UNITED STATES BANKRUPTCY COURT
For the Southern District of Iowa

In re:	:	**Case No. 01-01776-CH**
	:	
DAVID L. WEILER and EDNA Z. WEILER,	:	**Chapter 11**
	:	
Debtors.	:	
- -	:	
MAHASKA STATE BANK,	:	**Adv. No. 01-20105**
	:	
Plaintiff,	:	
	:	
v.	:	
	:	
DAVID L. WEILER, EDNA Z. WEILER, COMERCIAL FEDERAL BANK, BLOOMFIELD LIVESTOCK MARKET, INC., RON SCHOOLEY, DAVID SCHOOLEY, and SCHOOLEY FARMS,	:	
	:	
Defendants.	:	

- -

ORDER—MOTIONS FOR PARTIAL SUMMARY JUDGMENT

On May 23, 2002, the court conducted an evidentiary hearing on Plaintiff's Motion for Partial Summary Judgment on Counts I, II, and III, and Defendants' Motion for Partial Summary Judgment on Counts IV, V, and VI in the above captioned adversary proceeding. Mark D. Walz and Steven L. Nelson represented Plaintiff Mahaska State Bank. Lynn Wickman Hartman and Mat M. Dummermuth represented Defendants Bloomfield Livestock Market, Inc., Ron Schooley, David Schooley, and Schooley Farms. August B. Landis and Steven D. Marso represented Defendant Commercial Federal Bank. Dallas J. Janssen represented the Debtors in Possession, David L. and Edna Z.

Weiler. At the conclusion of the hearing, the court took the matter under advisement. Post-hearing briefs have now been received, and the court considers the matter fully submitted.

The court has jurisdiction of this matter pursuant to 28 U.S.C. §§ 157(b)(1) & 1334 and order of the United States District Court for the Southern District of Iowa. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(A), (E), (F), (H), (K) & (O). The court, upon review of the briefs, pleadings, evidence, and arguments of counsel, now enters its findings and conclusions pursuant to Fed. R. Bankr. P. 7052.

FINDINGS OF FACT

The court finds the following facts to be undisputed:

1. Plaintiff, Mahaska State Bank (hereinafter "Mahaska"), brought a Petition for Replevin of the personal property of David L. Weiler and Edna Z. Weiler (hereinafter "Debtors") in Davis County, Iowa, on March 30, 2001. The hearing on the request for immediate possession of the personal property was scheduled for April 13, 2001, the date following the date of the chapter 11 filing by the Debtors.

2. Debtors filed a chapter 11 petition for relief with the United States Bankruptcy Court for the Southern District of Iowa on April 12, 2001.

3. Debtors were in possession of approximately 1,653 cattle delivered to the Weiler's feedlot between February 28, 2000 and September 27, 2000 (hereinafter the "2000 Cattle"). Exhibit "V-1002" is the ledger maintained by Ron Schooley and David Schooley (hereinafter collectively the "Schooleys") evidencing the calculation of the indebtedness owing to Schooleys by the Weilers with respect to the 2000 Cattle.

4. A buyer's bill or an invoice evidences the delivery of the 2000 cattle to Debtors. The vast majority of the 2000 Cattle were located at Debtors' 920-acre feedlot in Davis County, Iowa, the balance located at Debtors' Pennsylvania farm.

5. The parties stipulate to the buyer's bills or buyer's invoices as being accurate, except for the following: Exhibits 1096, 1098, and 1107 are poor quality, which hinders verification of the May 31, 2000, and June 28, 2000 figures, and Commercial Federal Bank (hereinafter CFB) and Bloomfield Livestock Market, Inc. (hereinafter BLMI), maintain that the correct number of head of cattle on July 12, 2000, is 78, and not 28.

6. There is evidence in the CFB loan file of advances to BLMI for the purchase price of the 2000 Cattle. (Exh. 1394,1477,1487,1488, 1497, 1501, 1505, 1524, 1538, 1847, 2080, 2081, 2088). CFB and BLMI add that there may be additional sales and additional advances.

