UNITED STATES BANKRUPTCY COURT
For the Southern District of Iowa

In the Matter of	:	
BUILDING MAINTENANCE SERVICE OF IOWA,	:	Case No. 90-322-C H Chapter 7
Debtor.	:	
BUILDING MAINTENANCE SERVICE, INC. and DALE V. NELSON,	:	
Plaintiffs,	:	Adv. No. 90-90071
vs.	:	
FIRST INTERSTATE BANK OF DES MOINES, N.A.,	:	
Defendant.	:	

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FINDINGS AND CONCLUSIONS--
COMPLAINT TO DETERMINE CLAIM AND EXTENT OF LIENS

The Complaint to Determine Claim and Extent of Liens came on for trial on December 2, 1991, and was concluded on April 22, 1992. Michael P. Mallaney, Smith, Schneider, Stiles, Mumford, Schrage, Zurek, Wimer & Hudson, P.C., appeared for the Plaintiffs, Building Maintenance Service, Inc. and Dale V. Nelson. Gerald J. Newbrough and Frank B. Harty, Nyemaster, Goode, McLaughlin, Voigts, West, Hansell and O'Brien, P.C. appeared for the Defendant, First Interstate Bank of Des Moines, N.A.

At the conclusion of the trial the Court took the proceeding under advisement upon a briefing schedule. The parties have timely filed briefs and the Court considers the matter fully submitted.

The Court now enters its findings of fact and conclusions of law pursuant to Fed.R.Bankr.P. 7052.

JURISDICTION

This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(A), administration of the estate, and § 157(b)(2)(K), determination of the validity, extent, and priority of liens. The Court has jurisdiction pursuant to 28 U.S.C. § 1334 and 11 U.S.C. §§ 506, 510, and 547.

PLEADINGS

Plaintiffs Amended Complaint alleges multiple counts against the Defendant. Count I alleges that a subordination agreement should be enforced; Count II alleges the theory of equitable subordination; Count III alleges that Defendant's claim in bankruptcy should be disallowed and there should be a turnover of payments received by Defendant; Count IV prays for a declaratory judgment concerning the subordination agreement; Count VI alleges that Defendant received preferential payments; and Count VII alleges the theory of tortious interference with contract. Count V, Accounting, was previously dismissed. Plaintiffs pray for compensatory and punitive damages.

Defendant's Answer to the Amended Complaint denies the essential allegations of the Complaint and pleads affirmative

defenses. Defendant has also filed an Amended Counterclaim alleging that Plaintiffs have unlawfully appropriated and converted collateral of Defendant and Plaintiffs have wrongfully held and failed to account for collateral security granted to Defendant. Defendant prays for foreclosure of a security interest and turnover of all proceeds of accounts received by Plaintiffs belonging to Defendant. Defendant also prays for punitive damages.

Plaintiffs have denied the essential allegations of the counterclaim.

ISSUES

As framed by the parties in the Stipulated Final Pre-trial Order filed November 12, 1991, the issues are as follows:

1. Whether BMS-Iowa's guaranty of the $800,000 term loan and/or its pledge of assets to secure that loan constituted a breach of the net worth covenant and/or lien covenant and/or covenant against guaranties in sections 8.10(b), 8.11(a) and 8.11(b) of the Agreement of Sale; and, if so, whether such covenants are enforceable.

2. Whether the Bank caused BMS-Iowa to breach the net worth covenant and/or additional liens covenant and/or covenant against guaranties in sections 8.10(b), 8.11(a) and 8.11(b) of the Agreement of Sale (Exh. 48 or 49) by having

BMS-Iowa guaranty the $800,000 term loan and/or pledge its assets to secure the loan; and, if so, whether such conduct constituted tortious interference with contract (the Agreement of Sale); and, if so, whether the Plaintiffs are entitled to recover damages against the Bank and in what amount; and, if so, whether exemplary damages against the Bank are appropriate and in what amount.

3. Whether the Bank's secured claims and/or unsecured claims should be disallowed or equitably subordinated under Bankruptcy Code § 510; and, if so, which claims and how much are equitably subordinated.

4. Whether the Bank has waived or is estopped from enforcing its secured claims and/or unsecured claims vis-a-vis BMS's and Nelson's claims; and, if so, which claims and to what extent are they unenforceable.

5. Whether the Subordination Agreement (Exh. 2) subordinated any of the obligations or payments owed the Plaintiffs under the Agreement of Sale (Exh. 48 or 49).

6. If the amount limits the Bank's rights or entitlements, whether the dollar amount in the second (unnumbered) paragraph and paragraph 1 of the Subordination Agreement (Exh. 2) should have been $250,000 or $350,000.

7. Whether the Bank was required by the Subordination Agreement (Exh. 2) to apply the accounts receivable to the $350,000 working capital loan before it applied any

receivables to the $800,000 term loan.

8. Once the Bank collected accounts receivable equal to $350,000 (or $250,000, if that was the proper amount) plus accrued interest, attorney fees and other expenses of collection, whether the Subordination Agreement (Exh. 2) required the Bank to assign to the Plaintiffs its rights in the rest of the receivables.

9. Given their origin, character and time of payment or collection, whether the accounts receivable collected by the Bank (including receivables collected by the Trustee and paid over to the Bank) were covered by the Subordination Agreement (Exh. 2).

10. Whether the Subordination Agreement (Exh. 2) subordinated to the Bank, and entitled the Bank to receive, BMS's and Nelson's claims in BMS-Iowa's bankruptcy proceeding (under the Agreement of Sale) until the Bank has been made whole.

11. Whether the Bank's rights under the Subordination Agreement (Exh. 2) were prejudiced by the Agreement of Sale (Exh. 48 or 49) or by the Bank's alleged knowledge of the Agreement of Sale or by the alleged breach by BMS-Iowa and Jacobson of the provisions of the Agreement of Sale.

12. Whether, pursuant to the Section 11 forfeiture provision of the Agreement of Sale (Exh. 48 or 49), BMS and Nelson acquired an interest in any of BMS-Iowa's assets,

including accounts receivable; and, if so, whether such interest was superior to the Bank's security interest; and, if so, which assets.

13. Whether the Bank is entitled to the proceeds of BMS-Iowa's accounts receivable that are still held by BMS.

14. Whether the Plaintiffs have converted the Bank's collateral; and, if so, the amount of the Bank's damages and whether exemplary damages are appropriate and their amount.

