IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

IN RE:	)	In Proceedings
	)	Under Chapter 11
CARYLE MICHEL and	)	
CATHERINE MICHEL,	)	No. BK 89-40672
	)	
Debtor(s),	)	
	)	
CIBA-GEIGY CORPORATION,	)	
	)	
Plaintiff,	)	
	)	
v.	)	ADVERSARY NO.
	)	90-0010
CARYLE MICHEL and	)	
CATHERINE MICHEL, d/b/a	)	
Michel Fertilizer Co., Michel	)	
Equipment Co., Michel Oil Co.,	)	
Michel Drilling Co., Michel	)	
Grain & Fertilizer and Michel-	)	
Potter Properties,	)	
	)	
Defendants.	)	

MEMORANDUM AND ORDER

On July 18, 1989, Caryle and Catherine Michel (debtors or debtors in possession) filed a voluntary petition under Chapter 11 of the Bankruptcy Code. On January 8, 1990, Ciba-Geigy Corporation (Ciba-Geigy or plaintiff) filed a three count complaint against Caryle Michel and Catherine Michel, doing business as Michel Fertilizer Co., Michel Equipment Co., Michel Oil Co., Michel Drilling Co., Michel Grain & Fertilizer and Michel-Potter Properties. Ciba-Geigy seeks the imposition of a Constructive trust upon the proceeds of the sales of certain herbicide or grain products, which products it alleges belonged to Ciba-Geigy and which were sold or converted by the debtors in possession. Debtors have moved to dismiss the complaint.

In Count I, Ciba-Geigy alleges that it entered into two contracts governing the treatment of herbicide stored at the Mt. Vernon location of Michel Fertilizer Company. According to plaintiff, the first contract (Warehousing Agreement) establishes a bailment relationship between Ciba-Geigy and Michel Fertilizer Company as to the herbicide for the period from October 11, 1988 to August 31, 1989. It was executed by "Caryle Michel," without indication of corporate capacity, on behalf of "Michel Fertilizer." It provides, inter alia, that "[t]itle to all products stored ... shall be retained by Ciba-Geigy" and that "[m]aterial for storage ... may not be (1) sold, or (2) moved to another location without the prior written consent of Ciba-Geigy." Plaintiff attached a copy of the Warehousing Agreement to the complaint as exhibit A and incorporated its terms by reference. The Warehousing Agreement further provides that "[i]n the event that you wish to take title to any or all of the stored product under the terms of any then current sales program, title will not be transferred until approved by Ciba-Geigy's designated Marketing Representative or distributor."

The second contract (Sales Agreement), which is attached to the complaint as exhibit B, and incorporated by reference, sets forth the terms of a then current sales program. Count I alleges that the Sales Agreement was in effect between September 1, 1988 and August 31, 1989. It states that it is an agreement "between Ciba-Geigy Corporation ('Seller') and Michel Fertilizer ('Buyer')." It further states, inter alia, that "Seller agrees to sell to Buyer, for resale, ...herbicide....Seller will only sell the [herbicide] through its designated agent (hereinafter called the 'Marketing Representative').

The price and terms of sales, including credit limits, for the [herbicide] will be as quoted by the Marketing Representative, who will invoice Buyer for [herbicide] sold on behalf of Ciba-Geigy. Title...shall pass upon releasing and invoicing of the [herbicide] by Marketing Representative."

Count I then alleges that 1,128 gallons of herbicide were either sold or moved to another location without the prior written consent of Ciba-Geigy; that Michel Fertilizer Company received proceeds from the sale of the herbicide post-petition and deposited these proceeds in the debtor in possession account; that Ciba-Geigy was the legal title owner of the herbicide as shown by the financing statement which is attached to the complaint as exhibit C;[1] and that debtors in possession have been unjustly enriched by these proceeds. Accordingly, Ciba-Geigy is entitled to a constructive trust to be imposed on the debtor in possession bank accounts.

Count II of the complaint is based on the same legal theory as Count I and the facts alleged are nearly identical to Count I. Consequently, only those allegations that differ from those of Count I will be discussed. Here, Ciba-Geigy entered into the same pair of contracts governing the treatment of herbicide stored at the Grantsburg, Illinois location of Michel Fertilizer Company. Michel Fertilizer company was doing business at this location as Big Bay Grain or Big Bay Grain and Fertilizer.

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[1]The financing statement shows the "debtor" as "Michel Fertilizer Inc." The signature of the "debtor" on the financing statement is that of Caryle Michel with no indication of corporate capacity.