7. The 2000 Cattle, after they were fattened, were delivered by Debtors to Schooleys, sold at Iowa Beef Processors, Inc. (hereinafter "IBP"), and the proceeds applied by Schooleys to the reduction of the indebtedness described on Exhibit "V-1002". Schedule A, attached to Plaintiff's statement of undisputed facts, identifies proceeds from the 2000 Cattle received by Schooleys. Schedule A is constructed from IBP sale bills. Schedule A is not a complete accounting of the 2000 Cattle as it does not include the cattle fed in Pennsylvania.

8. On December 29, 2000, Weiler sold some of the 2000 Cattle located in Pennsylvania for $29,115.75. In 2001, Weiler sold 75 head of the 2000 Cattle that were located in Pennsylvania.

9. Mahaska made numerous advances to the Weilers, including the following:

3-10-2000	$ 97,977.80
4-13-2000	$101,447.00
6-01-2000	$203,345.00
7-12-2000	$113,574.00
4-13-2000[sic?]	$102,356.00

David Weiler stated that he knew that Mahaska was making loans to him against the purchase price of the 1999 and 2000 Cattle.

10. David and Edna Weiler were in possession 960 head of cattle placed on their feedlot in Davis County between July 19, 1999 and November 20, 1999.

11. All parties stipulated to the bills of sales or invoices with respect to the 1999 Cattle with the following exceptions: (a) the July 19, 1999 transaction is not evidenced by a buyer's bill or invoice, but is shown as Exhibit V-1048; (b) the date of the buyer's bill for transaction shown by V-1176 is July 26, 1999, not July 27, 1999; and (c) no credit is reflected on buyer's bill dated September 13, 1999, marked as Exhibit V-1162.

12. The parties do not dispute that certain proceeds from sales of the 1999 Cattle were deposited with Mahaska as identified by Plaintiff. Defendants dispute the May 29, 2000 deposit, because the source document, Exhibit LL, is unreadable.

Defendants dispute any other facts being implied or inferred from the identified sales and deposits.

13. Defendants do not dispute Plaintiff's identification of sales of the 1999 Cattle that were not deposited in Mahaska, except for Exhibit W, p.3, which is not in the Index to Exhibits.

14. Debtors provided their tax returns to Mahaska for their most recent tax years, 1998 and 1999, which showed 1999 sales of livestock of $2,880,411.00, of which $770,005.00 were in Pennsylvania and $2,110,406.00 in Iowa and 1998 sales of livestock of $1,449,112.00, of which $201,453.00 were in Pennsylvania and $1,247,659.00 were in Iowa.

15. Debtors provided financial statements dated November 28, 2000 and January 10, 2001 to Mahaska. The November 28, 2000 statement included 1957 head of cattle located in Iowa and valued at $1,471,552,00. The January 10, 2001 statement included 1900 head of cattle with a value of $1,661,400.00.

16. On November 28, 2000, a Mahaska representative made a physical inspection of Debtors' Davis County farm and counted the cattle located there.

17. BLMI did not file a UCC-1 financing statement, or make any other filing, identifying its claim of ownership of the 1999 Cattle or 2000 Cattle in the possession of Weilers.

18. BLMI did not post any signs at the Weiler's feedlot advising that the cattle were owned by BLMI.

19. Prior to 1999, David Weiler custom fed cattle for BLMI and others, and fed some of his own cattle that he bought and paid for at the time they were placed on his property.

20. Mahaska holds promissory notes from Debtors in the following amounts:

Note #	Principal Balance	Amount Now Due
5011876	$420,000.00	$441.036.73 due 3/1/01: $445,613.62 due 4/12/01. Interest thereafter at 10.5%, amounting to $106.44 per diem.
5026202	$97,977.80	$108,107.62 due 4/12/01. Interest thereafter at a variable rate amounting to $24.83 per diem.
5028132	$150,000.00	$164,888.19 due 4/12/01. Interest thereafter at 10% amounting to $41.10 per diem.
5030730	$349,000.00	$380,523.55 due 4/12/01. Interest thereafter at 10.5%.
5033144	$470,000.00	$506,911.09 due 4/12/01. Interest thereafter at 10.5%.
361461	$7,875.00	$8,333.89 interest thereafter at variable rate.

