IN THE UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF UTAH

CENTRAL DIVISION

In re: **QUALITY PRESS, INC.,** Debtor.	Bankruptcy No. 03-23214 Chapter 11
QUALITY PRESS, INC., Plaintiff, vs. **HEIDELBERG PRINT FINANCE AMERICAS, INC.,** Defendant.	Adversary Proceeding No. 03-02446

MEMORANDUM DECISION ON DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AND PLAINTIFF'S CROSS MOTION FOR SUMMARY JUDGMENT

Before the Court are cross motions for summary judgment in the adversary complaint filed by Plaintiff and Debtor-In-Possession, Quality Press, Inc. ("Plaintiff"). Defendant Heidelberg Print Finance Americas, Inc. ("Defendant"), filed a Motion for Summary Judgment, and Plaintiff filed a Cross Motion for Summary Judgment. A hearing on both motions was held

on April 7, 2004 at 10:00 a.m. Present at the hearing were: George W. Pratt and Lewis M. Francis of Jones, Waldo, Holbrook & McDonough, P.C., representing Defendant, and David E. Leta, Michael R. Johnson, and David H. Leigh of Snell & Wilmer, L.L.P., representing Plaintiff. The Court has considered the pleadings with the exhibits submitted therewith, the arguments of counsel, and has conducted an independent review of applicable statutes and case law. Based thereupon, the Court issues the following Memorandum Decision, which will constitute its findings of fact and conclusions of law as required by Rule 52 of the Federal Rules of Civil Procedure.[1]

FACTS

The facts are not disputed by the parties. On December 8, 1986, Plaintiff entered into a Security Agreement Conditional Sale Contract ("First Contract") with Heidelberg West, Inc., Defendant's predecessor-in-interest,[2] whereby Plaintiff purchased one (1) Heidelberg Two Color Offset Press, 19x251/2", Model MOZ, S/N 605428 ("Model MOZ"); and one (1) 1986 Pierry IR dryer. On November 9, 1990, Plaintiff entered into a second Security Agreement Conditional Sale Contract ("Second Contract") with Heidelberg West, Inc. for the purchase of one (1) Heidelberg Speedmaster Six Color Offset Press, 28x40", Model 102S, S/N 531316 ("Model

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[1] Incorporated into the Bankruptcy Code via Bankruptcy Rule 7052.

[2] Prior to October 28, 1993, Heidelberg USA Inc., became the successor-in-interest to Heidelberg West. On or about March 14, 1995, Heidelberg USA assigned its rights under the Second Contract and all applicable amendments to Print Finance USA, a division of Heidelberg North America, Inc. Print Finance USA was then renamed as Heidelberg Print Finance Americas, Inc. Hereinafter, all of the related Heidelberg entities will be referred to as "Defendant" or "Heidelberg."

102S"). The collateral pledged to secure payment of the indebtedness was described with particularity in Schedule "A" attached thereto.[3]

In early 1991, for the purpose of facilitating Defendant's extension of credit to Plaintiff in the purchase of the Model 102S, the Small Business Administration (SBA) and West One Bank entered into a Subordination Agreement ("Subordination Agreement") with Defendant. The SBA and West One Bank agreed to subordinate their security interests, liens, and claims to any security interest, lien, or claim asserted by Defendant with respect to the Model 102S. This subordination was conditioned upon the nonexistence of any pre-existing liens or claims.

Plaintiff filed its first voluntary petition for Chapter 11 relief on February 18, 1993. Defendant timely filed a proof of claim on June 23, 1993 based on several of the goods sold under the two contracts. In order to adequately provide for Defendant's security interest, Plaintiff amended its initial September 20, 1993 plan of reorganization on November 11, 1993 ("First Amended Plan"). The First Amended Plan expressly provided that, as a Class 1 Claim, Defendant held a secured lien on one (1) Heidelberg Speedmaster Six Color Offset Press; one (1) Heidelberg Two Color Offset Press; and one (1) Heidelberg One Color Offset Press, pursuant to

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[3] Schedule "A," attached to Defendant's June 23, 1993 proof of claim, listed the following collateral as part of the Second Contract: One (1) Model 102S, with all standard equipment including Alcolor continuous dampening, blanket wash-up devices, CP Tronics, CPC 1.03 computer print control, Grafix IR dryer, Refrigeration/Recirculation Alcohol Control, Packing Gauge, perf & slitting attachment, arbide grippers, and one extra set ink rollers; One (1) Model MOZ; One (1) Heidelberg Two Color Offset Press, Model GTOZP, S/N 681096 ("Model GTOZP"); One (1) Heidelberg Six Color Offset Press, Model SORS, S/N 521347 ("Model SORS"). Although Plaintiff argued in its Complaint that Schedule "A" attached to the 2003 proof of Claim was altered, such suggestion of document alteration or modification is not a subject of this action.

the terms of the Second Contract in the amount of $800,000.[4] With respect to the treatment of Defendant's Class 1 Claim, the First Amended Plan recognized Defendant's 11 U.S.C. § 1111(b)(2) election made on October 28, 1993. In addition to the Class 1 Claim, the First Amended Plan provided that as a Class 2 Claim, Defendant held a secured lien on one (1) Heidelberg Two Color Offset Press, and one (1) Pierry IR Dryer, pursuant to the terms of the First Contract in the amount of $39,265.92.[5]

Prior to Plaintiff's plan confirmation hearing, Plaintiff and Defendant agreed to modify the First Amended Plan's treatment of Defendant's Class 1 and Class 2 Claims. The parties entered into a Stipulation Respecting Plan Treatment ("Stipulation") in which the relevant modified provisions provided that Defendant was entitled to receive the present value of its secured Class 1 Claim in the amount of $1,232,000.00, with a stream of payments to equal no less than $1,440,519.80. Defendant's Class 1 Claim would bear interest at the rate of 9.5% per annum, and be paid in ninety-six (96) monthly installments of $16,481.77, beginning in January 1994 and ending in December 2001. A single balloon payment of all remaining principal and interest would be due by January 1, 2002. Furthermore, the Stipulation indicated that the Second Contract is "adopted and incorporated by reference in the Plan,"[6] with the exception of the

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[4] The First Amended Plan did not indicate the model numbers of the presses, but the lack of clarity is immaterial to the disposition of this case.