15. Whether the Bank's application of the accounts receivable to the $800,000 term loan constitutes a preferential transfer under Bankruptcy Code § 547.

16. Whether the Plaintiffs are entitled or have standing to bring claims against the Bank under Bankruptcy Code §§ 510 (Count II) and 547 (Count VI); and, if so, who is the beneficiary of these claims.

FINDINGS OF FACT

1. Plaintiff Building Maintenance Service, Inc., n/k/a CIC Plan, Inc. (hereinafter "BMS") is a corporation duly organized and existing under the laws of the State of Iowa and has its principal place of business in Polk County, Iowa. Prior to March 1989, BMS owned and operated an office cleaning business, a vending business, and a security service business.

2. BMS changed its name to CIC Plan in June 1990. Dale V. Nelson is the president and his son is the vice president

of CIC Plan.

3. Plaintiff Dale V. Nelson (hereinafter "Nelson") is an individual and resident of Polk County, Iowa. At all times material herein Nelson was the principal shareholder, director, chairman of the board, and president of BMS.

4. David L. Brodsky (hereinafter "Brodsky") received a law degree in 1963 and engaged in the private practice of law until 1982. His practice was primarily in the area of counseling financial institutions.

5. On April 21, 1982 the Iowa Supreme Court indefinitely suspended Brodsky's license to practice law in the courts of the state with no possibility of reinstatement for three years. Committee on Professional Ethics v. Brodsky, 318 N.W.2d 180 (Iowa 1982). Brodsky violated DR 1-102(A)(4) because his conduct involved dishonesty, fraud, deceit or misrepresentation. On December 20, 1991, during the course of this trial, Brodsky lied, while under oath, to an Iowa District Court Judge that he had not used trust assets for his own benefit. (Transcript vol. X p. 2509-14.) Brodsky altered documents in the perpetration of fraud and deceit.

6. Many of the Plaintiffs' allegations relied to a greater and lesser extent on the testimony of Brodsky. The Court finds, however, that Brodsky's testimony lacked credibility and candor.

7. Shortly after Brodsky's suspension and in 1982,

Nelson hired Brodsky as in-house corporate and personal counsel to BMS and Nelson. Nelson knew that Brodsky's license to practice law had been suspended when he hired Brodsky. Brodsky advised BMS and Nelson on business and legal matters. He was involved in almost all of the matters and events shaping Plaintiffs' claims and defenses and Nelson gave him almost complete authority and responsibility for the negotiations on the sale of BMS with little or no supervision and followup.

8. Defendant/counterclaimant First Interstate Bank of Des Moines, N.A. (hereinafter "the Bank" or "First Interstate"), n/k/a Boatmen's National Bank of Des Moines, is a national banking association with its principal place of business in Polk County, Iowa.

9. The Debtor, Building Maintenance Service of Iowa (hereinafter "BMS-Iowa"), was a corporation duly organized and existing under the laws of the State of Iowa, with its principal place of business in Polk County, Iowa. Commencing in March 1989, and ending in February 1990, BMS-Iowa owned and operated a janitorial service and security service in Polk County, Iowa.

10. BMS-Iowa filed its Chapter 7 bankruptcy petition in this Court on February 8, 1990, at 11:00 a.m.

11. Nicholas Jacobson (hereinafter "Jacobson") is a resident of the State of Maryland. At all times material

herein Jacobson was the sole shareholder and director of BMS-Iowa and its president and secretary.

12. Jeffrey Cunningham (hereinafter "Cunningham") is a resident of the State of Maryland. At all times material herein Cunningham was the treasurer of BMS-Iowa and he was also the accountant for said corporation.

13. Negotiations by Jacobson for the purchase of BMS commenced in December 1988. Nelson originally wanted to be protected on the purchase price by a letter of credit. As the negotiations proceeded the letter of credit was traded for a bigger down payment.

14. The total purchase price of $4,940,000 was arrived at on December 23, 1988. (Exh. FI-79.)

15. From December 1988 through March 1989 Nelson was aware that Jacobson and his agents were consulting with several banks for the purposes of borrowing to effect the transaction. Brodsky was advised during this period of time that certain banks were not being considered because Jacobson was unable to get sufficient money from them.

16. In January 1989, the Jacobson people advised Brodsky that even though they had the money they needed to buy BMS, they might borrow some of it for tax purposes.

17. On January 9, 1989, Nelson addressed a Letter of Intent, (Exh. FI-81), to the Jacobson Group, which was accepted by the Jacobson Group on January 10, 1989. This

letter of intent provided that the buyers were to furnish the seller with corporate and personal financial statements, net worth statements, and/or a letter of credit in an amount sufficient to discharge the unpaid purchase price (note balance) outstanding at the time of closing. No mention was made of any other security.

18. During the latter part of February 1989, Jacobson was attempting to borrow 1.6 million dollars from First Interstate. First Interstate would not agree to this and eventually the loan was for $1,150,000.

19. On March 7, 1989, First Interstate agreed to a $350,000 secured line of credit to BMS-Iowa to fund the working capital needs of the company. Bank also agreed to an $800,000 secured loan to Jacobson for the purchase of assets of BMS to be repaid from the operating profits of BMS-Iowa. Both loans were to be cross-collateralized by all business assets and guarantees as well as a $200,000 certificate of deposit.

20. During the process of the negotiation on an agreement of sale, counsel for Jacobsen and BMS-Iowa, William R. Clark, Jr. (hereinafter "Clark"), was concerned about the indefiniteness and amount of liabilities being assumed by BMS-Iowa and the requirement of BMS that there be prohibitions in the agreement of sale against the pledging of assets. Clark conveyed these concerns to Brodsky and advised Brodsky that

First Interstate would require Jacobson and BMS-Iowa to pledge the accounts receivable and assets as security for the Bank loans. Brodsky advised Clark that BMS was not talking about acquisition financing but about the pledging of assets for the acquisition of other businesses post-acquisition. (Transcript vol. VIII, page 1748, lines 11-25; page 1792, lines 14-21; pages 1798-1799.)

21. Clark also advised Brodsky in general terms about the amount being borrowed by the Jacobson group to effect the acquisition of BMS. Brodsky was advised that the amount being borrowed was in excess of a million dollars, some of which was being borrowed personally and some corporately. (Transcript vol. VIII, page 1758, lines 17-23; p. 1777, lines 1-9.)

