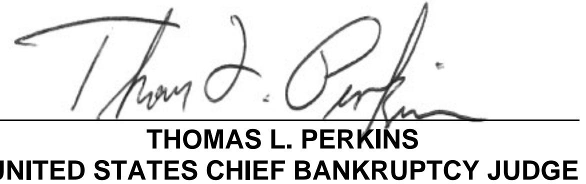
SIGNED THIS: February 26, 2007



THOMAS L. PERKINS
UNITED STATES CHIEF BANKRUPTCY JUDGE

UNITED STATES BANKRUPTCY COURT
CENTRAL DISTRICT OF ILLINOIS

IN RE:	)	
	)	
INTEGRATED AGRI, INC.,	)	**No. 01-84536**
Debtor.	)	
	)	
	)	
RICHARD E. BARBER, Chapter 7 Trustee for INTEGRATED AGRI, INC.,	)	
Plaintiff,	)	
	)	
vs.	)	**Adv. No. 03-8261**
	)	
MICHAEL W. MAULSBY, KENT A. NIXON, STEVEN L. WESTBAY,	)	
Defendants.	)	

OPINION

This matter is before the Court on the Motion for Summary Judgment filed by the Plaintiff, Richard E. Barber (TRUSTEE), Trustee for the Chapter 7 Debtor, Integrated Agri, Inc. (IAI) as to Count I, only, of the 3-count First Amended Complaint. This Court previously issued an opinion in this adversary proceeding setting forth the facts that form

the basis of the TRUSTEE'S claim. *In re Integrated Agri, Inc.*, 313 B.R. 419 (Bankr.C.D.Ill. 2004). They are briefly summarized as follows.

As of November, 1999, the stock of IAI was owned by Michael W. Maulsby, Kent A. Nixon, Steven L. Westbay (collectively the "DEFENDANTS") and Charles G. Westbay.[1] On November 30, 1999, the four entered into a Purchase Agreement whereby the DEFENDANTS agreed to buy out Charles' interest in IAI for a total sum of $549,500. The Agreement called for Charles to be paid $199,500 immediately with the balance of $350,000, plus interest, payable in monthly installments of $7,138.69. The Agreement also represents that Charles personally guaranteed certain obligations of IAI to Case Credit Corporation (CASE) and provides for the DEFENDANTS to indemnify him from any liability on those guaranties.

In their Answers, the DEFENDANTS admit the following allegation of the First Amended Complaint:

> Maulsby, Nixon and Westbay were advanced funds by Debtor (IAI) on an unsecured basis which they utilized to make the payments required by the Purchase Agreement to purchase the shares of stock of Charles. The advancements to Maulsby, Nixon and Westbay are reflected on Debtor's financial statements and tax returns as notes receivable to related parties ("Stockholder Notes").

Although the amounts were not individually specified in the First Amended Complaint, the Motion for Summary Judgment seeks judgment against Steven Westbay for $197,725 and against Maulsby and Nixon for $72,205 each.

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[1] Charles is the brother of Steven Westbay. Charles was named as a Defendant in the initial complaint. The claims against Charles were dismissed by Order entered August 4, 2004, and no new claims have been asserted against him.

Although the DEFENDANTS now claim that no promissory notes were ever signed, they do not dispute that they each borrowed funds from IAI to make the payments to Charles and that the loans have not been repaid.[2] Neither do they dispute that the amounts of the loans are $197,725 to Steven Westbay and $72,205 each to Maulsby and Nixon. It is a given that a claim for an unpaid loan owed to a debtor as of the petition date is property of the estate under Section 541(a)(1) that the Chapter 7 trustee has a duty to collect under Section 704(a)(1).

In their Answers and Responses to the Motion for Summary Judgment, the DEFENDANTS raised certain defenses that may be summarized as follows:

1. **Statute of Limitations:** That the claim is time barred.

2. **Release:** That the DEFENDANTS' liability for the loans has been validly released by CASE, the creditor that held a prepetition security interest therein.

