UNITED STATES BANKRUPTCY COURT FOR THE NORTHERN DISTRICT OF IOWA

IN RE:)
) Chapter 11
IOWA OIL COMPANY,)
) Bankruptcy No. 03-00418
Debtors.)

ORDER RE: MOTION TO APPROVE COMPROMISE, TO LIFT STAY, AND FOR OTHER RELIEF

This matter came before the undersigned on April 10, 2003 on ExxonMobil's Motion to Approve Compromise, to Lift Stay, and For Other Relief. Debtor was represented by Paul Fitzsimmons. ExxonMobil Oil Corp. was represented by Eric Lam. The two secured creditors, Bay View Franchise Mortgage Co. and American Trust and Savings Bank, were represented by Christine Conover and Chad Leitsch, respectively. The Iowa Department of Revenue was represented by John Waters. Cenex Harvest States Coop was represented by Wesley Huisinga. After the presentation of evidence and argument, the Court took the matter under advisement. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(G).

FINDINGS OF FACT

Debtor filed a voluntary Chapter 11 petition on February 13, 2003. Debtor operates gas stations/convenience stores throughout northeast Iowa.

Before the filing, two entities supplied Debtor with fuel and other products: ExxonMobil Oil Corp. ("Mobil") and Cenex Harvest States Coop ("Cenex"). Debtor and Mobil entered into a PMPA Distributor Franchise Agreement on March 2, 1998 ("Distributor Agreement"). The Distributor Agreement provides that Debtor shall purchase products from Mobil for retail sale at Mobil stations, or "outlets". As provided in the Distributor Agreement, Debtor purchased these items on credit, paying Mobil after the sale of the goods. The Distributor Agreement also gives Mobil a right of setoff in the product security to satisfy any indebtedness to Mobil. It defines "product security" as

> security sufficient to secure payment for one or more load of Product (motor fuels) in such amounts and forms as Mobil may specify is its sole discretion, including a letter of credit, cash deposit, or assignment, mortgage or pledge of cash, savings accounts or real estate or other collateral acceptable to Mobil.

Mobil Oil Corporation, PMPA Distributor Agreement, § 2.4.

As of the petition date, Debtor owed Mobil approximately $715,700 under the Distributor Agreement from purchases of gasoline and other consumer goods. Mobil did not file a financing statement with the Iowa Secretary of State.

Debtor sells merchandise to the public. GE Capital and Monogram Credit Card Bank of Georgia ("GE Capital") issue Mobil credit cards. Consumers use these cards to purchase fuel and other products at Debtor's Mobil stations.

The GE Capital Card Guide Agreement ("GE Card Agreement") provides that "GE Capital and Bank are the exclusive owners of, and are entitled to receive all payments made with respect to, accounts of GE Capital and Bank." The GE Card Agreement does not give Debtor any right, title or interests in the GE accounts. After a customer incurs charges at one of Debtor's Mobil stations, GE Capital pays Debtor for the sales minus a processing fee. If Debtor owes money to Mobil, the GE Card Agreement provides that Mobil could request GE Capital to pay Mobil any amount GE Capital would be obligated to pay Debtor.

On January 31, 2003, less than 90 days before Debtor filed its bankruptcy petition, Mobil instructed GE Capital to transmit to Mobil the amounts that GE Capital was obligated to pay Debtor under the GE Card Agreement. Between January 31 and February 12, GE Capital transmitted $189,556.82 to Mobil. Upon learning of Debtor's bankruptcy filing, Mobil held the amount in its account. Mobil filed its Motion to Lift Stay and for Other Relief on March 12, 2003. Mobil is holding the above amount pending resolution of the Motion.

Between February 13, 2003 and March 10, 2003, an additional $353,555.71 of credit cards receipts were turned over to Mobil from GE. The parties have settled their claims in regard to these receipts. The only issue for this Court is the prepetition amount of $189,556.82 that Mobil now holds.

