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NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY COURT

EASTERN DISTRICT OF CALIFORNIA

In re:	Case No. 11-37711-B-7
DELANO RETAIL PARTNERS, LLC,	Adversary No. 16-2146
Debtor.	DC Nos. HSM-1 DBR-1
SUSAN K. SMITH, Chapter 7 Trustee,	
Plaintiff,	
v.	
C&S WHOLESALE GROCERS, INC., a Vermont Corporation,	
Defendant.	
C&S WHOLESALE GROCERS, INC., a Vermont Corporation,	
Counterclaimant,	
v.	
SUSAN K. SMITH, Chapter 7 Trustee,	
Counterdefendant.	

MEMORANDUM DECISION GRANTING TRUSTEE'S MOTION FOR SUMMARY JUDGMENT AND DENYING C&S's MOTION FOR SUMMARY JUDGMENT

INTRODUCTION

There are two motions for summary judgment presently before the court. Plaintiff Susan K. Smith, in her capacity as the trustee appointed in the parent chapter 7 case ("Trustee") captioned In re Delano Retail Partners, LLC, case no. 11-37711, filed one summary judgment motion. Defendant C&S Wholesale Grocers, Inc. ("C&S"), a purported secured creditor in the parent chapter 7 case, filed the other.

Delano Retail Partners, LLC ("DRP") is the debtor in the parent chapter 7 case. Dennis Delano and Harley Delano ("Delanos") are the managers of DRP. DRP's attorney was Joseph Neri ("Neri"). The Delanos also formed another entity by the name of 2040 Fairfax, Inc. ("2040 FF"). The relationship of the parties and these entities is discussed in greater detail below.

The Trustee commenced this adversary proceeding by filing a complaint on July 22, 2016. The first four claims for relief in that complaint are for declaratory relief. For lack of a better description, those claims concern funds identified as four "buckets" of money which consist of the following:

(1) approximately $429,505.00 received or to be received from the settlement of the estate's claims against the Delanos, 2040 FF, and Neri that C&S purchased from the Trustee, thereafter prosecuted, and ultimately settled (the "Settlement Funds");

(2) approximately $384,000.00 of an original balance of approximately $560,000.00 that DRP transferred from its bank account to Neri's client trust account prepetition and which thereafter was transferred from Neri's client trust account to the Trustee (the "Neri Trust Account Funds");

(3) approximately $153,410.08 the Trustee collected from 2040 FF postpetition for 2040 FF's lease of DRP's furniture, fixtures, and equipment under a

prepetition asset lease agreement (the "Asset Lease Payments"); and

(4) approximately $37,661.60 the Trustee received from the sale of DRP's liquor licenses (the "Liquor License Proceeds").

The Trustee seeks a declaration that the funds in each of the "buckets" are not subject to C&S's prepetition security interest and therefore belong to the estate free and clear. The fifth claim for relief in the complaint is a claim under 11 U.S.C. § 542(a) for turnover of the Settlement Funds.

C&S filed an answer and counterclaim on September 6, 2016. The counterclaim asserts the same four claims for declaratory relief that are asserted in the complaint (but in different order). It seeks a declaration opposite of that requested in the complaint. In other words, whereas the Trustee seeks a declaration that all of the funds in each of the four above-referenced "buckets" are not subject to C&S's prepetition security interest, C&S seeks a declaration that all of the funds in each of those "buckets" are subject to its prepetition security interest.

The Trustee filed the initial summary judgment motion on May 5, 2017. C&S opposed the Trustee's summary judgment motion on May 23, 2017, and the Trustee replied on May 30, 2017. C&S filed a memorandum of points and authorities on May 5, 2017, and its summary judgment motion on May 9, 2017. The Trustee opposed C&S's summary judgment motion on May 23, 2017, and C&S replied on May 30, 2017. A hearing on the parties' cross-motions for summary judgment was held on June 9, 2017. Appearances at that hearing were noted on the record.

In reaching its decision, the court has reviewed and considered the following documents: (i) with regard to the Trustee's summary judgment motion, docket nos. 32-39, 49-56, 64-70, 76, 82, 86 & 89; and (ii) with regard to C&S's summary judgment motion, docket nos. 40-48, 57-63, 71-74, 75, 83, 86 & 88. The court also takes judicial notice of the dockets in this adversary proceeding and in the parent chapter 7 case, the dockets in related adversary proceedings nos. 12-02686 and 13-02250 filed in this court, and the dockets in related case nos. 2:13-cv-01413-TLN-AC, 2:14-cv-02215-TLN-DAD, and 2:14-cv-02263-TLN filed in the district court.[1] The court has also relied on the parties' stipulated undisputed facts and facts the parties submitted that the court has discerned are not in dispute.[2]

FACTUAL BACKGROUND

I. Generally

C&S is a grocery wholesaler that sold store inventory to DRP before DRP filed its voluntary chapter 7 petition. In 2006 C&S and DRP executed a supply agreement, promissory note, and security agreement. In connection with those agreements, C&S loaned DRP $2,000,000.00 to purchase assets and equipment for stores, including stores that DRP acquired from Ralph's Grocery Company and specifically including a store located at 2040 Sir

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[1]The requests for judicial notice at dkts. 44, 53, & 60 are granted.

[2]Except for plaintiff's objection 1.a. [dkt. 59] which is sustained inasmuch as it is not necessary for the court to reach the "equities of the case issue," all other objections at dkts. 51 and 59 are overruled.

Francis Drake Blvd., Fairfax, California.

The loan from C&S to DRP is evidenced by the promissory note, which is secured by the security agreement. The security agreement grants C&S a security interest in numerous classes of DRP's assets, all of which are identified in the security agreement submitted as an exhibit to the motion. Relevant here are all claims, accounts, general intangibles, chattel paper, deposit accounts, leases, inventory, furniture, fixtures, and equipment, and all proceeds of the foregoing. C&S's security interest in this collateral is perfected by a UCC-1 financing and two continuation statements.

II. As Specifically Relating to Each of the Four "Buckets"

A. The Settlement Funds: Trustee's First Claim for Relief in the Complaint & C&S's Fourth Claim for Relief in the Counterclaim [$429,505.00]

In November 2012 C&S filed an adversary complaint that named the Delanos, 2040 FF, and Neri as defendants. That complaint alleged fraudulent transfer claims, and claims for conspiracy to commit and aiding and abetting in the commission of fraudulent transfers.