22. On March 8, 1989 the Jacobson group and the Nelson group first learned about First Interstate's requirement that the Nelson group execute a subordination agreement. Brodsky was familiar with the form subordination agreement and objected to the same primarily for the reason that the subordination agreement required the seller to subordinate all payments under the contract even if the buyer was not in default with First Interstate. During the negotiations on the wording of the subordination agreement, Brodsky dictated the language that he desired. During these discussions Brodsky was advised that the amount being borrowed was in excess of $1,000,000 and the amount being loaned to BMS-Iowa was

$350,000. Brodsky wanted to limit the amount on the subordination agreement to the amount being borrowed by the corporation.

23. On March 9, 1989, Clark drafted a two-page letter, with enclosed copy of a proposed subordination agreement, to Rodney P. Kubat (hereinafter "Kubat"), counsel for First Interstate Bank. (Exh. 1.) This letter refers to changes in the proposed subordination agreement and the reasons the Nelson group requested the changes. The letter advised Kubat that the seller, BMS, was not taking a security interest in the accounts receivable or related assets being sold and purchased because it was anticipated that First Interstate would require, as part of any loan, a first security position. Clark thought that the proposed subordination agreement would merely duplicate First Interstate's first security position. Clark advised Kubat that the Nelson group preferred that if a subordination agreement was required that it be limited to the amount of money being loaned to BMS-Iowa, $350,000, rather than being open-ended or encompassing the entire amount of the loan to BMS-Iowa and its principal, Jacobson.

24. A draft copy of Clark's letter of March 9, 1989, and enclosed draft copy of the subordination agreement was faxed to Brodsky on March 9, 1989. (Exh. 1 and fourth page exh. FI-128; Transcript vol. VIII, p. 1779-80.)

25. On March 10, 1989, First Interstate committed itself

to make two separate loans to the Jacobson group to facilitate their purchase of the business from the Nelson group. (Exh. 27.) One loan was an $800,000 secured term loan to Jacobson (hereinafter the "$800,000 term loan"), which was made specifically for the purpose of acquiring the business and other related assets from the Nelson group. The other loan was a $350,000 secured line of credit loan to BMS-Iowa for working capital purposes (hereinafter the "$350,000 working capital loan").

26. First Interstate's loan documents included: two promissory notes, (Exhs. FI-20, FI-21), one for each loan; two guarantees, (Exhs. 17, FI-125), that is, cross-guarantees in which Jacobson guaranteed the $350,000 working capital loan and BMS-Iowa guaranteed the $800,000 term loan; a blanket-type security agreement that granted a security interest in all of BMS-Iowa's equipment, inventory, receivables, general intangibles and other personal property to secure all of its loans and other obligations to the Bank, (Exh. 12, FI-124); three additional security agreements that specifically pledged a $200,000 certificate of deposit owned by Jacobson as collateral for both loans, (Exh. 14, 15 & 16); and two financing statements that covered all of the Bank's collateral. Both financing statements were filed by First Interstate with the Iowa Secretary of State on March 15, 1989, (Exhs. FI-24, FI-25), and First Interstate retained possession

of the certificate of deposit.

27. First Interstate also loaned $20,000 to BMS-Iowa on or about May 31, 1989, to acquire a new computer system, including hardware and software (hereinafter referred to as the "computer loan"). (Exh. FI-22.) The computer loan was secured by the computer equipment and all of BMS-Iowa's other personal property. (Exhs. FI-23, FI-26.)

28. BMS-Iowa, Jacobson, BMS, and Nelson signed the Agreement of Sale on March 10, 1989, at the offices of BMS. (Exh. 48.) The parties agreed at the time of signing that the documents would become effective on March 14, 1989. (See Supplemental Memorandum, exh. 49.)

29. BMS-Iowa and Jacobson signed the Bank's loan documents on March 10, 1989, after the Agreement of Sale had been signed.

30. The Subordination Agreement, (Exh. 3a), was signed in blank on March 10, 1989. The amount to be subordinated was left blank because BMS-Iowa, Jacobson, BMS, and Nelson did not know whether First Interstate would agree to the $350,000 figure or whether it would require the full amount of the loan, $1,150,000, be inserted in the subordination agreement. Brodsky was not too concerned about this because he knew at the time that First Interstate was taking a first security position in all of BMS-Iowa's assets.

31. The Subordination Agreement was delivered to First

Interstate by a representative of the Jacobson Group and at that time the Jacobson Group learned that First Interstate would agree that the amount on the Subordination Agreement would be $350,000. $350,000 was entered on the Subordination Agreement, (Exh. 2), and Brodsky was advised that the Bank agreed that the amount subordinated would be $350,000 and that the Bank did not require subordination of the entire amount of the loan, $1,150,000.

32. Effective March 14, 1989, BMS and Nelson, the majority stockholder, sold the janitorial business, the security service, and the food service, and other related assets to BMS-Iowa. The sale documents, (Exh. 48 or 49), all dated and signed March 10, 1989, included the following documents, which were bound together as one document and entitled "Agreement of Sale (and Related Agreements)" (hereinafter the "Agreement of Sale"): an 18-page agreement, plus exhibits; and items defined as related documents, Supplemental Memorandum; Memorandum of Understanding.

33. The assets that were the subject of the Agreement of Sale included the janitorial and security business; equipment, supply inventory, customer lists and accounts, and accounts receivable related to the business; BMS's registered trademark; a non-competition covenant from Nelson contained in the non-compete agreement; a consulting arrangement with Nelson; and leasehold interests contained in several leases.

34. Under the terms of the agreement, BMS received a $600,000 note receivable in exchange for the sale of certain assets and assumption of certain liabilities. In addition, Nelson, the majority stockholder, received $1.075 million in cash as a finders fee and a note receivable of $3.195 million for a covenant not to compete. In addition, BMS-Iowa entered into employment agreements with the stockholders and certain other employees of BMS.

35. On March 14, 1989, Nelson received $1,650,000 pursuant to the Agreement of Sale. This amount included a finder's fee of $1,075,000, (§ 3 of the Agreement of Sale), and a $575,000 first payment on the non-compete covenant. (§ 9.1 of the Agreement of Sale.) Of this $1,650,000, $500,000 was paid from an escrow account and the remaining $1,150,000 was paid with a $1,150,000 cashier's check purchased from First Interstate Bank on March 14, 1989, payable to Nelson. (Exh. FI-123A.) The $1,150,000 cashier's check was purchased with monies withdrawn that day from Jacobson's checking account at First Interstate Bank. Jacobson was the remitter of the cashier's check delivered to Nelson. At the time of Jacobson's withdrawal from his account at First Interstate Bank, Jacobson's checking account contained $1,231,952.09. This balance contained $800,000 from the term loan, which was deposited into that account that day.

