

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

MECUL SERVICES CORP., INC.,)	
)	
<i>Plaintiff</i>)	
)	
v.)	Civil No. 97-279-P-H
)	
MELLON BANK, N.A.,)	
)	
<i>Defendant</i>)	

RECOMMENDED DECISION ON CROSS-MOTIONS FOR SUMMARY JUDGMENT

This dispute involves two financial institutions and the end of their contractual relationship in which one provided certain electronic transaction-processing services to the other. In 1997 plaintiff and counterclaim defendant MECUL Services Corp., Inc. (“MECUL”) decided to stop using the electronic fund transfer services of defendant and counterclaim-plaintiff Mellon Bank, N.A. (“Mellon”). The logistics of winding up such an electronic fund transfer services arrangement are a complicated matter, referred to by the parties as “deconversion.”

MECUL initially filed the lawsuit in state court, seeking not only damages for breach of contract but also declaratory and injunctive relief with the objective of compelling Mellon to perform certain services that would facilitate the deconversion and, thus, MECUL’s switch to a different provider of electronic fund transfer services. Mellon removed the case here, invoking the court’s diversity jurisdiction, and asserted counterclaims for breach of contract, promissory estoppel, quasi-contract (*quantum meruit*) and unjust enrichment. On September 12, 1997 the court entered a preliminary injunction pursuant to an agreement of the parties. *See* Order (Docket No. 8). The parties subsequently indicated that the only claims remaining in the case are Mellon’s counterclaims

against MECUL. *See* Joint Motion for Extension of Discovery Deadlines (Docket No. 16) at 1. Now pending are cross-motions for summary judgment on the counterclaims (Docket Nos. 19 and 22). For the reasons that follow, I recommend that each motion be granted in part and denied in part.¹

I. Summary Judgment Standards

Summary judgment is appropriate only if “the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” Fed. R. Civ. P. 56(c). “In this regard, ‘material’ means that a contested fact has the potential to change the outcome of the suit under the governing law if the dispute is resolved favorably to the nonmovant. By like token, ‘genuine’ means that ‘the evidence about the fact is such that a reasonable jury could resolve the point in favor of the nonmoving party’” *McCarthy v. Northwest Airlines, Inc.*, 56 F.3d 313, 315 (1st Cir. 1995) (citations omitted). The party moving for summary judgment must demonstrate an absence of evidence to support the nonmoving party’s case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). In determining whether this burden is met, the court must view the record in the light most favorable to the nonmoving party and give that party the benefit of all reasonable inferences in its favor. *Cadle Co. v. Hayes*, 116 F.3d 957, 959 (1st Cir. 1997). Once the moving party has made a preliminary showing that no genuine issue of material fact exists, “the nonmovant must contradict the showing by pointing to specific facts demonstrating that there is, indeed, a trialworthy issue.” *National Amusements, Inc. v. Town of Dedham*, 43 F.3d 731, 735 (1st Cir. 1995) (citing *Celotex*, 477 U.S. at

¹ MECUL has requested oral argument on the pending summary judgment motions (Docket No. 34). Because I am satisfied that both motions can be decided on the papers submitted, I deny the request.

324); Fed. R. Civ. P. 56(e). “This is especially true in respect to claims or issues on which the nonmovant bears the burden of proof.” *International Ass’n of Machinists & Aerospace Workers v. Winship Green Nursing Ctr.*, 103 F.3d 196, 200 (1st Cir. 1996) (citations omitted).

II. Factual Background

Many of the relevant facts are not in dispute. The summary judgment record reveals the following:

MECUL is a for-profit corporation that provides certain fee-based services to credit unions. Deposition of John G. Murphy (“J. Murphy Dep.”), Exh. 3,² at 9. It is a subsidiary of the Maine Credit Union League, an association of Maine-based credit unions. *Id.* at 7, 9-10. In October of 1997 MECUL was providing services to approximately 75 credit unions in Maine, 23 credit unions in Connecticut, and one credit union apiece in Massachusetts, Rhode Island and Vermont. Second Affidavit of J. Hunter King (“King Aff. II”) (Docket No. 31) at ¶ 4.

On August 14, 1990 MECUL entered into a written contract with Mellon in which Mellon agreed to provide MECUL with electronic funds transfer services.³ J. Murphy Dep. at 33; Electronic

² References are to the set of exhibits the parties have jointly provided to the court that includes nearly all material in the summary judgment record. The exhibit compilation was filed with Mellon’s reply memorandum in support of its summary judgment motion (Docket No. 32). The parties deserve commendation for this cooperative effort at efficient organization of the summary judgment record.

³ MECUL has provided the following “[o]verview” of these services:

The services under the Electronic Funds Transfer Services Agreement relate to the use of ATM or debit cards at automated teller machines (ATM’s) or for point of sale transactions. A point of sale transaction is when a debit card can be used at a merchant, such as a supermarket, to purchase goods or services with a direct debit to the cardholder’s account. . . . [Additionally, t]he ATM’s of the various credit unions

(continued...)

Funds Transfer Services Agreement dated August 14, 1990 (“1990 Contract”), Exh. 10, at 1. The agreement was negotiated by Robert Castellano for Mellon and John Murphy for MECUL. J. Murphy Dep. at 25; Deposition of Robert Castellano (“Castellano Dep.”), Exh 4, at 14. The relationship between the parties was an unusual one, although not a unique one, for Mellon. Castellano Dep. at 42-43. Mellon typically entered into such agreements with a single financial institution, whereas the arrangement with MECUL was a “wholesale” agreement in which Mellon was providing services to MECUL’s constituent financial institutions. *Id.*; Deposition of Donald Murphy (“D. Murphy Dep.”), Exh. 8, at 23.

