the Injunction Motion and the Attachment Petition (Doc. No. 47) (the "S. Foss Objection"); (d) and the objections of Patricia Foss to the Injunction Motion and the Attachment Petition (Doc. No. 36) (the "P. Foss Objection").

This Court has jurisdiction of the subject matter and the parties pursuant to 28 U.S.C. §§ 1334 and 157(a) and the "Standing Order of Referral of Title 11 Proceedings to the United States Bankruptcy Court for the District of New Hampshire," dated January 18, 1994 (DiClerico, C.J.). This is a core proceeding in accordance with 28 U.S.C. § 157(b).

II. FACTS

On June 11, 2006, the Plaintiff filed a one hundred fourteen page complaint consisting of fifty-one counts against fifteen defendants (Doc. No. 1) (the "Complaint"). On June 15, 2006,

the Court held a hearing on shortened notice on request of the Plaintiff. At the conclusion of that hearing, the Court issued a temporary restraining order (Doc. No. 19) (the “TRO”) and, at the request of Patricia Foss, scheduled the evidentiary hearing on the Injunction Motion for July 6, 2006. At the conclusion of the evidentiary hearing on the Injunction Motion and the Attachment Petition, the Court continued the TRO in effect pending further order of the Court.

The Complaint seeks recovery from Stephen Foss on the following twelve counts:

- | | |
|-----------|--|
| Count I | Breach of fiduciary duty to Felt Manufacturing Co., Inc. f/k/a Foss Manufacturing Co., Inc. (the “Debtor”) as an officer and director of the Debtor. |
| Count III | Knowingly and willfully aiding and abetting the breach of fiduciary duties to the Debtor by corporate officers. |
| Count IV | Wasting the Debtor’s assets by causing or permitting the Debtor to pay excessive compensation, illegal dividends, and other unnecessary expenses. |
| Count V | Unjust enrichment by receiving property from the Debtor to which he was not entitled. |
| Count VI | As a director of the Debtor, authorizing illegal dividends. |
| Count VII | Improperly extending the life of the Debtor, depleting its assets, and increasing its insolvency through breaches of his fiduciary duties to the Debtor. |
| Count VII | Equitable subordination of any claim against the Debtor. |
| Count X | Avoidance of constructively fraudulent transfers in the form of excessive salaries, expense reimbursement, payment of personal expenses, and repayment of insider loans under NH RSA 545-A:4(I)(b) pursuant to 11 U.S.C. §§ 544(b) and 550. |
| Count XI | Avoidance of transfers for less than reasonably equivalent value in the form of excessive salaries, expense reimbursement, payment of personal expenses, and repayment of insider loans under NH RSA 545-A:5(I) pursuant to 11 U.S.C. §§ 544(b) and 550. |

- Count XII Avoidance of transfers to an insider for an antecedent debt while the Debtor was insolvent in the form of excessive salaries, expense reimbursement, payment of personal expenses, and repayment of insider loans under NH RSA 545-A:5(II) pursuant to 11 U.S.C. §§ 544(b) and 550.
- Count XIII Avoidance of transfers for less than reasonably equivalent value in the form of excessive salaries, expense reimbursement, payment of personal expenses, and repayment of insider loans pursuant to 11 U.S.C. §§ 548 and 550.
- Count XIV Avoidance of preferential payments received by an insider within one year prior to the petition date on account of antecedent debts pursuant to 11 U.S.C. §§ 547 and 550.

The Complaint seeks recovery from Patricia Foss on the following nine counts:

- Count II Breach of fiduciary duty to the Debtor as a director of the Debtor.
- Count IV Wasting the Debtor's assets by causing or permitting the Debtor to pay excessive compensation, illegal dividends, and other unnecessary expenses.
- Count V Unjust enrichment by receiving property from the Debtor to which she was not entitled.
- Count VI As a director of the Debtor, authorizing illegal dividends.
- Count VII Improperly extending the life of the Debtor, depleting its assets, and increasing its insolvency through breaches of her fiduciary duties to the Debtor.
- Count VII Equitable subordination of any claim against the Debtor.
- Count XV Avoidance of constructively fraudulent transfers in the form of improvements to her personal residence, personal travel at the Debtor's expense, personal expense reimbursement or payments, and payments to entities owned or controlled by her for her benefit under NH RSA 545-A:4(I)(b) pursuant to 11 U.S.C. §§ 544(b) and 550.
- Count XVI Avoidance of transfers for less than reasonably equivalent value in the form of improvements to her personal residence, personal travel at the Debtor's expense, personal expense reimbursement or

payments, and payments to entities owned or controlled by her for her benefit under NH RSA 545-A:5(I) pursuant to 11 U.S.C. §§ 544(b) and 550.