36. On March 14, 1989, BMS-Iowa paid to Bankers Trust

Company $300,000 to satisfy BMS's working capital loan, which was assumed by BMS-Iowa under the Agreement of Sale. The funds for the $300,000 check to Bankers Trust were the proceeds of the $350,000 working capital loan.

37. The Agreement of Sale was a security agreement under the Iowa Uniform Commercial Code to the extent it granted to BMS a security interest in BMS-Iowa's shares of capital stock. (Agreement of Sale § 5.2.)

38. The Agreement of Sale contained, inter alia, the following provisions: a value warranty (hereinafter "net worth covenant") in Section 8.10(b), a covenant against certain liens (hereinafter the "lien covenant") in Section 8.11(a), and a covenant against guaranteeing debts of another (hereinafter "the covenant against guarantees") in Section 8.11(b). These covenants read, in part, as follows:

> 8.10 Value Warranties. Until the entire purchase price has been paid to Seller:
>
> 8.10(b) The shareholder equity of Buyer shall not be less than ninety percent (90%) of the shareholder equity of Buyer as of March 15, 1989, which shareholder equity shall be at least $150,000.
>
> 8.11 Buyer will not, without Seller's written consent, for as long as there are any monies still unpaid under this Agreement:
>
> 8.11(a) Create or permit the creation of any additional lien upon any of Buyer's property unless the monies realized therefrom are placed in Buyer and used by Buyer in connection with the assets being purchased under this

"Agreement".

8.11(b) Guarantee or endorse any indebtedness of another, or loan any funds or assets to another.

39. Prior to March 10, 1989, First Interstate received a draft copy of the Agreement of Sale, (Exh. 39), which copy contained essentially the same net worth covenant, lien covenant and covenant against guarantees as the final signed Agreement of Sale.

40. Paragraphs 8.11(a) and (b) of the preliminary draft of the Agreement of Sale, (Exh. 39), differ from the Agreement of Sale, (Exh. 48 or 49), in that in the final Agreement of Sale the words "except as permitted in writing by Seller" were deleted from Paragraph 8.11(a), and the words "except as permitted in writing by Buyer" were deleted from paragraph 8.11(b). This change was made so there would be no misunderstanding that this language did not include the acquisition financing.

41. The Jacobson Group failed to make payments to the Nelson Group and was in default to BMS and Nelson under the terms of the Agreement of Sale.

42. On January 22, 1990, Nelson and BMS served the Jacobson Group with a "Declaration of All Indebtedness Due". (Exh. 66), which declared all amounts owed under the Agreement of Sale due and payable immediately. This Declaration of All Indebtedness Due also stated that should the accelerated

amounts not be paid within 30 days, BMS-Iowa's rights, title and interest in all assets under the Agreement of Sale would be forfeited and held for naught.

43. BMS-Iowa and Jacobson were also in default to First Interstate Bank and on January 23, 1990, the Bank sent a default letter to BMS-Iowa and Jacobson. (Exh. 6.) These defaults continued and the Bank accelerated both loans on February 6, 1990. (Exh. 70.)

44. On January 24, 1990, BMS-Iowa's attorney brought an Assignment to First Interstate Bank. This assignment assigned to First Interstate Bank BMS-Iowa's accounts receivable. (Exh. 18.)

45. On January 24, 1990, the Jacobson Group responded to Nelson's Declaration of All Indebtedness Due by stating that the Jacobson Group was not going to pay the accelerated indebtedness and that unless the Jacobson Group and Nelson Group could come to terms on the Nelson Group taking back the business, BMS-Iowa would discharge its employees without pay and abandon the business. (Exh. FI-143.)

46. On January 25, 1990, counsel for the Nelson Group told the Jacobson Group in a letter that the Jacobson Group's threatened actions would destroy the Nelson Group's collateral and damage or destroy the Nelson Group's contractual rights under the Agreement of Sale. Counsel for the Nelson Group promised legal action and advised the Jacobson Group that

unless the Jacobson Group advised the Nelson Group by one o'clock that afternoon, the Nelson Group would conclude that the Jacobson Group had waived the remaining 27 days under the 30-day forfeiture period under the Declaration of All Indebtedness Due. (Exh. FI-143.)

47. The Jacobson Group did not respond to the Nelson Group's waiver pronouncement and on January 26, 1990, counsel for the Nelson Group demanded that BMS-Iowa turn over the assets under the Agreement of Sale to the Nelson Group within 5 days free of debt or any encumbrance. (Exh. FI-144.)

48. On February 1, 1990, Nelson filed a petition in the Iowa District Court for Polk County, Building Maintenance Service, Inc. and Dale V. Nelson v. Building Maintenance Service of Iowa, Inc. and Nicholas Jacobson, No. CL 83-49118 (hereinafter the "State Court Lawsuit"). Nelson and BMS alleged that the Jacobson Group had forfeited all of its rights, title and interest in any of the assets that were the subject of the Agreement of Sale and asked the Iowa District Court to declare that the assets that were the subject of the Agreement of Sale had been forfeited and vested in BMS free of any liabilities of BMS-Iowa. Nelson and BMS also filed a motion asking that the Iowa District Court appoint a receiver to operate and preserve the business and other assets until the court ruled on the underlying case. The Motion for Appointment of Receiver was set for hearing on February 9,

1990.

49. First Interstate Bank did not have notice of the state court lawsuit and was not made a party in that lawsuit.

50. On February 1, 1990, the Nelson Group served three more notices of default upon the Jacobson Group. (Exh. FI-126.) Rent payments under three real estate leases contained within the Related Contracts in the Agreement of Sale had now become delinquent and the Jacobson Group was noticed that unless the defaults were remedied within ten days, the leases would be canceled and forfeited.

51. On February 2, 1990, representatives of the Bank and the Nelson Group met at the board room of the Bank. The Nelson Group maintains that this is the first time that they were aware of the $800,000 term loan to Jacobson secured by BMS-Iowa's assets. It was at this meeting that the Nelson Group produced a subordination agreement with whiteout on it and the figure $250,000 penned on it in blue ink. (Exh. 3 is a photocopy of this document.)

52. On February 2, 1990, the Nelson Group denied that it was keeping accounts receivable payable to BMS-Iowa. (Exh. FI-29.)