[5] The Stipulation provided that "Class 2 will be paid in full by application of all post-petition adequate payments which have been made by the debtor to Heidelberg." Mem. Supp. Heidelberg's Mot. Summ. J. Ex. C at 5.

[6] Id. at 4.

specific payment provisions under Paragraph 2.3.1 of the Stipulation.[7] The Stipulation provided that in the event of default, "[Defendant] . . . shall be entitled to exercise all of its nonbankruptcy rights and remedies with respect to the Second Contract and the Collateral, provided, however, that the amount recoverable shall be based upon the Class 1 Claim."[8]

The Court approved the parties' Stipulation on December 21, 1993. In its Order Approving Stipulation Respecting Plan Treatment, the Court further ordered that the First Amended Plan be modified in accordance with the Stipulation. The First Amended Plan was modified accordingly, and at a hearing on December 23, 1993, the Court confirmed Plaintiff's First Amended Plan of Reorganization as Modified ("Modified Plan"). The Court's Findings of Fact, Conclusions of Law and Order Confirming Debtor's First Amended Plan of Reorganization as Modified ("Confirmation Order") was entered on February 8, 1994.

On or about July 18, 2001, Defendant's U.C.C.-3 continuation statement (the "continuation statement") that was previously filed on or about July 18, 1996 lapsed.[9] After the lapse, Plaintiff failed to remit to Defendant the final balloon payment of $270,000 by the Plan deadline of January 1, 2002. Because the effectiveness of its filed financing statement had

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[7] Paragraph 2.3.1 provided for a "Contract Time Price Balance" of $2,134,275, which is payable in ninety-six (96) payments where six (6) payments of $13,000 would be followed by ninety (90) payments of $22,847.50 beginning on April 16, 1991.

[8] Mem. Supp. Heidelberg Print Finance Americas, Inc.'s Mot. Summ. J. Ex. C at 5.

[9] Previously, Defendant assigned the first and second contracts to The CIT Group/Equipment Financing, Inc. ("CIT"), but repurchased from CIT all of CIT's rights, title, and interests, including perfection of security interests, in and to the first and second contracts. Regarding the original dates of perfection of security interest, Defendant filed a U.C.C.-1 financing statement for the property covered by the First Contract on December 16, 1986, and filed a U.C.C.-1 financing statement for the property covered by the Second Contract on December 24, 1990.

ceased, Defendant filed a U.C.C.-1 financing statement[10] ("2002 Financing Statement") on October 31, 2002 to re-perfect its security interest. The 2002 Financing Statement, which identified the Debtor as Quality Press, Inc., purported to cover "all of debtor's equipment,"[11] but did not contain Plaintiff's signature. Shortly thereafter, on November 13, 2002, the Internal Revenue Service (IRS) filed a tax lien against Plaintiff in Salt Lake County for a secured claim totaling $115,822.14.

Plaintiff filed a second voluntary petition for Chapter 11 relief ("Second Case") on December 13, 2002. The Second Case was dismissed on February 12, 2003 by the Court for Plaintiff's failure to file its statements and schedules. Plaintiff then filed its third petition for Chapter 11 relief ("Current Case") on February 25, 2003. In the Current Case, Plaintiff and Defendant entered into a Stipulation Resolving Motion of Heidelberg Print Finance Americas, Inc. for Relief from the Automatic Stay on June 9, 2003. To compensate for the depreciation of Defendant's collateral, Plaintiff agreed to pay monthly adequate protection payments in the amount of $2,700 commencing on February 25, 2003 until the Court entered an order confirming a Chapter 11 plan, or upon conversion or dismissal.

Defendant again timely filed its proof of claim in the Current Case on August 25, 2003, with an accompanying statement that asserted a security interest in one (1) Model 102S; one (1) Model GTOZP; and one (1) Model SORS. Plaintiff contested the validity of Defendant's security interest by filing a Complaint on October 16, 2003. In its Complaint, Plaintiff requested a declaratory judgment disallowing Defendant's secured claim, and argued various related causes

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[10] As opposed to a continuation statement.

[11] Mem. Supp. Heidelberg Print Finance Americas, Inc.'s Mot. Summ. J. Ex. F.

of action.

Defendant amended its proof of claim on November 20, 2003 by revising and limiting the collateral descriptions to one (1) Model 102S, and one (1) Model MOZ. Defendant also filed a Motion for Summary Judgment on January 16, 2004. In response, Plaintiff filed a Cross Motion for Summary Judgment on February 19, 2004. On March 30, 2004, the Court held a hearing on the sale of the Model MOZ pursuant to 11 U.S.C. § 363. At that hearing, Defendant agreed to the attachment of its security interest to the Muller Martini with the same priority, validity, force and effect Defendant had in the Model MOZ.[12] The parties' agreement to substitute collateral was approved by the Court in its Order dated March 31, 2004.

JURISDICTION AND LEGAL STANDARD

The Court has jurisdiction over the parties and subject matter of this proceeding pursuant to 28 U.S.C. § 1334(b) and § 157(a). This is a core proceeding under 28 U.S.C. § 157(b)(2)(B), and as such the Court has authority to enter a final order. Venue is proper in the Central Division of the District of Utah under 28 U.S.C. § 1409.