The 1990 Contract included an attachment labeled “Exhibit B” setting forth a schedule of fees payable by MECUL. 1990 Contract at 15-24. The contract provided that it “may be amended only by a written instrument signed by authorized officers of both parties.” *Id.* at 7. The initial term of the 1990 Contract was three years, with provisions for one-year extensions at the option of the parties. *Id.* at 6. The parties opted for one such extension. Castellano Dep. at 57. Neither the 1990 Contract nor the fee schedule appended to it as Exhibit B expressly provided for any specific deconversion fee upon the termination or expiration of the agreement. The only specific reference

³(...continued)

serviced under the Mellon/MECUL agreement are linked directly to Mellon via telecommunications lines. . . . An ATM transaction may be approved or denied. For most of the credit unions, the authorization was “on-line” via a direct link between Mellon and MECUL, with MECUL processing the actual account balance information. . . . Networks such as Plus and Cirrus allow the use of ATM cards anywhere in the country or world. The networks switch the transaction to the appropriate processor, *e.g.*, Mellon, which then authorizes the transaction per the applicable authorization method.

[MECUL] Statement of Material Facts (“MECUL SMF II”) (Docket No. 23) at ¶ 10. This narrative description is not fully supported by the cited record in the summary judgment record, but neither is it disputed by Mellon as an accurate summary of the services at issue.

to deconversion charges in the 1990 Contract was in Section V of the fee schedule, in a paragraph labeled “Credit Union Merges.” 1990 Contract at 21-22. This provision recited that “Credit Union merges resulting in the deconversion of a customer will be coordinated by the Network. The Network will charge \$75/hour for applicable deconversion support.”⁴ *Id.* at 22. The specific issue of deconversion fees was not discussed in the negotiations leading up to the 1990 Contract. J. Murphy Dep. at 35, 43.

Mellon notified MECUL on May 13, 1991 that any deconversions of individual financial institutions would be completed by Mellon for a fee of \$300 upon two weeks’ notice to Mellon.⁵ Memorandum from Mary M. Klinefelter to Deborah Analetto and Karen Murphy dated May 13, 1991, Exh. 17, at 4. Deconversions to be completed on less than two weeks’ notice were to be charged at \$500 apiece. *Id.* Karen Murphy, MECUL’s card services manager, accepted this as MECUL’s understanding of what Mellon would be charging in the future for the deconversion of individual financial institutions. Deposition of Karen Murphy (“K. Murphy Dep.”), Exh. 6, at 9, 23,

⁴ It is apparent from the context and from the discussion of these provisions in the parties’ memoranda that the reference to “merges” is intended to cover the merger of one credit union with another.

⁵ According to the parties, this \$300 fee for each individual deconversion was agreed upon between them in discussions that led up to the May 13, 1991 memo from Mellon. However, the record references cited by the parties in support of this proposition do not enlighten the court as to any discussions that may have preceded the May 13 memorandum.

The exact language of the May 13 memorandum is the source of disagreement between the parties and reads as follows:

Going forward, all project requests will be billed at \$75.00 per hour. Also, all future deconversions will be charged a flat fee of \$300.00 with a 2 week lead time. If deconversions are requested as expedites, (less than 2 weeks), a \$500.00 fee will be implemented.

Exh. 17 at 4.

26. Between July 1991 and October 1994, Mellon charged MECUL for each of two credit union deconversions: Kennebunk Health System and Telco. King Aff. II at ¶ 3. Both deconversions occurred in 1993. *Id.* Concerning the Telco deconversion, Mellon initially billed MECUL \$1,500, to which MECUL objected on the ground that the parties had agreed to a \$300 fee in such circumstances. Mellon Bank invoice addressed to Telco FCU and dated Feb. 15, 1994, Exh. 21; Deposition of Susan Emery (“Emery Dep.”), Exh. 7, at 14; K. Murphy Dep. at 32. Susan Emery, an account executive with Mellon, agreed by letter dated March 15, 1994 to credit MECUL with \$1,200 of the \$1,500 initially charged for the Telco deconversion, in light of the previous agreement to a \$300 charge. Emery Dep. at 6, 13; Letter of Susan Emery to Karen Murphy dated March 15, 1994, Exh. 23. However, Emery’s letter continued:

On all future de-conversions, our standard fee is \$2,500.00, given that the MECUL contract was extended for one-year, we will reduce your fee to \$1,500.00 per each Credit Union deconverted from this point on. Should you wish a detailed breakdown of additional charges that could be assessed, I will be available to discuss this further, should that be necessary.

Id. Karen Murphy never personally indicated to anyone at Mellon that she agreed to the deconversion fees as set forth in Emery’s March 15, 1994 letter. K. Murphy Dep. at 39. Nor, to her knowledge, did anyone else at MECUL express such assent. *Id.* at 40. Emery left her job with Mellon in June 1994. Emery Dep. at 5.

The parties entered into a second written agreement concerning electronic funds transfer services on October 3, 1994. J. Murphy Dep. at 51; Electronic Funds Transfer Services Agreement dated October 3, 1994 (“1994 Contract”), Exh. 13, at 1.⁶ Like the 1990 Contract

⁶ On the same date, the parties entered into two additional written contracts: an agreement relating to “Visa Check transaction processing services” and an agreement concerning (continued...)

was for a period of three years and included a provision expressly contemplating the possibility of subsequent one-year extensions. 1994 Contract at 1. Specifically, the 1994 Contract provided that, following the end of the initial three-year term, either party could terminate the agreement on 90 days' notice to the other party. *Id.* at 2. Absent such notice, the agreement provided for automatic one-year extensions. *Id.* at 1.