53. On February 6, 1990, the Bank accelerated the entire unpaid balance of the line of credit loan, the computer loan, and the term loan so that it became immediately due and payable. (Exh. 70.)

54. Representatives of the Nelson Group, the Jacobson Group, and the Bank met on February 7, 1990. The Nelson Group at this time declared that BMS-Iowa's assets had already been forfeited to them. On that date the Jacobson Group had informed the Nelson Group that the Jacobson Group would be filing for bankruptcy on February 8th unless the two groups could come to terms on transferring back the business to the Nelson Group. The Nelson Group demanded that the Bank release receivables it had recently collected at the Jacobson Group's request so BMS-Iowa could meet its February 8, 1990 payroll and continue to function as a business enterprise. The Nelson Group also asserted at this meeting that the assets under the Agreement of Sale now belonged to the Nelson Group under the forfeiture provisions of the Agreement of Sale.

55. Late on February 7, 1990, Nelson instructed one Archie Brooks, a BMS-Iowa employee, to take BMS-Iowa's computer records home with him that evening. Brooks was in charge of customer billing and payroll for BMS-Iowa. (Transcript vol. I, p. 221-22.)

56. BMS-Iowa's employees continued in their cleaning operations during the night of February 7, 1990, and February 8, 1990.

57. On February 8, 1990, in the early morning hours, Nelson went to BMS-Iowa's office to take possession of BMS-Iowa's facilities and other assets before BMS-Iowa could file

a bankruptcy petition. When Nelson arrived, he found that BMS-Iowa's papers and records had been removed and bankruptcy notices posted on the front door and throughout the premises. The Nelson Group determined that a bankruptcy petition had not been filed and the Nelson Group met with BMS-Iowa's executives and sales people and hired them to run the janitorial and security business and directed them to contact BMS-Iowa's customers and to say that BMS would be cleaning their offices from that time on. Prior to the filing of the bankruptcy petition, Nelson personally borrowed enough money to meet BMS-Iowa's February 8th payroll and proceeded to hire all of BMS-Iowa's employees to operate the business.

58. BMS-Iowa filed its bankruptcy petition on February 8, 1990, at 11:00 a.m.

59. BMS and Nelson operated the janitorial and security business commencing on February 8, 1990, by using BMS-Iowa's leased facilities, office equipment, computer system, cleaning equipment, vehicles, registered trademark, accounts receivable, and customer list.

60. BMS-Iowa's office equipment, cleaning equipment, pre-petition receivables, customer list, which was part of the computerized data base, motor vehicles, computer system, were seized by the Nelson Group on February 8, 1990. The computer system, hardware and software, was purchased by BMS-Iowa during the middle part of 1989. The computer system was not

purchased from the Nelson Group and the purchase was financed by First Interstate Bank. The Nelson Group seized the computer system in order to run the business, make payroll, and gain access to the customer list and book of business. The Nelson Group did not release the computer system to either First Interstate Bank or the bankruptcy trustee, but instead sold it to the Marsden Group.

61. Marsden Bldg. Maintenance Co. of Omaha is a maintenance company, which operates in the Upper Midwest. Adrian "Skip" Marsden (hereinafter "Marsden") is a principal of this company and a long-time acquaintance of Nelson. In the fall of 1989 Marsden advised Nelson that he, Marsden, had been invited by some of BMS-Iowa's customers to come to Des Moines and commence business. On January 23, 1990, Nelson set in motion actions whereby he contacted Marsden about commencing business in Des Moines.

62. Robert Taha was appointed as trustee of the BMS-Iowa estate on February 9, 1990. Said trustee never abandoned any stream of income owned by BMS-Iowa; he never abandoned any book of business owned by BMS-Iowa; and, he never abandoned any customer accounts or customer contracts. Said trustee was not in any position to operate BMS-Iowa, but he was in a position to sell its assets.

63. On February 9, 1990, the Bank sent a letter to the Nelson Group outlining the loans by the Bank to BMS-Iowa,

including the computer loan and security agreements. Demand was made by the Bank for turnover of all assets in possession of BMS. (Exh. FI-32.)

64. On February 15, 1990, Mallaney and Kubat met in Kubat's office. Mallaney had arranged this meeting in that he wanted to see the original $350,000 subordination agreement. The original $350,000 subordination agreement was produced at this time for Mallaney's view. Mallaney produced the original $250,000 subordination agreement. Kubat saw whiteout on it and saw the figure $250,000 printed on the whiteout in blue ink. Kubat commented on this and Mallaney's reaction to this comment was a smile and a chuckle. (Transcript vol. VII, p. 1568.) This original subordination agreement with $250,000 on it in blue ink has not been produced in this proceeding.

65. On February 23, 1990, a consent order was entered vacating the automatic stay and allowing the Bank to enforce its claimed rights in the accounts receivable without determining the rights of the parties. Thereafter, the Bank collected the accounts receivable and applied them first to Jacobson's personal loan. The Bank did this upon the advice of counsel and request of Jacobson because that note bore the highest rate of interest and the intent was to minimize the cost to the borrower. The $800,000 note was a long-term note and the interest rate was a half point higher than the $350,000 note lent directly to BMS-Iowa.

66. On February 25, 1990, Nelson addressed a letter to Marsden inquiring if Marsden was interested in entering the maintenance business in Des Moines.

67. During the latter part of February and first part of March, 1990, the Nelson Group and Marsden Group (i.e., Marsden Bldg. Maintenance Co., American Security Corporation and Adrian Marsden) negotiated the sale of the janitorial and security business to the Marsden Group.

68. On April 1, 1990, the purchase agreements between the Marsden Group and the Nelson Group were entered whereby the Nelson Group sold the janitorial business and security business to the Marsden Group. (Exhibits FI-40, FI-41.)

69. The stated purchase price was $2,300,000. (Exh. FI-42A.) A total of $200,000 of this figure was allocated to "customer accounts" and the remaining $2,100,000 was allocated to consulting fees and noncompetition allowances payable personally to Nelson. In addition, a total of $653,642.44 of BMS's liabilities were assumed by the Marsden Group. None of the purchase price was allocated to equipment. The purchase price was based upon a total of $6,000,000 of annual gross billings. (Exhibits FI-40, FI-41.)

70. Shortly after the Nelson-Marsden sale, the Marsden Group alleged that the Nelson Group had misrepresented the net worth of the company. (Exh. FI-45.)