The Warehousing Agreement in effect at this location (exhibit D to the complaint) was executed by Steve Foss, manager, on behalf of "Big Bay Grain & Fertilizer (Michel)." It was effective for the period from October 14, 1988 to August 31, 1989. The Sales Agreement (exhibit E to the complaint) was executed by Steve Foss and "Michel Fertilizer" was designated as "Buyer." A total of 1,034 gallons of herbicide were sold or removed from the Grantsburg location without the prior written consent of Ciba-Geigy. A financing statement showing the "debtor" as "Big Valley Grain and Fertilizer" is attached to the complaint as exhibit F. The signature of whomever signed as "debtor" on exhibit F is so faint as to be undecipherable.

In Count III of the complaint, plaintiff alleges that its seed division, Funk Seeds International (Funk), entered into a contract (Dealer Agreement) with Michel Fertilizer Company for the consignment of certain seed products. The Dealer Agreement, which is attached to the complaint as exhibit G, was entered into on November 4, 1987 and was to continue in effect until terminated by either party by written notice to the other. Pursuant to the Dealer Agreement, Funk delivered seed products to Michel Fertilizer Company. Thereafter, Michel Fertilizer Company, or debtors, as consignee, sold these products and received both pre-petition and post-petition proceeds from their sale. These proceeds were placed in various debtor in possession bank accounts. Plaintiff alleges that these proceeds have unjustly enriched debtors in possession. Accordingly, Ciba-Geigy is entitled to a constructive trust to be imposed on the debtor in possession bank accounts.

Debtors raise several grounds for dismissal of the complaint. First, they contend that under Illinois law,[2] the existence of fraud or the abuse of a fiduciary duty are essential elements to a cause of action seeking the remedy of constructive trust. However, while constructive trusts have generally been imposed in the two situations noted above, the remedy is not restricted to those grounds. A constructive trust may also arise when some other form of wrongdoing, such as duress, coercion, or, mistake, is present. Suttles v. Vogel, 126 Ill. 2d 186, 533 N.E. 2d 901, 904-905 (1988). Thus, "[a] constructive trust is created when a court declares the party in possession of wrongfully acquired property as the constructive trustee of that property because it would be inequitable for that party to retain possession of the property." Id. at 822 (citation omitted).

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[2]The contracts which are attached to the complaint as exhibits A,B,D and E state that they shall be interpreted in accordance with the laws of the State of New York. However, both parties have relied exclusively on federal law and on the law of the forum state - Illinois - in their arguments to the Court. Presumably, the parties agree that the issues before the Court are not in the nature of contract interpretation to which New York law must be applied. In any event, the parties are free, within limits, to agree on substantive law. Matter of Iowa R. Co., 840 F.2d 535, 542-43 (7th Cir.), cert. denied, _ U.S. _, 109 S.Ct. 244 (1988). A federal court must refer to the "whole law" of the state in which it sits. Id. at 543 (citing Klaxon v. Stentor, 313 U.S. 487 (1941)). When the parties fail to say that the forum state's choice of laws rules require the application of another state's substantive law, the federal court must apply the forum state's substantive law. Id. (citing Casio, Inc. v. S.M. & R. Co., 755 F.2d 528, 531 (7th Cir. 1985)). Moreover, were the Court to apply New York law to the issue now under discussion the same result would be obtained. See Simonds v. Simonds, 45 N.Y. 2d 233, 241-42, 380 N.E. 2d 189, 193-94, 408 N.Y.S. 2d 359, 363 (1978); In re Estate of Violi, 65 N.Y. 2d 392, 482 N.E. 2d 29, 33, 492 N.Y.S. 2d 550, 554 (1985); Bankers Sec. Life Ins. Soc'y v. Shakerdge, 49 N.Y. 2d 939, 406 N.E. 2d 440, 440, 428 N.Y. S. 2d 623, 624 (1980).

Of course, for purposes of a motion to dismiss all allegations in the complaint must be accepted as true. E.g., In re Smurzynski, 72 B.R. 368, 369 (Bankr. N.D. Ill. 1987); In re Haas, 36 B.R. 683, 688 (Bankr. N.D. Ill. 1984); In re Oien, 22 B.R. 720, 721 (Bankr. D. S.D. 1982). "Very little is required in a complaint as long as it sets forth the basis upon which relief is sought." In re Overmeyer, 32 B.R. 597, 602 (Bankr. S.D. N.Y. 1983). A motion to dismiss a complaint must not be granted unless it clearly appears that the plaintiff can prove no set of facts under its pleadings which would entitle it to the relief requested. In re Smurzynski, 72 B.R. at 370; In re Haas, 36 B.R. at 688. In the instant case, Counts I and II of the complaint allege the existence of a bailment arrangement arising by contract between the parties.[3] Under this contractual arrangement, Michel Fertilizer Company promised to refrain from selling the herbicides or moving them to another location without the prior written consent of plaintiff (or, at least, the approval of plaintiff's designated Marketing Representative or distributor). Counts I and II further allege that Michel Fertilizer Company violated this promise by selling the herbicides without approval and that debtors have been unjustly enriched as a result. The Court finds that in Counts I and II plaintiff has alleged sufficient facts to establish a wrongful taking or transfer of property which may be redressed through the remedy of constructive trust. See, e.g., Rosalinda v. Kent Co., Inc., 86 A.D. 2d 587, 446 N.Y.S. 2d 312, 314 (App. Div. 1982). Thus, Counts I and II

