The below described is SIGNED.

(kn)

Dated: January 28, 2005

GLEN E. CLARK
U.S. Bankruptcy Judge

Dated January 28, 2005

Glen E. Clark, Chief Judge
United States Bankruptcy Court

IN THE UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF UTAH

In re EQUITY TRADER-1, LLC, Debtor,	Bankruptcy Case No. 02-30135 GEC Chapter 11
EQUITY TRADER-1, LLC, an Idaho limited liability company, Plaintiff, v. DAN COX, an individual; BRIAN CANNELL, an individual; HILLYARD ANDERSON & OLSEN, a Utah partnership corporation; and EMCC, INC, a Delaware corporation, Defendants.	Adversary Proceeding No. 02-2472 ORDER GRANTING, PARTIAL SUMMARY JUDGMENT, DENYING PARTIAL SUMMARY JUDGMENT, and ORDER DENYING MOTION FOR SUMMARY JUDGMENT

The motion of the Debtor, Equity Trader-1, LLC, ("Equity Trader"), for partial summary judgment against Dan Cox, and the second motion for summary judgment of Cannell, and Hillyard Anderson & Olsen came before the Court on September 28, 2004 and October 22, 2004. Mona Lyman Burton and Sherilyn Olsen of Holland & Hart LLP appeared in behalf of Equity Trader, William G. Marsden of Prince, Yeates & Geldzhler appeared in behalf of Dan Cox and Michael F. Skolnick of Kipp and Christian, P.C. appeared in behalf of Brian Cannell and Hillyard Anderson & Olsen. After considering the pleadings and argument of counsel, the Court rules as follows:

FACTS

1. Equity Trader is an Idaho limited liability company that was in the business of collecting consumer account debt which it purchased at a discount.
2. EMCC, Inc., a Delaware corporation ("EMCC") is a secured creditor of Equity Trader claiming a two million one hundred thousand dollar lien on Equity Trader's accounts receivable. EMCC is also Equity Trader's agent for collection of consumer account debt.
3. Prior to the bankruptcy filing, Lance Henderson ("Henderson") was the exclusive member and manager of Equity Trader.
4. For the most part, the consumer accounts purchased by Equity Trader were generated by one or more Hague Quality Water franchises which sold water purification systems to consumers.
5. Equity Trader purchased consumer accounts with funds it raised from its investors.
6. Dan Cox ("Cox") was one of those investors.

7. Equity Trader maintained an operating account ("Operating Account") and a capital account ("Capital Account") at Lewiston State Bank in Logan, Utah.

8. Equity Trader deposited and commingled all investors' funds into the Capital Account.

9. Equity Trader used funds in the Capital Account to purchase additional consumer accounts.

10. The commingled investor funds were not used to purchase specific consumer accounts for specific investors, but were used to purchase consumer accounts for Equity Trader generally.

11. All payments received from collections of consumer accounts were deposited into Equity Trader's Operating Account.

12. Equity Trader would pay Equity Trader's operating expenses and issue interest payment checks to the investors from its Operating Account.

13. If there was not enough money in the Operating Account to meet its payment obligation to an investor, Equity Trader would pay that obligation by transferring funds from the Capital Account to Equity Trader's Operating Account.

14. Equity Trader's larger investors included, among others, Cox, Clyne Long, Bruce Henderson, Bob Holbrook and John Tippitts.

15. Henderson and Cox met in 1997 or 1998 when Henderson moved into Cox's neighborhood.

16. Cox placed money with Equity Trader in April of 2000.

17. Cox placed the principal amount of $402,218.70 with Equity Trader. Later, Cox purchased a portion of another individual's placement in the amount of $50,000, for a total placement with Equity Trader of $452.218.70.

18. Cox made most of his placements by means of checks issued to Equity Trader from his personal bank account.

19. On the checks, Cox described his payments to Equity Trader as investments and not as purchases.

20. Upon making his second placement, Cox on or about June 29, 2000, received a letter of understanding (the "Cox Agreement") from Equity Trader.

21. Although the Cox Agreement provided for a rate of return to Cox of 35%, Equity Trader actually paid him a return above 35%, as a bonus for referring other investors.

22. All investors, including Cox, were paid interest at a flat rate and not based on the performance of specific consumer accounts.

23. The Cox Agreement did not identify which consumer accounts would be purchased by or assigned to Cox.

24. The Cox Agreement provided that Equity Trader guaranteed payment of assigned notes.

25. At Cox's request, on September 21, 2001, Lisa Burns, an Equity Trader employee, sent by facsimile, a list of consumer accounts that were purportedly assigned to Cox ("September Fax").

