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3 UNITED STATES BANKRUPTCY COURT
4 EASTERN DISTRICT OF CALIFORNIA
5 SACRAMENTO DIVISION
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8 In re:)
9 MICHAEL HAT,) Case No. 04-32497-B-11
10 Debtor(s).)
11 _____)
12 JOHN VAN CUREN,)
13 Plaintiff(s)) Adv. No. 05-2506-B
14 vs.)
15 BANK OF THE WEST,) Docket Control No. GSMD-1
16 Defendant(s).) Date: November 7, 2006
17 _____) Time: 9:30 a.m.

18 On or after the calendar set forth above, the court issued
19 the following ruling. The official record of the ruling is
appended to the minutes of the hearing.

20 Because the ruling constitutes a "reasoned explanation" of
21 the court's decision under the E-Government Act of 2002 (the
"Act"), a copy of the ruling is hereby posted on the court's
22 Internet site, www.caeb.uscourts.gov, in a text-searchable
format, as required by the Act. However, this posting does not
23 constitute the official record, which is always the ruling
appended to the minutes of the hearing.

24 **DISPOSITION AFTER ORAL ARGUMENT**

25 This matter continued most recently from October 24, 2006 for the
26 court to further consider plaintiff's motion and defendant's
27 counter-motion. The matter came on for hearing on November 7, 2006, at
28 9:30 a.m. Appearances are noted on the record. The following

1 constitutes the court's findings of fact and conclusions of law,
2 pursuant to Federal Rule of Bankruptcy Procedure 7052.

3 The motion is denied.

4 Federal Rule of Civil Procedure 56, made applicable to this
5 proceeding by Bankruptcy Rule 7056, provides that summary judgment is
6 appropriate if the pleadings, depositions, answers to interrogatories,
7 admissions on file, and declarations, if any, show that there is "no
8 genuine issue of fact and that the moving party is entitled to
9 judgment as a matter of law."

10 Plaintiff John Van Curen, chapter 11 trustee of the estate of
11 Michael Hat, ("Plaintiff") seeks partial summary judgment on his first
12 amended complaint filed December 29, 2005 (Dkt. No. 8). The first
13 cause of action seeks to avoid an allegedly unperfected security
14 interest in approximately 118 hauling trailers pursuant to the "strong
15 arm" powers of 11 U.S.C. §§ 544(a)(1) and (a)(2) and recover the
16 trailers or their value. The second cause of action objects to
17 defendant Bank of the West's ("Defendant") claim under the terms of
18 the confirmed chapter 11 plan.

19 By this motion, Plaintiff seeks: (1) A determination that the
20 Defendant's security interest in the trailers is unperfected and
21 subject to avoidance and that Plaintiff is entitled to recovery of the
22 trailers or their value; (2) Judgment on the counterclaim that
23 Defendant take nothing thereby; and (3) Judgment in Plaintiff's favor
24 on the Defendant's tenth (10th) affirmative defense. Plaintiff argues
25 that partial summary judgment to the extent set forth above is
26 appropriate because the undisputed facts before the court entitle
27 Plaintiff to judgment as a matter of law. Plaintiff has failed to
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1 show that he is entitled to such judgment, and the motion for summary
2 judgment is denied.

3 As an initial matter, the court addresses the evidentiary
4 objections filed by Defendant on September 12, 2006 (Dkt. No. 56).

5
6 A) Declaration of John Van Curen (Dkt. No. 22)

7
8 1) Sustained. The declaration lacks specific facts that
9 show personal knowledge.

10 2) Sustained. The declaration lacks specific facts that
11 show personal knowledge.

12 3) Sustained. The statement is based on information and
13 belief and therefore does not show personal knowledge.

14 3(a) Sustained. The documents are not self-
15 authenticating under Federal Rule of Evidence FRE 902.
16 The declaration contains no facts as to the source of the
17 copies or how declarant obtained them. The unsworn
18 statements in the response cannot cure the defect.

19 4) Sustained. The statement is based on information and
20 belief and therefore does not show personal knowledge.

21 5) Sustained. The statement is based on information and
22 belief and therefore does not show personal knowledge.

23 It is also irrelevant. How the trailers were registered
24 after Defendant sold them is not relevant to whether or
25 not Defendant held a perfected security interest on the
26 petition date.