In March 2013 the Delanos, 2040 FF, and Neri moved to dismiss the adversary complaint. Those defendants asserted that the claims alleged in the complaint belonged to the estate and therefore C&S lacked standing to prosecute them on its own behalf. The Trustee also asserted ownership of the claims. After C&S moved in April 2013 to prosecute the estate's claims in place of the Trustee and for the benefit of the estate, C&S and the Trustee entered into a stipulation in May of 2013 that

authorized C&S to prosecute the estate's claims, including those alleged in the 2012 adversary complaint. There are two significant paragraphs in that stipulation.

The first is ¶ 1 which pertains to the consideration that C&S agreed to pay the Trustee for its purchase—and the Trustee's sale—of the estate's claims. Paragraph 1 states that "in consideration of payment to the Trustee for the benefit of DRP's estate out of any settlement, judgment or other recovery" C&S would pay the Trustee (i) a minimum of $250,000.00, (ii) an additional $50,000.00 of any amount between $300,000.00 and $1,000,000.00, and (iii) the $250,000.00 and the $50,000.00 plus 25% of any amount over $1,000,000.00.

The second is ¶ 3 which states as follows:

> The terms for payment as set forth herein shall be without prejudice to, and shall not affect, C&S' assertion of any secured and unsecured claims herein, as well as the Trustee's right to dispute, contest, or otherwise object to any such claims, all of which rights and remedies are hereby preserved and unaffected by this stipulation.

The Trustee filed a motion to approve the stipulation in May 2013. The court (Holman, J.) heard that motion on June 18, 2013, and also treated it as a motion to sell the estate's claims to C&S. During the hearing on the motion, and without any objection from or disagreement by C&S, the Trustee explained ¶ 3 of the stipulation as follows:

> And as the trustee made clear in her reply to the Fund's opposition, the ability to object to C&S's **claim** is preserved to the estate. All rights are reserved here. If the trustee feels that there has been some sort of double dipping or double recovery to C&S as a result of the litigation, she retains the ability under the Bankruptcy Code to object to that **proof of claim** and will do so if that serves the interest of the estate.

Hr'g Tr. at 6:9-17 (emphasis added).

The order granting the motion and approving the May 2013 stipulation and sale of the estate's claims to C&S was entered in July 2013. Thereafter, C&S owned 100% of the estate's claims and it asserted its ownership of those claims in pleadings filed in subsequent litigation involving the purchased claims. C&S also characterizes all of the claims it bought from the estate as its collateral and the proceeds received in settlement of the estate's claims as a replacement for its damaged or destroyed collateral.

C&S settled the estate's claims against the Delanos and 2040 FF in January of 2015. That settlement agreement requires 2040 FF to make 42 monthly payments of $10,833.00 each from February 2015 to July 2018, with increasing payments thereafter to and including January 2022. Under that settlement agreement, 2040 FF agreed to pay a total of $1,518,020.00 to C&S by January 2022. C&S also settled the estate's claims against Neri in July of 2015. That settlement agreement requires Neri to pay $40,000.00. Based on the amounts of those settlements, $429,505.00 is at issue with regard to this "bucket".

B. Neri Trust Account Funds: Trustee's Fourth Claim for Relief in the Complaint and C&S's First Claim for Relief in the Counterclaim [$384,000.00]

From 2009 to 2010, several of DRP's grocery stores in Northern California experienced a downturn in business and began shutting down. As the remaining DRP stores (other than Fairfax) went out of business, DRP sold inventory.

In late 2010, DRP transferred $560,000.00 from its bank

account to Neri's client trust account. There is also deposition testimony that inventory proceeds were deposited into Neri's client trust account in late 2010. That same deposition testimony also reflects that whatever the extent of inventory proceeds that went into Neri's client trust account, those proceeds were not segregated and, in fact, were commingled with other funds that belonged to a "Peterson" and other unidentified operational funds.

In any case, of the $560,000.00 that was deposited into Neri's client trust account in late 2010, $384,000.00 was transferred from Neri's client trust account to the Trustee in July 2011. The reduction resulted from withdrawals from the trust account to pay DRP's taxes, payroll, and employment department claims. An order entered in prepetition state court litigation also authorized a withdraw from the account to pay expenses associated with that litigation.

C. Asset Lease Funds: Trustee's Third Claim for Relief in the Complaint & C&S's Second Claim for Relief in the Counterclaim [$153,410.08]

In 2008 the Delanos formed 2040 FF with Neri's assistance. DRP terminated its rights under an existing sublease of the Fairfax store and, simultaneously, 2040 FF negotiated a new long-term lease for that store. DRP and 2040 FF executed a sublease agreement for the Fairfax store under which DRP agreed to pay the monthly rent due under 2040 FF's new long-term lease. DRP and 2040 FF also executed an agreement under which DRP agreed to use its license, permits, employees, and other resources to operate the Fairfax store on behalf of 2040 FF.

Relevant for purposes of this "bucket" is that in January 2010 DRP entered into what is referred to as an "Asset Lease" with 2040 FF under which DRP leased its furniture, fixtures, and equipment in the Fairfax Store to 2040 FF in exchange for semi-annual payments from 2040 FF. After DRP filed its chapter 7 petition, payments under the Asset Lease were collected directly by the Trustee. Prepetition those payments were made to DRP. The Trustee has collected approximately $153,410.08.

D. Liquor License Sale Funds: Trustee's Second Claim for Relief in the Complaint & C&S Third Claim for Relief in the Counterclaim [$37,661.60]

DRP owned several liquor licenses which were used in connection with grocery store operations. The Trustee sold those liquor licenses to third parties during the administration of the bankruptcy case. The Trustee received net sales proceeds of approximately $37,661.60 from those sales. C&S claims those funds as proceeds of its collateral consisting not of the liquor licenses themselves but, rather, as proceeds of the liquor licenses as general intangibles.

JURISDICTION

Federal subject matter jurisdiction is founded on 28 U.S.C. § 1334. This adversary proceeding is a core proceeding under 28 U.S.C. §§ 157(b)(2) (A), (B), (E), (K), and (O). To the extent this adversary proceeding may ever be determined to be a matter that a bankruptcy judge may not hear and determine without consent, the parties nevertheless consent to such determination by a bankruptcy judge. See 28 U.S.C. § 157(c)(2). Venue is

proper under 28 U.S.C. § 1409.