Negotiations on the 1994 Contract took place between Robert Castellano, a regional manager with Mellon, and Gerard Veroneau, a MECUL vice president. Affidavit of Robert Castellano ("Castellano Aff.") (Docket No. 4) at ¶ 3. These discussions began as early as May 1993. Castellano Dep. at 70. During the course of those negotiations, Castellano or someone at his office prepared and transmitted to Veroneau a document that appears to propose certain "Third-Party" and "Optional" fees, including an item that lists "Deconversion Fees" as "\$2,500 + Reports N/A." Document entitled "Third-Party/Optional Fees," Exh. 20 at page marked "Exhibit C" page 1; Castellano Dep. at 55. According to Castellano, the designation 'N/A' had reference to the fact that such a \$2,500 fee would not be applicable to the agreement under negotiation between the parties. *Id.* at 75. The subject of what a "global deconversion," i.e., deconversion of all the individual financial institutions receiving financial services under the MECUL-Mellon contract, was never addressed during the negotiations. *Id.* at 90. In any event, the document marked as Exhibit C and purporting to set forth third-party and/or optional fees did not become part of the 1994 Contract as it was ultimately entered into by the parties. Deposition of Gerard J. Veroneau ("Veroneau Dep."),

⁶(...continued)

"MasterMoney transaction processing services." J. Murphy Dep. at 51-52; Visa Check Agreement dated October 3, 1994, Exh. 14, at 1, 10; MasterMoney Agreement dated October 3, 1994, Exh. 15, at 1, 10. It does not appear that either of these two agreements are implicated in the present dispute.

Exh. 5, at 14; Castellano Dep. at 21-22.

On January 21, 1997 Senior Vice-President J. Hunter King of MECUL sent Mellon written notice that MECUL intended to terminate the 1994 Contract as of October 3, 1997, i.e., at the conclusion of the initial three-year term provided for in the contract. Letter of J. Hunter King to Bonnie L. Wikert dated January 21, 1997, Exh. 40; Affidavit of J. Hunter King (“King Aff. I”) (Docket No. 24) at ¶¶ 1, 4. MECUL intended to allow the 1994 Contract to expire by its terms in October 1997, without renewal, even in the event MECUL decided to continue using Mellon for electronic funds transfer services. King Aff. at ¶ 5. Had MECUL decided to continue with Mellon, it would have negotiated a new agreement. *Id.* Mellon remained in contention as a provider of such services for the period following the 1994 Contract until MECUL decided in the early summer of 1997 to use another vendor. *Id.* at ¶¶ 5-6.

On behalf of MECUL, King notified Mellon official Donald J. Murphy by telephone on July 21, 1997 that MECUL had decided to change its electronic funds transfer services provider to a concern identified in the record only as “EDS.” *Id.* at ¶ 6. Murphy asked for a written termination notice, to which King responded that MECUL had transmitted one in January 1997 but would send another. *Id.* King wrote such a letter to Murphy the same day. *Id.*; Letter of J. Hunter King to Donald J. Murphy dated July 21, 1997, Exh. 43. The letter expressed a desire to extend the relationship between the parties “on a month-by-month basis through January 1998” so as to facilitate a “smooth deconversion from Mellon and conversion to EDS.” Exh. 43. The following day, King spoke by telephone with Sidney K. Horton, Jr., Mellon’s regional vice-president. King Aff. at ¶ 7. The two discussed MECUL’s decision to switch providers, Horton mentioned that MECUL should be aware of expenses associated with deconversion and King told Horton that the

parties' 1994 agreement did not provide for any deconversion fees. *Id.*

King received a letter on August 4, 1997 from Richard B. Pylant, identified therein as First Vice-President of Mellon Network Services. *Id.* at ¶ 8; Letter of Richard B. Pylant to J. Hunter King dated Aug. 1, 1997 (“Pylant Letter”), Exhibit A to King Aff. Pylant stated in his letter that Mellon would agree to the proposed month-to-month extension on certain conditions, including, *inter alia*, payment of a \$2,500 deconversion fee per credit union.⁷ Pylant Letter at 1-2. Thereafter, King asked Pylant to fax him a copy of the document Mellon considered to be the 1994 Contract in its entirety. King Aff. at ¶ 11. Pylant did so on August 26, 1997. *Id.* The document Pylant transmitted included a list of “Third-Party Fees,” marked as Exhibit C and including a listing of “\$2,500 + Reports” under “Deconversion Fees.” *Id.*⁸ MECUL President John G. Murphy faxed a letter to Pylant pointing out that the so-called Exhibit C was not part of the parties’ contract and offering to pay a total fee of \$2,500 for all required deconversions. Affidavit of John G. Murphy (“J. Murphy Aff.”) (Docket No. 26) at ¶ 6 and Exh. A thereto. Pylant responded, by letter received by Murphy on September 2, 1997, that the \$2,500 per credit union deconversion fee was part of the parties’ agreement but that Mellon was willing to lower the fee to \$2,000 subject to certain conditions. J. Murphy Aff. at ¶ 7 and Exh. B thereto. Two days later, MECUL filed its complaint in state court. *See* Exh. B to Notice of

⁷ According to Mellon, Pylant was not involved in the negotiations on the 1994 Contract, Castellano and Emery had left Mellon’s employment by 1997, Pylant had no personal knowledge of the prior negotiations and, therefore, Pylant’s insistence on the \$2,500 per-credit union fee was based on his uninformed speculation that the fee schedule referenced *supra* as Exhibit C was part of the 1994 Contract. The excerpts from Pylant’s deposition cited for these propositions by Mellon do not support them.

⁸ The document Pylant faxed to King appears in the summary judgment record as Exhibit 11. *See* King Aff. at ¶ 11. The referenced fee schedule appears in Exhibit 11 with a Bates stamp of 059.

Removal (Docket No. 1).

The preliminary injunction entered by this court on September 12, 1997 required Mellon to facilitate MECUL's transition to the new supplier of electronic funds transfer services by, *inter alia*, providing to MECUL certain "Card Authorization File ("CAF") account information and Card Management File ("CMF")⁹ information on or before September 24, 1997, in the format to be requested by MECUL." Order at 1. The injunction also required Mellon to

provide to MECUL updated CAF and CMF information in the requested format on a date to be mutually agreed upon . . . and [to] provide all information requested by MECUL to enable MECUL to complete its deconversion from Mellon and conversion to its new processor on November 4, 1997.