3. **Estoppel:** That because no notes were ever signed by the DEFENDANTS, the TRUSTEE is not the holder of any notes; the theory pleaded in the First Amended Complaint is limited to a collection of notes; without signed notes, the repayment obligations are open accounts that the TRUSTEE is estopped from pursuing.

4. **Setoff:** That the DEFENDANTS are entitled to offset the amounts paid CASE in settlement of liability on their personal guaranties of IAI's debts to CASE.

5. **Abandonment:** That the TRUSTEE abandoned the loan repayment claims against the DEFENDANTS on December 31, 2001, when he filed a Notice of Partial Abandonment.

<u>Limitations</u>

______The first issue that must be addressed is the contention that the TRUSTEE'S cause of action is time-barred. The DEFENDANTS incorrectly assert the limitations provision

[2]The DEFENDANTS do not attempt to characterize the advances from IAI as anything other than loans. They do not allege, for example, that the monies received were dividends or a return of capital.

of Section 546(a), which applies only to actions under Section 544, 545, 547, 548 or 553. 11 U.S.C. § 546(a). The TRUSTEE is not exercising an avoiding power. Rather, the TRUSTEE, as successor to IAI, is asserting a contract claim that IAI held against the DEFENDANTS as of the petition date.

The time for bringing such claims is governed by Section 108(a) which provides as follows:

> If applicable nonbankruptcy law, an order entered in a nonbankruptcy proceeding, or an agreement fixes a period within which the debtor may commence an action, and such period has not expired before the date of the filing of the petition, the trustee may commence such action only before the later of–
>
> (1) the end of such period, including any suspension of such period occurring on or after the commencement of the case; or
>
> (2) two years after the order for relief.

11 U.S.C. § 108(a). A two-step analysis is required. First, it must be determined whether the applicable non-bankruptcy limitations period had expired prepetition. If so, the claim is barred. If not, the second step requires the determination of the deadline without regard to the bankruptcy filing. The claim may be timely asserted within the longer of that deadline or two years after the order for relief.

The parties agree that Illinois law provides the applicable statute of limitations. *See Cox v. Kaufman,* 212 Ill.App.3d 1056, 1062, 571 N.E.2d 1011, 1015 (Ill.App. 1 Dist. 1991) (law of forum state controls procedural questions such as limitations period). Under Illinois law, actions on unwritten contracts must be commenced "within 5 years next after the cause of action accrued." 735 ILCS 5/13-205. For actions on unwritten contracts, the 5-year period starts to run on the date of breach. *Clark v. Robert W. Baird Co., Inc.,* 142 F.Supp.2d

1065, 1075 (N.D.Ill. 2001); *Hermitage Corp. v. Contractors Adjustment Co.*, 166 Ill.2d 72, 77, 651 N.E.2d 1132, 1135 (1995). Where the breach concerns the failure to pay money, the statute begins to run when payment becomes due. *Kozasa v. Guardian Elec. Mfg. Co.*, 99 Ill.App.3d 669, 673, 425 N.E.2d 1137, 1142 (Ill.App. 1 Dist. 1981).

There is no evidence in the record as to when, if at all, DEFENDANTS' obligation arose to repay the stockholder loans. Under Section 108(a), for the TRUSTEE to have a live claim, the limitations period must not have expired before the petition date, which was October 23, 2001. So unless the breach occurred prior to October 23, 1996, the limitations period could not have expired prepetition. In fact, since the stockholder loans were not made until late 1999, there is no question that the actions were live when IAI filed its petition.

The initial complaint to collect the loans was filed by the TRUSTEE on November 14, 2003, more than 2 years after IAI's voluntary Chapter 11 petition, which constitutes the order for relief. 11 U.S.C. § 301. Although the case was converted to Chapter 7 on November 16, 2001, which constitutes an order for relief under Chapter 7, the conversion did not effect a change in the date of the initial order for relief for purposes of Section 108. *See* 11 U.S.C. § 348(a) and (b). Accordingly, since the complaint was filed more than 2 years after the applicable order for relief, the TRUSTEE gains no extension of time by operation of Section 108(a)(2) and must rely solely on the state limitations period.