LEGAL STANDARD

Summary judgment is proper where "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); Fed. R. Bankr. P. 7056. The moving party has the burden of demonstrating the absence of a genuine issue of fact. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 256 (1986). That burden may be discharged by showing, *i.e.*, pointing out, that there is an absence of evidence to support the nonmoving party's case. Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). Thereafter, the nonmoving party bears the burden of designating specific facts demonstrating genuine issues for trial. In re Oracle Corp. Sec. Litig., 627 F.3d 376, 387 (9th Cir. 2010).

In examining a motion for summary judgment, "the inferences to be drawn from the underlying facts . . . must be viewed in the light most favorable to the party opposing the motion." U.S. v. Diebold, Inc., 369 U.S. 654, 655 (1962). However, the nonmoving party's allegation that factual disputes persist will not automatically defeat an otherwise properly supported motion for summary judgment. See Fed. R. Civ. P. 56(e). And a "mere 'scintilla' of evidence will be insufficient to defeat a properly supported motion for summary judgment; instead, the nonmoving party must introduce some 'significant probative evidence tending to support the complaint.'" Fazio v. City & County of San

Francisco, 125 F.3d 1328, 1331 (9th Cir. 1997) (quoting Anderson, 477 U.S. at 249, 252). The court does not weigh conflicting evidence; rather, it asks whether the nonmoving party has produced sufficient evidence to permit the factfinder to hold in its favor. Ingram v. Martin Marietta Long Term Disability Income Plan for Salaried Employees of Transferred GE Operations, 244 F.3d 1109, 1114 (9th Cir. 2001).

Cross-motions for summary judgment evaluated separately, giving the nonmoving party in each instance the benefit of all reasonable inferences. A.C.L.U. of Nev. v. City of Las Vegas, 466 F.3d 784, 790-91 (9th Cir. 2006) (quotation marks and citation omitted); Pintos v. Pac. Creditors Ass'n, 605 F.3d 665, 674 (9th Cir. 2010). In evaluating the motions, "the court must consider each party's evidence, regardless under which motion the evidence is offered." Las Vegas Sands, LLC v. Nehme, 632 F.3d 526, 532 (9th Cir. 2011).

DISCUSSION

I. The Cross-Motions for Summary Judgment

A. The Settlement Funds are not Collateral or Proceeds that Replace Damaged or Destroyed Collateral.

This "bucket" contains the proceeds received and to be received in settlement of the estate's claims against the Delanos, 2040 FF, and Neri. C&S maintains those funds, including the consideration it is obligated to pay the Trustee for its purchase of those claims from the Trustee, are encumbered by its security interest either as its collateral, *i.e.*, the claims, or as the replacement of damaged or destroyed collateral, *i.e.*, the

settlement proceeds. The Trustee, on the hand, maintains that the consideration portion of the Settlement Funds are not subject to any security interest. For the reasons explained below, the Trustee is correct.

It is true that DRP granted C&S a security interest in "all claims." It is also true that settlement proceeds can be a replacement for original collateral that is damaged or destroyed. O.H. Kruse Grain and Milling v. United California Bank (In re Wiersma), 324 B.R. 92, 106 (9th Cir. BAP 2005), aff'd in part, rev'd in part, 483 F.3d 933 (9th Cir. 2007), and aff'd in part, 277 Fed. Appx. 603 (9th Cir. 2007); In re Endresen, 530 B.R. 856, 869 (Bankr. D. Or. 2015), aff'd in part, rev'd in part, 548 B.R. 258 (9th Cir. BAP 2016). However, at least in this case, an admission by C&S negates the possibility of any such outcome.

The Trustee cites In re Ice Mgmt. Sys., Inc., 2014 WL 6892739 (9th Cir. BAP 2014), for the proposition that the portion of the Settlement Funds described in the May 2013 stipulation as the consideration C&S is obligated to pay the Trustee for its purchase of the estate's claims are not encumbered by C&S's prepetition security interest. In an effort to distinguish Ice Management from this case, and to refute the Trustee's argument, C&S makes the following statement which the court treats as an admission:[3]

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[3]The court exercises its discretion to treat the statement as an admission. See American Title Ins. Co. v. Lacelaw Corp., 861 F.2d 224, 227 (9th Cir. 1988). The statement was not inadvertent. It was made in the context of a request by C&S for affirmative relief. The court pointed out the statement to C&S's attorney when the parties' summary judgment motions were heard on June 9, 2016, and since that time C&S has not amended, retracted, or assigned any error to the statement. See Sicor Ltd. v. Cetus

> Unlike in *Ice*, the Trustee here did *not* sell an encumbered asset, such as an intellectual property right belonging to DRP or, for example, an item of real or personal property that was subject to an existing lien or security interest. Rather, *the Trustee sold the Estate's claims*-claims that only *she* had standing to prosecute.

Dkt. 71 at 9:8-12 (emphasis in original).

Short of buying claims from the same individual who sold Jack his magic beanstalk beans, the admission that the estate's claims, *i.e.*, the very claims that C&S bought from the Trustee, prosecuted, and settled resulting in the Settlement Funds, are not (and when bought were not) encumbered can only mean those claims are not (and when bought were not) subject to any security interest under the security agreement between C&S and DRP. That means the claims are not (and could not be) collateral. That also means proceeds received in settlement of the unencumbered claims likewise are not (and could not be) a replacement for original collateral—damaged, destroyed, or otherwise.

The admission by C&S that the Trustee did not sell it encumbered claims also sheds light on the purpose of ¶ 3 of the May 2013 stipulation. The purpose of that paragraph could not be to preserve a security interest in the consideration portion of the Settlement Funds - or any portion of the Settlement Funds for that matter - because the paragraph cannot be read to preserve

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Corp., 51 F.3d 848, 859-860 (9th Cir.), cert. denied, 116 S.Ct. 170 (1995) (stating that where "the party making an ostensible judicial admission explains the error in a subsequent pleading or by amendment, the trial court must accord the explanation due weight"); see also Westgate Communications, LLC v. Chelen County, Fed. Appx. 708 (9th Cir. 2013) (district court properly declined to treat statement in memorandum as admission where statement was read out of context, inadvertent, party making statement timely confessed error, and statement retracted).

that which C&S admits does not (and when it bought the estate's claims from the Trustee did not) exist, *i.e.*, a security interest.