A motion for summary judgment will be granted if the pleadings and affidavits "show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law."[13] "When applying this standard, [the Court] view[s] the evidence and draw[s] reasonable inferences therefrom in the light most favorable to the nonmoving

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[12] The parties agree that the Model 102S and Model MOZ are the subject collateral in this action. However, based on the parties' March 30, 2004 agreement to substitute collateral, the subject collateral now consists of the Model 102S and Muller Martini.

[13] Fed. R. Bankr. P. 7056; Fed. R. Civ. P. 56(c).

party."[14] However, "where at pretrial, admissions and pleadings show that no issue of fact remains to be determined, the court has power to decide the questions of law and enter summary judgment thereon."[15]

DISCUSSION

The validity of the First and Second Contracts providing for Defendant's security interest, and the effectiveness of the parties' Stipulation preserving the above interests, are not contested. Therefore, resolution of the questions presented by the parties does not require a determination of factual disputes in this case. The Court must first decide whether Defendant's 2002 Financing Statement properly re-perfected Defendant's security interest in the collateral under Utah law, and if so, whether the Confirmation Order prohibited re-perfection notwithstanding. Should it be determined that Defendant's 2002 Financing Statement was proper, the Court must then address the question of whether Defendant may assert a deficiency claim against Plaintiff, and the significance of a possible change in Defendant's lien priority after lapse.

A. Signature Requirements of Financing Statements

The Utah Code adopted the Revised Article 9 of the Uniform Commercial Code ("U.C.C.") effective July 1, 2001.[16] The effectiveness of a filed record is governed by § 70A-9a-

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[14] Simms v. Oklahoma ex rel. Dep't of Mental Health and Substance Abuse Servs., 165 F.3d 1321, 1326 (10th Cir. 1999).

[15] Holcomb v. Aetna Life Ins. Co., 255 F.2d 577, 580 (10th Cir. 1958).

[16] 2000 Utah Laws 252.

510, which states that "a filed record is effective only to the extent that it was filed by a person that may file it under Section 70A-9a-509."[17] Section 70A-9a-509 sets forth the requirement of debtor authorization:

> (1) A person may file an initial financing statement, amendment that adds collateral covered by a financing statement, or amendment that adds a debtor to a financing statement only if:
> (a) the debtor authorizes the filing in an authenticated record or pursuant to Subsection (2) or (3); or
> ....
> (2) By authenticating or becoming bound as debtor by a security agreement, a debtor or new debtor authorizes the filing of an initial financing statement, and an amendment, covering:
> (a) the collateral described in the security agreement[18]

An effectively filed record will remain effective for the duration of five years after filing, and will lapse upon expiration of the statutory period.[19] If a continuation statement is not filed by the time of expiration, the lapse of the financing statement will render it *unperfected*.[20] Any security interest will be "deemed never to have been perfected as against a purchaser of the collateral for value."[21] The resulting lack of perfection due to a lapse will not impair the security interest, and the interest may be subsequently re-perfected.[22] Nevertheless, subsequent re-

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17 Utah Code Ann. § 70A-9a-510 (2003).

18 Id. § 70A-9a-509.

19 Id. § 70A-9a-515(1).

20 Id. § 70A-9a-515(3) (emphasis added).

21 Id.

22 See Frank v. Talcott, Inc., 692 F.2d 734, 737 (11th Cir. 1982) (holding that under the Florida Uniform Commercial Code, which employed language similar to Utah Code Annotated § 70A-9a-515, a lapsed financing statement does not invalidate the security interest);

perfection will only relate back to the date of re-perfection, not the original perfection, allowing for junior interests that were perfected prior to lapse to become senior to the lapsed interest.[23]

In light of the fact that lapse occurred on July 18, 2001, the parties dispute whether Defendant's attempt to re-perfect its security interest by filing the 2002 Financing Statement without Plaintiff's signature was nonetheless effective pursuant to § 70A-9a-509(2)(a), which recognizes debtor authorization stemming from a security agreement. The Court's starting point in interpreting a statute is the language itself.[24] The plain text is conclusive, absent clear legislative intent to the contrary.[25]

Plaintiff would have the Court construe the language of "initial" financing statement under § 70A-9a-509 to designate only the *original* financing statement. According to Plaintiff's argument, effective financing statements under § 70A-9a-509 would be *initial* financing

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see also Rosner v. Plaza Hotel Assocs, Inc., 370 A.2d 41, 45 (N.J. Super. Ct. App. Div. 1977) (holding that after lapse, an enforceable security interest can be re-perfected in the "same manner as if it had never been previously perfected at all"). The Court notes that although the foregoing cases were decided prior to the enactment of Revised Article 9, the application appears appropriate in light of the Court's conclusion that § 70A-9a-509 allows re-perfection.

[23] See In re Four Winds Enters, Inc., 94 B.R. 694, 697 (Bankr. S.D. Cal. 1988) (concurring with another jurisdiction's conclusion that re-perfection does not relate back to the date of original perfection for the purpose of determining a preferential transfer); see also Federal Fin. Co., v. Grady County, 988 P.2d 908, 910 (Okla. Ct. App. 1999) (supporting the retroactive effect of lapse by ruling that a secured creditor's subsequent failure to file a continuation statement resulted in the lapse of its priority of its perfected security interest).

[24] Landreth Timber Co. v. Landreth, 105 S.Ct. 2297, 2301 (1985).