[3]A bailment does not establish a fiduciary relationship. E.g., G.T. Bogert, Trusts §13 at 28-29 (6th ed. 1987).

are not subject to dismissal on this basis. Count III, however, is a different matter. Although Count III sets forth the existence of a consignment relationship, there are no allegations whatsoever in Count III to establish that any promise has been violated or that any wrongful taking or transfer of property has occurred.[4] Count III merely alleges that Michel Fertilizer Company or debtors sold consigned products - which is permitted by contract - and that debtors now hold the proceeds which rightfully belong to plaintiff. These facts are insufficient to state a cause of action for the imposition of a constructive trust under Illinois or New York law. See Suttles v. Vogel, 533 N.E. 2d at 904-905; Simonds v. Simonds, 45 N.Y. 2d at 241-42, 380 N.E. 2d at 193-94, 408 N.Y.S. 2d at 363; In re Estate of Violi, 482 N.E. 2d at 33, 492 N.Y.S. 2d at 554; Bankers Sec. Life Ins. Soc'y v. Shakerdge, 406 N.E. 2d at 440, 428 N.Y.S. 2d at 624.

Debtors' next argument supporting dismissal is based on the premise that the contracts set forth in each Count of the complaint create consignment arrangements. Debtors contend that even if

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[4]Nor does plaintiff allege the existence of a fiduciary duty arising from the consignment arrangement. In fact, the Dealer Agreement expressly provides that the consignee is not an agent of the consignor. Bankruptcy courts have consistently held that a consignment arrangement is "nothing more than a run-of-the-mill commercial transaction," Matter of Hyers, 70 B.R. 764, 771 (Bankr. M.D. Fla. 1987), absent an express and formal trust arising by contract between the parties. E.g., id. (citing Davis v. Aetna Acceptance Co., 293 U.S. 328 (1934)); In re Sutton, 39 B.R. 390, 394-95 (Bankr. M.D. Tenn. 1984). See also 3 Collier on Bankruptcy ¶523.14 at 523-96 to 523-98 (15th ed. 1989). Although arising in the context of dischargeability of fiduciary debts under 11 U.S.C. section 523(a)(4), the Court finds this line of cases persuasive on the question of whether a fiduciary responsibility may be imposed on a consignee by operation of law.

plaintiff adequately sets forth facts in each Count entitling it to a constructive trust under Illinois law, that a constructive trust is not appropriate unless plaintiff has taken those steps necessary under Articles Two and Nine of Illinois'[5] Uniform Commercial Code to protect its consigned products and their proceeds from the claims of the consignee's other creditors by giving notice of the consignment. Of course, this position has merit only if Ciba-Geigy is, in fact, a consignor of products to Michel Fertilizer Company. This is not at issue in Count III where plaintiff has alleged the existence of a consignment arrangement.[6] However, in counts I and II, plaintiff alleges that the Warehousing Agreements establish bailments.[7] The Court

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[5]Looking to the whole law of the forum, including the forum state's choice of laws rules, Klaxon v. Stentor, 313 U.S. at 496-97, brings the Court to Ill.Rev.Stat. ch. 26, para. 9-103 dealing with perfection of security interests in multiple state transactions. Section 9-103 provides, in pertinent part, that "perfection and the effect of perfection or non-perfection of a security interest in collateral are governed by the law of the jurisdiction where the collateral is when the last event occurs on which is based the assertion that the security interest is perfected or unperfected." Filing the financing statement is the crucial event here. However, neither party has advised the Court where the financing statement was filed and where the collateral was located at that time. Accordingly, since the parties refer to Illinois law on this issue, and fail to state that Illinois' choice of laws rules require the application of another state's substantive law, the Court will apply the substantive law of the forum state. Matter of Iowa R. Co., 840 F.2d at 543.

[6]Since the Court has already determined that dismissal of Count III is proper, further discussion of Count III is solely for the purpose of showing additional grounds for dismissal.