The Trustee's statements during the hearing on the motion to approve the stipulation and sale of the estate's claims to C&S are also independent evidence that the purpose of ¶ 3 of the May 2013 stipulation was not to preserve any security interest. Rather, as the Trustee explained, the purpose of that paragraph was to preserve the secured and unsecured claims that C&S asserted in its proof of claim and the Trustee's ability to object to the proof of claim to prevent a double recovery by C&S on both the proof of claim and the estate's claims. C&S did not object to or otherwise dispute the Trustee's explanation of ¶ 3 when it was given. And it does not do so now with any admissible evidence.

Finally, it is also worth noting that the motion to approve the stipulation and Trustee's sale of the estate's claims to C&S was considered in the context of the Woodson and A&C factors.[4] That standard requires the court to find that a proposed settlement and compromise provides some benefit to the estate and creditors. If Judge Holman understood that the consideration C&S agreed to pay the Trustee for its purchase of the estate's claims was subject in its entirety to a security interest so that the estate effectively received nothing in exchange for the sale of its claims to C&S, he could not have found that the stipulation

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[4]Woodson v. Fireman's Fund Ins. Co. (In re Woodson), 839 F.2d 610 (9th Cir. 1988); Martin v. Kane (In re A&C Properties), 784 F.2d 1377 (9th Cir. 1986).

and motion to approve it satisfied the Woodson and A&C factors.

The benefit to the estate from the stipulation and the Trustee's sale of the estate's claims to C&S comes in the form of the "consideration" that C&S is now obligated to pay the Trustee for its purchase of the estate's claims. That consideration is a clearly-defined structured payment arrangement pursuant to which C&S is obligated to pay the Trustee a total of $429,505.00. In other words, what the estate has following approval of the stipulation and the Trustee's sale of the estate's claims to C&S is an unencumbered postpetition bargained-for contract and right to payment. Both are property of the estate under § 541(a)(7) of the Bankruptcy Code which includes "[a]ny interest in property that the estate acquires after the commencement of the case." 11 U.S.C. § 541(a)(7); see also Carroll v. Tri-Growth Centre City, Ltd. (In re Carroll), 903 F.2d 1266, 1270 (9th Cir. 1990) (typical § 541(a)(7) property of estate is a postpetition contract); In re MCEG Productions, Inc., 133 B.R. 232, 235 (Bankr. C.D. Cal. 1991) (postpetition compromise agreement).[5]

In short, C&S is obligated to pay $429,505.00 as consideration for its purchase of the estate's claims from the Trustee. That payment - like the entirety of the Settlement Funds - is not subject to any security interest and is property

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[5]The significance of this conclusion is discussed in Section II, infra. This conclusion also raises interesting questions not presently before the court, but which perhaps could be: By withholding payment from the estate does the Trustee, on behalf of the estate, now have a claim against C&S for violation of 11 U.S.C. § 362(a)(3) which prohibits an "act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate[?]" And if C&S violated § 362(a)(3) is it now liable to the estate for actual, and potentially punitive, damages under 11 U.S.C. § 362(k)?

of the estate. Therefore, for the foregoing reasons, the court will grant summary judgment for the Trustee on the First Claim for Relief in the complaint and will deny summary judgment for C&S on the Fourth Claim for Relief in the counterclaim.

B. The Neri Trust Account Funds are not Encumbered by C&S's Security Interest.

This "bucket" includes the funds that were transferred from DRP's bank account to Neri's client trust account in late 2010, and thereafter transferred from Neri's client trust account to the Trustee in 2011. DRP's bank account from which these funds came is a "deposit account" within the meaning of California Commercial Code § 9102(a)(29). So too is Neri's client trust account. In re Allied Respitory Care Services, Inc., 182 B.R. 589, 593-595 (Bankr. S.D. Fla. 1995).

A financing statement is not effective to perfect a security interest in a deposit account. See Cal. Comm. Code § 9310(b)(8). In fact, except when proceeds in a deposit account are already subject to a perfected security interest under California Commercial Code §§ 9315(c) and (d), a security interest in a deposit account is perfected only by control. See Cal. Comm. Code §§ 9312(b) & (b)(1); §§ 9314(a) & (b). A secured party has control over a deposit account for purposes of perfection of a security interest under any of the following conditions: (i) the secured party is the bank where the funds are deposited; (ii) the secured party, the debtor, and the bank enter into a deposit control agreement; or (iii) the security agreement becomes the bank's customer with respect to the deposit account. See Cal.

Comm. Code §§ 9104(a)(1)-(3).

C&S has produced no evidence of control over any DRP bank account, much less any bank account into which inventory proceeds were supposedly deposited. The same is true with regard to Neri's client trust account. There is no evidence that C&S exercised control over either account. For example, C&S is not the bank where the funds were deposited, it produced no deposit control agreement for either account, and it has not established that it is a customer of the institutions where either account was maintained with respect to either account. Consequently, C&S has failed to establish that it has a perfected security interest in DRP's bank account and in Neri's client trust account as deposit accounts. But that does not end the inquiry.

A secured creditor can retain a perfected security interest in a deposit account as proceeds to the extent funds credited to the deposit account are proceeds of the secured creditor's primary collateral. Stierwalt v. Associated Third Party Administrators, 2016 WL 2996936, *3 (N.D. Cal. 2016). However, a "transferee" of funds from a deposit account takes the funds from the deposit account free of any security interest. See Cal. Comm. Code § 9332. And as explained below, that includes the Trustee who is, and who C&S acknowledges is, a "transferee."

The parties stipulated that $560,000.00 went from DRP's bank account to Neri's client trust account in late 2010. There is also deposition testimony that in late 2010 inventory proceeds were deposited into Neri's client trust account. Construing that evidence favorably to C&S, that could mean that the funds that went *into* Neri's client trust account in late 2010 were all

inventory proceeds and, as such, were subject to C&S's security interest. But even if that is the case, when those funds were *transferred out* of Neri's client trust account to the Trustee they were free and clear of any security interest when received by the Trustee. There are two paths to this conclusion.

In Orix Fin. Serv., Inc. v. Kovacs, 167 Cal. App. 4th 242 (Cal. App. 2008) (as modified October 16, 2008), a debtor business defaulted on its financial obligation to Orix which was secured by all of the business's goods, chattels, and property. Id. at 246. Separately, defendant Kovacs obtained a judgment against the business and executed on the business's deposit account. Id. All of the funds in that deposit account were proceeds from the sale of the business's inventory and collection of its accounts receivables, which meant all of the deposits were subject to Orix's security interest. Id. Kovacs' execution on the business's deposit account prompted Orix's suit against Kovacs. Id. The trial court sustained a demure by Kovacs and Orix appealed. Id. at 245.