[25] Schusterman v. United States, 63 F.3d 986, 989 (10th Cir. 1995); see also Lamie v. United States Trustee, 124 S.Ct. 1023, 1030 (2004) (indicating that "when the statute's language is plain, the sole functions of the courts–at least where the disposition required by the text is not absurd–is to enforce it according to its terms") (quoting Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A., 120 S.Ct. 1942 (2000)).

statements that have obtained proper debtor authorization, and, in the event debtor authorization is not in the record, those *initial* financing statements that are based on security agreements. Because Defendant's 2002 Financing Statement was arguably a "subsequent" financing statement that was filed after the "initial" financing statement of December 24, 1990, it should fall outside of the purview of § 70A-9a-509(2)(a), regardless of the parties' standing security agreement. Furthermore, Plaintiff argues, the Utah Code employs the terms "initial filing statement" and "filing statement" in different provisions and contexts, suggesting that the legislative intent was to distinguish amongst the types of financing statements.

Defendant, on the other hand, points out that the definitional section of Utah Code § 70A-9a-102 does not define "initial" financing statements, only "financing statements," which may be "a record or records composed of an initial financing statement and any filed record relating to the initial financing statement."[26] Defendant also urges the Court to consider the intent of the drafters of the Revised U.C.C.. By recognizing specific situations, the 2002 revision of the U.C.C. does not require the debtor's signature for a sufficient financing statement. The drafters of the Revised U.C.C. explained in Official Comment 4 that "authentication of a security agreement *ipso facto* constitutes the debtor's authorization of the filing of a financing statement covering the collateral described in the security agreement."[27] Defendant maintains that the drafters' intent is consistent with case law under prior versions of the U.C.C., which recognized that when a lapse occurs, "a secured party's rights in collateral would be adversely affected for no justifiable reason if the secured party was required to obtain the debtor's signature on the

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[26] Utah Code Ann. § 70A-9a-102(39) (2003).

[27] U.C.C. § 9-509, cmt. 4 (2003).

second financing statement . . . . The debtor has no motivation to sign the second financing statement because he receives no new or additional value."[28]

The Court determines that interpretation of the plain meaning of § 70A-9a-509 as suggested by Plaintiff would lead to an unreasonable result because the provisions of § 70A-9a-514 would be rendered meaningless, and a lapse would lose its retroactive effect. As discussed above, if a security interest becomes unperfected upon lapse, it is deemed never to have been perfected as against a purchaser of the collateral for value. Thus, when a lapse occurs, the original financing statement is not preserved as the "initial financing statement" at an immovable point in time. In that circumstance, an enforceable security interest may indeed be re-perfected by an "initial" financing statement, not a "subsequent" financing statement. Although the Utah Code's definitional section of § 70A-9a-102 does not include a definition of "initial financing statement," the Court does not believe that the term "initial" is surplusage, but rather acts to designate a financing statement's order in relation to amendments and continuation statements. Such construction would comport with the definitional language set forth under § 70A-9a-102(39).

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[28] In re Abell, 66 B.R. 375, 381 (Bankr. N.D. Miss. 1986); see also Buck v. United States Dept. of Agriculture, Farmers Home Admin., 960 F.2d 603 (6th Cir. 1992), In re Tebbs Const. Co., 39 B.R. 742 (Bankr. E.D. Va. 1984). The Court notes that Utah courts have not yet addressed § 70A-9a-509 of the revised Utah statutes. However, under former U.C.C. Article 9, the Court of Appeals of Utah expressly recognized the exception to the requirement that the debtor sign the financing statement under § 70A-9-402(2)(c) where a financing statement filed to reinstate a lapsed security interest is sufficient with only the secured party's signature. See Guardian State Bank v. Lambert, 834 P.2d 605, 607 (Utah Ct. App. 1992). The interpretation by the Court of Appeals of Utah comports with case law and the Official Comment to the 2000 revision of the U.C.C.

The Court is also persuaded by Official Comment 4 to U.C.C. § 9-509.[29] The Court is mindful of the fact that Official Comments to the U.C.C. are useful, but not controlling interpretations of the U.C.C..[30] Utah has not adopted the Official Comments to the Revised U.C.C.. However, the Utah Supreme Court has stated that "in interpreting provisions of our Code, we often turn to the official comments of the Uniform Commercial Code for guidance."[31] Based on the Utah Courts' recognition of the Official Comments as useful aids, the Court declines Plaintiff's request that the drafters' intention as unambiguously set forth in the Official Comments be excluded from the Court's analysis.[32] Therefore, based on the undisputed existence of a valid security agreement, the Court determines that Defendant's 2002 Financing Statemcnt filed after lapse is effective under § 70A-9a-509.

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[29] The statutory language of U.C.C. § 9-509 is identical to the statutory language of Utah Code Ann. § 70A-9a-509.

[30] Power Systems & Controls, Inc. v. Keith's Elec. Constr. Co., 765 P.2d 5, 10 n.3 (Utah Ct. App. 1988) (noting that "while the Official Comments to the U.C.C. are not entitled to as much weight as ordinary legislative history, they are 'by far the most useful aids to interpretation and construction,' promoting reasonably uniform interpretation of the code by the courts") (quoting Southern Util., Inc. v. Jerry Mandel Mach. Corp., 321 S.E.2d 508, 510 (N.C. Ct. App. 1984)).

[31] Scharf v. BMG Corp., 700 P.2d 1068, 1070 (Utah 1985); accord Keladis v. Community First National Bank, 276 B.R. 266, 270 (B.A.P. 10th Cir. 2002).

[32] The Court of Appeals of Kansas opined that the legislature's adoption of the Uniform Commercial Code without amendments can be interpreted as the legislature's intention of the provisions to be interpreted as "set forth in the official comments which were available to the legislature at that time." Rosedale State Bank & Trust Co. v. Stringer, 579 P.2d 158, 164 (Kan. Ct. App. 1978).