So, the TRUSTEE is stuck with the rule set down by Section 108(a)(1) which means his complaint, to be timely, must have been filed within 5 years of the breach. Working backward from the filing of the Complaint, the breach must have occurred no earlier than

November 14, 1998. Since the loan was not made until late 1999, and it is impossible for the breach to have predated the loan. Therefore, no matter when the breach occurred, the TRUSTEE'S action was timely filed.

Undocumented Loans Are General Intangibles

The Court will next resolve the dispute over how the undocumented loans should be classified from a UCC Article 9 perspective. The DEFENDANTS do not dispute that they borrowed funds from IAI for the purpose of paying Charles his buyout payments. Neither do they contend that the absence of promissory notes or other written evidence of indebtedness renders the loans uncollectible or unenforceable. The DEFENDANTS assert that the asset of IAI that is their obligation to repay the loans is properly characterized as an open account. The TRUSTEE characterizes it as a particular kind of general intangible called a payment intangible. The TRUSTEE is correct.

The UCC Article 9 definition of "account" expressly excludes "rights to payment for money or funds advanced." 810 ILCS 5/9-102(a)(2). "Instrument" requires there to be a negotiable instrument or other writing that evidences the right to payment. 810 ILCS 5/9-102(a)(47). Thus the asset at issue is neither an account nor an instrument.

"General intangible" is the residual category of personal property not included in other defined categories, and includes "payment intangibles." 810 ILCS 5/9-102(a)(42). "Payment intangible" means a general intangible under which the account debtor's principal obligation is a monetary obligation. 810 ILCS 5/9-102(a)(61). The Official Comment to Section 9-102 gives the following example of general intangible: the right to payment of a loan of funds that is not evidenced by an instrument. UCC § 9-102 Comment

para. 5.d. Based on the plain language of the statute, as well as the Official Comments, it is clear that the DEFENDANTS' obligations to repay the loans are properly characterized as general intangibles.[3]

Estoppel

The DEFENDANTS assert an estoppel argument claiming that the TRUSTEE initially sued to enforce written promissory notes, not undocumented loans, and should be estopped from proceeding. Specifically, they accuse the TRUSTEE of violating the "mend the hold" doctrine, which is the wrestling-derived name of a common law doctrine that limits the right of a party to a contract suit to change his litigating position. *Harbor Ins. Co. v. Continental Bank Corp.* 922 F.2d 357, 362 (7th Cir. 1990). In *Harbor Ins. Co.*, the Seventh Circuit criticized the doctrine as embodying "an antithetical conception of the litigation process, one in which a party is expected to have all his pins in perfect order when he files his first pleading." *Id* at 364. The Seventh Circuit has also characterized the doctrine as being in conflict with the philosophy of the Federal Rules of Civil Procedure, which permit pleadings to be amended well into the litigation. *Houben v. Telular Corp.,* 309 F.3d 1028, 1036 (7th Cir. 2002).

The "mend the hold" doctrine has no applicability here. From its inception, this adversary proceeding has asserted a claim for the DEFENDANTS to pay the TRUSTEE the sums they borrowed from IAI. The initial complaint filed on November 14, 2003, in short and plain allegations, alleges as the factual basis for the claim that the DEFENDANTS were

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[3]The TRUSTEE maintains that he has never been certain whether promissory notes ever existed. The DEFENDANTS assert none did. The DEFENDANTS' factual assertion supports the TRUSTEE'S characterization of the asset as a general intangible.

advanced funds by IAI used to make the buyout payments to Charles. Those operative facts have never changed and are admitted by the DEFENDANTS.

The TRUSTEE'S legal theory has changed. The initial complaint alleged a fraudulent transfer theory. The First Amended Complaint, in Count I, noting that the advances are shown on IAI's books and records as notes receivable or stockholder notes, alleges a theory for recovery of the loans as debts owed by the DEFENDANTS to IAI collectible by the TRUSTEE for the benefit of IAI's estate.