On appeal, Kovacs conceded that Orix's position as a secured creditor was superior to its own as a judgment creditor. Id. at 246. However, Kovacs argued that such an analysis was irrelevant to the question of the satisfaction of his judgment from the funds in the business's deposit account, which it maintained was wholly free of any such priority analysis because of California Commercial Code § 9332(b). Id. The California appellate court agreed with Kovacs and held that, as a judgment creditor, Kovacs was a transferee under California Commercial Code § 9332(b) who took funds from the business's deposit account free and clear of

any security interest. Id. at 245, 251. Notably, the court supported its holding by reference to Harley-Davidson Motor Co. v. Bank of New England-Old Colony N.A., 897 F.2d 611, 622 (1st Cir. 1990), in which U.S. Supreme Court Justice Breyer referred to comment 2(c) of U.C.C. § 9-306 from which California Commercial Code § 9332(b) is derived to note that the purpose behind § 9-306 was (and thence § 9332(b) is) to explicitly exclude any judicial efforts to trace identifiable secured proceeds paid out of a commingled deposit account. Orix Financial, 167 Cal. App. 4th at 248.

More recently, Stierwalt, supra, involved a similar dispute between a judgment creditor who levied on funds in the judgment debtor's bank account and a secured creditor who claimed a security interest in the judgment debtor's bank account as a deposit account and as proceeds of its collateral. Stierwalt, 2016 WL 2996936 at *1, *2. In the absence of the requisite control, the court concluded that the secured creditor lacked a perfected interest in the bank account as a deposit account. Id. at *3. More importantly, the court recognized that the proceeds in the bank account were identifiable proceeds and, as such, subject to the secured creditor's security interest as proceeds of its contract rights collateral. Id. at *4-*5. Nevertheless, relying on Orix Financial, the court concluded that the secured creditor's security interest in the funds as proceeds of its contract rights collateral did not survive the transfer of those funds out of the deposit account to the judgment creditor who, as in Orix Financial, was a transferee under California Commercial Code § 9332(b). Id. at *6-*8.

The Trustee cites Orix Financial to support her position that the $384,000.00 transferred to her from Neri's client trust account is not encumbered by C&S's security interest. In response to that argument, C&S acknowledges that Orix Financial holds that a judgment creditor is a transferee under § 9332(b) of the California Commercial Code who takes funds from a deposit account free and clear. However, C&S maintains that Orix Financial and § 9332(b) are inapplicable because the Trustee is not, and when she received the $384,000.00 from Neri's client trust account was not, a judgment creditor. More precisely, C&S states as follows:

> [T]he Trustee cites [Orix], but as the Orix court explained, 'This case presents a very narrow question-one of first impression in California: Is an unsecured judgment creditor, who satisfied its judgment from deposit account funds, included in the definition of a 'transferee' as contemplated by section 9332(b), such that it may take those funds free of any security interest?' Id. at 245. The court held that the answer to that question was 'yes.' In other words, an unsecured judgment creditor may satisfy its judgment from deposit accounts [sic] funds and take such funds 'free and clear.' But it is undisputed that the Trustee was not a judgment creditor and did not obtain what remained of the $560,000 by way of a lawsuit and subsequent satisfaction of judgment.

Dkt. 71 at 15:14-16. And that is where C&S's argument collapses.

C&S fails to recognize that § 544(a) of the Bankruptcy Code confers upon the Trustee the status of a hypothetical judgment creditor and lienholder as of the date a bankruptcy petition is filed. See 11 U.S.C. § 544(a); Neuton v. Danning (In re Neuton), 922 F.2d 1379, 1383 (9th Cir. 1990); In re Lloyd, 511 B.R. 657, 659 (Bankr. D. Ariz. 2014). Thus, as C&S acknowledges and Orix Financial and Stierwalt hold, that makes the Trustee a transferee under § 9322. And that means the Trustee took the Neri Trust

Account Funds from Neri's client trust account free and clear of any existing security interest. Therefore, for the foregoing reasons, the court will grant summary judgment for the Trustee on the Fourth Claim for Relief in the complaint and will deny summary judgment for C&S on the First Claim for Relief in the counterclaim.

Alternatively, it is true as C&S points out, a security interest attaches to identifiable proceeds of collateral. See Cal. Comm. Code § 9315(a)(2). It also is true that a security interest in proceeds is perfected if the security interest in the original collateral was perfected. See Cal. Comm. Code § 9315(c). However, a security interest in proceeds only remains perfected for twenty days and becomes unperfected on the twenty-first day unless one of three conditions is satisfied. See Cal. Comm. Code § 9315(d).

The first condition applies to maintain perfection if (i) a filed financing statement covers the original collateral, (ii) the proceeds are collateral that could be perfected by filing a financing statement, and (iii) the proceeds are not acquired with cash proceeds. See Cal. Comm. Code § 9315(d)(1)(A)-(C). Here, the proceeds are either cash or a deposit account. A security interest in either is not perfected by a financing statement. The former requires possession for perfection, see Cal. Comm. Code §§ 9312(b)(3) & 9313(a), and, as explained above, the latter requires control for perfection. There is no evidence that C&S took possession of any inventory cash proceeds (the testimony is that they were deposited into bank accounts) and, as noted above, there is no evidence that C&S had control over any deposit

account. Thus, while a security interest in the original collateral, *i.e.*, inventory, could be perfected by a financing statement, a security interest in proceeds of that collateral, *i.e.*, cash or a deposit account, could not. Consequently, the first condition is not satisfied.

The second condition is also not satisfied. The second condition allows perfection to be maintained in "identifiable proceeds." See Cal. Comm. Code § 9315(a)(2). However, once cash proceeds are deposited into an account and commingled with other money the identifiability of a secured creditor's proceeds is destroyed unless the secured creditor can prove that the money in the account corresponds to its collateral. Arkison v. Frontier Asset Mgmt., LLC (In re Skagit Pacific Corp.), 316 B.R. 330, 338 (9th Cir. BAP 2004). That is done by tracing proceeds in the commingled account to the collateral. See Cal. Comm. Code § 9315(b)(2). The burden of tracing rests with the secured creditor claiming a security interest in the proceeds. Id. (citing Stoumbos v. Kilimnik, 988 F.2d 949, 957 (9th Cir. 1993)); Chrysler Credit Corp. v. Superior Court, 17 Cal. App. 4th 1303, 1311 (Cal. App. 1993). The secured creditor meets that burden by submitting detailed testimony or documentary evidence that establishes a transactional link between the proceeds and the collateral. Arkinson, 316 B.R. at 338 (citing Stoumbos, 988 F.2d at 958); see also In re Sunrise R.V., Inc., 107 B.R. 277, 282 (Bankr. E.D. Cal. 1989).