[7]Title to bailed goods, and security interests in bailed goods, do not fall within the scope of Articles Two and Nine. Rather, they are governed primarily by the provisions of Article Seven of the Illinois Uniform Commercial Code dealing with documents of title. 2 J. White & R. Summers, Uniform Commercial Code §§21-1, 21-2, 21-3 (3d

must examine section 2-326 of Article Two to resolve this issue.

Section, 2-326 provides, in pertinent part:

> (1) Unless otherwise agreed, if delivered goods may be returned by the buyer even though they conform to the contract, the transaction is
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> > (a) a "sale on approval" if the goods are delivered primarily for use, and
> >
> > (b) a "sale or return" if the goods are delivered primarily for resale.
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> (2) Except as provided in subsection (3), goods held on approval are not subject to the claims of the buyer's creditors until acceptance; goods held on sale or return are subject to such claims while in the buyer's possession.
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> (3) Where goods are delivered to a person for sale and such person maintains a place of business at which he deals in goods of the kind involved, under a name other than the name of the person making delivery, then with respect to claims of creditors of the person conducting the business the goods are deemed to be on sale or return. The provisions of this subsection are applicable even though an agreement purports to reserve title to the person making delivery until payment or resale or uses such words as "on consignment" or "on memorandum. However, this subsection is not applicable if the person making delivery
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> > (a) complies with an applicable law providing for a consignor's interest or the like to be evidenced by a sign, or
> >
> > (b) establishes that the person conducting the business is generally known by his creditors to be substantially engaged in selling the goods of others, or
> >
> > (c) complies with the filing

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ed. 1988). Debtors have raised no arguments for dismissal based on noncompliance with any provision of Article Seven.

> provisions of the Article on Secured Transactions (Article 9).

Ill.Rev.Stat. ch. 26, para. 2-326. In essence, then, section 2-326 obliterates the distinction that has long plagued courts between a "sale or return" and a "consignment" transaction. See, e.g., Ill.Ann.Stat. ch. 26, para. 2-326 Illinois Code Comment at 296 (Smith-Hurd 1963; In re Ide Jewelry Co. Inc., 75 B.R. 969-973 (Bankr. S.D. N.Y. 1987). Under certain conditions, consignment arrangements are "deemed" to be sale or return transactions despite a reservation of title in the consignor. E.g., In re Ide Jewelry Co., Inc., 75 B.R. at 974. When these conditions are met, the consignor must comply with one of the three notice provisions set forth in section 2-326(3) in order to protect the consigned goods from the claims of the consignee's other creditors. However, before a consignment arrangement will be deemed a sale or return transaction, the three preconditions which must be present are: (1) the goods must be delivered to a person for sale; (2) that person must maintain a place of business in which he deals in goods of the kind involved; and (3) that person must deal under a name other than the name of the person making delivery. See Ill.Ann.Stat. ch. 26, para. 2-326 Illinois Code Comment at 297 (Smith-Hurd 1963).

It is the first element which is critical to the issue at hand. As noted above, in Counts I and II plaintiff alleges that a bailment has been established. If, in fact, the delivery of the herbicide to the Michel Fertilizer Company locations was for the purpose of warehousing rather than for the purpose of sale, then section 2-326 would not apply.

The existence of either a bailment or a consignment is determined by contract and by the conduct of the parties. 4 Collier on Bankruptcy ¶541.08 at 541-43 to 541-44 (15th ed. 1990). A bailment has been defined to be "nothing more than a delivery of goods for some purpose, upon a contract, express or implied, to be redelivered to the bailor upon fulfillment of the purpose or to be dealt with according to the bailor's direction." Id. at 541-42. However, sometimes what purports to be a bailment, is, in fact, a sale or a purchase money security interest. Id. at 541-43. "The distinguishing characteristic is usually whether there is an obligation to purchase rather than to return the goods. But the fact that the bailee...has a continuing option to purchase if and when desired is not necessarily inconsistent with a bailment.... Id. On the other hand, customarily, a consignment is simply a bailment for care or sale with no obligation to purchase in the consignee. Id. at 541-43 to 541-44.