B. Description of Collateral in Financing Statements

Plaintiff argues that the language of Defendant's 2002 Financing Statement, claiming a security interest in "all of Debtor's equipment," does not meet the sufficiency requirements of the Utah Commercial Code (U.C.C.) because Defendant only had a security interest in some, but not all, of Plaintiff's equipment. When interpreting the U.C.C., the Court is required to look at the plain language of that statute as a starting point.[33] In discerning the plain language, the Court should assume that words will be interpreted as taking their "ordinary, contemporary, common meaning."[34] With these canons of statutory construction in mind, the Court looks to the plain language of the U.C.C. to determine whether Defendant's 2002 Financing Statement sufficiently described its interest in Plaintiff's collateral.

Subsection (1) of § 70A-9a-108[35] of the U.C.C. states that "Except as otherwise provided in Subsections (3), (4), and (5), a description of personal or real property is sufficient, whether or not it is specific, if it reasonably identifies what is described."[36] The Court notes that subsections (4) and (5), which relate to security entitlements, securities accounts, commodity accounts, commercial tort claims, and consumer transactions, are not applicable to this case. Subsection (3), however, does appear to apply in this case at first glance. It states that "[a] description of collateral as 'all the debtor's assets' or 'all the debtor's personal property' or using *words of*

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[33] Schusterman, 63 F.3d at 986, 989 (10th Cir. 1995) (citing United States v. Ron Pair Enterprises, Inc., 489 U.S. 235, 241 (1989)).

[34] Pioneer Inv. Services Co. v. Brunswick Associates Ltd. Partnership, 507 U.S. 380, 388 (1993) (citing Perrin v. United States, 444 U.S. 37, 42 (1979)).

[35] Entitled "Sufficiency of Description."

[36] Utah Code Ann. § 70A-9a-108 (2003).

similar import does not reasonably identify the collateral."[37] These super-generic descriptions[38] could represent virtually anything owned by the Debtor, and therefore they do not reasonably identify what interest the Creditor may have.[39] The question, therefore, is whether "all equipment" constitutes words of similar import.[40]

Subsection 33 of § 70A-9a-102 defines equipment as "goods *other than* inventory, farm products, or consumer goods."[41] Equipment is therefore confined to specific types of goods and does not include crops, livestock, supplies used or produced in a farming operation, or products of crops or livestock in their unmanufactured states.[42] Nor does equipment include any goods that are leased by a person as lessor; held by a person for sale or lease or to be furnished under a contract of service; furnished by a person under a contract of service; or that consist of raw

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37 Utah Code Ann. § 70A-9a-108 (2003) (emphasis added).

38 See B. Clark, The Law of Secured Transactions under the Uniform Commercial Code para. 2.9[5][c] (1980).

39 See Gulf Forge Co. v. Ellwood Quality Steels Co., 202 B.R. 238, 241 (S.D. Tex. 1996); World Wide Tracers, Inc. v. Metropolitan Protection, Inc., 373 N.W.2d 839, 842 (Minn. App. 1985) (holding that the phrase "all property" does not describe by item or type, and is therefore insufficient to perfect a security interest), aff'd 384 N.W.2d 442 (Minn. 1986); In re Fuqua, 461 F.2d 1186, 1188 (10th Cir. 1972) (holding that the phrase "all personal property" is not an acceptable description); Mogul Enterprises, Inc. v. Commercial Credit Business Loans, Inc., 92 N.M. 215, 585 P.2d 1096, 1098 (1978) ("all-inclusive, vague language such as [all assets] . . . is not sufficient to perfect a security interest"); In Re E.P.G. Computer Services Inc., 20 U.C.C. Rep. Serv. 1084, 1976 WL 23711 (S.D.N.Y. 1976) ("If the defendant's description of collateral [all present and future assets of debtor] were acceptable, it would clearly frustrate the spirit of the statute.").

40 There is no dispute between the parties that the Defendant's financing statement reads "all of Debtor's equipment."

41 Utah Code Ann. § 70A-9a-102(a)(33) (emphasis added).

42 See id. § 70A-9a-102(a)(34), defining "farm products."

materials, work in process, or materials used or consumed in a business.[43] Likewise, equipment does not include goods that are used or bought for use primarily for personal, family, or household purposes.[44] What equipment *does* include are goods that are movable when the security interest attaches.[45] Excluded from this list, however, are accounts, chattel paper, commercial tort claims, deposit accounts, documents, general intangibles, instruments, investment property, letter-of-credit rights, letters of credit, money, or oil, gas, or other minerals before extraction.[46] Being confined as such by definition under the U.C.C., the Court finds that, by interpreting the plain language of the statute, the term "all equipment" is not super-generic and therefore does not constitute "words of similar import." As a result, subsection (3) of § 70A-9a-108 does not apply to this case and the Court is required to interpret the balance of the statute to determine if Defendant's 2002 Financing Statement meets the sufficiency requirements of the U.C.C..

Subsection (2) of § 70A-9a-108 states that

> (2) Except as otherwise provided in Subsection (4), a description of collateral reasonably identifies the collateral if it identifies the collateral by:
> (a) specific listing;
> (b) category;
> (c) except as otherwise provided in Subsection (5), a type of collateral defined in this title;
> (d) quantity;
> (e) computational or allocational formula or procedure; or
> (f) except as otherwise provided in Subsection (3), any other method, if the

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43 See id. § 70A-9a-102(a)(48), defining "inventory."