Id. The parties do not contend that Mellon failed to comply with these terms of the injunction. The only invoice received by MECUL from Mellon concerning deconversion activities was dated December 22, 1997 and included a unit price of \$2,500 for each of 103 individual financial institutions, for a total of \$257,500. King Aff. I at ¶ 16 and Exh. C thereto. As of April 14, 1998 MECUL had not received an invoice from Mellon specifying Mellon's charges for the CAF and CMF data, which was apparently supplied in tape format, or an invoice specifying any special programming work incurred by Mellon in connection with the MECUL deconversion. King Aff. I

⁹ According to MECUL, in connection with the provision of electronic funds transfer services,

Mellon maintains a Cardholder Account File (CAF) and Card Management File (CMF) for each individual account holder. The CAF file contains a record of every cardholder, including card status, account status and parameters. [T]he CMF file contains the customer name and address information. This file information can be run on a hard copy report or on a tape.

MECUL SMF II at ¶ 10. As with the overview of Mellon's services quoted *supra*, this description is not supported by appropriate record citations but is not challenged by Mellon.

at ¶ 17. The December 22 invoice furnished by Mellon includes charges of \$13,600 for “Telecom Line Disconnect” and \$13,600 for “ATM Disconnect.”

III. Discussion

Although the volume of papers filed in these summary judgment proceedings would suggest a complicated case, this dispute is actually a fairly straightforward one. Mellon believes it is entitled to recover \$2,500 for every MECUL-affiliated credit union it deconverted from its electronic funds processing system when MECUL switched from Mellon to another provider of the electronic services in question. Mellon also contends it is entitled to recover an additional sum for certain services it provided as a part of the deconversion process, including but not necessarily limited to providing the credit unions with the so-called CAF and CMF files, which are simply records of the individual customer accounts involved in the electronic transactions. MECUL’s position is that it is under no obligation to pay the \$2,500 per-credit-union fee and that, as to any additional sums payable to Mellon, it is not in breach of their contract because Mellon has yet to furnish an appropriate invoice as required under the contract as a condition precedent to payment. Although it would appear, regrettably, that the parties only communicated this to each other via their summary judgment filings, they agree that the basic written contracts into which they entered in 1990 and 1994 are silent as to the \$2,500 fee. Thus, if such an obligation exists, its source is somewhere else — either in a separate contract entered into by the parties somewhere along the line or through the operation of some equitable principle. Hence Mellon’s claims for promissory estoppel, *quantum meruit* and unjust enrichment.

a. Choice of law

At the outset, the court confronts the problem of what jurisdiction's law to apply to the dispute. Unfortunately, the parties provide little or no assistance to the court in accomplishing this task. Mellon simply ignores the choice-of-law issue — indeed, providing very little in the way of citation to legal authority from any jurisdiction in support of its positions. MECUL rather blithely assures the court that choice of law is a non-problem, but then goes on to point out some genuine differences between the laws of the two jurisdictions — Maine and Pennsylvania — whose law could conceivably apply to Mellon's equitable claims. *See* Motion for Summary Judgment with Incorporated Memorandum of Law of Counterclaim Defendant MECUL Services Corp. (Docket No. 22) at 7-8, 22 n.4. Although it appears that a choice-of-law dispute is not what stands between these parties and an amicable resolution of their disagreement, I do not believe a federal court sitting in diversity can responsibly adjudicate a case arising under state law without at least stating with some precision which state's law applies.

Maine's choice-of-law rules apply when this court exercises its diversity jurisdiction. *Anderson v. Virginia Sur. Co.*, 985 F.Supp. 182, 186 (D.Me. 1998). In formulating Maine's choice-of-law rules, the Law Court generally follows the approach of the *Restatement (Second) of Conflict of Laws* ("Restatement"). *Burr v. Melville Corp.*, 868 F.Supp. 359, 363 (D.Me. 1994). In Maine,

the rights and duties of the parties with respect to an issue in contract are to be determined at the forum level by the local law of the state which, with respect to that particular issue, has the most significant relationship to the transaction and the parties.

Anderson, 985 F.Supp. at 186 (quoting *Baybutt Const. Corp. v. Commercial Union Ins.*, 455 A.2d 914, 918 (Me. 1983), overruled on other grounds, *Peerless Ins. Co. v. Brennon*, 564 A.2d 383 (Me. 1989)).

The written contracts entered into by the parties in 1990 and 1994 both contain express language to the effect that Pennsylvania law governs the interpretation of the agreements. *See* 1990 Contract at 7; 1994 Contract at 8. Such a provision would normally resolve the choice-of-law issue in favor of applying Pennsylvania legal principles. *See Restatement* § 187(1). The problem, however, is that the parties are in agreement that their two written contracts do not resolve the issue that accounts for the majority of Mellon’s requested damages: the disputed \$2,500 per-credit-union fee.

Absent an express election of the applicable law, the court must revert to the “most significant relationship” test, which involves consideration of the following issues: “(1) place of contracting; (2) place of negotiation; (3) place of performance; (4) where the subject matter of the contract is located; and (5) the domicile, residence, nationality, place of incorporation, and place of business of the parties.” *Burr*, 868 F.Supp. at 363, *citing Restatement* § 188(2). Given their non-interest in the choice-of-law issue, the parties have not opted to assist the court by addressing these factors in their statements of material facts. Generally speaking, the relationship at issue in this case appears to be one of that ever-more ubiquitous variety that exists less in any particular geographic location than in the realm of cyberspace. On the other hand, most of the credit unions that used the electronic funds transfer services at issue are in Maine and, thus, with special reference to the fourth factor enumerated above, Maine would seem to have the most significant relationship to the relevant transactions for the same reason that Willie Sutton said he robbed banks: because that’s where the money is. The problem with applying Maine law to any part of this case is that Pennsylvania law clearly governs at least so much of this relationship as is covered by the 1990 and 1994 Contracts, and it seems anomalous to use the laws of two different jurisdictions to resolve the various issues

arising out of what is unmistakably one contractual relationship.