Count XVII Avoidance of transfers to an insider on account of antecedent debt pursuant to 11 U.S.C. §§ 548 and 550.

At the hearing on the Injunction Motion and the Attachment Petition, the Court heard the testimony of Patricia Foss. By agreement of the parties the transcripts of the Rule 2004 examination of Stephen Foss taken on March 28, 2006, the transcript of the Rule 2004 Examination of Patricia Foss taken on March 23, 2006, and the exhibits to such examinations, were admitted into evidence. The affidavit of Lynn A. Huras dated June 9, 2006, previously filed with the Court as part of the affidavit of Robert J. Feinstein (Doc. No. 6) (the “Huras Aff’d”) was admitted by agreement as the direct testimony of Ms. Huras. Ms. Huras was cross examined by the Defendants at the hearing. The declaration of Patricia Foss dated July 5, 2006, and the exhibits submitted with the declaration, (Doc. No. 66) were also admitted into evidence by agreement of the parties.

III. DISCUSSION

The Court must weigh four factors when determining whether to issue a preliminary injunction: (1) the likelihood of success on the merits; (2) the potential for irreparable harm to the movant if the injunction is denied; (3) the balance of relevant impositions, for example the hardship to the nonmovant if enjoined as contrasted with the hardship to the movant if no injunction issues; and (4) the effect (if any) of the court’s ruling on the public interest. Wine and Spirits Retailers, Inc. v. Rhode Island, 418 F.3d 36, 46 (1st Cir. 2005). “The *sine qua non* of this four-part inquiry is likelihood of success on the merits: if the moving party cannot demonstrate

that he is likely to succeed in his quest, the remaining factors become matters of idle curiosity.”
New Comm Wireless Servs., Inc. v. Sprintcom, Inc., 287 F.3d 1, 9 (1st Cir. 2002).

The Attachment Petition is governed by applicable New Hampshire law on prejudgment attachments under Federal Rule of Civil Procedure 64, made applicable to this adversary proceeding by Federal Rule of Bankruptcy Procedure 7064. Diane Holly Corp. v. Bruno & Stillman Yacht Co., Inc., 559 F.Supp 559, 560 (D.N.H. 1983). The Plaintiff has requested a prejudgment attachment in the amount of \$10.0 million. Stephen Foss objects to any attachment of his interests in real estate in New Hampshire in excess of \$1.5 million and to any attachment of any other property interests. Patricia Foss objects to any attachment whatsoever. At a hearing on an objection to an attachment, the burden is on the plaintiff to show there is a reasonable likelihood the plaintiff will recover a judgment, including interest and costs, that is equal to or greater to the amount of the attachment. NH RSA 511-A:3. At the hearing, the plaintiff must make a strong showing it will ultimately prevail on the merits and obtain judgment in the requested amount by proof greater than a mere preponderance of the evidence. Chi Shun Hua Steel Co., Ltd. v. Crest Tankers, Inc., 708 F.Supp 18, 25 (D.N.H. 1989); Diane Holly Corp., 559 F.Supp at 561.

A. Request for Preliminary Injunction against Stephen Foss

Stephen Foss has consented to a preliminary injunction that is in substance similar to the TRO, but has objected to the portion of the requested preliminary injunction that requires him to submit a line-item budget of proposed monthly ordinary and necessary living expenses and the filing of monthly expense reports (Doc. No. 47). Stephen Foss contends the Plaintiff has not established any basis in fact or law for such an intrusion into personal finances as part of

prejudgment relief. See Sawyer v. Boufford, 113 N.H. 627, 630 (N.H. 1973). The Plaintiff concedes its request is extraordinary, but asserts it is justified on the unique facts of this case where they contend Stephen Foss is transferring assets and asserting his Fifth Amendment rights in refusing to answer questions regarding the location of his assets. The Plaintiff has not offered a citation to any case granting the personal financial monitoring it requests.