44 See id. § 70A-9a-102(a)(23), defining "consumer goods."

45 See id. § 70A-9a-102(a)(33).

46 See id. § 70A-9a-102(a)(44)(e).

identity of the collateral is objectively determinable."[47]

Defendant argues that "all equipment" is a category and as such is valid. "Category" is not defined by the U.C.C., but Webster's defines category as "a division within a system of classification."[48] As stated previously, "equipment" is extensively defined by the U.C.C., in its own system of classification. As such, the Court finds that equipment is a category and therefore Defendant's 2002 Financing Statement reasonably identifies the collateral.

Plaintiff also argues that Defendant's 2002 Financing Statement is seriously misleading because it is overbroad. The Court disagrees. Section 9-502 of the Revised Article 9 states that "a financing statement is sufficient only if it: (a) provides the name of the debtor; (b) provides the name of the secured party or a representative of the secured party; and (c) indicates the collateral covered by the financing statement."[49] Official Comment 2 under §9-502 of Revised Article 9 notes that

> This section adopts the system of 'notice filing.'. . . [O]nly a simple record providing a limited amount of information (financing statement) [is required]. . . . The notice itself indicates *merely* that a person *may* have a security interest in the collateral indicated. Further inquiry from the parties concerned *will be necessary* to disclose the complete state of affairs.[50]

Section 9-502 is mirrored by Utah Code Annotated §70A-9a-502. In such instances, as discussed above, the Utah Supreme Court has stated that "[i]n interpreting provisions of our Code, we often

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47 Id. at § 70A-9a-108(2).

48 Webster's New Collegiate Dictionary 174 (1979).

49 U.C.C. § 9-502 (2004).

50 U.C.C. § 9-502, cmt. 2 (2004) (emphasis added); see infra p.12 for a discussion on the role of the Official Comments.

turn to the official comments of the Uniform Commercial Code for guidance."[51] Because the Official Comment directs that the financing statement need indicate only collateral that the creditor "may" have an interest in, and because the comment notes that further inquiry "will be necessary," the Court finds that the Defendant's 2002 Financing Statement is not overbroad and serves its purpose of noticing other parties that there is a potential interest in Plaintiff's assets. Therefore, the Court finds that the 2002 Financing Statement is not seriously misleading and conforms to the requirements of the U.C.C..

C. Injunctive Effect of the 1994 Confirmation Order

Plaintiff argues that when Defendant filed the 2002 Financing Statement, Defendant violated the injunction provided by the Confirmation Order. Defendant, in response, contends that it was free to continue the perfection of its security interest as recognized in the Confirmation Order. As the parties dispute the proper interpretation of the injunction language in the Confirmation Order, it is the "court's duty to construe the instrument so as to effectuate the manifest intention of the parties . . . ."[52]

The injunction provisions of the Confirmation Order in their entirety are as follows:

> 7. All creditors whose claims are discharged, or which are otherwise treated in the Plan, are hereby enjoined from commencing, instituting or continuing any action or employing any act, process or taking any action to collect or recover such debts as personal liabilities of the Debtor. Except as otherwise provided in the Plan, confirmation of the Plan shall operate as an injunction, applicable to all entities, against: a) the commencement or continuation of any

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[51] Scharf v. BMG Corp., 700 P.2d 1068, 1070 (Utah 1985).

[52] Harrison Western Corp. v. Gulf Oil Co., 662 F.2d 690, 694 (10th Cir. 1981) (citations omitted).

> action or proceeding against the Debtor to collect, recover or set-off a claim against the Debtor; b) any act to obtain possession of property of the Debtor; c) any act to create, perfect or enforce any lien against property of the Debtor; and d) any act by the holder of a claim to assert, declare or enforce any default arising from any secured or unsecured claim or interest. All holders of claims whose claims are discharged by this order, except as expressly provided for in the Plan, are permanently enjoined from commencing or continuing any action or proceeding or employing any process against the Debtor or the Reorganized Debtor in an attempt to obtain partial or full satisfaction of any such claim, or from enforcing or seeking to enforce any such claim or taking any steps which will lead to enforcement against the Debtor or Reorganized Debtor of any such claim, or enforcement of any such claim against any property of the Debtor or the Reorganized Debtor including, without limitation, seeking to set off against obligations owed to the Debtor or the Reorganized Debtor, or seeking to create, perfect or enforce any lien against any property of the Debtor or the Reorganized Debtor and from all other acts against the Debtor of the Reorganized Debtor or property of either, including, but not limited to, those acts described in 11 U.S.C. § 362(a).[53]

The more pertinent provisions of this paragraph of the Confirmation Order relating to the facts of this case are: "Except as otherwise provided in the Plan, confirmation of the Plan shall operate as an injunction, applicable to all entities, against . . . c) any act to create, perfect or enforce any lien against property of the Debtor."[54] The latter part of Paragraph 7 adds the following, which is also pertinent:

> All holders of claims whose claims are discharged by this order, except as provided for in the Plan, are permanently enjoined from . . . taking any steps which will lead to enforcement against the Debtor or Reorganized Debtor of any such claim, or enforcement of any such claim against any property of the Debtor or the Reorganized Debtor including . . . seeking to create, perfect or enforce any lien against property of the Debtor or Reorganized Debtor . . . .[55]

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[53] Mem. Supp. Heidelberg's Mot. Summ. J., Ex. E at 10.

[54] Id.

[55] Id.

From the foregoing, the Court determines that the Confirmation Order created two separate injunctions: 1) that relating to property of the Debtor and 2) that relating to discharged claims of creditors against the Debtor or Reorganized Debtor. It is noteworthy that Plaintiff specifically defined the terms"Debtor" and "Reorganized Debtor" in Paragraph 7. Plaintiff limited the first type of injunction against property of the "Debtor," while the second type of injunction related to discharged claims against either the "Debtor or the Reorganized Debtor." As seen in the definitional section of the First Amended Plan, "Debtor" is defined as "Quality Press, Inc." while the "Reorganized Debtor" is defined as "Quality Press, Inc., after confirmation of the Plan."[56] This definitional distinction is significant in reviewing the applicability of the injunction.