Ultimately, I am disinclined to embark on an elaborate choice-of-law inquiry because the parties do not provide the court with the necessary factual data to do so. I will apply Pennsylvania law to issues arising under the 1990 and 1994 Contracts because I cannot ignore the contracting parties' lawful election to make the law of that jurisdiction part of those agreements. As to other issues, I will apply Maine law. But I want to make absolutely clear that I am doing so not because I am certain this is the right answer under the applicable choice-of-law rules but because MECUL argues its positions based on Maine law and Mellon does not object, thus waiving any argument that the court should be applying Pennsylvania legal principles to the extent they differ from Maine's. *See LaPlante v. American Honda Motor Co.*, 27 F.3d 731, 740-41 (1st Cir. 1994) (describing steps party must take to preserve choice-of-law issue).

b. The \$2,500 fee: Contract claim

Although Mellon presents its request for relief in the form of distinct claims for breach of contract, promissory estoppel, *quantum meruit* and unjust enrichment, the case logically divides between the disputed \$2,500 per-credit-union fee and the other charges that Mellon contends it may recover from MECUL. I therefore bifurcate my analysis accordingly.

Mellon contends it is entitled to receive \$2,500 for every credit union it deconverted at the end of the relationship with MECUL under an agreement that has its roots in the memorandum of May 13, 1991 from Mary Klinefelter of Mellon to Deborah Analetto and Karen Murphy of MECUL informing them that Mellon would be charging MECUL \$300 for all future deconversions. As Mellon points out, there is no dispute that MECUL, through Karen Murphy, acceded to this fee.

Mellon further points to the further communication in March 1994 between Susan Emery of Mellon and Karen Murphy of MECUL in which Emery agreed that the deconversion of the Telco credit union would incur a charge of \$300 but that all future deconversions would be subject to Mellon's standard fee of \$2,500.

I must agree with MECUL that, even viewing the relevant factual data in the light most favorable to Mellon, application of the most basic principles of contract law permits only one conclusion: None of the communications between employees of the parties concerning deconversion fees yields a contractually binding agreement by MECUL to pay any fee, much less \$2,500, for every credit union in the system at the end of the parties' relationship.

To establish a legally binding agreement the parties must have mutually assented to be bound by all its material terms; the assent must be manifested in the contract, either expressly or impliedly; and the contract must be sufficiently definite to enable the court to determine its exact meaning and fix exactly the legal liabilities of the parties.

Searles v. Trustees of St. Joseph's College, 695 A.2d 1206, 1211 (Me. 1997) (citation omitted).

Viewing the record in the light most favorable to Mellon would certainly permit a factfinder to determine that MECUL assented to Mellon's position that, as of May 13, 1991, MECUL would pay \$300 for the deconversion of individual credit unions as they left the MECUL fold. The problem, from the standpoint of affording relief to Mellon on such a basis, is that the only appropriate way to view the 1991 agreement, as most recently assented to by MECUL in March 1994 in the discussion over the deconversion of the Telco credit union, is as a modification of the 1990 written contract that created and governed the parties' relationship in the first place. That 1990 contract was replaced in October 1994 with a new written instrument containing the following language:

This Agreement contains the entire agreement of the parties relating to the subject

matter hereof and supersedes any prior agreements or representations relating to such subject matter that are not set forth herein. This Agreement may be amended only in writing executed by the parties hereto.

1994 Contract at 10. “A binding integrated agreement discharges prior agreements to the extent that it is inconsistent with them.” *Maine Mortgage Co. v. Tonge*, 448 A.2d 899, 902 (Me. 1982) (citations omitted); *see also Bradney v. Sakelson*, 473 A.2d 189, 192 (Pa. Super. 1984) (“where there is an evident intent to substitute one agreement for another, and consideration appears, the contract is binding”). The 1994 Contract rendered any antecedent discussion about deconversion fees irrelevant to resolution of the present dispute because there is evident intent to substitute the 1994 agreement for all prior agreements covering Mellon’s provision of electronic funds transfer services to MECUL.

With reference to the language in the 1994 Contract purporting to limit future modifications to written instruments, MECUL contends that any discussions about deconversion fees that followed the 1994 Contract are similarly of no import. I agree, but not for the reason asserted by MECUL. As a matter of the common law of contracts generally, “a contract clause prohibiting oral modifications is essentially unenforceable because the clause itself is subject to oral modification.” *Pacific Northwest Group A v. Pizza Blends, Inc.*, 951 P.2d 826, 828 (Wash. App. 1998) (citing *Martinsville Nylon Employees Council Corp. v. NLRB*, 969 F.2d 1263, 1267 (D.C.Cir. 1992)). Pennsylvania law is in accord. *See Somerset Community Hosp. v. Allan B. Mitchell & Assocs., Inc.*, 685 A.2d 141, 146 (Pa. Super. 1996) (noting, however, that oral modification of prior written contract “must be proved by clear, precise and convincing evidence”). Research discloses no reported case from the Law Court indicating whether Maine has adopted such a rule. *But see Diversified Foods, Inc. v. First Nat. Bank of Boston*, 605 A.2d 609, 613 (Me. 1992) (given similar

contractual language on subsequent modification, and anti-waiver provision, contract not modified through course of dealing). Ultimately, the court need not resolve the question of whether the parties modified their 1994 Contract by providing for deconversion fees because there is nothing in the parties' respective statements of material facts, submitted pursuant to Local Rule 56, that would permit the court to conclude that a modification had occurred, oral or otherwise. *See Pew v. Scopino*, 161 F.R.D. 1, 1 (D.Me. 1995) (parties may not challenge summary judgment ruling based on matters not properly presented in factual statements). The only possible exceptions are as follows. First, there is the reference in the factual statement MECUL submitted in opposition to the Mellon summary judgment motion to the second affidavit executed by MECUL Senior Vice President J. Hunter King. *See MECUL Services Corp.'s Response to Mellon Bank's Statement of Material Facts Not in Dispute* ("MECUL SMF I") (Docket No. 30) at ¶ 15. King discloses that Mellon charged MECUL \$500 for the deconversion of the BANME credit union in July 1995 and \$2,250 for the deconversion of the Medical Services credit union in February 1997. King Aff. II at ¶ 3. Second are the following assertions contained in the factual statement Mellon submitted in support of its summary judgment motion:

For the Medical Services deconversion Mellon charged MECUL \$2,000 plus \$250 for tapes that it produced in conjunction with the deconversion; the \$2,000 reflected a cut from the normal fee because MECUL requested that Mellon reduce its fees for that deconversion. . . . MECUL invoiced Medical Services \$4,500 for the deconversion and \$250 for the production of the tapes. . . . This invoice reflected Mellon's \$2,000 deconversion fee and its \$250 tape fee, and then a charge by MECUL of \$2,250 as a deconversion fee to Medical Services from MECUL.