The Court agrees with Stephen Foss. New Hampshire law severely restricts the right of a plaintiff, before entry of judgment, to require the disclosure of the identity, location, and amount of a defendant's financial assets, with the exception of certain insurance policies. Id. An exception to this rule would exist if a defendant objected to an attachment on the basis that he possessed sufficient assets to pay any likely judgment. See NH RSA 511-A:3. However, no such objection has been raised in this case. Moreover, although the Plaintiff argues that circumstances are unique in this case because Stephen Foss refused to respond to questions about his assets based on his Fifth Amendment rights, the Plaintiff failed to present any evidence that Stephen Foss was actually transferring assets beyond the jurisdiction of the Court or beyond the ability of the Plaintiff to levy after judgment. Since there is no requirement that Stephen Foss make such disclosures prior to judgment, there is nothing the Court can construe from his refusing to make such disclosures based on his Fifth Amendment rights. Therefore, in the absence of any evidence suggesting improper transfers, the Plaintiff has not established a prejudgment right to such extraordinary relief. Accordingly, the Court shall enter a separate order granting a preliminary injunction against Stephen Foss without any budgeting or reporting requirements.

B. Request for Preliminary Injunction against Patricia Foss

Patricia Foss opposes the issuance of any preliminary injunction against her on a number of grounds including: (1) under the decision of the United States Supreme Court in Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc., 527 U.S. 308 (1999), this Court does not have the power to issue a preliminary injunction to a prejudgment creditor lacking any lien or equitable interest in the assets that are the object of the injunction; (2) the Plaintiff cannot establish a likelihood of success due to the doctrine of *in pari delicto*; (3) The Plaintiff has not demonstrated a likelihood of success on the merits of its claims; (4) Plaintiff has failed to demonstrate irreparable harm due to the existence of directors and officers liability insurance; (5) the Plaintiff has not demonstrated that the balancing of the harms favors the Plaintiff; and (6) the granting of a preliminary injunction is not in the public interest. The Plaintiff contends that: (1) Grupo Mexicano does not bar a chapter 11 trustee who is asserting claims of the estate under the provisions of 11 U.S.C. § 544(a) from obtaining injunctive relief; (2) the *in pari delicto* defense is not available to Patricia Foss as a corporate insider; (3) good faith is not a defense to the Plaintiff's breach of fiduciary duty claims; and (4) the other grounds for Patricia Foss' objection, based upon the merits of its claims or the standards for the issuance of a preliminary injunction, are unavailing.

1. Likelihood of Success

a. Claims Related to Fiduciary Duty

The Plaintiff admits, for the purposes of the preliminary injunction hearing, that Patricia Foss has no liability for breach of fiduciary duty (Count II), waste of corporate assets (Count IV), illegal dividends (Count VI), or deepening insolvency (Count VII) for any time period

before she officially took office as a director of the Debtor. It is undisputed that Patricia Foss was a director of the Debtor from February 14, 2005, until the filing of the Debtor's chapter 11 petition on September 16, 2005 (the "Petition Date"). The Plaintiff presented evidence that Patricia Foss was elected to be a director at a shareholders meeting held on July 1, 2004 (Exhibit 3). The Plaintiff also introduced minutes of directors meetings held on October 6, October 21, and November 4, 2004 (the "2004 Minutes"), which indicate that Patricia Foss was present as a member of the board of directors (Exhibits 6, 7, and 8). Patricia Foss testified that she was not elected to be a director on July 1, 2006, and that she had never seen the minutes of that shareholders meeting before the Petition Date. She admitted she had attended directors meetings as a shareholder in the last half of 2004 due to her interest in the Debtor's strategic planning to solve its financial problems. She also testified that she advised Stephen Foss to correct the 2004 Minutes that indicated she was a director, but he apparently never did so. Finally, she testified that the alleged shareholder minutes were not on the Debtor's letterhead as were the other minutes and that the 2004 Minutes also reflected that Kevin Sexton and David Rowell were present as directors, which was inconsistent with the purported July 1, 2004, minutes of the shareholders meeting (Exhibit 3). Based upon the conflicting evidence regarding Patricia Foss' status as a director and the lack of any corroborating evidence of her status as a director of the Debtor prior to February 14, 2004, the Court finds that the Plaintiff has not established a likelihood of success in establishing that she was a director prior to February 14, 2006.

(i) Count VII and Count IV

The Court finds that the Plaintiff did not present sufficient evidence to establish adverse changes in the Debtor's solvency between February 14, 2005, and the Petition Date to establish a

likelihood of success against Patricia Foss on its deepening insolvency claim (Count VII). The Plaintiff did not present sufficient evidence to support that Patricia Foss, as a director, had any knowledge or role in approving excessive executive compensation or expense reimbursement. Therefore, it has not established a likelihood of success on its wasting assets count (Count IV) against Patricia Foss. The portion of that count dealing with illegal dividends will be considered as part of Count VI.