Paragraph 3 of the Confirmation Order "vests all of the property of the estate in the 'Reorganized Debtor.'"[57] Paragraph 2 of the Confirmation Order provides that "the Court shall retain jurisdiction as expressly provided for in the Plan, and over all property in which the 'Reorganized Debtor' has any legal or equitable interest."[58] Paragraph 2 specifically places Reorganized Debtor in quotation marks. This use of terms leads the Court to conclude that there was a specific purpose for differentiating between the "Debtor" and the "Reorganized Debtor" which this Court must recognize in this Memorandum Decision.

The Court determines that the Confirmation Order's injunction, as it pertains to

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[56] Id. at Ex. B at 3. The Court notes that the parties did not include as an exhibit Plaintiff's confirmed plan, but only the First Amended Plan. The First Amended Plan later incorporated the Stipulation and additional modifications made on the record. Id. at Ex. E at 8.

[57] Id. at Ex. E at 9.

[58] Id.

Defendant, is therefore limited to property of the "Debtor" and not property of the "Reorganized Debtor." As a practical matter, the collateral claimed by Defendant became property of the Reorganized Debtor and as a result, plainly reading the language of the First Amended Plan and the Confirmation Order, there was no injunction against Defendant and Defendant was free to either file a continuation statement before expiration or file another financing statement once the original financing statement lapsed. Accordingly, Defendant did not violate any injunction.

Even if such an injunction existed, Plaintiff argues that Defendant was enjoined from re-perfecting its lien once it lapsed. Defendant argues that 1) its authority to renew its lien was otherwise provided for in the Plan, thereby taking advantage of the exculpatory language of Paragraph 7 of the Confirmation Order; 2) that it would lead to an absurd result to construe the injunction order otherwise; and 3) that the Court must look at the intent of the Confirmation Order, which Defendant claims favors allowing re-perfection of liens already in existence at the time of confirmation.

The Court is persuaded by Defendant's argument. First, the Plan clearly provides for Defendant to retain its lien. The Stipulation between Plaintiff and Defendant of November, 1993 was incorporated into the Plan by the Confirmation Order at Paragraph 7 of the Findings.[59] Paragraph 2.1 of the Stipulation identifies Defendant as having an allowed secured claim on collateral having a value of $1,232,000.00.[60] Paragraph 2.3 of the Stipulation identifies Defendant as having a Class 1 Claim with a secured amount of $1,232,000.00.[61] Finally,

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[59] Id. at Ex. E at 4.

[60] Id. at Ex. C at 3.

[61] Id.

Paragraph 4 of the Confirmation Order provides that "property dealt with by the Plan is free and clear of all claims and interests of creditors, and equity security or interest holders, except as otherwise provided in the Plan or in this Order confirming the Plan."[62]

Taking the terms of the Stipulation and the Confirmation Order together, the Court concludes that it was the intent of the parties to treat Defendant as a secured creditor on the equipment and that such terms and provisions took it outside the "free and clear" language of Paragraph 4 of the Confirmation Order and as a result, Defendant's claims were "otherwise provided for in the Plan." Further, it was the intent of the parties to recognize Defendant's right to file financing statements that would either continue the effectiveness of the lien recognized by the First Amended Plan or to file any subsequent financing statement after the earlier U.C.C. had lapsed. This is the natural consequence of classifying Defendant as a secured creditor.

Any other reading would be render the right to allow Defendant to perfect either during the non-lapsed period or afterwards unreasonable. Once the Plan recognized a creditor as secured, that creditor should have the right to continue being a secured creditor, provided that is allowed by state law[63] and the creditor follows that law. Because the lapse of perfection does not impair the security interest, but merely causes it to become unperfected, the interest may be re-perfected after the lapse of perfection.[64] Here, Utah law allows for 1) filing of a continuation

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[62] Id. at Ex. E at 9.

[63] "The only significance by the failure to file a continuation statement was that for approximately one year [the creditor] held an unperfected security interest; plaintiffs were still indebted to [the creditor] and the collateral remained pledged to secure the indebtedness." Buck v. United States Dept. of Agriculture, Farmers Home Admin., 960 F.2d 603, 610 (6th Cir. 1992).

[64] See Frank v. Talcott, Inc., 692 F.2d 734, 737 (11th Cir. 1982).

statement before the earlier financing statement lapses,[65] and 2) filing of a financing statement after the lapsed period.[66] The Court sees no inconsistency with allowing Defendant to perfect and re-perfect its lien pursuant to Utah law and the injunction provided by the Confirmation Order. The maintaining of a lien was provided for in the Plan.

The Court concludes that the intent of the parties regarding the Stipulation, the First Amended Plan, and the Confirmation Order, was that the injunction did not forbid Defendant's perfecting its security interest whether or not the perfection lapsed.

D. Election of 11 U.S.C. § 1111(b)(2)

Plaintiff alleges that by making an "1111(b)(2) election" during Plaintiff's prior bankruptcy, Defendant's claim was rendered non-recourse. As such, Plaintiff claims that Defendant may only look to the collateral and not to Plaintiff for any deficiency. While jurists and commentators have commonly stated that § 1111(b) is one of the most complicated sections in the Bankruptcy Code,[67] the question the Court must answer here is simple: Does making an 1111(b)(2) election render a recourse creditor's claim non-recourse? The Court looks to the plain meaning of the statute to find the answer.

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65 Utah Code Ann. § 70A-9a-515.