The burden here is on C&S, as the secured creditor claiming a security interest in the funds transferred from Neri's client to the Trustee, to establish those funds are proceeds of its

inventory collateral. Evidence of tracing, if it can be considered that, is limited to conclusory and speculative deposition testimony that inventory proceeds went into Neri's client trust account in late 2010 and a spreadsheet that reflects "approximately five deposits" over a three-month period between October and December 2010. Even if that sufficed to establish what went into Neri's client trust account, it does not establish a link between the funds that Neri transferred from his client trust account to the Trustee back to C&S's original inventory collateral. In other words, it is not *detailed* evidence of tracing.

For example, there is no evidence that once in Neri's client trust account inventory proceeds were and remained segregated. In fact, the same deposition testimony on which C&S relies to establish that inventory proceeds went into Neri's client trust account also reflects that once in that account the inventory proceeds were commingled with at least $100,000.00 in other funds that did not belong to DRP and some other unidentified operational funds. Moreover, because $100,000.00 in the account did not belong to DRP and belonged to someone named "Peterson," sometime after inventory proceeds were deposited in Neri's client trust account and thereafter commingled with other funds in that account Neri transferred $100,000.00 to a separate "Peterson" account. But what $100,000.00 did Neri transfer? C&S does not answer that question with any admissible evidence. And what of the other operational funds in the account - what where they and where did they come from? Again, C&S does not answer those questions with admissible evidence.

The problem for C&S is that there is no detailed evidence in the form of deposition testimony or documentation that traces the $384,000.00 that was transferred to the Trustee in 2011 back through Neri's client trust account to funds apparently transferred from DRP's bank account and finally back to proceeds of original inventory collateral. Thus, even if all the deposits that went into Neri's client trust account in late 2010 were inventory proceeds going in, C&S has failed to establish they remained identifiable in the account and when thereafter transferred out of the account. Consequently, the second condition is also inapplicable.

The third condition is the simplest. If the proper steps for perfecting a security interest in the type of collateral that constitutes proceeds are taken before the twenty-first day after the security interest attaches to the proceeds, perfection is maintained. See Cal. Comm. Code. § 9315(d)(3). Again, there is no evidence that C&S ever took possession of any inventory proceeds within twenty days of any inventory sales and, as explained above, there is no evidence it had control over any deposit account. Accordingly, this third condition is likewise inapplicable.

In sum, and alternatively, even if the Neri Trust Account Funds were proceeds of DRP's inventory collateral when they went into Neri's client trust account in late 2010, there is no evidence that C&S retained a perfected security interest in those proceeds in 2011 when they were transferred out of the trust account to the Trustee. That would mean when the funds were transferred from Neri's client trust account to the Trustee in

2011, at best, C&S would have had an unperfected security interest in the inventory proceeds. That would also mean that, as a hypothetical judgment creditor and lienholder under § 544(a), the Trustee's interest in the Neri Trust Account Funds would be superior to C&S's unperfected security interest in the same funds. Therefore, on this alternative basis, the court would grant summary judgment for the Trustee on the Fourth Claim for Relief in the complaint and deny summary judgment for C&S on the First Claim for Relief in the counterclaim.

C. The Asset Lease Funds are not Encumbered by C&S's Security Interest.

The Asset Lease is chattel paper. NetBank, FSB v. Kipperman (In re Commercial Money Center, Inc.), 350 B.R. 465, 469 (9th Cir. BAP 2006) ("Commercial Money I"). The security agreement between C&S and DRP grants C&S a security interest in chattel paper. C&S perfected its interest in chattel paper with a properly filed financing statement. See Cal. Comm. Code § 9312(a). But here, at least with respect to payments under the Asset Lease collected directly by the Trustee, we're not dealing with chattel paper.

In Commercial Money I, the bankruptcy appellate panel held that there is a critical distinction between a lease and a payment stream under a lease when the payment stream is stripped from the lease and paid to a third-party. When the payment stream is stripped from the lease and paid to a third party, the bankruptcy appellate panel held that the payment stream is no longer chattel paper but, instead, becomes a newly-created, and a

wholly separate and distinct, payment intangible which is a subset of general intangibles. Id. at 469, 476, 478; Federal Deposit Ins. Corp. v. Kipperman (In re Commercial Money Center, Inc.), 392 B.R. 814, 824 (9th Cir. BAP 2008) ("Commercial Money II"). This critical distinction is explained in context below.

"Th[e] estate and the Chapter 7 trustee appointed to administer the estate are separate and distinct entities from the pre-petition debtor." In re Central Louisiana Grain Co-Op, Inc., 467 B.R. 390, 396 (Bankr. W.D. La. 2012). That legal distinction is crucial because it means that when DRP filed its bankruptcy petition a new legal entity in the form of the estate was created by operation of federal law. That also means when the Trustee thereafter collected the lease payments under the Asset Lease directly from 2040 FF and on behalf of the estate the payment stream under the Asset Lease was paid to a separate legal entity and thereby stripped from the original payee under the lease agreement. That did two things.

First, stripping the lease payments from the Asset Lease and paying them directly to the estate as a third party made the payment stream a new and distinct postpetition intangible that did not exist prepetition when the payment stream remained with the Asset Lease, i.e., was paid to DRP. Second, as a newly-created postpetition payment intangible that did not exist prepetition, the Asset Lease payment stream was not (and could not have been) encumbered by C&S's prepetition security interest. See 11 U.S.C. § 552(a). Nor could it have been proceeds, products, offspring or profits of prepetition collateral. See 11 U.S.C. § 552(b)(1). In fact, perfecting an interest in the

postpetition payment stream as a payment intangible would have required C&S to file a financing statement that covered it, see In re Commercial Money Center, Inc., 2007 WL 7144803, *3-4 (Bankr. S.D. Cal. 2007) (on remand from Commercial Money I, 350 B.R. 465), aff'd, Commercial Money II, 392 B.R. 814, which C&S did not do.