Bay View Franchise Mortgage Co. ("Bay View") is the holder of several promissory notes and security agreements between Debtor and FMAC Loan Trust Receivable Trust 1998 C. These agreements, dating from June 1998, involve security interests in the form of mortgages and Article 9 filings relating to seven real properties and personal property, Two of these properties are Mobil stations. At the time of filing of the Chapter 11 petition, Debtor owed Bay View at least $3,437,093.73. Debtor is obligated to pay Bay View $35,981.98 monthly. Debtor is not in default on these payments.
Debtor's two Bay View Mobil stations are located at 3270 Dodge Street and at 2150 Twin Valley, both in Dubuque, Iowa. At these two locales, $72,860.73 of Mobil products were sold between January 31, 2003 and February 12, 2003.

American Trust & Savings Bank of Dubuque, Iowa, ("American Trust") also holds various recorded security agreements and mortgages of Debtor. American Trust's agreements pertain to seven other properties in northeast Iowa and date from April 1998. Debtor has not defaulted on its obligations to American Trust. The remainder of the $189,556.82, or $116,696.09, represents purchases at Debtor's stations in which American Trust has a security interest.

Bay View and American Trust object to Mobil's Motion to Lift Stay on the grounds that they have priority over Mobil's interest in the prepetition collections. Both secured creditors assert that they hold perfected U.C.C. liens on inventory, proceeds, and receivables at the property for which they have security interests.

Bay View has never requested an accounting of or asserted its lien over these proceeds. Debtor does not segregate Bay View funds from other revenues. American Trust has asked for and receives an accounting of receivables at the end of each month. Historically, Debtor possessed a bank account for each American Trust station. These accounts would be "swept" into one general account with which Debtor would pay debts accrued at the American Trust stations. American Trust ceased the "sweep" on Debtor's accounts from December 2002 through February 2003.

Both Bay View and American Trust assert that the GE credit card proceeds are cash collateral on which they have priority security interests. Bay View and American Trust
argue that Mobil is an unsecured creditor and should not be elevated to secured status.

Mobil asserts that it is entitled to a setoff due to the GE Card Agreement. Alternatively, Mobil argues that it can recoup the money it now holds and apply it to its claim. In addition, Mobil asserts five additional reasons why its interest in the GE Card Proceeds has priority over Bay View's interest; 1) Bay View has impliedly waived its lien on Debtor's inventory proceeds because Bay View has never demanded any accounting or tracing of inventory sale dollars, 2) Debtor is not in default on its mortgage payments to Bay View, 3) Bay View's security agreement with Debtor specifically authorizes Debtor to sell inventory, 4) Debtor has no interest in the credit card proceeds, and 5) if Bay View does have a lien, it is inferior to Mobil's setoff and recoupment rights under U.C.C. § 9-404(a)(1).

In regard to American Trust, Mobil asserts that American Trust did not file a timely objection to its motion and should be barred as having waived any objection to the motion. Mobil adds that some of the Bay View objections apply to American Trust as well, stating that Debtor is not in default on its payments to American Trust and that American Trust has authorized the sale of inventory and thus expressly waived its lien. Mobil declares that in never asserting a

lien against inventory and lifting its "sweep" of Debtor's accounts, American Trust has also impliedly waived its lien on the prepetition $189,556.82.

SETOFF AND RECOUPMENT

Mobil first claims that it is entitled to apply the money it holds to Debtor's obligation to Mobil under either the doctrine of setoff, as codified in 11 U.S.C. § 553(a), or the equitable doctrine of recoupment. Under bankruptcy law, both the doctrines of recoupment and setoff are applicable to adjudicate "countervailing claims in one suit" when the bankruptcy case involves one of those claims. In re Hiler, 99 B.R. 238, 241 (Bankr. D.N.J. 1989) (citing Lee v. Schweiker, 739 F.2d 870, 875 (3d Cir. 1984)); In re Saffold, Adv. No. 89- 0198, slip op. at 2 (Bankr. N.D. Iowa Aug. 27, 1990) (Melloy, J.).

Setoff is authorized under the Bankruptcy Code in 11 U.S.C. § 553(a). That section provides:

> (a) Except as otherwise provided in this section and in sections 362 and 363 of this title, this title does not affect any right of a creditor to offset a mutual debt owing by such creditor to the debtor that arose before the commencement of the case under this title against a claim of such creditor against the debtor that arose before commencement of the case . . .