[Mellon] Statement of Material Facts Not in Dispute ("Mellon SMF I") (Docket No. 20) at ¶¶ 34-36 (record citations omitted). This evidence certainly suggests that Mellon sought to recover deconversion fees from MECUL in connection with these deconversions of individual credit unions

in 1995 and 1997, but they fall well short of evidence that could yield a conclusion that Mellon assented to any modification of the 1994 Contract — much less one that would require it to pay \$2,500 per credit union for the bulk deconversion required by the termination of the parties' relationship. To the extent that Mellon's contract claim seeks to recover such deconversion fees, MECUL is entitled to summary judgment in its favor.¹⁰

c. The \$2,500 fee: Promissory estoppel claim

Mellon further contends it is entitled to recover the deconversion fees based on the doctrine of promissory estoppel. Under Maine's formulation of the principle, a "promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise." *Gagne v. Stevens*, 1997 ME 88 at ¶ 13; 696 A.2d 411, 416 (quoting *Restatement (Second) of Contracts* § 90). In my opinion, even viewing the record in the light fully favorable to Mellon would not permit a factfinder to determine that the bank is entitled to recover on a promissory estoppel theory. On the issue of deconversion fees, the only promises possibly discernable on this record involve commitments by MECUL to pay certain fees in connection with the deconversion of individual credit unions, as already discussed.¹¹ In opposing MECUL's bid for

¹⁰ Because I conclude that the terms of the 1994 Contract preclude any assertion by Mellon that other communications passing between the parties established any obligation in MECUL to pay the deconversion fees, it is not necessary to discuss certain other factual issues raised and debated at some length by the parties. I refer to their respective views about what various employees of each party understood the significance of their communications to be and to Mellon's references to what MECUL charged its constituent credit unions for deconversion services.

¹¹ In arguing to the contrary, Mellon points to the \$300,000 bond posted by MECUL pursuant to the terms of the preliminary injunction that also caused the deconversion to go forward. (continued...)

summary judgment on the promissory estoppel claim, Mellon does not describe the action or forbearance these promises induced. It was obvious to both parties from the outset of their relationship that if MECUL ever switched to a different provider of electronic funds transfer services, Mellon was going to have to deconvert all of MECUL's constituent credit unions. Mellon may have assumed it would be receiving fees for all those deconversions and that assumption may have even been reasonable, but I discern no sense in which this assumption induced action or forbearance. MECUL is therefore entitled to summary judgment to the extent that Mellon seeks to recover the \$2,500 fees on a theory of promissory estoppel.

d. The \$2,500 fee: *Quantum meruit*

For similar reasons, Mellon's claim to the \$2,500 fees under the theory of *quantum meruit* also fails. In Maine, the elements of *quantum meruit* are: "(1) services [that] were rendered to the defendant by the plaintiff; (2) with the knowledge and consent of the defendant; and (3) under circumstances that make it reasonable for the plaintiff to expect payment." *Carvel Co. v. Spencer Press, Inc.*, 1998 ME 74 at ¶ 12; 1998 WL 162169 at *3 (citations omitted). Although *quantum meruit* involves an implied rather than an express contract, recovery on this theory requires Mellon to prove that it had a "reasonable expectation that [its] work was not gratuitous and that [MECUL] by [its] words or conduct justified this expectation." *Paffhausen v. Balano*, 1998 ME 47 at ¶ 10,

¹¹(...continued)

According to Mellon, such action represented an implied promise to pay at least something for deconversion services. This position, similar to the argument Mellon makes in connection with the unjust enrichment claim, *see* discussion of that issue, *infra*, is devoid of merit. There is nothing of record from which the court is in a position to draw any inferences as to why it agreed to post a bond. Therefore, the court can only assume that in posting the bond MECUL was simply complying with the injunction and not promising anything.

1998 WL 120045 at *2.

MECUL draws the court's attention to its decision in *Combustion Eng'g, Inc. v. Miller Hydro Group*, 812 F.Supp. 260 (D.Me. 1992), *aff'd*, 13 F.3d 437 (1st Cir. 1993). Construing Maine law, the court determined in *Combustion Engineering* that the existence of a written contract between the parties did not preclude one party recovering from the other in *quantum meruit*. *Id.* at 262 (noting that, while such a bar is the law in other jurisdictions, the Law Court has not established such an "absolute rule"). However, when the parties have entered into an express contractual relationship that covers the same "subject matter" as the *quantum meruit* claim, "the law should be *most hesitant* to imply a second contract . . . if the evidence does not compel an inference that the parties intended to make one." *Id.* (quoting *Aroostook Valley R.R. Co. v. Bangor & Aroostook R.R. Co.*, 455 A.2d 431, 433 (Me. 1983) (emphasis in original)).¹²

Taking care to view the record in the light most favorable to Mellon, I am convinced that no reasonable factfinder could infer that these parties intended to make a separate contract that in essence would govern the process of ending the relationship under their then-existing written agreement. The most Mellon-favorable inference a factfinder could draw is that the parties had an implied contract governing the deconversion of individual credit unions as they opted out of the MECUL-Mellon electronic funds transfer system and that, under this implied contract, MECUL was