27 6) Overruled. The declarant has personal knowledge as to
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1 the facts and circumstances surrounding a stipulation to
2 which he is a party.

3 7) Sustained. The statement is based on information and
4 belief and therefore does not show personal knowledge.

5 8) Overruled. The sentence is neither conclusory nor
6 lacking in evidentiary facts. The declarant is stating
7 that he proposed and sought confirmation of the confirmed
8 plan because of the specific terms contained therein,
9 including Section 5.4.3.

10
11 B) Declaration of Katherine D. Ray (Dkt. No. 23)

12
13 9) Sustained. The declaration lacks specific facts that
14 show personal knowledge.

15 10) Sustained. The declaration fails to authenticate
16 Exhibit A. Declarant fails to state specific facts that
17 show her personal knowledge that the trailer pictured
18 therein is one of those at issue here.

19 11) Sustained. The fact that the declaration discloses
20 the source of the documents does not establish that they
21 are what they purport to be. The documents are also
22 irrelevant. How the trailers were registered after Bank
23 sold them is not relevant to whether or not Bank held a
24 perfected security interest on the petition date.

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26 C) Declaration of Steven Stewart (Dkt. No. 24)

1 12) Sustained. The declaration lacks specific facts that
2 show personal knowledge.

3 13) Sustained. The declaration lacks specific facts that
4 show personal knowledge.

5 14) Sustained. The declaration lacks specific facts that
6 show personal knowledge.

7 15) Sustained. The declaration lacks specific facts that
8 show personal knowledge.

9 16) Overruled. Declarant is competent to testify as to
10 debtor's customary practice because the declaration
11 contains specific facts showing declarant's personal
12 knowledge, as vineyard manager for many years, of the
13 business practices surrounding the harvesting of the
14 vineyards. The fact that this testimony may conflict
15 with that of Ms. Ortel or debtor does not make it
16 inadmissible. Any conflict with other testimony goes to
17 credibility and what weight the court assigns to
18 declarant's testimony.

19 17) Sustained. The statement is based on information and
20 belief and therefore does not show personal knowledge.

21 18) Sustained. The statement is based on information and
22 belief and therefore does not show personal knowledge.

23 19) Sustained. The statement is based on information and
24 belief and therefore does not show personal knowledge.

25 20) Sustained. The statement is based on information and
26 belief and therefore does not show personal knowledge.

27 The statement is also irrelevant. How the trailers were
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1 registered after Defendant sold them is not relevant to
2 whether or not Defendant held a perfected security
3 interest on the petition date.

4 Having resolved the evidentiary objections, the court proceeds to
5 the merits of the motion.

6 First Cause of Action

7 Plaintiff's request for partial summary judgment on the first
8 cause of action must be denied. Plaintiff has failed to provide
9 admissible evidence identifying the collateral at issue.

10 The court finds itself in a situation roughly analogous to that
11 described by the Ninth Circuit Court of Appeals in Ferrari North
12 America, Inc. v. Simms (In re R.B.B., Inc.), 211 F.3d, 475 (9th Cir.
13 2000). Therein, the Circuit Court was asked to rule, *inter alia*, on
14 the bankruptcy court's finding that the purchaser of a Ferrari
15 dealership was a good faith purchaser within the meaning of 11 U.S.C.
16 § 363(m). The court ultimately reversed and remanded the matter to
17 the bankruptcy court in part because the purchaser was not adequately
18 identified in the order from which appeal was taken. "The first
19 requirement of having a purchaser in good faith is to have a
20 purchaser." R.B.B., Inc., 211 F.3d at 478. Here, the first
21 requirement of having a perfected security interest in collateral is
22 to have collateral. No admissible evidence has been presented to the
23 court which identifies the collateral at issue.

24 Because the collateral which is the subject of the disputed
25 security interest is not identified, the court cannot reach the merits
26 of the parties contentions regarding whether the Commercial Code or
27 the Vehicle Code governs perfection. To do so without any evidence of
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1 the collateral at issue would be nothing more than providing an
2 improper advisory opinion as the court would be required to discuss
3 the applicability of these Code sections to vehicles in general. That
4 this court may not do. U.S. Nat. Bank of Oregon v. Independent Ins.
5 Agents of America, Inc., 508 U.S. 439, 446, 113 S.Ct. 2173, 2178, 124
6 L.Ed.2d 402 (1993) ("a federal court [lacks] the power to render
7 advisory opinions."). Plaintiff has failed to show that there are no
8 disputes of material fact on this issue and summary judgment must be
9 denied.