11 U.S.C. § 553(a).

The applicability of setoff in bankruptcy is limited to "very narrow circumstances." In re American Cent. Airlines, 60 B.R. 587, 589 (Bankr. N.D. Iowa 1986) (Melloy, J.); In re B & L Oil Co., 782 F.2d 155, 157 (10th Cir. 1986) (citing 4 Collier on Bankruptcy § 553.03 (15th ed. 1981)). In general, setoff is available to a creditor as a means to reduce a debtor's bankruptcy claim against the creditor only to the extent that mutual obligations exist between the debtor and the creditor which arise from different transactions between the parties. In re Holford, 896 F.2d 176, 178 (5th Cir. 1990); see also Hiler, 99 B.R. at 241. Section 553 requires that the creditor and debtor have claims against each other in the same capacity. In re Photo Mech. Servs., Inc., 179 B.R. 604, 613 (Bankr. D. Minn. 1995). The right of setoff is permissive, not mandatory, its application resting in the discretion of the court. In re Cascade Roads, Inc., 34 F.3d 756, 763 (9th Cir. 1994).

The Bankruptcy Code limits setoff to prepetition claims of the debtor against a creditor being setoff against prepetition claims of the creditor against the debtor. 11

U.S.C. § 553(a). Bankruptcy law does not allow "a prepetition claim against the debtor (to) be setoff against postpetition debts to the debtor." Schweiker, 739 F.2d at 875. The mutuality requirement is not satisfied in that situation since the creditor's prepetition claim against the debtor is being used to setoff the creditor's postpetition debt to the debtor- in-possession. American Cent., 60 B.R. at 589.

Setoff is further limited by the express provisions of the automatic stay. 11 U.S.C. § 362(a)(7). Creditors must acquire relief from the stay before executing a setoff. Hiler, 99 B.R. at 241, 243. Some courts have indicated that the reason the stay is made applicable to creditors using setoff in bankruptcy is that setoff allows creditors to

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enhance their position. See Hiler, 99 B.R. at 242-43; American Cent., 60 B.R. at 589. Setoff also allows a creditor a greater priority in bankruptcy since setoff essentially "elevates an unsecured claim to a secured position" by giving the creditor "a permissible preference over other creditors." Hiler, 99 B.R. at 243 (quoting American Cent., 60 B.R. at 590); see also Schweiker, 739 F.2d at 875. The automatic stay requires the creditor to get leave from the court before obtaining this favored treatment. Mobil has complied with this requirement.

Triangular setoffs are prohibited by 11 U.S.C. § 553, as they violate the mutuality requirement. In re KZK Livesock, Inc., 221 B.R. 471, 481 (Bankr. C.D. Ill. 1998) (refusing to allow a creditor to claim setoff to justify payment from a third party not indebted to it, but who is indebted to debtor); In re St. Francis Physician Network, Inc., 213 B.R. 710, 715 (Bankr. N.D. Ill. 1997) (denying a setoff where Creditor HMO owed the Debtor money, the Debtor owed the health care providers and the Creditor HMO wanted to pay the health care providers, and deduct such amounts from the fees it owed Debtor); Photo Mech. Servs., 179 B.R. at 615. To satisfy mutuality, the creditor must owe a debt to the debtor that arose before the commencement of the case. Id.

Under the GE Card Agreement, GE Capital had exclusive right to the credit card proceeds stemming from customers' purchases at Debtor’s service stations. GE Capital could transfer the proceeds to Mobil at its discretion upon Mobil’s request. The only reason Mobil "owed" Debtor was that GE Capital transferred to Mobil its obligation to remit the proceeds to Debtor. Interestingly, when Mobil challenges Bay View and American Trust’s respective liens in these proceeds, Mobil claims that Debtor has no interest in these proceeds per the GE Card Agreement. But in attempting to claim

setoff, Mobil claims that it "owes" Debtor the amount of these same proceeds.