¹² On its facts, *Combustion Engineering* provides little assistance to the court in resolving the dispute over the deconversion fees. The plaintiff in *Combustion Engineering* had failed to fulfil a condition precedent under its construction contract with the defendant, which was fatal to the plaintiff's contract claim. *Combustion Eng'g*, 812 F.Supp. at 261. The plaintiff's *quantum meruit* claim, although not necessarily barred by the existence of the written contract, foundered on the court's determination that lack of good faith precluded the requested equitable relief. *Id.* at 264. This case, by contrast, is not one in which the failure of a condition precedent excused MECUL from paying deconversion fees that were part of its express contract with Mellon.

obligated to pay a fee (which it apparently passed along to the individual credit union involved) to Mellon. In the face of an express contract governing every aspect of the relationship between Mellon and MECUL as to the credit unions that did not opt out of the system prior to its termination, it was not reasonable for Mellon to expect \$2,500 for every credit union deconverted when the relationship between Mellon and MECUL ended upon expiration of the express contract by its terms.

e. The \$2,500 fee: Unjust enrichment

The Law Court has recently taken considerable care to draw the appropriate distinction between *quantum meruit* and unjust enrichment, pointing out that the latter “describes recovery for the value of the benefit retained when there is no contractual relationship, but when, on the grounds of fairness and justice, the law compels performance of a legal and moral duty to pay.” *Paffhausen*, 1998 ME 47 at ¶ 6 & ¶ 12 n.3, 1998 WL 120045 at *1 & *3 n.3 (also pointing out differences in damages measurement between the two theories). Thus, in contrast to the *quantum meruit* analysis, the focus in determining whether Mellon may recover the \$2,500 fees is not on whether there was an express or implied contract providing for such fees but on whether Mellon conferred a benefit on MECUL for which justice compels MECUL to pay.

One additional difference between *quantum meruit* and unjust enrichment in Maine law is that under the latter, there *is* a blanket rule that recovery is precluded when the parties are in a contractual relationship. *See June Roberts Agency v. Venture Properties, Inc.*, 676 A.2d 46, 49 n.1 (Me. 1996) (noting this is because “unjust enrichment describes recovery for the value of the benefit retained when there is no contractual relationship”). In my view, MECUL is entitled to summary judgment on the unjust enrichment claim, as it relates to the \$2,500 deconversion fees, on this basis

alone.

Even if that were not so, the claim that MECUL was unjustly enriched by avoiding the \$2,500 fees still founders. In opposing MECUL's request for summary judgment on the unjust enrichment claim, Mellon relies entirely on its contention that the court should assume the existence of a conferred benefit given that a prime objective of the lawsuit as it was originally filed was the injunctive relief ultimately ordered by the court requiring Mellon to complete the deconversion process. I find such a contention to be singularly unpersuasive. If the court were to adopt such reasoning it would essentially mean that any litigant subjected to affirmative injunctive relief (i.e., a court order compelling the party to take some action) would have an unjust enrichment claim against the party that obtained the injunction on the theory that any harm, once mitigated, becomes a benefit. Under even the most Mellon-favorable view of the factual record, there can be no question that both parties always understood that the MECUL credit unions would need to be deconverted at the end of the parties' relationship. The question is whether Mellon is entitled to recover additional fees for causing the deconversion to take place — a contention that must rise and fall on contract principles. MECUL is entitled to summary judgment on the unjust enrichment claim insofar as it concerns the \$2,500 deconversion fees.

f. Other fees

In addition to seeking the deconversion fees, Mellon contends in its summary judgment motion that it is entitled to recover an additional \$61,500 in damages on its contract claim. According to Mellon, 103 credit unions were deconverted and it therefore provided 103 CAF reports at \$50 apiece and 103 CMF reports at \$250 apiece, entitling it to \$30,900 under the 1994 Contract.

Mellon further avers that it provided 68 “ATM disconnects” at \$250 apiece and 68 “telecommunication line disconnects” at \$200 each, entitling it to an additional \$30,600 under the same contract. Memorandum of Law appended to Mellon Bank’s Motion for Summary Judgment (Docket No. 19) at 10. MECUL does not respond to these contentions in its memorandum in opposition to the Mellon motion. However, in its own summary judgment motion, MECUL takes the position that it is entitled to judgment in its favor on these issues because Mellon has not complied with a condition precedent under the contract: the obligation to furnish Mellon with an invoice. MECUL counters that it has furnished no invoice because “MECUL has expressed its unwillingness to pay any fees at all related to the deconversion until this lawsuit is resolved.” Mellon Bank’s Opposition to MECUL’s Motion for Summary Judgment (Docket No. 27) at 8.

In its statement of material facts submitted in support of its motion, Mellon asserts that the 1994 Contract provides for CAF tapes at \$50 apiece and CMF tapes at \$250 each. Mellon SMF I at ¶ 39 (citing 1994 Contract and D. Murphy Dep. at 79-80). The 1994 Contract, at an unnumbered page bearing a Bates stamp of 161, contains this notation under a heading entitled “Optional Processing Fees:” “F. CAF/CMF Reports \$50-\$25 0/ Report.” Mellon employee Donald Murphy testified at his deposition that “50 for the CAF and 250 for the CMF” is actually “what it’s supposed to be.” D. Murphy Dep. at 79. Citing the 1994 Contract and pages 79-80 of Donald Murphy’s deposition, Mellon further alleges in its factual statement that it produced 103 CAF and CMF reports. Mellon SMF I at ¶ 40. However, the cited record material does not establish the number of such reports actually produced.