71. The dispute between Nelson and Marsden was

eventually resolved by Nelson lowering the purchase price by $623,000, which was deducted from Nelson's noncompetition allowances and counseling fees. During the negotiation between Nelson and Marsden, Nelson's accountant stated that at least $110,000 of equipment and supplies existed at the time of the sale and were not included as corporate assets. (Exh. FI-49.) All of the equipment and supplies were acquired by Marsden.

72. The principal balance of the $800,000 term loan is $3,037.93. Accrued interest through October 1, 1991 totals $2,662.61, and interest after October 1, 1991 is $5.36 per day computed at 11.5% per annum.

73. The principal balance of the $350,000 working capital loan is $259,095.05. Accrued interest through October 1, 1991 totals $36,961.34, and interest after October 1, 1991 is $78.08 per day computed at 11% per annum.

74. The principal balance of the computer loan is $8,435.10. Accrued interest through October 1, 1991 totals $999.09, and interest after October 1, 1991 is $2.66 per day computed at 11.5% per annum.

DISCUSSION

The Nelson group (BMS) negotiated a sale of its business to the Jacobson group (BMS-Iowa). The Bank provided acquisition financing for this transaction. While under the control of BMS-Iowa, the business failed and wound up in a

Chapter 7 bankruptcy. While a couple of side and secondary issues exist, this dispute is essentially about whether the Nelson group or the Bank has superior rights to the assets that were the subject of the Agreement of Sale between the Nelson group and the Jacobson group. Resolution of the dispute hangs primarily on determination of factual issues. Because the fact findings have been stated above, this discussion will only recount the key facts and apply them to the issues as stated by the parties.

On March 10, 1989, the Bank committed itself to make two separate loans to the Jacobson group to facilitate their purchase of the business from the Nelson group. One loan was an $800,000 secured term loan to Jacobson, which was made specifically for the purpose of acquiring the business and other related assets from the Nelson group. The other loan was the $350,000 working capital loan made to BMS-Iowa. The loans were documented by separate promissory notes, two guarantees, and numerous security agreements as specified in the fact findings. The Bank perfected its security interests in its collateral by filing financing statements with the Iowa Secretary of State. All of the aforementioned documents evidence, then, a perfected security interest in BMS-Iowa's assets, which is not disputed, except for the Plaintiffs' claim that the Agreement of Sale prohibits or otherwise defeats BMS-Iowa's guaranty and pledge of assets securing the

$800,000 term loan. Plaintiffs allege and argue that they were never informed or aware of the BMS-Iowa pledge of assets on the $800,000 term loan; and, therefore under theories of tortious interference with contract, equitable subordination, waiver, estoppel, and under the Subordination Agreement, Plaintiffs have a superior right to the assets of BMS-Iowa.

EFFECT OF AGREEMENT OF SALE

While Plaintiffs argue the lien covenant was designed to prevent a leveraged sale (Plaintiff's Post Trial Brief 24) and to preserve the net worth covenant, the Court holds that as a matter of contract interpretation, the covenant would prevent the creation of liens only to the extent the monies realized therefrom were not placed in BMS-Iowa and used in connection with the assets purchased under the Agreement of Sale. The Bank's acquisition financing did not violate the lien covenant contained in the Agreement of Sale. In fact, the lien covenant may be interpreted to provide for just the type of financing the Bank provided. The covenant allowed the creation of liens upon BMS-Iowa's property if the monies realized therefrom were placed in BMS-Iowa and used by it in connection with the assets being purchased under the Agreement of Sale. The pledges of collateral for both the $350,000 working capital loan and $800,000 term loan were made to realize monies that were in fact placed in BMS-Iowa in connection with the assets

being purchased under the Agreement of Sale.

Moreover, the Court finds the Nelson group knew of the extent of the acquisition financing, consented to it and benefitted from it; thus estopping them now from attempting to capitalize on any of the ambiguities that might be raised in the Agreement of Sale. Clark testified that when he had expressed to Brodsky his concerns about whether the negative clauses might prohibit BMS-Iowa from pledging assets to the Bank for acquisition financing, Brodsky assured Clark that the clauses were not intended to prohibit the acquisition funding, only acquisition of other businesses post-acquisition. (Transcript vol. VIII, p. 1748, lines 11-25.) Despite Brodsky's and Nelson's testimony that they were not aware of the full extent of the Bank's loans or that the Bank was receiving a security interest in BMS-Iowa assets for the $800,000 term loan, the Court finds that they did know and Brodsky did make the assurances as Clark testified. (See also Transcript vol. VIII, pages 1801, 1811, 1826.) In light of the Nelson group's acquiescence and profit from the acquisition financing and the fact that the lien covenant contemplated such acquisition financing, any technical argument that might be made on the basis of the net worth covenant or covenant against guarantees is ineffectual or immaterial.

Therefore, Plaintiff's allegations and argument based on the Agreement of Sale must fail. BMS-Iowa's pledge of assets

did not constitute a breach of the lien covenant and therefore any violation of the covenant against guarantees or the net worth covenant would have been immaterial because the pledge gave the Bank a first security interest in the assets of BMS-Iowa. Even if the negative covenants were violated, the Nelson group is estopped from challenging the pledges or guarantees because they knew of, acquiesced in and benefitted from the financing. Thus, issues one and two are resolved.

Equitable Subordination under § 510

Plaintiffs argue that, pursuant to 11 U.S.C. § 510, the Court should equitably subordinate the claims of the Bank to those of the Plaintiffs because of Bank's alleged tortious interference with the Agreement of Sale, alteration of documents, misrepresentation to the Plaintiffs of the debts of BMS-Iowa, causing the insolvency of BMS-Iowa and the misapplication of accounts receivable against the $800,000 term loan. 11 U.S.C. § 510(c) empowers a bankruptcy court to employ principles of equitable subordination to subordinate claims or, when a secured claim is involved, to transfer a creditor's lien to the estate. Before exercising this power, three findings must be made: 1) that the claimant engaged in some type of inequitable conduct; 2) the misconduct resulted in injury to creditors or conferred an unfair advantage on the claimant; and 3) equitable subordination of the claim would

not be inconsistent with the Bankruptcy Code. See generally 2 D.G. Epstein, Bankruptcy § 6-93 (1992).