The DEFENDANTS make too much of this change of theory as well as the TRUSTEE'S uncertainty as to whether promissory notes existed, claiming to be surprised and prejudiced. DEFENDANTS' position is disingenuous at best. The DEFENDANTS are the ones who borrowed the funds from IAI. They have known all along the true nature of the transfers and whether notes existed. Others may have been in the dark about these loans, but the DEFENDANTS were not among them. The DEFENDANTS can claim neither surprise nor prejudice with a straight face now that the true facts have come to light.

The TRUSTEE'S switch of legal theories, based on the same facts, and allowed after notice and hearing, merits nothing more than a shrug of the Court's shoulders. Under Seventh Circuit authority, since it is to be expected that details of fact and law will come out through the discovery process, pleading an incorrect legal theory is not fatal. *Bartholet v. Reishauer A.G. (Zurich),* 953 F.2d 1073, 1078 (7th Cir. 1992). The TRUSTEE is not estopped from proceeding.

What is the effect on the TRUSTEE'S rights if, as it now appears, no promissory notes were ever executed to evidence the stockholder loans? The lack of notes has no

effect. The lack of an instrument does not affect a corporation's right to collect a loan from the borrower and neither does it prevent the corporation's trustee in bankruptcy from exercising that right. *See, Stumpf v. Albracht,* 982 F.2d 275, 277 (8th Cir. 1992) (trustee in bankruptcy stands in the shoes of the debtor and succeeds to all of the debtor's assets). As a general rule, however, where the trustee seeks to assert or enforce the debtor's right of action against another, he is subject to all defenses that could have been asserted against the debtor. *In re Arter & Hadden, LLP,* 339 B.R. 445, 450 (Bankr.N.D.Ohio 2006). It is not disputed that the affirmative defense of release, if proved, is a valid defense to a claim to collect a loan.

Release and Abandonment

The Court will next address the defense of release. The TRUSTEE concedes that CASE held a valid, perfected, prepetition security interest in the general intangibles of IAI. Neither is it disputed that after obtaining modification of the automatic stay, CASE negotiated a settlement with and executed and delivered a written release to each of the DEFENDANTS. The Court must evaluate the scope of the stay relief order, the breadth of the releases, and the effect of the TRUSTEE'S non-abandonment of the stockholder loans.

Following conversion of IAI's case from Chapter 11 to Chapter 7, Richard E. Barber was appointed Chapter 7 Trustee on November 13, 2001. When IAI filed its schedules on December 17, 2001, it scheduled CASE as holding a secured claim in the amount of $744,771.44, secured by unidentified collateral with an unknown value. On schedule B, IAI scheduled personal property valued at $7,378,273.02. The DEFENDANTS' loans were not scheduled.

On December 17, 2001, CASE filed a motion for relief from the automatic stay alleging a debt of $21,033,393.45, secured by a blanket security interest in substantially all of IAI's personal property including general intangibles. The motion alleges that the security interest was perfected by the filing of UCC financing statements and that IAI had no equity in the collateral. CASE'S motion was granted without objection on January 15, 2002, by entry of an order modifying the stay to permit CASE to "exercise its rights against the collateral described in its security documents under applicable state law." The lift stay order identifies the collateral by reference to CASE'S security documents, not to IAI's schedules. Thus, the order effected stay relief as to the stockholder loans which were covered by the term "general intangibles" used in the security agreements and financing statements.

Prior to entry of the order, the TRUSTEE had filed a "partial abandonment" on December 31, 2001, whereby he abandoned all scheduled assets except money, avoidance rights, lien-free titled vehicles, income tax refunds, postpetition preconversion income and any excess attorney fee retainer. Since the stockholder loans were not scheduled, the TRUSTEE'S partial abandonment did not effect an abandonment of those assets. In general, if a debtor fails to schedule property, it is not abandoned but remains property of the estate. *Vreugdenhill v. Navistar Intern. Transp. Corp.,* 950 F.2d 524, 526 (8th Cir. 1991); *In re Haralambous,* 257 B.R. 697 (Bankr.D.Conn. 2001). A Chapter 7 trustee has a duty to abandon property encumbered by an unavoidable lien if there is no equity available for the benefit of the estate. Occasionally, if the trustee is uncertain whether an encumbered asset has equity for the estate, he will not oppose modification of the stay to allow the creditor

to liquidate the asset while, at the same time, preserving his right to the equity, if any is generated, by not abandoning the asset. Importantly, however, the creditor need only obtain stay relief to permissibly enforce its collateral interest. It is not necessary that the trustee's abandonment also be obtained in advance of enforcement.[4]