(ii) Count VI

The Debtor was a New Hampshire business corporation. Under New Hampshire law, no dividend may be paid to shareholders if, after giving effect to the distribution, the corporation would be unable to pay its debts as they became due or such distribution would render the corporation insolvent. NH RSA 293-A:6.40(c). It is undisputed that after February 14, 2005, the Debtor distributed \$210,750.00 in dividends to preferred shareholders. The evidence established that Patricia Foss was made aware of financial reporting irregularities with respect to the Debtor's lender in early August of 2005 and that subsequent investigation disclosed that the irregularities had occurred over a period of time starting before February 14, 2005. The effect of those irregularities was to permit the Debtor to borrow more on its revolving credit facility than it was otherwise entitled to borrow and, but for such excess borrowing, the Debtor would have been unable to meet its obligations as they became due. The Court finds that the Plaintiff has established a likelihood of success on its claim against Patricia Foss for illegal dividends paid to preferred shareholders after February 14, 2005, under Count VI.

(iii) Count II

The evidence established that after Patricia Foss was elected as a director she failed to acquaint herself with the responsibilities of that office or to make inquiries into the controls over expenses, cash management, or budgeting for a corporation she knew to be in financial difficulty. She testified that she did not have any knowledge of the terms of the Debtor's lending relationship with its primary lender or any details of the difficulties the Debtor had experienced with that lender in late 2004, notwithstanding the fact that she had at least attended directors meetings during that time frame as a shareholder. When the long-time chief financial officer ("CFO") of the Debtor abruptly resigned and advised her by separate emails that (1) he had been asked to do "unprofessional, unethical, and even 'other' things" (Exhibit 10) and (2) sales projection for December 2004 had been misrepresented to the Debtor's primary lender by \$1.0 million (Exhibit 11), she took no action other than asking the immediate supervisor of the CFO, her husband the chief executive officer ("CEO") of the Debtor, to write a response for the file. Patricia Foss testified that she discounted the CFO's comments based upon her independent knowledge of stress in his personal life and, therefore, accepted the answers of the CEO and made no further inquiries.

Based upon the evidence presented at the hearing it appears that Patricia Foss, after a lifetime of being excluded from the operation of the family business by her husband and his family, suddenly began regular attendance at directors meetings in the middle of 2004 because of her concerns over the strategic future of the Debtor. She never became aware of the Debtor's problems with its primary lender and apparently never inquired. She became concerned enough about the management of the Debtor that she advocated replacing the CEO, her husband, with an

outside hire, shifting him to chief technology officer for the company and improving the financial management of the company. Nevertheless, after being elected as a director on February 14, 2005, she failed to make any inquiries into the details of the Debtor's relationship with its primary lender. Additionally, despite her concerns over the ability of senior management, she failed to conduct any investigation or seek any advice concerning the allegations raised by the CFO in March of 2005.

Under New Hampshire law, a director must discharge her duties in good faith, with the care of an ordinary prudent person and in a manner that is in the best interests of the corporation. NH RSA 293-A:8.30(a). A director is entitled to rely on information, opinions, reports, and financial statements prepared or presented by officers or employees of the corporation whom the director reasonably believes to be reliable and competent in the matters presented. NH RSA 293-A:8.30(b). A director is not acting in good faith if she has knowledge concerning the matter in question that makes reliance on officers or employees of the corporation unwarranted. NH RSA 293-A:8.30(c). The Court finds that the Plaintiff has established a likelihood of success that Patricia Foss: (1) breached her duty as a director to act with the care of an ordinary prudent person by failing to make reasonable inquiries into the acts, policies, and practices of the Debtor, despite her knowledge of its financial difficulties and her questions about the capabilities of senior management and (2) failed to act in good faith because her reliance on the opinions, reports, and statements of officers and employees of the Debtor was unwarranted (Count II).

(iv) Count V

The Plaintiff's claims for unjust enrichment (Count V) was brought against Patricia Foss and twelve other Defendants. To the extent that the transfers covered by the complaint were not

made to Patricia Foss as the immediate transferee, the Court finds that the Plaintiff has failed to establish a likelihood of success against Patricia Foss under Count V because little or no evidence of benefit to her was established. To the extent that she was an immediate transferee, the claim is subsumed within the fraudulent transfer counts.