An exception to the triangular setoff is based in contract law. If the parties agree in a prepetition contract that a setoff may be taken between A, B, and C, then the agreement may be enforced in bankruptcy to the extent that it is enforceable under applicable nonbankruptcy law. 2 Collier on Bankruptcy § 553.02 (3d ed. 2002); In re Kirkie's Implement Inc., Adv. No. 89-052, slip op. at 2 (Bankr. N.D. Iowa October 4, 1989); In re Berger Steel Co., 327 F.2d 401, 405 (7th Cir.

1964) (finding no mutuality where evidence failed to establish agreement between bankrupt and respondent permitting respondent to assert as setoffs bankrupt's debts to respondent's subsidiary); Piedmont Print Works v. Receivers of People's State Bank, 68 F.2d 110, 111 (4th Cir. 1934) (finding mutuality where such an agreement and an "identity of interests" between company and its subsidiary were established). Arguably, the GE Card Agreement falls within this rubric. It is only enforceable, however, to the extent that it is enforceable under nonbankruptcy law. 2 Collier on Bankruptcy § 553.02 (3d ed. 2002).

A perfected Article 9 security agreement has priority over an unrecorded security agreement. Iowa Code § 554.9322. A "security agreement" under Article 9 is defined as a "transaction, regardless of its form, that creates a security interest in personal property or fixtures by contract." Iowa Code § 554.9109. A "security interest" under the U.C.C. is defined as "an interest in personal property or fixtures which secures payment or performance of an obligation . . ." Iowa Code § 554.1201(37). Mobil's contractual ability to obtain the cash proceeds from GE Capital on Debtor's behalf is a security interest. Mobil concedes that the agreement is unperfected. Since Bay View and American Trust have priority over Mobil's unperfected security interest, Mobil cannot meet the exception to the triangular setoff. To allow Mobil to enforce its interest in the proceeds would violate Article 9.

RECOUPMENT

The doctrine of recoupment, as opposed to setoff, "allows a (creditor) to reduce the amount of a (debtor's) claim by asserting a claim against the (debtor) which arose out of the same transaction to arrive at a just and proper liability on [debtor's] claim." In re Holford, 896 F.2d 176, 178 (5th Cir. 1990) (citations omitted) (emphasis in original); In re NWFX, 864 F.2d 593, 597 (8th Cir. 1989).

The mutuality limitation on setoff does not apply to recoupment. Recoupment is "a defense to the debtor's claim against the creditor rather than mutual obligation." B & L Oil Co., 782 F.2d at 157 (quoting Lee v. Schweiker, 739 F.2d 870, 875 (3rd Cir. 1984)). Like setoff, recoupment is narrowly construed. In re Peterson Distrib., Inc., 82 F.3d 956, 959 (10th Cir. 1996). Recoupment is a creditor's claim to reduce a debt growing out of the "identical transaction

that furnished the (debtor's) cause of action" which is available to creditors as a damage claim "strictly for the purposes of abatement or reduction" of the claim debtor makes in bankruptcy against the creditor. In re American Cent. Airlines, 60 B.R. 587, 589 (Bankr. N.D. Iowa 1986) (Melloy, J.); Saffold, slip op. at 4. Hence, a recouping creditor can reach no additional property of the estate beyond that which is the subject of the claim and defense. See Hiler, 99 B.R. at 243.

The automatic stay limitation found in setoff does not apply to recoupment because recoupment is an equitable apportionment of the creditor's claim, not an enhancement of the creditor's position. Hiler, 99 B.R. at 243; Saffold, slip. op. at 4 (adopting the Hiler approach that recoupment is not subject to the automatic stay).

The distinction between recoupment and setoff is critical since these doctrines produce very separate results. Hiler, 99 B.R. at 242. The test most courts apply to make the distinction between the doctrines is "whether the claim arises out of the same or different transactions." Hiler, 99 B.R. at 241 (citations omitted); Saffold, slip op. at 4. When the creditor's claim against the debtor arises from the same transaction as the debtor's claim against the creditor, the creditor's reduction can be properly characterized as a recoupment. Conversely, when the claims arise from different transactions between the parties, the creditor's reduction can be accomplished only by setoff, subject to the limitations noted above. Saffold, slip op. at 4.