21. Debtors and Mahaska entered into two security agreements dated March 6, 1997, and June 23, 1997.

22. BLMI claims that it owned the 2000 Cattle. Most of the 2000 Cattle were under the name Schooley Farms.

23. BLMI made the bulk of its money from sales through its auction house.

24. Debtors custom fed for BLMI beginning in 1989. The parties dispute whether Debtors were custom feeding after 1997.

25. Debtors' financing constitutes one of Mahaska's largest agricultural loan portfolios.

26. David Weiler distributed business cards identifying his business as "Iowa Custom Feeding." Mahaska denies having knowledge of the cards.

27. Mahaska was aware by at least 2000 that Debtors "bought" cattle from BLMI.

28. Mahaska had knowledge that BLMI had customers, including Debtors, who had custom fed cattle for BLMI.

29. Prior to March 2001, Mahaska never spoke with anyone at IPB, BLMI or CFB about Debtors' cattle operations.

30. IPB representative Jim Beattie always dealt with Ron Schooley as to the purchases of the finished 2000 Cattle.

31. Debtors did not use the loan funds from Mahaska Bank to buy cattle.

32. Mr. Anderson, the officer at Mahaska responsible for Debtors' credit file, admitted, that in July of 2000, he was concerned because Debtors were highly leveraged at the time he took over their credit file. Mr. Anderson also admitted that Debtors' loans were structured so that advanced funds for cattle purchase and operating needs were not segregated.

33. Mahaska commenced the above captioned adversary proceeding by filing its Complaint to Determine Validity, Priority and Extent of Liens on August 23, 2001. The complaint is cast in eight separate counts.

34. Mahaska did not seek or obtain prior approval to pursue avoidance actions pursuant to 11 U.S.C. §§ 547 or 548 prior to filing its complaint.

35. Mahaska is a corporate entity, and not an individual.

STANDARD FOR SUMMARY JUDGMENT

Federal Rule of Bankruptcy Procedure 7056 applies Federal Rule of Civil Procedure 56, governing summary judgment, to adversary proceedings. Summary judgment shall be granted if the court determines that "there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56; Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). There is no genuine issue of material fact unless there is sufficient evidence favoring the non-moving party for the finder of fact to return a verdict for that party, if the non-moving party is the party with the burden of proof. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986). A court considering a motion for summary judgment must view all the facts in the light most favorable to the non-moving party, and give the non-moving party the benefit of all reasonable inferences that can be drawn from the facts. Matsushita Electric Industries, Co., v. Zenith Radio Corp., 475 U.S. 574, 587 (1986) (quoting United States v. Diebold, Inc., 369 U.S. 574 (1962)); Rifkin v. McDonnell Douglas Corporation, 78 F.3d 1277, 1280 (8th Cir. 1996). The court is not to weigh the evidence, but determine whether there is a genuine issue of fact for trial. Johnson v. Enron Corporation, 906 F.2d 1234, 1237 (8th Cir. 1990); see also Anderson, 477 U.S. at 249; Celotex, 477 U.S. at 323-24; Matsushita, 475 U.S. at 586-87.

If the non-moving party fails to make a sufficient showing of an essential element of a claim with respect to which it has the burden of proof, then the moving party shall be granted judgment as a matter of law. Celotex, 477 U.S. at 323. However, if the court can conclude that a reasonable trier of fact could return a verdict for the non-movant, then summary judgment should not be granted. Anderson, 477 U.S. at 248.

Procedurally, the moving party "bears the initial responsibility of informing the district court of the basis for its motion and identifying those portions of [the record which show lack] of a genuine issue of material fact." Celotex, 477 U.S. at 323; see also Reed v. Woodruff County, 7 F.3d 808, 810 (8th Cir. 1993). Rule 56 does not require the moving party to support its motion with affidavits or other similar materials negating the opponent's claim. "When a moving party has carried its burden under Rule 56(c), its opponent must do more than simply show there is some metaphysical doubt as to the material facts." Matsushita, 475 U.S. at 586. The non-moving party is required by Rule 56(e) to go beyond the pleadings, and by affidavits, or by the "depositions, answers to interrogatories, and admissions on file," to designate "specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e); Celotex, 477 U.S. at 324; Mclaughlin v. Esselte Pendaflex Corp., 50 F.3d 507, 511 (8th Cir. 1995).