26. The September Fax contained the words "For information only - Not a Legal Document" on the bottom of the consumer account list.

27. Almost immediately after receiving the September Fax, Cox determined that a number of accounts listed on it were "non-performing."

28. Within 72 hours after receiving the September Fax, Cox contacted Henderson and demanded that the "non-performing" accounts listed on the September Fax be replaced with "performing" accounts.

29. Cox also contacted Ms. Burns after receiving the September Fax.

30. On November 20, 2001, Becky James, an Equity Trader employee, generated another list of consumer accounts that were purportedly assigned to Cox. Becky James sent by facsimile, the newly generated list of consumer accounts to Cox on November 21, 2002 ("November Fax").

31. The November Fax contained the words "For information only - Not a Legal Document" on the bottom of the consumer account list.

32. In the later part of 2001, Henderson became concerned that the Securities Exchange Commission ("S.E.C.") would seize the Equity Trader consumer accounts.

33. On December 19, 2001, Henderson held a meeting at Equity Trader's offices with Bob Holbrook, Bruce Henderson, and Cox.

34. Cox invited attorney Brian Cannell ("Cannell") of Hillyard, Anderson & Olsen ("Hillyard") to the December 19, 2001 meeting.

35. Cannell is a shareholder at Hillyard Anderson & Olsen, P.C..

36. On a personal basis, Cannell had met and associated with Bob Holbrook, Henderson, Bruce Henderson, and Cox at church.

37. As an attorney at Hillyard Anderson & Olsen, Cannell had previously represented Henderson, Bruce Henderson and Cox on various matters unrelated to Equity Trader.

38. Henderson, in his affidavit, states that: "Based on my previous relationship with Mr. Cannell, I believed that he would be providing advice to me, Equity Trader, and the others present at the meeting."

39. A second meeting took place between the parties on December 19, 2001. During both meetings, Bob Holbrook, Henderson, Bruce Henderson, and Cox discussed forming a new business, Northern Finance Exchange ("Northern Finance").

40. Bruce Henderson, Bob Holbrook, Kent Henderson, and Cox signed the Articles of Organization for Northern Finance and the intended members of Northern Finance gave the Articles of Organization to Cox to file with the State of Utah.

41. Cox never filed the Articles of Organization for Northern Finance with the State of Utah.

42. Because of a concern that the S.E.C. might seize the consumer account documents, Bob Holbrook, Henderson, Bruce Henderson, and Cox agreed to remove Equity Trader's consumer account documents from Equity Trader's office and store them at another location.

43. Bruce Henderson, Bob Holbrook, and Cox disagreed as to where the consumer account documents should be stored.

44. In order to resolve various concerns regarding where to store the consumer account documents, Henderson suggested storing the documents at Cannell's office.

45. Bob Holbrook, Henderson, Bruce Henderson and Cox agreed to store the consumer account documents at Cannell's office.

46. The consumer account documents were delivered to Cannell's office on December 19, 2001.

47. At the time the consumer account documents were delivered to Cannell's office, Cannell assured Bob Holbrook, Henderson, Bruce Henderson and Cox that it would take either a subpoena or a warrant for the S.E.C. to get the consumer account documents.

48. Between December 19 and December 23, 2001, in consultation with Cannell, Cox removed certain consumer account documents from Cannell's office.

49. Cannell did not ask Equity Trader, Bob Holbrook, Henderson, or Bruce Henderson if they objected to Cox removing certain consumer account documents from Cannell's office.

50. On or about December 22, 2001, Cox went to Henderson's home and presented him with an asset purchase agreement ("First Asset Purchase Agreement"). Henderson did not sign the First Asset Purchase Agreement.

51. Henderson wanted to make certain changes to the First Asset Purchase Agreement, so he made revisions which were reflected in a second asset purchase agreement ("Second Asset Purchase Agreement").

52. The Second Asset Purchase Agreement had an Exhibit A attached to it which was supposed to describe the accounts to be assigned to Cox. Exhibit A was not filled in.

53. Exhibit A to the Second Asset Purchase Agreement has never been completed and Cox has never signed the Second Asset Purchase Agreement.

54. On December 24, 2001, Bob Holbrook and Bruce Henderson retrieved the remaining Equity Trader consumer account documents from Cannell's office.

55. When asked by Bob Holbrook and Bruce Henderson if all of Equity Trader's consumer account documents were in the boxes, Cannell replied "Here's all I have."