Courts have generally found this 'same transaction' requirement to be satisfied only when the debts to be offset arise out of a single, integrated contract or similar transaction." In re Davidovich, 901 F.2d 1533, 1539 (10th Cir. 1990) (citations omitted); Saffold, slip op. at 4. It must be "inequitable for the debtor to enjoy the benefits of that transaction without also meeting its obligations." Peterson Distrib.,82 F.3d at 960.

The doctrine of recoupment has been applied in many situations, the common element being a narrowly defined transaction. Employee disability plans have been allowed to recoup overpayments to plan

beneficiaries. Hiler, 99 B.R. at 242; Saffold, slip op. at 4. A claim for damages for alleged breach of a construction contract was applied to reduce the

balance due under the construction contract. In re Clowards, Inc., 42 B.R. 627 (Bankr. D. Idaho 1984). A record company was entitled to recoup the advances paid to a musician from postpetition record sales, in lieu of filing a claim as an unsecured creditor. Waldschmidt v. CBS, Inc., 14 B.R. 309 (M.D. Tenn. 1981). A creditor could recoup overpayments made pre-petition pursuant to an oil division order, by withholding money owed for purchases made postpetition. B & L Oil Co., 782 F.2d at 157. An employer could recoup prepetition advances paid to the debtor against postpetition commissions, as long as the repayment was made in connection with actual sales promotion for which commissions were paid. In re Vaughter, 109 B.R. 229 (Bankr. W.D. Tex. 1989). An electric utility could recoup the debtor's prepetition security deposit to reduce its claim against the debtor for electrical services. In re Norsal, 147 B.R. 85 (Bankr. E.D.N.Y. 1992).

In most recoupment cases, the contract at issue expressly permits the withholding of overpayments from future payments. B & L Oil Co., 782 F.2d at 157. Some courts require overpayment. Photo Mech. Servs., 179 B.R. at 613. The GE Card Agreement contains no such provision.

Recoupment is an equitable doctrine and necessarily involves the question of unjust enrichment. B & L Oil Co., 782 F.2d at 159; In re Centergas, 172 B.R. 844, 849 (Bankr. N.D. Tex. 1994). Recoupment is allowed so that other creditors do not get a "windfall." Centergas, 172 B.R. at 849.

In the present case, the transactions between Mobil and Debtor giving rise to the claims before this Court are based on items that Mobil sold to Debtor and for which Debtor has not paid Mobil. Pursuant to the GE Card Agreement, Mobil can apply the monies from the Mobil credit cards to satisfy a portion of Debtor’s obligation to Mobil. The GE Card Agreement incorporates by reference the Distributor Agreement.

While Mobil argues that these transactions are an "integrated contract," this Court does not agree. Credit card transactions and debt from the purchase of goods do not arise from the same transaction. Even if this were one contract, a single contract does not resolve the question of "same transaction" for purposes of recoupment. Peterson Distrib., 82 F.3d at 960. There must be "such a close, necessary

relationship" between the events that gave rise to the respective claims that the amount of one cannot fairly be determined without accounting for the latter. St. Francis Physicians, 213 B.R. at 719. When the two claims arise from different parts of a contract, dealing with different performance obligations, recoupment comes closer to a prohibited cure at the expense of other creditors. Id. at 720.

In Centergas, Conoco Oil attempted to "recoup" a previous debt by applying credit card proceeds against a debtor's product purchase account. 172 B.R. at 852. Unlike here, there were only two parties in Centergas, the debtor and Conoco. Still, the court concluded that the

> nature of the transactions between the parties shows many separate sales of different Conoco products by the Debtor to third party customers or to other retailers who paid by credit card or in cash. . . . Conoco applied everything it got to the existing debt-whether credit card receipts from Debtor's sales to customers or cash paid by the Debtor on its delinquent debt.

Id.

The court further noted that

> [A]lthough the JFA (Jobber Franchise Agreement) governed the general relationship between the Debtor and Conoco, each sale from Conoco to the Debtor was a separate transaction. Additionally, the JFA spoke to offset only. Recoupment was not mentioned.

Id.; see also Peterson Distrib., 82 F.3d at 962-63 (holding that another "JFA" set forth the entire business relationship and was not limited to a single sale but rather encompassed several kinds of sales and related activities).