66 Id. § 70A-9a-509; see discussion infra pp.11-12.

67 "Unfortunately, but understandably, § 1111(b) has earned a reputation for being one of the most complex provisions of the Code, both in terms of its basic tenets and in terms of its legal and practical applications in specific bankruptcy cases. Not only is § 1111(b) confusingly written, but also there is no way to "quantify" the § 1111(b)(2) election or to force it into a rigid, predetermined formula." Steven R. Haydon et al., The 1111(b)(2) Election: a Primer, 13 Bankr. Dev. J. 99, 102 (1996).

Section 1111(b)(1)(A) provides as follows:

> A claim secured by a lien on property of the estate shall be allowed or disallowed under section 502 of this title the same as if the holder of such claim had recourse against the debtor on account of such claim, whether or not such holder has such recourse, unless–
> (I) the class of which such claim is a part elects, by at least two-thirds in amount and more than half in number of allowed claims of such class, application of paragraph (2) of this subsection; or
> (ii) such holder does not have such recourse and such property is sold under section 363 of this title or is to be sold under the plan.[68]

In essence, § 1111(b)(1)(A) states that both recourse and non-recourse claims which are secured by property of the estate shall be treated as recourse claims *unless*: 1) the creditor makes an 1111(b)(2) election or 2) the property is sold pursuant to 11 U.S.C. § 363 or according to the Plan. While this section gives an extra advantage to non-recourse claimants by allowing the claim to be treated as recourse, it gives nothing to recourse claimants because their claims would, obviously, already be treated as recourse.

Section 1111(b)(2) provides that "If such an election is made, then notwithstanding section 506(a) of this title, such claim is a secured claim to the extent that such claim is allowed."[69] To put this into context, 11 U.S.C. § 506(a) separates an undersecured creditor's claim into two parts: a secured claim to the extent of the *value* of its collateral; and an unsecured claim for the balance of its claim. Thus, by making an 1111(b)(2) election, Defendant by-passed the general rule of § 506(a) and instead afforded itself the right to "a secured claim to the extent that such claim is *allowed*." As such, Defendant holds a lien for the full amount of the allowed claim, as opposed to the value of the claim.

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[68] 11 U.S.C. § 1111(b)(1)(A) (2004).

[69] 11 U.S.C. § 1111(b)(2).

Nowhere in §1111(b) does the statute say that, by making the 1111(b)(2) election, a recourse creditor is converted to a non-recourse creditor. To the contrary, § 1111(b)(1)(A) states only that by making the election, a *non-recourse* creditor loses its extra advantage of being treated as a recourse creditor. Interpreting statutes by their plain language does not permit the Court to read extra language into the provisions. Therefore, the Court finds that Defendant, which began as a recourse creditor, remained a recourse creditor after making the 1111(b) election in the Debtor's prior bankruptcy. As such, Defendant held a lien in the allowed amount of $1,232,000.00[70] as of the confirmation date or such other amount as may be now due after application of prior payments, against both the collateral and Plaintiff, and not solely the collateral.

E. Subordination

Plaintiff argues that irrespective of the validity of Defendant's 2002 Financing Statement, Defendant lost its lien priority on the Model 102S due to the lapse of its financing statement. Plaintiff contends that the value of the collateral is less than the claims of creditors with interests now allegedly senior to Defendant, and therefore, there is no equity in the collateral with which to secure Defendant's claim. The parties dispute the proper interpretation of the terms of the Subordination Agreement, with Defendant alleging that Plaintiff lacks standing to make an assertion that more appropriately belongs to the Small Business Administration ("SBA").

Rule 19 of the Federal Rules of Civil Procedure provides that a necessary party must be

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[70] As allowed pursuant to the Stipulation Respecting Plan Treatment, which was approved by the Court on December 21, 1993.

joined as a party if joinder is feasible:

> (a) A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in the person's absence complete relief cannot be accorded among those already parties, or (2) the person claims an interest relating to the subject of the action and is so situation that the disposition of the action in the person's absence may (I) as a practical matter impair or impede the person's ability to protect that interest, or (ii) leave any risk of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest.

If joinder of a necessary party is not feasible, the court may dismiss the claim.[71]

The Court determines that, as parties to the Subordination Agreement who should be accorded the ability to protect their interests under the Agreement, lienholders West One Bank and the SBA are necessary parties under Rule 19(a). Neither Plaintiff nor Defendant elected to join West One Bank or the SBA; and neither party has alluded to the feasibility of joinder. Therefore, the Court will not determine the issue of subordination without the inclusion of those necessary parties in this adversary proceeding.

CONCLUSION

The Court determines that Defendant's 2002 Financing Statement properly perfected Defendant's security interest in the collateral under Utah law. The Court further determines that the injunction under the Confirmation Order did not prevent Defendant from re-perfecting its security interest after lapse. Defendant retains a lien on the collateral to the extent the Stipulation so provides and in the Current Case, it may pursue a deficiency claim against Plaintiff should

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[71] Davis ex rel. Davis v. U.S., 343 F.3d 1281, 1289 (10th Cir. 2003).

such exist after either any valuation hearing and determination of value or upon any liquidation of the collateral as the case may be.

For the reasons set forth above, it is hereby

ORDERED, that the Defendant's Motion for Summary Judgment is GRANTED; and it is further

ORDERED, that Plaintiff's Cross Motion for Summary Judgment is DENIED.

Counsel for Defendant is directed to prepare an appropriate judgment consistent with the terms of the Memorandum Decision.

DATED this 8th day of April, 2004.

WILLIAM T. THURMAN
United States Bankruptcy Judge

CERTIFICATE OF MAILING

I hereby certify that I mailed a copy of the foregoing Memorandum Decision on Defendant's Motion for Summary Judgment and Plaintiff's Cross Motion for Summary Judgment to the following on the 28th day of April, 2004:

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