56. Cannell admits that his statement to Bob Holbrook and Bruce Henderson was misleading.

57. The boxes of documents retrieved on December 24, 2001 were taken from Cannell's office to Equity Trader's office, where they were inventoried, and where it was discovered that a number of the consumer account documents were missing.

58. On his 2000 tax return, Cox reported interest income from Equity Trader in the amount of $32,914.00. Cox has not amended his tax returns.

59. From and after his first placement with Equity Trader, Cox received a total of $116,801.89 in payments from Equity Trader from the commingled funds in Equity Trader's Operating Account.

60. In addition, Cox received $3,750.00 from Henderson and payment in kind in the amount of $325.00.

61. The payments made by Equity Trader to Cox did not correspond with the actual performance of the accounts purportedly owned by Cox.

62. Also at Cox's request, Equity Trader repaid $35,000.00 of Cox's principal investment.

63. In January of 2002, litigation was commenced by a number of investors against Equity Trader in the First Judicial District Court of Cache County, Utah.

64. On January 17, 2002, an Order was entered by the First Judicial District Court of Cache County, Utah ("Receivership Order") which, among other things appointed ETE, LLC as the Receiver for Equity Trader.

65. The Receivership Order restrained Henderson from paying out, assigning, or delivering any of the property, moneys or effects of Equity Trader to any other person and from encumbering the same.

66. The Receivership Order also provided ETE, LLC with authority to control and maintain all Equity Trader accounts, and to reclaim and take hold of all property of Equity Trader for the benefit of creditors.

67. On February 28, 2002, Cox filed a UCC-1 financing statement against the consumer accounts removed by Cox from Cannell's office between December 19 and 23, 2001, and

the consumer accounts identified in the September Fax (collectively referred to as the "Disputed Accounts").

68. Cox claims an ownership interest in the Disputed Accounts.

69. The UCC-1 financing statement includes consumer accounts which Cox does not have in his possession.

70. Cox did not ask ETE, LLC for authority to file the financing statement against the Disputed Accounts, and Cox filed the UCC-1 without the authority of ETE, LLC.

71. The damages Equity Trader seeks to recover from Cannell and Hillyard are attorney's fees and costs incurred in this adversary proceeding.

72. Cox has not interfered or attempted to interfere with EMCC's attempts to collect the consumer accounts.

73. The report of Leslie Randolph states that in her professional opinion: "There was no attorney client relationship between Equity Trader-1 and Cannell or his law firm."

74. Equity Trader filed a voluntary petition under Chapter 11 on June 19, 2002.

ANALYSIS

Equity Trader seeks partial summary judgment against Cox. Cannell and Hillyard seek summary judgment against Equity Trader. A party seeking summary judgment always bears the initial responsibility of informing the court of the basis for its motion, and identifying those portions of the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, which it believes demonstrate the absence of a genuine issue of material fact. The burden on the moving party may be discharged by showing, that is, pointing out to the court that

there is an absence of evidence in the nonmoving party's case. Where the nonmoving party will bear the burden of proof at trial on a dispositive issue, that party must go beyond the pleadings and designate specific facts so as to make a showing sufficient to establish the existence of an element essential to that party's case in order to survive summary judgment. Celotex Corp. v. Catrett, 477 U.S. 317 (1985). The purpose of a summary judgment hearing is to determine whether there is evidence to support a party's factual claims. Unsupported conclusory allegations do not create a genuine issue of fact. To withstand summary judgment, the nonmoving party must come forward with specific facts showing that there is a genuine issue for trial. In re Grandote Country Club Company, LTD., 252 F.3d 1146, 1150 (10th Cir. 2001). The nonmovant must establish, at a minimum, an inference of the existence of each element essential to the case. Boykin v. ATC/VanCom of Colo., L.P., 247 F.3d 1061, 1065 (10th Cir. 2001).

A. Equity Trader's Motion for Partial Summary Judgment

In support of its motion for partial summary judgment, Equity Trader argues:

1) Cox was not assigned the Disputed Accounts;

2) Cox is not the owner of the Disputed Accounts;

3) Cox is not a perfected secured creditor in the Disputed Accounts;

4) Cox is liable for conversion for taking possession of certain consumer accounts without authority from Equity Trader; and

5) Cox's taking possession of the consumer accounts and the purported UCC-1 lien are voidable as fraudulent transfers under 11 U.S.C. § 544 and U.C.A. § 35-6-1 et seq..