In sum, the $153,410.08 in postpetition Asset Lease payments collected directly by the Trustee are not C&S's collateral or proceeds of its collateral, which means those payments are not subject to C&S's security interest. Therefore, the court will grant summary judgment for the Trustee on the Third Claim for Relief in the complaint and will deny summary judgment for C&S on the Second Claim for Relief in the counterclaim.

D. The Liquor License Funds are not Encumbered by C&S's Security Interest.

California law prohibits the use of a liquor license as collateral for a loan. California Business & Professions Code § 24076 states that "[n]o licensee shall enter into any agreement wherein he pledges the transfer of his license as security for a loan or as security for the fulfillment of any agreement[.]" See also In re Morev, 2015 WL 9264937, *4 (Bankr. S.D. Cal. 2015). And perhaps that is why C&S does not assert a security interest *directly* in the liquor licenses sold by the Trustee. Instead, C&S maintains that DRP's liquor licenses are general intangibles which makes the funds that the Trustee received from the sale of those liquor licenses proceeds of its collateral and thereby subject to its security interest. C&S relies primarily on two

cases: Concorde Equity II, LLC v. Bretz, 2011 WL 5056295 (Cal. App. 2011), and Mola Dev. Corp. v. Orange County Assessment Appeals Bd., 80 Cal. App. 4th 309 (Cal. App. 2000). Neither are persuasive.

An analysis of this issue must begin with Sulmeyer v. California Dept. of Employment Dev. (In re Professional Bar Co.), 537 F.2d 339 (9th Cir. 1976) (per curium), in which the Ninth Circuit stated as follows: "The bankrupt estate, insofar as it includes liquor licenses, has only the limited value of the licenses encumbered as they may be by the terms of the statutes which create the licenses and provide the conditions of their transfer." Id. at 340. And on that basis, Concorde Equity is not helpful or persuasive. More important, it is not applicable.

Concorde Equity involved a priority dispute under California Business & Professions Code § 24074 over proceeds from the sale of a liquor license claimed by two judgment creditors. Concorde Equity, 2011 WL at *1. The sale proceeds were insufficient to satisfy both creditors' claims against the judgment debtor/liquor license owner. Id. Therefore, in order to determine which creditor had priority to the proceeds from a receiver's sale of the liquor license *for purposes of distribution under California Business & Professions Code § 24074*, the court characterized the proceeds as a business asset of the judgment debtor, which made the judgment creditor with a pre-existing security interest in the judgment debtor's business assets a "secured creditor" for purposes of third priority distribution under § 24074. Id. at *3.

The problem with Concorde Equity is that both federal and

California courts recognize that its analysis does not apply inside a bankruptcy case. Citing Gough v. Finale, 39 Cal. App. 3d 777, 783-84 (Cal. App. 1974), the Ninth Circuit in Professional Bar also stated as follows: "Although Cal. Bus. and Prof. Code § 24074 (West Supp. 1975) establishes a system of priorities among creditors in the transfer of a state liquor license, federal rather than California law must be applied in deciding priority when the net proceeds in issue have become available to the [bankruptcy] trustee." Id. at 340. In other words, Professional Bar's reliance on Gough is convincing evidence that Concorde Equity is a state law priority distribution case and, as such, its analysis is inapplicable in this federal bankruptcy case.

As to Mola, it is true that the court in that case made a passing reference to a liquor license as an intangible. Mola, however, is a taxation case. And just because a liquor license may be characterized as an intangible under state tax law, that does not necessarily mean it is an intangible under the Uniform Commercial Code for bankruptcy purposes.

In order for a liquor license or its proceeds to qualify as general intangible under Article 9 in the context of a bankruptcy case, and thereby subject to a security interest as such, the liquor license must first qualify as personal property under state law. See In re Circle 10 Restaurant, LLC, 519 B.R. 95, 128 (Bankr. D.N.J. 2014). This is because Article 9 defines a "general intangible" as "any personal property." Cal. Comm. Code § 9102(a)(42). Thus, in states where a liquor license is not property under state law, it also is not (and cannot be) a

general intangible under the state's version of Article 9. See, e.g., Circle 10, 519 B.R. at 135-37; In re Chris-Don, Inc., 367 F. Supp. 696, 699 (D.N.J. 2005). On the other hand, in states where a liquor license is personal property under state law, a liquor license can be a general intangible subject to an Article 9 security interest. See, e.g., In re Ciprian Ltd., 473 B.R 669, 672 (Bankr. W.D. Pa. 2012). Therefore, the threshold question is whether DRP's liquor licenses are personal property under California law for purposes of applying the California Commercial Code in this bankruptcy case. This court is not persuaded that they are.

The court is aware that there are some federal and state cases that characterize a California liquor license as "property." However, they do so in the context of a *federal* statute and for *federal* law purposes. See e.g., Golden v. State, 133 Cal. App. 2d 640, 643-45 (1955) (for purposes of federal tax lien under federal tax law); Dash, Inc. v. Alcoholic Beverage Control Appeals Bd., 683 F.2d 1229, 1233 (9th Cir. 1982) (for purposes of federal due process analysis). Characterization of a liquor license as property for *federal law* purposes in general, and particularly for federal tax and due process purposes, does not mean that a liquor license is property under *state law* in general and for purposes of defining the scope of intangibles under a state's commercial code in particular, at least in the context of a bankruptcy case. Circle 10, 519 B.R. at 133. That is because the bankruptcy code is unlike the tax code or federal due process analysis because under Butner v. United States, 440 U.S. 48 (1979), what is "property" for the "federal purpose" of

the bankruptcy code is defined by state law.[6] See Circle 10, 519 B.R. at 133.