Here, the Warehousing Agreements provide, inter alia, that Michel Fertilizer Company is to be paid a fee for storing herbicide for plaintiff, that title to the herbicide is to be retained by plaintiff, and that herbicide may not be sold without the express consent of plaintiff. Thus, they appear to establish a bailment. However, the Warehousing Agreements also give Michel Fertilizer Company, upon approval of Ciba-Geigy's designated Marketing Representative, the option of taking title to any or all of the herbicide under the terms of the sales program set forth in the Sales Agreements. Counts I and II do not discuss what impact, if any, the Sales Agreements have on the nature or existence of the bailment relationship. The Sales Agreements

provide, inter alia, that Michel Fertilizer Company may purchase herbicide from Ciba-Geigy, through Ciba-Geigy's agent, for resale by Michel Fertilizer Company. They further provide that Ciba-Geigy's agent will invoice Michel Fertilizer Company for herbicide sold on behalf of plaintiff and that title shall pass upon releasing and invoicing of the herbicide by Ciba-Geigy's agent. When this language is read in a light most favorable to plaintiff, it may set forth an option to purchase in Michel Fertilizer Company that cannot be exercised without Ciba-Geigy's consent. As such, the language is not inconsistent with the notion that the herbicide was in Michel Fertilizer Company's possession for warehousing rather than for sale until such time as Ciba-Geigy's consent was forthcoming.[8] And, although the Court may well find after further evidence that, in fact, this is a consignment for the purpose of sale, see, e.g., In re Flo-Lizer, Inc., 100 B.R. 341, 342-44 (Bankr. S.D. Ohio 1989), plaintiff's version of the facts must be accepted as true for purposes of a motion to dismiss.

Moreover, even were the Court to find that Counts I and II set forth consignments subject to section 2-326, debtors would nonetheless fail to prevail on a motion to dismiss these Counts. For while the Court agrees that a consignor of goods must comply with the applicable notice provisions of the Uniform Commercial Code before the equitable

[8]The question of whether the contracts create bailments or consignments is subject to the express agreement of the parties that the law of New York shall govern matters of contract interpretation. The parties never mention New York law. The Court has found no New York authority which would alter the result reached here.

remedy of constructive trust can be invoked as to the consigned goods and their proceeds, here debtors have failed to establish noncompliance. Of course, in reaching this conclusion, the Court has had to decide, in the first instance, which notice provisions are applicable. And, in this respect, a little historical perspective and background information is helpful.

Prior to the advent of the Uniform Commercial Code in all jurisdictions except Louisiana, a consignor could usually reclaim its goods against the consignee's creditors and the trustee in bankruptcy even though its interest was a "secret lien." 2 J. White & R. Summers, supra §23-4 at 255 (citation omitted). With the enactment of the Uniform Commercial Code in Illinois and forty-eight other states, a number of requirements have been placed upon a consignor of goods who wants to protect its consigned products and their proceeds from the competing claims of the consignee's other creditors. Exactly what those requirements are depends upon whether the consignment is found to be a "true" consignment or a consignment intended as a security interest. This is determined by the intent of the parties at the time they enter into the transaction. In re Sullivan, 103 B.R. 792, 794 (Bankr. N.D. Miss. 1989); In re Ide Jewelry Co., Inc., 75 B.R. at 977. And, intent is determined by an objective standard which examines the following factors:

> Facts which support the notion that a consignment was intended as security include: (i) setting-of price by the consignee...(ii) billing consignee upon shipment...(iii) commingling of proceeds and failure to keep proper accounts by the consignee...(iv) "mixing consigned goods with goods owned"... and (v) consignor purporting to

> retain title to goods until paid...
>
> Conversely, the following facts indicate that a transaction was not intended as security and that it constitutes a true consignment: (i) consignor retained control over price...(ii) consignee "was given possession with authority to sell only upon the express consent of [the consignor] as to the sale price"...(iii) consignor may recall the goods...(iv) consignee "was to receive a commission and not a profit on the sale"... (v) consigned property was segregated from other property of the consignee...(vi) consignor was entitled to inspect sales records and physical inventory of the goods in the consignee's possession...and (vii) consignee has "no obligation to pay for the goods unless they are sold."

In re Sullivan, 103 B.R. at 794-95 (quoting In re Ide Jewelry Co., Inc., 75 B.R. at 978).

Here, with only the pleadings before the Court, an examination of the above factors is inconclusive. However, the warehousing Agreements state that filing a financing statement "is not for the purpose of obtaining a security interest in goods sold but to evidence title in Ciba-Geigy until the goods are purchased by you or another party or retrieved by Ciba-Geigy." And, neither party appears to argue that a security interest was intended. Thus, the Court will treat the arrangement as a "true" consignment for purposes of this motion.