Plaintiffs' plea for equitable subordination is wholly without merit. As discussed above, the Bank did not tortiously interfere with the Agreement of Sale, nor did it engaged in inequitable conduct. The Bank did not alter documents, though it appears likely that the Plaintiffs attempted to alter the Subordination Agreement so as to argue the amount subordinated was $250,000 instead of $350,000. Rather than any alleged misrepresentation about how much BMS-Iowa had borrowed and pledged as security, the evidence is clear and convincing that Plaintiffs knew of and consented to the Bank loaning over $1 million for the acquisition of the BMS business, despite Plaintiff's attempt to now manufacture a plausible denial of that knowledge. Finally, the application of the accounts receivable is also immaterial since the Bank had a perfected, superior security interest in the accounts receivable, which it could apply to the secured loan balances however it pleased until they were paid in full. Thus, because the Plaintiffs' equitable subordination demand is without basis or merit, it will be denied.

Bank Subject to Waiver or Estoppel?

The Bank has not waived nor is it estopped from enforcing

its secured and/or unsecured claims vis-a-vis BMS and Nelson's claims. Plaintiffs argue that the Bank has waived or should be estopped from asserting any claim against BMS-Iowa based on the $800,000 term loan because of the Bank's alleged misrepresentation of and failure to disclose the basic terms and extent of the Bank's loans. If the Plaintiffs had known BMS-Iowa would guarantee and pledge its assets for the $800,000 loan, they argue, they would not have consummated the Agreement of Sale.

Plaintiff's waiver and estoppel arguments must fail because, as already stated above, the Court finds the Plaintiffs did know of, consented to and benefitted from the full amount of the acquisition financing provided by the Bank. In fact, the Plaintiffs are more properly estopped from bringing this claim than is the Bank. In light of the findings of fact already made, the Plaintiff's waiver and estoppel arguments need not be addressed further.

Subordination Agreement

Plaintiffs allege and argue that the Subordination Agreement subordinated Plaintiff's claim to the Bank's claim only to the extent of the $350,000 line of credit loan, allowed payment to Plaintiffs as the Agreement of Sale provided, required the Bank to apply monies collected to senior liabilities unpaid (limited only to the $350,000 line

of credit loan) and after application and payment of the senior liabilities ($350,000 only), required the Bank to assign to the holders of the junior liabilities (BMS) that portion of its debt representing the monies received by the Bank on account of the junior liabilities. That is, once senior liabilities ($350,000 only) were satisfied, Bank was to turn over to Plaintiffs any additional monies collected and, essentially, assign the Bank's collateral position to Plaintiffs.

Plaintiffs also rely, to some extent, on the Subordination Agreement as evidence that the Bank misrepresented the extent to which BMS-Iowa assets were pledged or guaranteed to the Bank. Plaintiffs point to the Subordination Agreement language Brodsky requested be added: "up to the limit of $350,000." One could interpret this language in the first paragraph as a limitation on the debt BMS-Iowa could incur to the Bank. The Subordination Agreement may even be read to define the senior liabilities, to which the junior liabilities were subordinated, to be limited to $350,000 (paragraph number one), that is, the $350,000 working capital loan only.

Bank argues that the Subordination Agreement entitles Bank to the first $350,000 of all payments and distributions of any kind or character in respect of the junior liabilities to which the Nelson group would be entitled if the junior

liabilities were not subordinated pursuant to the Subordination Agreement. Thus, the Bank would be entitled to anything Plaintiffs receive from BMS-Iowa's bankruptcy estate, and anything they receive from Jacobson, and anything they have already received or will receive from the Marsden group as proceeds of BMS-Iowa's "forfeited" assets, until such time as the Bank's loans (and attorney fees) have been paid in full.

The Subordination Agreement was not well-drawn and is ambiguous. While BMS-Iowa is named as "Borrower," Nicholas Jacobson signed the agreement both on behalf of BMS-Iowa and personally. Because Jacobson signed for BMS-Iowa and personally and because all the parties understood the Bank was providing acquisition financing through both, the Court finds the agreement should be read to include both BMS-Iowa and Jacobson as "borrowers." The agreement states that Borrower has requested or may request the Bank make loans to the Borrower "up to the limit of $350,000." The "undersigned" (the Plaintiffs) agreed to the Subordination Agreement "up to the limit of $350,000." And finally in paragraph number one, liabilities to the Bank are called senior liabilities and all liabilities to the Plaintiffs are called junior liabilities up the limit of $350,000. Is the phrase "up to the limit of $350,000" then here to be read as limiting the amount Bank could loan to the Borrowers or evidencing the Plaintiffs'

agreement to be subordinated to $350,000 of the total loan package or to the $350,000 working capitol loan only? It is unclear what the phrase modifies in paragraph number one and how that modification is to be interpreted.

Despite the Plaintiffs' allegations and the inartful drafting of the Subordination Agreement, the Court finds the agreement was intended by the parties to operate in the following way. Both the $350,000 line of credit loan and the $800,000 loan to Jacobson were secured by the assets of BMS-Iowa. The Bank's position was and is a first perfected security position in those assets by virtue of the documents and circumstances discussed above. The Subordination Agreement was intended to further induce the Bank to provide acquisition financing by further protecting it should an unsecured deficiency result from BMS-Iowa's failure. The situation is similar to one in which the Bank would have a claim against a solvent surety. (here, the Plaintiffs.) The Bank could be required to realize first on its security to liquidate the debt and could claim under the Subordination Agreement only for any deficiency.

Language to support this interpretation is found in the Subordination Agreement. Paragraph number three subordinated the junior liabilities (Plaintiffs' claim) to the payment in full of all senior liabilities (Bank's claims) except for payments under the Agreement of Sale. (See Schedule A of the

Subordination Agreement.) Thus, the subordination was not "complete," in that payments could be made to the Plaintiffs before the Bank was paid in full. Paragraph four, however, provided that in the event of liquidation of the Borrower, the senior liabilities were to be paid first in full before the Plaintiffs would be entitled to receive or retain any payment or distribution in respect of the junior liabilities. The $350,000 limitation was not a limitation on how much the Bank would loan the Jacobson group. (Transcript vol. VIII, p. 1801, lines 18-23.) Rather than being paid first "in full," the Bank would be entitled to the first $350,000 to which the Plaintiffs were entitled in any payment or distribution in respect of its claims. This is where the $350,000 limitation most makes sense under the circumstances; and this reading of the Subordination Agreement comports more reasonably with the circumstances of the case than the allegations and arguments presented by the Plaintiffs.