However, "as a general principle, questions of motive and intent are particularly inappropriate for summary adjudication." P.H. Glatfelter Co. v. Voith Inc., 784 F.2d 770, 774 (7th Cir. 1986), quoting Cedillo v. International Association of Bridge & Structural Iron Workers, Local Union No. 1, 603 F.2d 7, 11 (7th Cir. 1979). "A dispute over historical facts or inferences, if genuine and material within the meaning of Rule 56,

precludes summary judgment." Schwarzer, Hirsch & Barrans, The Analysis and Decision of Summary Judgment Motions at 14 (Federal Judicial Center 1991); but see In re Chavin, 150 F.3d 726 (7th Cir. 1998) (denial of knowledge may be so utterly implausible that no reasonable jury could find otherwise and, therefore, summary judgment is appropriate); Aubrey v. Thomas (In re Aubrey), 111 B.R. 268 (B.A.P. 9th Cir. 1989) (debtor provided insufficient proof to demonstrate genuine issue of material fact and summary judgment was appropriate to deny discharge). A matter is material to the bankruptcy if it relates to the debtor's business transactions or estate, or "concerns the discovery of assets, business dealings, or the existence and disposition of [the debtor's] property." Palantine National Bank of Palantine, Illinois, (In re Olson), 916 F.2d 481, 484 (8th Cir. 1990) (quoting and adopting the materiality standard set forth in In Re Chalik, 748 F.2d 616, 618 (11th Cir. 1984)).

DISCUSSION

Plaintiff commenced this adversary proceeding requesting relief based on eight (8) separate counts. The first three are the subject of Plaintiff's motion, while Defendants' motions concern the following three.

Count I alleges that Mahaska held a perfected security interest in the 2000 Cattle, and that Debtors had sufficient interest for Mahaska's lien to attach to the livestock. It asks the court to determine that its security interest was prior and superior to any interest of the Schooleys or CFB claiming through the Schooleys.

Count II alleges that Mahaska has prior right to possession of the 2000 Cattle and the proceeds from their sale. Mahaska contends that the Schooleys and CFB converted

the 2000 Cattle and alleges that it was damaged as a result of the conversion. Mahaska asks for judgment against the Schooleys and CFB for the amount of the purchase price paid by IBP for the 2000 cattle and other just and equitable relief.

Count III asks the court to impose a constructive trust on the proceeds of the sale of the 2000 Cattle. Mahaska argues that the imposition of the trust is necessary to prevent the Schooleys and CFB from profiting from their wrongful acts. Mahaska requests that the trust corpus be turned over to the bankruptcy estate. Debtors in possession should be directed to disburse the funds first to Mahaska with any surplus going to unsecured creditors.

Count IV asks for a declaratory ruling that the transfer of the 2000 Cattle constitutes a preferential transfer to the Schooleys and CFB that is avoidable under 11 U.S.C. §§ 547 & 550. Mahaska alleges some of the transfers were made within ninety days to one year of the bankruptcy filing, and the Schooleys occupy insider relationships with Debtors. Mahaska asks the court to declare that the pre-petition transfers are avoidable preferential transfers and direct Debtors to recover the preferential transfers for the benefit of the bankruptcy estate.

Count V alleges that some of the 2000 Cattle were transferred to or for the benefit of the Schooleys and CFB after the filing of Debtors' bankruptcy petition without the prior approval of the court. Mahaska argues that these transfers are avoidable under 11 U.S.C. § 549. It requests that the court enter judgment declaring that these post-petition transfers are avoidable and directing Debtors to recover the transfers for the benefit of the bankruptcy estate.

Count VI alleges that the post-petition transfers of the 2000 Cattle to or for the benefit of the Schooleys and CFB were made in violation of the automatic stay of 11 U.S.C. § 362(a). Mahaska argues that the Schooleys and CFB acted willfully within the meaning of 11 U.S.C. § 362(h). Mahaska requests that the Schooleys be ordered to pay actual damages, including costs and attorney fees, along with punitive damages to Mahaska.

The court has reviewed the motions, exhibits, and arguments of counsel. For the following reasons, the court will deny Plaintiff's motion for partial summary judgment and grant Defendant's motion for partial summary judgment.

Plaintiff's Motion for Partial Summary Judgment on Counts I, II, and III

Plaintiff requests summary judgment on Counts I - lien priority, II - conversion, and III – constructive trust. Each of these matters require the court to make a preliminary determination that Debtors had sufficient interest in the 2000 cattle for Mahaska's security interest to attach. If the court determines that Debtors had such interest, it can then determine the priority of potential liens, whether the elements of conversion are met, and whether the imposition of a constructive trust is the appropriate remedy. If the court determines that Debtors did not have such interest, each count necessarily fails.