Responding to these factual positions, MECUL counters as follows in its statement of material facts opposing the Mellon motion:

39. The 1990 Agreement [sic] does provide in the Addendum to Exhibit B for a range for CAF and CMF tapes of \$50 to \$250. In fact, the amount actually charged by Mellon would be less if multiple financial institutions were being processed at the same time. For example, when MECUL requested multiple CAF and CMF files in 1995, the charge was \$25 per CAF file and \$75 per combined CAF/CMF file. *See* Dep. Exh. 48[.] Even Mellon's unauthenticated pricing manual attached as Exhibit A to its Statement of Material Facts quotes (at p. 4) \$50 for CAF or CMF Reports and \$250 for a Combined CAF/CMF Report. Mellon did not provide combined reports as part of the deconversion, but placed multiple CAF and CMF files on separate tapes.

40. MECUL agrees that Mellon provided the stated CAF and CMF reports, but disputes the stated fee of \$30,900 for the production of those reports. Based on past practice MECUL believes an appropriate charge for each CAF file and each CMF file is \$25, which translates to \$5,150, not \$30,900. *See* Response to Paragraph 39.

MECUL SMF I at ¶¶ 39-40.

As already noted the parties are bound by their respective Local Rule 56 factual statements and cannot challenge the court's summary judgment determination based on material not appearing therein. In its factual statement opposing Mellon's motion, MECUL essentially employs its attorneys' argument, as opposed to matter of record, to support its position that Mellon is entitled to recover something less than \$50 per CAF report and \$250 per CMF report. Therefore, pursuant to Local Rule 56, the court must credit Donald Murphy's testimony concerning this aspect of the 1994 Contract. Mellon has provided no appropriate record citation to support its contention that it provided 103 of each type of report. However, MECUL explicitly agrees that Mellon provided the stated number of reports.

On the issue of the ATM disconnects and telecommunication line disconnects, in support of its contention that MECUL owes it a total of \$30,600 for 68 of each type of service, Mellon provides these record citations: "King Dep. at ___; D. Murphy Dep. at 70-71; Ex. A." Mellon SMF I at ¶ 41. Obviously, the court is not in a position to pore over the King deposition in search of where, or

whether, this witness discusses the disputed disconnection fees. *See Pew*, 161 F.R.D. at 1 (court will not comb through summary judgment record in search of factual issues). As for the cited portions of Donald Murphy's deposition, they contain only testimony concerning Mellon's pricing manual and do not enlighten the court as to how many disconnections occurred or what charge would be appropriate for them under the 1994 Contract. The citation to "Ex. A" appears to be a reference to a page marked "Pricing Manual" appended to Mellon's factual statement and containing what looks to be a list of fees for various services. Even assuming the court could credit whatever data appears in such an unverified and unexplained document, it offers no enlightenment as to the number of ATM and telecommunications line disconnections actually performed under the 1994 Contract. In contrast to the CAF and CMF reports, MECUL does not specifically accede to Mellon's assertion as to the number of disconnections performed and, therefore, the court is not in a position to credit Mellon's factual assertion that it performed 68 of each kind of disconnection and is therefore entitled to recover \$30,600.

The bottom line is this: There is no genuine issue of material fact on the question of what MECUL owes Mellon for the CAF and CMF reports. Mellon has established that the appropriate figure is \$30,900. Mellon does not dispute MECUL's contention that Mellon was obligated under the 1994 Contract to invoice MECUL for that amount as a condition precedent to the payment obligation.¹³ It is nevertheless my recommendation that the court not delay resolution of this aspect of the case further as it would serve no useful purpose to require Mellon to comply with its

¹³ Moreover, as already noted, it is undisputed that Mellon did invoice MECUL for the sum of \$292,157 in December 1997 and included charges for the disconnect fees (but not the CAF and CMF reports). Mellon does not cite this document as evidence that it complied with the condition of furnishing such an invoice — presumably because it is seeking to recover sums beyond the scope of those billed therein.

obligation to provide an invoice. Plainly, the objective of such a contractual requirement is to give MECUL due notice of its payment obligation so that it may comply or, if appropriate, contest the sum demanded. Through its summary judgment filing, Mellon has essentially provided MECUL with the functional equivalent of an invoice. MECUL, on the other hand, has accomplished what in my view can be understood as an implied waiver of the invoice requirement by presenting the contract dispute to the court for resolution and by acknowledging that it owes Mellon at least some unspecified sum for services rendered by Mellon pursuant to the preliminary injunction. *See Trumpp v. Trumpp*, 505 A.2d 601, 603 (Pa. Super. 1985) (contract provisions can be waived expressly or through implication). In my view, Mellon is entitled to summary judgment to the extent it seeks to recover \$30,900 for providing CAF and CMF files to Mellon. Unfortunately, I conclude that the court is unable to determine on the present record what, if anything, MECUL owes Mellon for the ATM and telecommunications line disconnections. Therefore, this aspect of Mellon's contract claim must await trial.¹⁴

The parties do not discuss the extent to which Mellon would be entitled to recover fees for CAF reports, CMF reports and disconnect fees under its equitable claims in the event relief under Mellon's contract theory proves to be unavailable. I therefore do not recommend summary judgment in favor of either party to the extent that Mellon presses its equitable claims to such an end.

IV. Conclusion

¹⁴ Given that Mellon has the burden of proof on its contract claim, its failure to present evidence on the disconnection charges arguably entitles MECUL to summary judgment on this aspect of the claim. However, MECUL's summary judgment motion does not seek to put Mellon to its proof on the disconnect charges but, instead, argues only that Mellon has failed to provide an invoice. As I have already noted, I am unable to conclude that MECUL should prevail on such a basis.

For the foregoing reasons, I recommend that each pending summary judgment motion be **GRANTED IN PART AND DENIED IN PART** and, accordingly, that judgment enter in favor of counterclaim-defendant MECUL Services Corp., Inc. on all counterclaims to the extent that counterclaim-plaintiff Mellon Bank, N.A. seeks to recover deconversion fees, that judgment enter in favor of counterclaim-plaintiff Mellon Bank, N.A. in the amount of \$30,900 on its contract claim for disconnection fees, and that the pending summary judgment motions otherwise be denied.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated this 2nd day of June, 1998.

*David M. Cohen
United States Magistrate Judge*