Cox responds to Equity Trader's motion for partial summary judgment arguing that the Cox Agreement, the September Fax, the November Fax, Cox's taking possession of the consumer

account documents in December 2001, the First and Second Asset Purchase Agreements, and Cox's UCC-1 filing, either separately or in any number of combinations, make Cox an assignee of the Disputed Accounts, the owner of the Disputed Accounts, or a creditor who is secured by the Disputed Accounts.

Equity Trader's motion for partial summary judgment can be addressed by focusing upon the following issues:

1) The Cox Agreement - The Cox Agreement, by itself, is insufficient as a matter of law to support an assignment, sale, or transfer of consumer accounts in favor of Cox, and is insufficient to support a secured indebtedness in favor of Cox. The Cox Agreement provides that Equity Trader retain the risk of collection on the consumer accounts, it provides that Cox's rights to the consumer accounts are extinguished upon final payment of the debt. The Cox Agreement does not identify which consumer accounts would to be assigned, purchased, or used to secure an interest in favor of Cox. The Cox Agreement refers to Cox as an investor and not as a purchaser. Cox was not compensated based on the performance of any specific accounts, but instead was compensated with interest payments calculated at a fixed rate. In addition, Cox treated the payments as interest income on his personal tax. Cox is neither an assignee, an owner, or a secured creditor with respect to the disputed account by virtue of the Cox Agreement alone.

2) The September Fax and the November Fax - The September Fax and the November Fax, as a matter of law, are insufficient to complete an assignment, sale, or transfer of consumer accounts in favor of Cox, and are insufficient to secure an indebtedness in favor of Cox because both the September Fax and the November Fax contain the words "For information only - Not a Legal

Document", on the bottom of the consumer account list. The fax documents speak for themselves. They are without legal effect.

3) Cox's Physical Possession of the Consumer Account Documents - Conversion - The facts surrounding Cox's taking physical possession of certain consumer account documents in December 2001 are disputed. Because the facts concerning whether or not Cox took possession of the accounts with the permission and authority of Equity Trader are in dispute, summary judgment on this issue is not possible.

4) The First and Second Asset Purchase Agreements - Cox's claim of ownership of the consumer accounts by virtue of the First Asset Purchase Agreement or the Second Asset Purchase Agreement must fail. Neither of the asset purchase agreements were ever signed by the parties. The First Asset Purchase Agreement is nothing more than an offer that was rejected by virtue of the Second Asset Purchase Agreement, a counter offer. The Second Asset Purchase Agreement, never having been signed, is an unaccepted counter-offer and nothing more.

Even if one of the two asset purchase agreements had been signed by both parties, neither of the asset purchase agreements identified which consumer accounts were to be purchased. The First and Second Asset Purchase Agreements are without force or effect, either alone or in combination with another document or event.

5) Cox's Financing Statement - For a financing statement to be effective, it must be backed by a security agreement. *Wes Dor, Inc.*, 996 F.2d 237, 239 (10th Cir. 1993). The Court is unable to find any document, or combination of documents, that constitute a security agreement between Cox and Equity Trader. At a minimum, Cox must produce something with language that creates or grants a security interest in identified collateral. *see Mitchell v. Shepherd Mall State Bank*, 458 F.2d

700, 703 (10th Cir. 1972)(for a security agreement to be effective it must contain language which specifically creates or grants a security interest in the collateral described). In the absence of a valid security agreement, a financing statement does not create an enforceable security interest. *Transport Equip. Co. V. Guaranty State Bank*, 518 F.2d 377, 380 (10th Cir. 1975). Cox has produced no document that leads to the logical conclusion that it was the intent of the parties that a security interest be created. *Mitchell*, 458 F.2d at 703. Without a valid security agreement, the financing statement filed by Cox is unenforceable and without effect.

6) Utah Code Annotated § 25-6-1 et seq. and 11 U.S.C. § 544 - Equity Trader seeks partial summary judgment arguing that Cox's taking possession of the consumer account documents is avoidable as a fraudulent transfer[1] under U.C.A. § 25-6-1 et seq., because when Cox took possession of the consumer account documents, Equity Trader was insolvent and did not receive reasonable equivalent value in return. Cox responds arguing that under U.C.A. § 25-6-4(1), value includes the satisfaction of an antecedent debt and that receipt of the consumer account documents satisfied the $459,000.00 antecedent debt owed to Cox. Because U.C.A. § 25-6-4(1) defines value as the satisfaction of an antecedent debt, Cox has raised an effective defense under Utah law to Equity Trader's motion for partial summary judgment under U.C.A. § 25-6-4(1). Cox status as either an investor or a lender is still a disputed fact and for that reason, summary judgment on this issue is not possible.