The arguments on the Subordination Agreement can be summarized and resolved by addressing issues five through eleven stated above. The Subordination Agreement subordinated obligations or payments owed the Plaintiffs under the Agreement of Sale upon default by the Borrowers. The dollar amount in the second (unnumbered) paragraph and paragraph one of the Subordination Agreement is and should read $350,000 instead of $250,000. The Court finds that the Plaintiff's

witnesses consistently testified to something that was not true on this point.

The Subordination Agreement did not require the Bank to apply the accounts receivable to the $350,000 line of credit loan before it applied any receivables to the $800,000 term loan. (See also Transcript vol. VIII, p. 1826-27.) Nor did it require the Bank to assign to the Plaintiffs its rights in the rest of the receivables once the Bank had collected accounts receivable equal to $350,000 plus accrued interest, attorney fees and other expenses of collection. The Bank was entitled under its perfected security interests to collect the debts out of the collateral first and before Plaintiffs had any right to BMS-Iowa's assets. (See also Transcript vol. VIII, p. 1811 (Clark understood and discussed with Brodsky the Bank's right to apply collateral to full $1,150,000).) Collection by the Bank under the Subordination Agreement would occur only in case of a deficiency and only if Plaintiffs were entitled to receive a payment or distribution. At that point, Bank would be entitled under the Subordination Agreement to the first $350,000 Plaintiffs would have received absent the Subordination Agreement.

The Subordination Agreement subordinated to the Bank and entitled the Bank to receive the Plaintiffs' claims under the Agreement of Sale in BMS-Iowa's bankruptcy proceeding to the extent of the first $350,000 to which Plaintiffs would have

been entitled. Finally, neither the Agreement of Sale, any knowledge Bank had of it, nor any alleged breach of the Agreement prejudiced the Bank's rights under the Subordination Agreement.

Bank's Security Interest Superior to Plaintiffs' Forfeiture Rights

Pursuant to the Agreement of Sale Section 11 forfeiture provision, (Exhs. 48 or 49), the Plaintiffs seized all of BMS-Iowa's assets just prior to BMS-Iowa filing bankruptcy. Notwithstanding the forfeiture, the Plaintiffs' interest in those assets is not superior to the Bank's first, perfected secured interest in those assets covered by the Bank's security interests and financing statements. Title-reversionary devices like the forfeiture provisions of the Agreement of Sale are in substance no better or worse than title-retentive devices. At best, the forfeiture provisions gave Plaintiffs an Article 9 security interest in the items sold, subject to Article 9 perfection and priority rules. See Iowa Code § 554.2401. In light of the above findings of fact, further discussion is unnecessary.

Proceeds of Accounts Receivable Held by Plaintiffs

The Bank is entitled to the proceeds of BMS-Iowa's accounts receivable, as the Bank's collateral, that are still

held by the Plaintiffs to the extent its claims have not yet been satisfied in light of the above fact findings and conclusions.

Bank's Conversion Claim

The Plaintiffs have converted the Bank's collateral and the Bank is entitled to compensatory and exemplary damages. It has already been established that the Bank had a security interest in BMS-Iowa's equipment, accounts and general intangibles (the Bank's collateral) and that the Bank's security interest was superior to Plaintiffs' rights in the Bank's collateral. Plaintiff intentionally exercised dominion and control over the Bank's collateral and seriously interferred with the Bank's rights to control the collateral. See generally Restatement, Second, Torts §§ 222A & 237. Plaintiffs did this by seizing the assets of BMS-Iowa, by refusing to release them, and then by disposing of the assets in a sale to Marsden.

The degree to which Plaintiffs interferred with the Bank's rights justifies compensation. On February 8, 1990, the Plaintiffs seized all of the Bank's collateral, outside of the accounts receivable that had been assigned to the Bank. Even though the Bankruptcy Trustee never abandoned BMS-Iowa accounts or the book of business, Plaintiffs did not turn

these over or account for them to the Trustee or to the Bank. Plaintiffs refused all demands made by Bank for turnover of all BMS-Iowa assets in Plaintiffs' possession. Then, on April 1, 1990 Plaintiffs sold the Bank's collateral to the Marsden Group. The Bank, as a result, has had to go to considerable trouble and expense to defend its rights. Accordingly, the Bank is entitled to damages in the amount of $354,090.44 plus interest after August 1, 1992, plus attorney fees and collection expenses, less $13,969.72 (receivables collected just prior to trial).

Plaintiffs' conduct with regard to their refusal to turnover the computer system warrants the imposition of exemplary damages. See generally Restatement, Second, Torts § 908; State Savs. Bank v. Allis-Chalmers, 431 N.W.2d 383. (Iowa App. 1988). The computer system was purchased by BMS-Iowa in the middle part of 1989. The Bank financed the purchase. It was absolutely clear that the Bank had a superior security interest in the computer system. The Bank requested that its collateral be protected. Yet, the Plaintiffs refused to turn it over and instead used it to run the business and gain access to the customer list and book of business. Then Plaintiffs sold it to Marsden. In so doing, Plaintiffs acted maliciously, willfully and with reckless disregard for the Bank's security interest in the computer system. In accordance with Iowa Code § 668A.1(a), the Court finds Plaintiffs'

conduct clearly constituted a willful and wanton disregard for the Bank's rights. See Freeman v. Bonnes Trucking, Inc., 337 N.W.2d 871, 879 (Iowa 1983); Sinnard v. Roach, 414 N.W.2d 100, 108 (Iowa 1987); and McCarthy v. J.P. Cullen & Son Corp., 199 N.W.2d 362, 368-69 (Iowa 1972). Accordingly, the Court awards the Bank exemplary damages in an amount equal to the amount the Bank loaned BMS-Iowa for the computer system, $20,000.00.

In light of the above findings and conclusions, the Court finds it unnecessary to address issues fifteen and sixteen concerning preferential transfers and Plaintiffs' standing under 11 U.S.C. §§ 510 and 547.

ORDER

IT IS ACCORDINGLY ORDERED that Plaintiffs' complaint is dismissed with prejudice.

IT IS FURTHER ORDERED that the Bank is entitled to judgment against the Plaintiffs (joint and several) on Bank's conversion claim for compensatory damages in the amount of $354,090.44, plus interest after August 1, 1992, and costs, less the accounts receivable in the amount of $13,969.72 (collected by Bank just prior to trial).

IT IS FURTHER ORDERED that the Bank is entitled to punitive damages in the amount of $20,000.00.

Dated this day of 7th day of June 1993.

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Russell J. Hill
U.S. Bankruptcy Court