Plaintiff advances two theories on which it bases Debtors' and its derivative interest in the 2000 cattle. Plaintiff first contends that Debtors purchased the cattle through BLMI. Although Ron Schooley bid on feeder calves at the auction and purchased livestock directly off the farm from some producers, they transferred ownership to Debtors. Plaintiff describes the arrangement as a "purchase money line of

credit secured by the retained ownership interest of BLMI, which is itself an unperfected security interest." (Pl. Brief at 6). In essence, BLMI retained bare legal title while Debtors held all other property rights to the cattle.

According to Plaintiff, BLMI delivered the cattle to Debtors' feedlot, where Debtors provided feed and care for the cattle until they reached slaughter weight. The cattle were then sold to IBP for processing. Upon sale of the livestock, Debtors paid BLMI for the cost of the livestock, including shipping, and interest on the money. Debtors also repaid BLMI money that they borrowed for expenses to carry on their operation. Debtors retained the balance of sale proceeds including all the profit generated by the cattle or stood the loss.

Alternatively, Plaintiff argues that the transfer of the 2000 Cattle was a deemed sale or return under Iowa Code § 554.2326(3). It alleges that the section protects creditors, such as itself, from parties who are given possession of goods for sale by someone retaining a "secret" lien. The version of Iowa Code § 554.2326 that was in effect during the time the 2000 Cattle were on feed at Debtors feedlot provides in relevant part:

> 1. Unless otherwise agreed, if delivered goods may be returned by the buyer even though they conform to the contract, the transaction is
>   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.
> 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.
> 3. Where goods are delivered to a person for sale and such person maintains a place of business at which that person 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
>
> 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 creditors of the person conducting the business to be substantially engaged in selling the goods of others, or
>
> c. complies with the filing provisions of the Article on Secured Transactions (Article 9).
>
> * * *

Iowa Code § 554.2326 (2000).

Plaintiff argues that the required elements of § 554.2326 exist in this proceeding. The 2000 Cattle were delivered to Debtors for sale; Debtors maintain a place of business at which Debtors deal in goods of the kind involved (cattle); and Debtors dealt in cattle under a name other than BLMI. Plaintiff further argues that BLMI fails to meet any of the exceptions provided by the section. BLMI did not post a sign or otherwise provide notice to Debtors' creditors of its interest in the cattle, nor can it show that Debtors were generally known by its creditors to be substantially engaged in selling cattle of others. Finally, BLMI did not comply with the secured transactions article by filing a UCC-1 financing statement.

Defendants dispute Plaintiff's conclusions concerning Debtors' interest in the 2000 Cattle. They contend that BLMI and the Schooleys retained complete ownership of the cattle, and that Debtors were essentially bailees who were custom feeding the livestock for BLMI. Accordingly, Debtors had no interest to which Plaintiff's lien could attach.

Defendants further dispute that custom feeding of livestock falls within the purview of § 544.2326. Defendants assert that the statute is limited in scope to consignment sales. They argue that Debtors do not market the custom fed cattle; the owners market the cattle by determining when and where they are sold. Defendants further dispute the contention that Debtors' creditors were unaware that Debtors were custom feeding cattle. Defendants assert that Plaintiff was aware of this fact prior to providing financing.

The parties do not dispute and the record bears out the fact that Debtors, the Schooleys, and BLMI had an agreement whereby cattle were placed in Debtors' feedlot. On occasion, BLMI agreed to provide funds to Debtors to pay expenses related to the feedlot operation. The parties did not memorialize the agreement in a written document; it is wholly a verbal contract.

While the agreement itself, its provisions, and the intent of the parties in entering into it may not be dispositive of the issue of Debtors' interest in the cattle, the court finds the agreement and the parties' intent is certainly relevant to the issue. The court further finds that the current record is insufficient to make a determination of the provisions of the agreements and the intent of the parties as a matter of law.