Unlike a consignment intended as a security interest, which is deemed a security interest by definition, Ill.Rev.Stat. ch. 26, para. 1-201(37), falls within the scope of Article Nine, id. para. 9-102, and is subject to all of the provisions of Article Nine,[9] a "true"

[9]With a security consignment, a purchase money security interest is, in fact, intended and a financing statement must be properly filed in accordance with Ill.Rev.Stat. ch. 26, paras. 9-401 and 9-

consignment is not subject to every provision of Article Nine. Instead section 2-326 of Article Two on sales governs in the first instance. E.g., 4 Collier on Bankruptcy, supra, ¶541.08 at 541-45. With certain qualifications noted earlier[10] section 2-326 provides that in a "true" consignment arrangement, consigned goods are subject to the claims of the consignee's creditors unless the consignor complies with one of three notice options. These are complying with an applicable sign-posting statute, establishing that the consignee is known by his creditors to, be dealing in the goods of others, or complying with the filing provisions of Article Nine. Accordingly, even in a "true" consignment, where the consignor elects the third option at least part of Article Nine will apply. E.g., 4 Collier on Bankruptcy, supra, ¶541.08 at 541-46. Sections 9-401, Ill.Rev.Stat. ch. 26, para. 9-401, and 9-402, Ill.Rev.Stat. ch 26, para. 9-402, of Article Nine, dealing with the proper place to file and the form of the financing statement, are clearly applicable. Additionally, it may be necessary to comply with sections 9-408, Ill.Rev.Stat. ch. 26, para. 9-408, and 9-114.

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402. The security interest then only flows to proceeds where the underlying agreement between the parties and the financing statement or state law covers proceeds. 4 Collier on Bankruptcy, supra, ¶541.08 at 541-48. See also Ill.Rev.Stat. ch. 26, para. 9-306. Failure to properly file a financing statement results in the subordination of the consignor's interest to the claim of an intervening judicial lien creditor, Ill.Rev.Stat. ch. 26, para. 9-301(l)(b), and renders it vulnerable to the bankruptcy trustee's avoiding powers under section 544(a) of the Bankruptcy Code. 11 U.S.C. §544(a). See 4 Collier on Bankruptcy, supra, ¶541.08 at 541-45.

[10]Section 2-326 applies when goods "are delivered to a person for sale and such person maintains a place of business at which he deals in goods of the kind involved, under a name other than the name of the person making delivery." Ill.Rev.Stat. ch. 26, para. 2-326(3).

Ill.Rev.Stat. ch. 26, para. 9-114.

Notably, because a "true" consignment subjects goods in the possession of the consignee to the rights of the consignee's general creditors, Ill.Rev.Stat. ch. 26, paras. 2-326, 1-201(12), failure to comply with the filing requirements of Article Nine before the bankruptcy petition is filed allows the trustee in bankruptcy to avoid the consignor's claim of title under section 544(a). E.g., 4 Collier on Bankruptcy, supra, ¶541.08 at 541-46. However, where a consignor has complied with the filing requirements and is able to identify the goods, or their proceeds, the goods or their proceeds may be recovered.[11]

In the instant case, debtors argue that plaintiff has not protected its goods from debtors' general creditors, and by implication, from the trustee in bankruptcy, by its failure to comply with section 2-326. However, plaintiff attached financing statements as exhibits to Counts I and II. Plaintiff argues that the financing statements were properly filed. Thus, at first glance, plaintiff appears to have complied with section 2-326(3)(c) - which does nothing more than require compliance with the filing provisions of Article Nine - by filing financing statements covering the products described in Counts I and II.

Of course, section 2-326(3)(c) brings at least part of Article

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[11]Id. at 541-47 to 541-48. Of course, in the usual situation - where a constructive trust has not been invoked - the automatic stay of section 362 is operative and prevents the consignor from ousting the estate of possession and its rights under the consignment contract. Id. at 541-48. See also In re Marta Group, Inc., 33 B.R. 634, 641-42 (Bankr. E.D. Pa. 1983).

Nine to bear. Debtors contend that plaintiff was required by section 2-326(3)(c) to comply with sections 9-408 and 9-114 of Article Nine and failed to do so. However, the full extent of their argument to the Court on this point is the statement that "[p]laintiff did not comply with [sections 2-326, 9-114 and 9-408] in that it did not properly file a financing statement in the name of the [d]ebtors." This leaves the Court trying to surmise debtors' arguments.

Sections 9-401 and 9-402, dealing with the proper place to file and the form of the financing statement, respectively, are fundaments of Article Nine. Debtors do not mention either section in their arguments for dismissal. By their silence, the Court presumes that debtors concede compliance with section 9401. Debtors are silent as well about section 9-402. However, because this is the section which sets forth the formal requisites for identification of the debtor on the financing statement, the Court assumes debtors intended to assert noncompliance with this section.