This Court construes the Distributor Agreement similarly to the way the Centergas court viewed the "JFA." This Court also agrees with the courts' analyses in Centergas and Peterson Distributing pertaining to "many separate sales" arising from the sales of Mobil's products at Debtor's stores.

Similar facts are presented in In re Westinghouse Elec. Corp., 63 B.R. 18 (Bankr. E.D. Pa. 1986). The debtor was a dealer in Westinghouse products. A debt was created by debtor's failure to pay for the merchandise that he purchased and later sold. Id. at 20. Westinghouse then altered the relationship by billing the debtor's customers and paying a commission to the debtor, which Westinghouse retained to offset the debt. Id. In denying recoupment, the Westinghouse court noted that "the fact that the same parties are

involved, and that a similar subject matter gave rise to both claims . . . does not mean that the two arose from the same transaction." Id. at 21. Similarly, Mobil seeks to retain money owed to Debtor to fulfill a debt concerning the same subject matter but not the same transaction for purposes of recoupment.

This is a classic case of unjust enrichment for two reasons. First, Mobil is an unsecured creditor attempting to elevate its position by virtue the GE Card Agreement. No other creditor is getting a windfall. In fact, it is Mobil which is attempting to improve its position ahead of secured creditors Bay View and American Trust. Peterson Distrib., 82 F.3d at 963. Recoupment cannot defeat the rights of a creditor who holds a properly perfected Article 9 security interest. In re Tecumseh Constr. Co., 157 B.R. 471, 472 (Bankr. E.D. Cal. 1993).

Secondly, the GE Card Agreement is really an agreement between GE Capital and Debtor, not Mobil and Debtor. The GE Card Agreement provides that GE Capital retains all rights in the accounts and Mobil only may acquire the proceeds if GE Capital transfers the proceeds to Mobil. Mobil is trying to bootstrap itself to Debtor via the GE Card Agreement. Photo Mech. Servs., 179 B.R. at 613 (denying recoupment in a transaction where a creditor was attempting to connect itself to Debtor via another agreement in which Debtor owed a debt to a third party). For these reasons, the Court holds that Mobil is not entitled to recoupment as Mobil is a general unsecured creditor and the amounts "owed" do not arise from the same transaction.

U.C.C. LIENS

Bay View and American Trust claim that they possess valid U.C.C. liens on Debtor's personal property at the locations secured by their respective mortgages. Mobil claims that both parties have either impliedly or expressly waived their respective liens. Mobil claims that the following acts demonstrate its premise; 1) The secured creditors' security agreements with Debtor specifically authorizes Debtor to sell inventory, 2) the secured parties have impliedly waived their lien on Debtor's inventory proceeds, Bay View by not demanding an accounting and American Trust by lifting its "sweep," and 3) if there is a valid lien, it is inferior to Mobil's setoff or recoupment rights under U.C.C. § 9-404(a)(1).

This Court rejects Mobil's argument that whatever valid lien the secured creditors have is subject to their setoff or recoupment rights under U.C.C. § 9-404(a)(1) because Mobil does not have a setoff or right of recoupment in the $189,000. This Court need not address the substantive aspects of U.C.C.

§ 9-404(a)(1).

The perfected security agreements and mortgages in this case were initiated in 1998 under the former U.C.C. These interests retain their priority over subsequent lien creditors under the revised U.C.C. § 9-703.

Authorization to sell collateral has no bearing on waiver of collateral proceeds. The secured party may waive its lien in the collateral in this manner, but a secured party's interest attaches to any identifiable proceeds of the sale of the collateral. Iowa Code § 554.9315(1)(a); Ellefson v. Centech Corp., 606 N.W.2d 324, 335 (Iowa 2000) (noting that under § 554.9205, creditor did not waive its lien on the collateral proceeds held in the debtor's bank account); Wilkin Elevator v. Bennett State Bank, 522 N.W.2d 57, 63 (Iowa 1994) (holding that a course of dealing in which bank allowed customers to sell hogs free of a security interest did not act as a waiver of the sale proceeds).