The parties have offered various exhibits showing livestock sold through the BLMI's sale barn, and they generally agree that the identified cattle were placed at Debtors' feedlots in Iowa and Pennsylvania. They also agree that certain exhibits show the sale of the livestock to IBP. However, the parties disagree on how the exhibits evidence ownership of the livestock. The parties have also offered abundant and

conflicting deposition testimony from numerous individuals to explain the exhibits, and identify the parties' interests in the 2000 Cattle.

The documentary evidence taken collectively does not support a finding as a matter of law that Debtors had a sufficient interest in the 2000 Cattle for Plaintiff's security interest to attach. The testimony of the parties is required to interpret the documents and explain why various names appear on invoices, buyer bills, sale bills, etc. At this point, the deposition testimony is conflicting. For instance, Plaintiff and Defendants alike point to David Weiler's testimony as evidence of the ownership of the 2000 Cattle. David Weiler first stated that BLMI or the Schooleys owned the 2000 Cattle. He then said that he did not know who owned the cattle, and it was a matter for the court to decide.

The court is mindful of the Eighth Circuit's admonition that the court should not weigh the evidence when making a summary judgment determination. See Johnson, 906 F.2d at 1237. Therefore, for purposes of this motion, it will not make a determination of which deponent's statements are credible and which are not.

As to Plaintiff's theory under Iowa Code § 544.2326, there remains genuine issue of material fact as to whether "the person conducting the business is generally known by creditors of the person conducting the business to be substantially engaged in selling the goods of others." Iowa Code § 554.2326(3)(b) (2000). Defendants have provided sufficient evidence to raise a factual issue concerning the extent of Plaintiff's knowledge that Debtors engaged in the custom feeding of cattle. Defendants additionally argue that

summary judgment is inappropriate because the livestock were not placed with Debtors for sale. Iowa Code § 554.2326(3) (2000).

Further, even if the standard for summary judgment has been met, the Eighth Circuit has held that in the exceptional and appropriate case, the court may exercise its discretion to deny a summary judgment motion and require a trial on the merits. Olberding v. U.S. Dept. of the Army, 709 F.2d 621, 622 (8th Cir. 1983) affirming Olberding v. U.S. Dept. of the Army, 564 F.Supp. 907, 908 (S.D. Iowa 1982); Roberts v. Browning, 610 F.2d 528 (8th Cir. 1979); McLain v. Meier, 612 F.2d 349, 356 (1979); see also 10A. Wright, Miller, and Kane, Federal Practice and Procedure; Civil 3rd § 2728, pp. 517-27 (1998).

The court finds that the present proceeding is such an exceptional and appropriate case. The case raises issues related to custom feeding of livestock, financing of livestock purchases, livestock auction practices, and the application of Iowa's version of the Uniform Commercial Code. The interest concerning these issues extend beyond the parties involved in this proceeding. Accordingly, the court finds that the most appropriate procedure is to bring the issues raised in Counts I, II, and III, to trial on the merits.

Defendants' Motions for Partial Summary Judgment on Counts IV, V, and VI

Defendants request summary judgment on Counts IV, V, and VI based on a lack of standing by Plaintiff. In Counts IV and V, Plaintiff seeks to avoid pre-petition and post-petition transfers of the 2000 Cattle and the proceeds from their sale utilizing the avoidance powers provided by 11 U.S.C. §§ 547, 549, & 550. Defendants contend that

these powers are generally reserved for the trustee, and a creditor may act under these sections only after requesting and being granted the court's permission to proceed. Accordingly, Defendants argue that because Plaintiff has not requested permission to exercise the trustee's avoiding powers, it lacks standing to prosecute this case, and summary judgment is appropriate. The court agrees.

Section 547 states that "the trustee may avoid any transfer of an interest of the debtor in property…." 11 U.S.C. § 547(b). Section 549 uses the similar wording that "the trustee may avoid a transfer of property of the estate…." 11 U.S.C. § 549(a). Finally, § 550 provides that "the trustee may recover, for the benefit of the estate, the property transferred…." 11 U.S.C. § 550(a). In chapter 11, if a trustee is not appointed, then the debtor in possession is vested with the powers of the trustee. 11 U.S.C. § 1107(a).