Section 9-402(7) states in pertinent part that "[a] financing statement sufficiently shows the name of the debtor if it gives the individual, partnership or corporate name of the debtor, whether or not it adds other trade names or names of partners." Ill.Rev.Stat. ch. 26, para. 9-402(7). Section 9402(8) further provides that "[a] financing statement substantially complying with the requirements of this Section is effective even though it contains minor errors which are not seriously misleading." Ill.Rev.Stat. ch. 26, para. 9-402(8).

In the instant case, the complaint is not internally consistent. The caption names as defendants "Caryle Michel and Catherine Michel

d/b/a Michel Fertilizer Co...." The caption suggests that Michel Fertilizer Company may not be a corporation with a separate legal identity from debtors. Similarly, in Count I, the Warehousing Agreement (exhibit A) and the Sales Agreement (exhibit B) refer to "Michel Fertilizer" and they are executed by Caryle Michel without any indication that he signed in a corporate capacity. In the body of Count I, reference is made to "Michel Fertilizer" or "Michel Fertilizer Company." Then, the financing statement (exhibit C) bears the typed name "Michel Fertilizer Inc." and is signed "Caryle Michel." Accordingly, the Court is unable to determine from the pleadings whether or not Michel Fertilizer Company and Michel Fertilizer, Inc. are trade names and whether the consignee, in whose name the financing statement should be filed, is an individual, a sole proprietorship, a partnership or a corporation. See, e.g., In re Platt, 257 F.Supp. 478, 482 (E.D. Pa. 1966)(financing statement filed under the name, Platt Fur Company, held not seriously misleading to creditors of the true debtor, Henry Platt, where Platt Fur Company was an unregistered trade name for the business of Henry Platt); In re Lintz West Side Lumber, Inc., 655 F. 2d 786, 791 n.7 (7th Cir. 1981); In re Swati, Inc., 54 B.R. 498, 501 (Bankr. N.D. Ill. 1985). Debtors have done nothing to clarify this question in their motion to dismiss. Additionally, the Court has no evidence before it showing under what name the financing statement was indexed or whether the indexing resulted in a financing statement which was "seriously misleading." See, e.g., In re Terry Pierson, Inc., 84 B.R. 533, 534-35 (Bankr. S.D. Ill. 1988). The sole evidence before the Court is the financing statement itself which the Court must view in a

light most favorable to plaintiff. A determination at this time that the financing statement bears the wrong name and that it was improperly indexed and "seriously misleading" would be pure conjecture.

In Count II, the Warehousing Agreement (exhibit D) refers to "Big Bay Grain & Fertilizer (Michel)." The Warehousing Agreement is executed by "Steve Foss" whose title is given as "manager." The Sales Agreement (exhibit E) refers to "Michel Fertilizer" and is executed by Steve Foss. In the body of Count II, reference is made to "Michel Fertilizer Company doing business as Big Bay Grain," to "Michel Fertilizer," and to "Big Bay Grain and fertilizer [sic]." Then, the financing statement (exhibit F) bears the typed name "Big Valley Grain And Fertilizer." The signature of whomever signed for the "debtor" cannot be deciphered on the Court's copy of exhibit F. Thus, as to Count II as well, particularly without knowing who signed for the "debtor", the Court cannot determine what name should have been used for consignee, what name was, in fact, used for indexing and whether the indexing created a "seriously misleading" financing statement.

Count III, however, contains no allegations showing compliance with any of the notice options set forth in section 2326(3). Accordingly, plaintiff has no more entitlement to the proceeds of the consigned seed products than any other of the debtors' general creditors. Ill.Rev.Stat. ch. 26, para. 2326(2),(3). For this reason as well, Count III fails to state a claim for relief for constructive trust. See, e.g., Matter of Iowa R. Co., 840 F.2d at 545. In order to invoke the equitable remedy of constructive trust, plaintiff must convince the Court that its own hands are clean. Where plaintiff comes

before the Court to assert a "secret lien" against debtors' other general creditors, the balance of equities tips in favor of innocent third parties who also seek recovery from unencumbered assets of the estate. Id. And, certainly, plaintiff, having failed to protect its superior position, can show no "unjust enrichment" where debtors in possession hold these assets for the benefit of creditors whose claims are equally legitimate. Id. Nor is the Court persuaded by plaintiff's argument that funds held in constructive trust never become part of the bankruptcy estate making section 2-326 inapplicable. This reasoning places the proverbial cart before the horse. A constructive trust is purely a tool of equity to prevent unjust enrichment. E.g., Matter of Kennedy & Cohen, Inc., 612 F.2d 963, 965 (5th Cir.), cert. denied, 449 U.S. 833 (1980). As a remedial devise, it does not arise until plaintiff has proven entitlement.[12]