(v) Count VII

The Plaintiff's likelihood of success on its claim for equitable subordination (Count VII) need not be considered by the Court because the success of the claim will only affect any ultimate distribution to creditors and no irreparable harm can result from the denial of a preliminary injunction on this count.

b. Claims Related to Avoidable Transfers

(i) Count XV

The Plaintiff's claim to avoid constructively fraudulent transfers under applicable state law (Count XV) is based upon the economic effect of the transfer and not on the intent of the Debtor or the good faith, or lack thereof, of Patricia Foss. In re Jackson, 318 B.R. 5, 18 (Bankr. D.N.H. 2004); NH RSA 545-A:4(I)(b). The Plaintiff must establish that the Debtor transferred an asset or incurred a debt without receiving reasonably equivalent value and that the Debtor was engaged in business for which its assets were unreasonably small or intended to incur debts beyond its ability to pay. Id.

The Plaintiff's claim is based upon improvements to Patricia Foss' personal residence paid by the Debtor, personal travel on a company airplane, club memberships, and payments to and/or on behalf of entities in which she has an interest. At the hearing, Patricia Foss admitted to a number of trips each year on the Debtor's airplane for personal travel. However, she denied

any knowledge of how or whether such travel was reimbursed to the Debtor. The Plaintiff established that the Debtor paid significant sums in connection with the operation of its airplane, but failed to establish any basis for allocating those expenses to personal travel by Patricia Foss. The evidence established that unknown amounts of money were paid to Stephen Foss in connection with payment or reimbursement to him for charges at private clubs in Bermuda, Florida, and New Hampshire. However, other than anecdotal testimony that some of those charges were for the benefit of Patricia Foss, the Plaintiff presented no specific evidence of any such benefit. Finally, the Plaintiff established significant payments to or for the benefit of various entities in which Patricia Foss held an interest as owner, beneficiary, or trustee (e.g. Foss Family LLC I, Foss Family LLC II, and Custom Travel of New Hampshire, Inc.). However, no evidence of the precise nature of Patricia Foss' beneficial interest in such entities or the benefit received by her, if any, was presented. Simply because the Debtor transferred assets or satisfied obligations of an entity in which Mrs Foss held an interest does not establish its right to recover any such transfer from her under 11 U.S.C. § 550. Accordingly, the Court finds that the Plaintiff has failed to establish a likelihood of success on Count XV.

(ii) Count XVI

The Plaintiff's claim under NH RSA 545-A:5(I) (Count XVI) is substantively identical to the constructive fraud claim under Count XV. The only difference is the required element that the Plaintiff must establish the existence of creditors of the Debtor before the transfers in question. Even assuming that the Plaintiff established the existence of pre-transfer creditors, it failed to establish a likelihood of success for the reasons discussed in the immediate preceding section.

(iii) Count XVII

The final count is the Plaintiff's claim under 11 U.S.C. § 548 for transfers to an insider on account of antecedent debt (Count XVII). All of the Plaintiff's claims are described in the complaint as transfers or conveyances "to Defendant Patricia Foss for, among other things, lease, mortgage and other payments to and/or on behalf of Defendants Foss Family LLC I, Foss Family LLC II, and Custom Travel of New Hampshire, Inc., in which she has or had an ownership interest." For the reasons discussed above, the Court finds that the Plaintiff has failed to establish that (1) any such transfers were made directly to Patricia Foss, (2) her ownership interest in any of the other named Defendants, or (3) the benefit, if any, received by her. Accordingly, the Plaintiff has failed to establish a likelihood of success on Count XVII.

2. Other Factors Affecting Issuance of a Preliminary Injunction

For the reasons discussed above, the Court has found that the Plaintiff has established a likelihood of success on its claims against Patricia Foss only as to breach of fiduciary duty as a director (Count II) and illegal dividends (Count VI). On the record before the Court, the Plaintiff has failed to establish a likelihood of success on any of the equitable claims. Therefore, the Court need not consider the remaining three factors for issuance of an injunction on claims other than Counts II and VI against Patricia Foss. Neither of those counts are equitable claims, but rather seek only money damages. Therefore injunctive relief is neither appropriate nor permissible against Patricia Foss. Grupo Mexicano, 527 U.S. at 333; Deckert v. Independence Shares Corp., 311 U.S. 282, 290 (1940) (injunctive relief available on equitable claims); Charlesbank Equity Fund II, Ltd. P. v. Blinds To Go, Inc., 370 F.3d 151, 162 (1st Cir. 2004)

(irreparable harm most often exists where a party has no adequate remedy at law; money damages are an adequate remedy at law).