In determining whether a California liquor license is personal property under California state law for purposes of the commercial code, one could argue that California law draws a distinction between rights as between the licensee and the state and rights as between the licensee and a third party. That distinction seems to find some support in Roehm v. County of Orange, 32 Cal. 2d 280 (1948), in which the California Supreme Court stated: "Although a liquor license is merely a privilege so far as the relations between the licensee and the state are concerned, it is property in any relationship between the licensee and third persons, because the license has value and may be sold." Id. at 283. But after noting that distinction, which actually appears to be the court's recitation of a party's argument, the California Supreme Court ultimately rejected it. Instead, the supreme court framed the question before it as follows: "The controlling question is whether under present constitutional and statutory provisions such [liquor] licenses can now be regarded as personal property for the purposes of taxation." Roehm, 32 Cal. 2d at 284. It answered that question in the negative concluding that a liquor license is not taxable personal property under state law. Id. at 290 ("Although liquor licenses are not taxable as property...."). Thus, Roehm holds

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[6]This should not be confused as to what is "property of the estate" for the *federal* bankruptcy purpose. A California liquor license is property of the estate under 11 U.S.C. § 541(a) for the federal purpose of bankruptcy. In re Quaker Room, 90 F. Supp. 758, 760-61 (S.D. Cal. 1950).

that a liquor license, albeit an intangible for state taxation purposes, is not taxable (or taxed as) personal property under state constitutional and statutory provisions. See American Sheds, Inc. v. County of Los Angeles, 66 Cal. App. 4th 384, 392 (Cal. App. 1988).

The California legislature and numerous California cases also describe a liquor license not as a "right" but as a "privilege" conferred by state law. See California Business & Professions Code § 24079 (describing alcoholic beverage license as a "privilege"); Hevren v. Reed, 126 Cal. 219, 222 (Cal. 1899) (liquor license is neither property nor a contract, in any constitutional sense); Yu v. Alcoholic Bev. Etc. Appeals Bd., 3 Cal. App. 4th 286, 297 (Cal. App. 1992) ("While a license to practice a trade is generally considered a vested property right, a license to sell liquor is a *privilege* that can be granted or withheld by the state."); Cornell v. Reilly, 127 Cal. App. 2d 178, 184 (Cal. App. 1954) (proceeding to revoke liquor license is not for the primary purpose of punishment but "to protect the public, that is, to determine whether a licensee has exercised his *privilege* in derogation of the public interest, and to keep the regulated business clean and wholesome"); Saso v. Furtado, 104 Cal. App. 2d 759, 763-64 (Cal. App. 1951) (explaining that a liquor license is a privilege rather than a state law, contract, or constitutional right).

The court also finds unpersuasive the argument that a liquor license has value apart from the license which transforms the license into personal property and thence into a general intangible under the California Commercial Code. The court in

Circle 10 addressed that issue under New Jersey law, which characterizes a liquor license as a privilege and not personal property under state law but also recognizes that a liquor license and its transferability have value to the licensee. The Circle 10 court resolved that conflict by reasoning that any value to the licensee is created and exists solely as a result of the issuance of the license by the state and therefore cannot be bifurcated from the license itself. Circle 10, 519 B.R. at 131-32. Thus, the Circle 10 court ultimately concluded that any value to the licensee did not make the liquor license personal property and that, in turn, meant that proceeds from the sale of the license could not be subject to a security interest as a general intangible. Id. at 132. That analysis is persuasive. Like New Jersey, the value that a California liquor license has to a licensee is created by and exists only as a result of the issuance of the license by the state. That makes the value inseparable from the license.

In sum, a California liquor license is not personal property under state law for purposes of defining it as a general intangible under the California Commercial Code in a bankruptcy case. That means the Liquor License Funds in the approximate amount of $37,661.60 are not (and cannot be) collateral subject to C&S's security interest. Put another way, DRP's liquor licenses are not general intangibles under the California Commercial Code because in the context of this bankruptcy case they are not personal property under state law. Therefore, the court will grant summary judgment for the Trustee on the Second Claim for Relief in the complaint and will deny summary judgment

for C&S on the Third Claim for Relief in the counterclaim.

II. The Trustee's § 542(a) Turnover Claim

C&S maintains the stipulation does not state when it has to pay the Trustee. That may be the case. But the Bankruptcy Code does insofar as property of the estate is concerned.

An entity, other than a custodian, in possession, custody, or control, during the case, of property of the estate *shall* deliver to the trustee, and account for, the property or the value of the property unless the property is of inconsequential value. 11 U.S.C. § 542(a). Section 542(a) "creates an affirmative obligation on the part of the party holding estate property to turn the property over[.]" In re Rutheford, 329 B.R. 886, 892 (Bankr. N.D. Ga. 2005). Moreover, "[t]his affirmative obligation is self-executing and does not require the holding of a hearing or the entry of an order by the bankruptcy court." In re Prince, 2012 WL 1095506, *9 (Bankr. E.D. Tex. 2012) (citing Knaus v. Concordia Lumber Co. (In re Knaus), 889 F.2d 773, 775 (8th Cir. 1989); Boyer v. Carlton, Fields, Ward, Emmanuel, Smith & Cutler, P.A. (Matter of USA Diversified Products, Inc.), 100 F.3d 53, 56 (7th Cir. 1996)).

The court concludes that $429,505.00 is not of inconsequential value. And inasmuch as the court has determined that the May 2013 stipulation and the payment that the Trustee is entitled to receive under that agreement are property of the estate, as a matter of law C&S now has an affirmative obligation to turn over $429,505.00 to the Trustee. And while C&S may think the timing of that turnover obligation is in dispute because the

stipulation is silent on that point, that is a non-issue. The Ninth Circuit has long-recognized that "[i]t is well settled that existing laws are read into contracts in order to fix the rights and obligations of the parties." Rehart v. Clark, 448 F.2d 170, 173 (9th Cir. 1971). In other words, the Bankruptcy Code fills in any gap or any silence in the stipulation with regard to the timing of C&S's payment obligation which, as noted, is an affirmative obligation on the part of C&S to turn over to the Trustee the Settlement Funds as property of the estate. Therefore, for the foregoing reasons, the court will grant summary judgment for the Trustee on the § 542(a) turnover claim in the Fifth Claim for Relief of the complaint. C&S is ORDERED to turn over $429,505.00, or such portion of the Settlement Funds currently in its possession, to the Trustee within ten days of the entry of judgment.

CONCLUSION

For all the foregoing reasons, the Trustee's motion for summary judgment will be granted and judgment will be entered for the Trustee and against C&S on the First, Second, Third, Fourth, and Fifth Claims for Relief in the complaint. C&S's motion for summary judgment will be denied and C&S will take nothing on the First, Second, Third, and Fourth Claims for Relief in the counterclaim.

Dated: August 14, 2017.

UNITED STATES BANKRUPTCY JUDGE

INSTRUCTIONS TO CLERK OF COURT
SERVICE LIST

The Clerk of Court is instructed to send the attached document, via the BNC, to the following parties:

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