10 Counterclaim

11 Plaintiff's request for summary judgment as to Defendant's
12 counterclaim is also denied. Plaintiff sets forth three theories
13 under which he asserts an entitlement to summary judgment on the
14 counterclaim: (1) Section 5.4.3.1 of the plan contains a release
15 provision; (2) the doctrine of waiver; and (3) the doctrine of
16 estoppel.

17 1) Release. As an initial matter, the court finds that this
18 argument is properly raised by the trustee for the first time in this
19 motion for summary judgment. Camarillo v. McCarthy, 998 F.2d 638, 639
20 (9th Cir. 1993). The court finds no prejudice or unfair surprise.
21 Defendant is unquestionably aware of the alleged "release" provisions
22 in the confirmed plan. The terms of that plan were the subject of
23 extensive negotiations between Plaintiff, Defendant and others. There
24 is no surprise, let alone unfair surprise, and no prejudice.

25 In addition, the court agrees that under the facts of this case
26 Defendant, or its representative, must execute a release for it to be
27 effective. The essential terms of the release are contained in the
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1 confirmed chapter 11 plan, and the parties are clearly bound by the
2 terms of the plan. "Except as provided in subsections (d)(2) and
3 (d)(3) of this section, the provisions of a confirmed plan bind the
4 debtor, any entity issuing securities under the plan, any entity
5 acquiring property under the plan, and any creditor, equity security
6 holder, or general partner in the debtor, whether or not the claim or
7 interest of such creditor, equity security holder, or general partner
8 is impaired under the plan and whether or not such creditor, equity
9 security holder, or general partner has accepted the plan." 11 U.S.C.
10 § 1141(a) (West 2006).

11 However, the court agrees with Defendant that Section 5.4.3.1 of
12 the plan is not structured by its terms to constitute a release. It
13 instead requires the parties to execute a release "in a form mutually
14 acceptable to the parties" on the effective date. It is undisputed
15 that as of the hearing on this matter, no such release had been
16 executed. The court expresses no view on the issue of whether the
17 parties could be compelled to execute a release that conforms to the
18 terms of Section 5.4.3.1 of the plan.

19 2) Waiver. Plaintiff's motion fails on this issue because the
20 court finds there are disputed material facts that preclude summary
21 judgment. The court agrees that the language in Section 5.4.3.1 of
22 the confirmed plan is unambiguous. However, that lack of ambiguity
23 does not favor trustee. The plan requires the parties to execute a
24 release "in a form mutually acceptable to the parties" on the
25 effective date. This standing alone is not clear and convincing
26 evidence of an intent to waive the claims made in the counterclaim.
27 The balance of the evidence is conflicting and would require the court
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1 to weigh it. "[A]t the summary judgment stage the judge's function is
2 not himself to weigh the evidence and determine the truth of the
3 matter but to determine whether there is a genuine issue for trial."
4 Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986).

5 3) Estoppel. This issue fails for identical reasons as those
6 immediately above regarding Waiver. The court will not reproduce the
7 discussion here.

8 Tenth Affirmative Defense

9 The court agrees with plaintiff that the Tenth Affirmative
10 Defense seeks affirmative relief and is improperly designated as an
11 affirmative defense. It should have been pled as a counterclaim. The
12 court will however treat the Tenth Affirmative defense as if it had
13 been properly designated. "When a party has mistakenly designated a
14 defense as a counterclaim or a counterclaim as a defense, the court on
15 terms, if justice so requires, shall treat the pleading as if there
16 had been a proper designation." Fed. R. Bankr. P. 7008 incorporating
17 Fed. R. Civ. P. 8(c) (West 2006). The court will treat the Tenth
18 Affirmative defense as a counterclaim because the issue has been
19 raised by both parties in pleadings filed in this adversary
20 proceeding. As so treated, Plaintiff's motion for summary judgment
21 must be denied. Plaintiff's motion seeks judgment based on the same
22 theories asserted against the counterclaim. The motion fails for the
23 same reasons as set forth above.

24 The court will issue a minute order.