If a creditor has a perfected security interest in the original collateral, then the creditor also has a perfected security interest in the sale proceeds. Iowa Code § 554.9315(3). The perfection in the proceeds lasts indefinitely, regardless of whether the security interest in the original collateral remains perfected. Iowa Code § 554.9315, U.C.C. cmt.

Mobil argues that the secured creditors have impliedly waived their liens on the collateral proceeds. The term "proceeds" includes "whatever is received upon the sale, exchange, collection or other disposition of collateral."

Iowa Code § 554.9102. A security interest in the proceeds is unaffected by a debtor's usage in business or any failure by the creditor to account for the proceeds. Ellefson, 606 N.W.2d at 336; Brown & Williamson Tobacco Corp. v. First Nat'l Bank, 504 F.2d 998, 1001-02 (7th Cir. 1974); Insley Mfg. Corp. v. Draper Bank & Trust, 717 P.2d 1341, 1345-46 (Utah 1986) (noting that the purpose of section 9-205 "is to relieve creditors from the age-old requirement of policing collateral in the hands of a debtor"); 68A Am.Jur.2d Secured Transactions § 94, at 108 (1993).

This continuing security interest or lien, however, may fail if the creditor cannot identify the proceeds in the debtor's bank account as coming from the sale of the collateral covered by the creditor's security agreement. Ellefson, 606 N.W.2d at 336; C.O. Funk & Sons, Inc. v.

Sullivan Equipment, Inc., 431 N.E.2d 370, 373 (Ill. 1982).

Here, the proceeds are derived from credit card purchases of the secured parties' collateral inventory at Debtor's service stations. The proceeds were placed in the account at GE Capital. GE Capital turned over these proceeds to Mobil.
The identity of the proceeds is easily ascertained.

Mobil argues that because Bay View has never demanded an accounting and American Trust has lifted its "sweep," the creditors have waived their liens. This argument, however, is without merit as a creditor does not waive its lien on proceeds if a debtor uses them to operate a business.
Ellefson, 606 N.W.2d at 336. As for Mobil's argument that in lifting its "sweep," American Trust has waived its liens, Mobil does not cite any authority for how this action constitutes a waiver. American Trust possesses a blanket lien on all Debtor's personal property, so it is of no consequence that the sales from Debtor's stations were "swept" into one account. The proceeds are still identifiable as deriving from American Trust's collateral. This Court finds that Bay View and American Trust have not waived their respective liens in the collateral proceeds.

While arguing that Bay View and American Trust have waived their liens, Mobil additionally argues that the secured creditors do not have any lien on the credit card proceeds, as Debtor did not have any property interest in the proceeds.
The GE Card Agreement does state that Debtor has no right, title or interest in the accounts. This fact does not stop
Mobil from asserting that it "owes" Debtor the amount of the credit card proceeds for purposes of setoff. The Court disagrees with Mobil's assertion that Debtor has no interest in the credit card proceeds. It is unconscionable that a contract could strip a seller of its rights because it issued credit to third parties who purchased the seller's inventory.

A debtor's entry into bankruptcy does not affect the creditor's interest in the proceeds, except as provided in the bankruptcy code. Iowa Code § 554.9315, U.C.C. cmt. This Court finds that the $189,556.82 in prepetition credit card proceeds is cash collateral pursuant to 11 U.S.C. § 363(a).
In the Order Authorizing Use of Cash Collateral by Debtor approved by this Court on April 22, 2003, American Trust and Bay View have agreed to allow Debtor to use these prepetition proceeds in Debtor's operations.

WHEREFORE, Mobil is not entitled to a setoff of the credit card proceeds pursuant to 11 U.S.C. § 553, or recoupment.

FURTHER, Mobil is an unsecured creditor, with Bay View and American Trust having priority in the proceeds.

FURTHER, Mobil's request for relief from the stay is DENIED.

FURTHER, Mobil is directed to turn over $189,556.82 in prepetition credit card proceeds which it received from GE Capital for Debtor's use pursuant to the agreed Order Authorizing Use of Cash Collateral by Debtor filed April 22, 2003.

SO ORDERED this 21st day of May, 2003

PAUL J. KILBURG
CHIEF BANKRUPTCY JUDGE