Debtors next argue that plaintiff failed to comply with section 9-408 of Article Nine. Unfortunately, debtors fail to explain in what

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[12]The Court is disinclined to hold, at debtors' request, that a constructive trust is an inappropriate remedy because debtors are in bankruptcy. Here, the alleged element of wrongful taking or conversion distinguishes this case from the cases upon which debtors rely. Cf. Matter of Iowa R. Co., 840 F.2d 535 (interline railroad balances owed by bankrupt railroad held to be unsecured debts rather than funds in trust for interline creditors); Matter of Kennedy & Cohen, Inc., 612 F.2d 963 (funds in possession of appliance retailer pursuant to executory maintenance contracts held not subject to constructive trust); United States v. Randall, 401 U.S. 513 (1971) (income and social security taxes withheld from wages of bankrupt's employees held subject to priority system set forth in Bankruptcy Act rather than to statutory trust despite federal statute providing that such taxes constitute a "special fund in trust for the United States"). Moreover, these cases do not foreclose the availability of the remedy in bankruptcy in appropriate circumstances. Matter of Iowa R. Co., 840 F.2d at 545; Matter of Kennedy & Cohen, Inc., 612 F.2d at 966.

respect such failure has occurred. As best the Court can intuit, debtors' argument appears to concern that provision in section 9-408 which states that "[a] consignor... of goods may file a financing statement using the terms 'consignor,' [or] 'consignee'...instead of the terms specified in section 9402. The provisions of this part shall apply as appropriate to such financing statement...." Ill.Rev.Stat. ch. 26,, para. 9-408 (emphasis added). The Illinois Code Comment for section 9-408 states, in pertinent part, that this section "permits a consignor ...who files a financing statement to avoid the 'debtor' - 'secured party' terminology normally required by §9-402." Ill.Ann.Stat. ch. 26, para. 9-408 Illinois Code Comment at 315 (Smith-Hurd 1974). Accordingly, section 9-408 is permissive. It authorizes the appropriate adaptations of terminology. Debtors have done nothing to persuade the Court that such adaptation is mandatory.

Debtors then contend - again without supporting explanation - that plaintiff failed to comply with section 9-114 of Article Nine. Ill.Rev.Stat. ch. 26, para. 9-114. Section 9-114 regulates the relationship between a consignor and creditors of the consignee. Ill.Ann.Stat. ch. 26, para. 9-114 Illinois Code Comment at 96 (Smith-Hurd 1974). It requires a consignor who elects the filing option under section 2-326(3)(c) to give written notification of the consignment arrangement to prior holders of perfected security interests in the consignee's inventory in order to maintain priority as to the consigned goods and their proceeds. E.g., In re Sullivan, 103 B.R. at 797-98. Here, plaintiff contends that it complied with section 9-114. See plaintiff's "Motion in Response to Motion to Dismiss Complaint to

Impose a Constructive Trust" at 4. Moreover, debtors have not shown the Court that there was any inventory secured party with a prior interest in the goods who should have received written notification but did not. Nor is plaintiff's interest subject to the bankruptcy trustee's hypothetical judicial lien. While the consignment arrangements were entered into before the date the bankruptcy petition was filed, the trustee's avoiding powers did not come into being until the date of filing. Certainly, plaintiff could not be expected at the time it entered into the consignment arrangements to provide written notification of the consignment to a nonexistent trustee. E.g., In re Sullivan, 103 B.R. at 798.

Finally, debtors contend that a constructive trust is not available in any event since plaintiff is attempting to attach the constructive trust on the debtors' general funds. Debtors cite Matter of Kennedy & Cohen, Inc., 612 F.2d 963, in support of this argument. In Matter of Kennedy & Cohen, Inc., the court refused to impose a constructive trust upon the bankrupt's general funds where there was no specific asset to which the constructive trust could attach and the plaintiffs could not trace the funds in question. Id. at 965. The case before the Court is distinguishable because here plaintiff asserts that debtors have a sophisticated computer accounting system which will enable plaintiff to trace the proceeds to the debtor in possession bank accounts. See 4 Collier on Bankruptcy, supra, ¶¶541.08 at 541-47 to 541-48 & n.20, 541.13 at 541-79 to 541-80. For purposes of a motion to dismiss, the Court must assume that plaintiff will be able to do so.

Accordingly, IT IS ORDERED that debtors' motion to dismiss

Counts I and II is DENIED. The motion to dismiss Count III is GRANTED.

_____ /s/ Kenneth J. Meyers
U.S. BANKRUPTCY JUDGE

ENTERED: June 19, 1990