C. Attachment against Stephen Foss

Stephen Foss has agreed to an attachment against his interests in real estate in Rockingham County, New Hampshire, up to \$1.5 million and objected to the Plaintiff's request for a trustee attachment against unnamed trustee defendants. Pursuant to Federal Rule of Civil Procedure 64, the attachment of bank accounts in this adversary proceeding is controlled by New Hampshire law. Under New Hampshire law, attachment of any money, goods, chattels, rights, or credits of a defendant, not otherwise exempt, may be accomplished through trustee process. NH RSA 512:20. Trustee process is commenced by a plaintiff serving a trustee writ of trustee process on the defendant and the trustee. NH RSA 512:3. Absent proper service of a writ of trustee process, a trustee may not be charged for property of the defendant in the trustee's possession. In this case, the Plaintiff has failed to properly serve and file any writ of trustee process. Therefore, any request to attach any money, goods, chattels, rights, or credits of Stephen Foss in the hands of a third party must be denied pending the Plaintiff following proper procedure under New Hampshire law.

Since Stephen Foss has conceded that it is appropriate for the Court to grant a real estate attachment and a preliminary injunction, the only question for the Court is the amount of the attachment. The Plaintiff failed to offer any quantitative evidence on measure of damages for many of its claims. For example, the Plaintiff claims that during the four years pre-petition the Debtor paid to or for the benefit of Stephen Foss \$561,923.85 on his corporate American Express credit card. The Plaintiff alleges that "a material portion" of such payments were for personal

rather than business expenses. However, at the hearing, the Plaintiff was unable to offer any evidence as to what portion of such payments was personal. Absent such evidence, the Court is unable to determine the likelihood that the Plaintiff will recover a judgment on such claim, as required by applicable law. NH RSA 511-A:3. The Court finds that the Plaintiff presented sufficient evidence to establish a likelihood that it could recover judgment in the following amounts:

Count IV	\$ 888,762.71	(Huras Aff'd ¶ 3)
Count VI	\$ 873,350.11	(Huras Aff'd ¶ 12)
Count X	\$1,769,250.00	(Huras Aff'd ¶ 13)
Count XI	<u>\$ 235,969.16</u>	(Huras Aff'd ¶'s 14 & 15)
Total	\$3,767,331.98	

Accordingly, the Court shall authorize a real estate attachment against Stephen Foss in the amount of \$3,767,331.98.

D. Attachment against Patricia Foss

Patricia Foss opposes any attachment against her. For the reasons discussed in section III.C above, the Plaintiff's request for a trustee process attachment against Patricia Foss shall be denied. For the reasons discussed in section III.B above, the Court has found that the Plaintiff has established a likelihood of success against Patricia Foss on only Counts II (breach of fiduciary duty) and Count VI (illegal dividends after February 15, 2005). The Court also finds that the Plaintiff has established a strong likelihood of success on Counts II and VI by more than a preponderance of the evidence. See Diane Holly Corp. v. Bruno & Stillman Yacht Co., Inc., 559 F.Supp at 561.

As discussed in section III.C above, the Plaintiff did not submit sufficient quantitative evidence for the Court to determine the amount of the judgment the Plaintiff is likely to receive

under Count II. Patricia Foss contends that an attachment is not appropriate because of the existence of directors and officers liability insurance in the amount of \$10 million. Although copies of insurance policies were entered into evidence, no evidence of that coverage under such policies was available was offered. The Plaintiff did submit quantitative evidence establishing a likelihood that it could recover a judgment in the amount of \$210,750.00 for illegal, post-February 15, 2005, dividends under Count II. See Huras Affid ¶ 12. Accordingly, the Court shall authorize a real estate attachment against Patricia Foss in the amount of \$210,750.00.

IV. CONCLUSION

This opinion constitutes the Court's findings of fact and conclusions of law in accordance with Federal Rule of Bankruptcy Procedure 7052. The Court will issue separate orders consistent with this opinion.

ENTERED at Manchester, New Hampshire.

Date: July 12, 2006

/s/ J. Michael Deasy
J. Michael Deasy
Bankruptcy Judge