B) Cannell and Hillyard's Motion for Summary Judgment

[1]The Court notes that Equity Trader seeks to avoid the transfer as a fraudulent transfer but not as a preference under 11 U.S.C § 547.

In support of their motion for summary judgment, Cannell and Hillyard argue:

1) Equity Trader has failed to identify any damages allegedly caused by Cannell other than attorney fees; and

2) Equity Trader may not recover attorney fees from Cannell or Hillyard because Equity Trader would have been involved in this adversary proceedidng irrespective of any act or omission by Cannell, because Cox was entitled to possession of the Disputed Accounts documents, and because of the general rule prohibiting recovery of attorney fees in the absence of contractual or statutory provisions.

Equity Trader responds to Cannell and Hillyard's motion for summary judgment arguing that Equity Trader sought and received legal advice from Cannell at the meeting of December 19, 2004, that Cannell agreed that the consumer account documents would not be removed from his possession, and that notwithstanding Cannell's representation, Cannell allowed Cox to remove certain documents without Equity Trader's permission. Equity Trader argues that Cannell owed it a duty of care, was negligent and that the attorney fees and costs that Equity Trader has expended to recover the Disputed Accounts are the result of Cannell's negligence and/or breach of a duty of care.

Cannell and Hillyard's motion for summary judgment can be addressed by focusing upon the following issues:

1) Attorney-Client Relationship - There is a dispute with respect to the facts surrounding Cannell's representations and actions during the events of December 19, 2001, and Equity Trader's actions and beliefs during the same time period. Because of the disputed facts, and in light of *Kilpack v. Wiley, Rein & Fielding*, 37 P.3d 1130, 1139 (Utah 2001)(proper determination of whether

an implied attorney-client relationship exists hinges on whether the party had a reasonable belief that it was represented), the attorney-client relationship issue between Equity Trader, Henderson, Cannell and Hillyard cannot be resolved by summary judgment.

2) Duty of Care - Equity Trader raises numerous issues with respect to the question of whether a duty of care was owed to Equity Trader by Cannell, arguing that Northern Financial and Equity Trader were substantially the same entity, that Northern Financial was a privy of Equity Trader and therefore entitled to claim an extended attorney-client relationship, that Equity Trader was an intended beneficiary of Cannell's agreement to safe-keep the consumer account documents, and that representations were made by Cannell to lead Equity Trader into believing that it's interests would be protected. These issues involve factual disputes that preclude summary judgment.

3) Damages - Equity Trader cites to *Sanpitch Co. v. Pack*, 765 P.2d 1279, 1282 (Utah App. 1988) which supports the proposition that when the natural consequence of one's negligence is another's involvement in a dispute with a third party, then attorney fees incurred in resolving the dispute are recoverable from the negligent party as an element of damages. The Court finds *Sanpitch* to be persuasive and well reasoned. In light of *Sanpitch* and the disputed facts surrounding Cox's taking possession of the Disputed Accounts, summary judgment with respect to damages is not possible.

CONCLUSIONS OF LAW

Based on the above, the Court makes the following Conclusions of Law:

1. The Cox Agreement, by itself, did not assign the Disputed Accounts to Cox.

2. The Cox Agreement, by itself, did not transfer ownership of the Disputed Accounts to Cox by sale or transfer.

3. The Cox Agreement, by itself, is insufficient to secure an indebtedness in favor of Cox of the Disputed Accounts.

4. The September Fax is without legal force or effect, and the November Fax is without legal force or effect.

5. The First Asset Purchase Agreement is without legal force or effect.

6. The Second Asset Purchase Agreement is without legal force or effect.

7. The financing statement filed by Cox on or around February 28, 2002 is unenforceable and without effect.

8. If Cox was a lender of money to Equity Trader and not an investor, then Cox's taking possession of the consumer account documents in December 2001 was not an avoidable fraudulent transfer under U.C.A. § 25-6-1 et seq..

ORDER

Based upon the above, it is hereby:

ORDERED that Equity Trader's motion for partial summary judgment with respect to the issues disposed in paragraphs one, two, three, four, five, six, and seven of the Court's Conclusions of Law above is GRANTED, and it is further;

ORDERED that Equity Trader's motion for partial summary judgment, with respect to the issue described in paragraph eight of the Court's Conclusion of Law above, is hereby DENIED, and it is further;

ORDERED that Equity Trader's motion for partial summary judgment with respect to conversion of certain consumer account document in December 2001 by Cox is hereby DENIED, and it is further;

ORDERED that Cannell and Hillyard's motion for summary judgment is hereby DENIED.

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