In this case, Plaintiff is neither a trustee nor a debtor in possession. Plaintiff is a creditor. Courts in the Eighth Circuit consistently hold that individual creditors lack standing to assert claims to avoid transfers of property. In re Lauer, 98 F.3d 378, 388 (8th Cir. 1996). A potential exception to the rule may exist when the trustee cannot be relied upon to bring such claims. Id.; see also Canadian Pacific Forest Prod., Ltd. v. J. D. Irving, Ltd.(In re Gibson Group, Inc.), 66 F.3d 1436, 1438 (6th Cir.1995) (holding "that a bankruptcy court may permit a single creditor in a [c]hapter 11 case to initiate an action to avoid a preferential or fraudulent transfer instead of the debtor-in-possession if the creditor: 1) has alleged a colorable claim that would benefit the estate, if successful, based on a cost-benefit analysis performed by the bankruptcy court; 2) has made a

demand on the debtor-in-possession to file the avoidance action; 3) the demand has been refused; and, 4) the refusal is unjustified in light of the statutory obligations and fiduciary duties of the debtor-in-possession… "). However, "derivative standing" is a judicially created doctrine of which the Eighth Circuit has not definitively approved, Lee v. National Home Centers, Inc. (In re Bodensein), 284 B.R. 808, 817 n. 39 (Bankr. W. D. Ark. 2000), nor has the United States Supreme Court. See Hartford Underwriters Ins. Co. v. Union Planters Bank, 530 U.S. 1, 13 n. 5 (2000) (refusing to address the validity of the practice allowing creditors or creditors' committees a derivative right to bring avoidance actions when the trustee refuses to do so, because the petitioner in this case asserted in independent right to pursue the action).

Defendants also argue that Plaintiff lacks standing to pursue remedies for violation of the automatic stay under 11 U.S.C. § 362(h) because Plaintiff is a corporation and not an individual. Section 362(h) provides, "An individual injured by any willful violation of a stay provided by this section shall recover actual damages, including costs and attorneys' fees, and, in appropriate circumstances, may recover punitive damages." The Eighth Circuit has held that the plain meaning of the word "individual" precludes the use of § 362(h) by corporations. Sosne v. Reinert & Duree, P.C. (In re Just Brakes Corporate Systems, Inc.), 108 F.3d 881, 884-85 (8th Cir. 1997).

This is not to say that a corporation is left without a remedy. Although relief is not available under § 362(h), the court has broad equitable powers under § 105 to fashion an appropriate remedy for violation of the automatic stay. Id. at 885.

In its post-hearing brief, Plaintiff appears to eschew its own right to remedy and seeks to advance Debtors' right derivatively. As stated above, it is not entirely clear that the Eighth Circuit has definitively accepted the derivative standing doctrine. Regardless, Article X of the confirmed plan provides that Debtors' cause of action for stay violations are transferred to the Unsecured Creditors Committee.

In summation, Plaintiff lacks standing to claim damages under § 362(h) because it is a corporation, and a corporation is not an individual under this paragraph of the Code. Plaintiff cannot claim derivative standing by utilizing Debtors' claim because Debtors transferred their cause of action to the Unsecured Creditors Committee.

The court notes that the Unsecured Creditors Committee amended the complaint in Adv. No. 02-20045 on February 26, 2003, docket no. 45, to include a claim for a stay violation under § 362(h) for the post-petition transfer of cattle. Since there is now an adequate remedy at law for the alleged violation, it is not necessary for the court to fashion an equitable remedy. Further, it would be inappropriate for the court to allow double recovery for the same violation.

Finally, the court notes that buried within Plaintiff's response to BLMI and CFB's statements of facts is a statement identified as a motion to strike Exhibit H. The motion was not filed separately with a bardate notice, proposed order and certificate of service, as required by the local rules. The fact that BLMI responded to the motion with an affidavit which it asserts cures any admissibility problems of Exhibit H, does not alter the fact that the motion to strike is not properly before the court. Accordingly, the court will not consider the matter.

ORDER

IT IS THEREFORE ORDERED that Plaintiff 's Motion for Partial Summary Judgment on Counts I, II, and III is DENIED.

IT IS FURTHER ORDERED that Defendants' Motion for Partial Summary Judgment on Counts IV, V, and VI is GRANTED.

FURTHER, Defendants shall have judgment against Plaintiff dismissing Courts IV, V and VI.

_____
RUSSELL J. HILL, JUDGE
U.S. BANKRUPTCY COURT