When CASE filed its lift stay motion in December, 2001, because the stockholder loans were not scheduled, the TRUSTEE was unaware of their existence. Had he known then what he knows now, that the DEFENDANTS owed IAI the loans in question, he would have abandoned those claims since CASE was grossly undersecured and its security interest covered general intangibles.[5] Since the loans were not scheduled, no abandonment occurred. However, the order entered January 15, 2002, modified the stay as to all of CASE'S collateral whether scheduled or not and whether abandoned or not. IAI's failure to schedule the stockholder loans is not CASE'S fault. To the extent CASE took action to enforce its rights and eventually settled those loans with the DEFENDANTS, after obtaining stay relief, it was not improper for it to do so.

In response to the TRUSTEE'S Motion for Summary Judgment, each of the DEFENDANTS filed an Affidavit declaring that he entered into a settlement agreement with CASE, whereby CASE released each of them from all further liability. They contend that the CASE releases covered the shareholder loans in question and that the TRUSTEE is improperly attempting to resurrect the released loans in this adversary proceeding.

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[4]A creditor's postpetition collection actions taken without first obtaining stay relief are voidable. No similar concept applies to actions taken with stay relief but without first obtaining the trustee's abandonment.

[5]Thus, Count I is a direct consequence of IAI's failure to properly schedule the stockholder loans. Had they been scheduled, Count I would never have been filed.

The TRUSTEE contends that the DEFENDANTS paid CASE to settle only their guaranty liability, not their liability on the stockholder loans. The TRUSTEE also considers it to be important that he was not a party to the settlement agreements, which were entered into postpetition. He argues that CASE "had no legal right to settle any claims" that the TRUSTEE held against the DEFENDANTS on the stockholder loans which were property of the bankruptcy estate of IAI and which, being unscheduled, were not abandoned.[6] The TRUSTEE concludes that the releases given by CASE to the DEFENDANTS are not binding on him.

The releases relied upon by the DEFENDANTS were executed long after the bankruptcy was filed, without the TRUSTEE'S knowledge and were given not by the party to whom the loans were owed, but by a creditor of that party. For the reasons set forth above, however, CASE, having properly obtained stay relief, was within its rights to execute on all of its collateral without regard to the TRUSTEE'S knowledge, participation or authorization. The TRUSTEE'S sole remaining right in the stockholder loans, retained because of the lack of abandonment due to IAI's failure to schedule the loans, was the residual right to obtain for the benefit of the estate any equity value in the loans. Since CASE was undersecured, that residual right was worthless to the TRUSTEE.

That is where this tangled tale should have ended. Unfortunately for all concerned, it does not end there. The TRUSTEE maintains that even though the stockholder loans

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[6] As President of IAI, Michael W. Maulsby signed the Declaration Concerning the Schedules that certified their accuracy. Because the stockholder loans were obviously known to Maulsby, his Declaration was false. The issue of culpability for a false Declaration is not before the Court in this proceeding.

were worthless as of August, 2004, because of CASE'S undersecured position, they reacquired potential value for the estate once CASE released its lien against the loans. The DEFENDANTS responded by raising the affirmative defense of release.

The parties dispute whether the releases given by CASE to the DEFENDANTS cover the stockholder loans. Even if it is determined that they did, the Court must also consider the effect of the release of its security interest given by CASE to the TRUSTEE following the Court's earlier Opinion in this proceeding. This consideration is necessary as the Court rejects DEFENDANTS' argument that CASE'S release of its security interest did not effect an assignment of the loans to the TRUSTEE. No such assignment is necessary. CASE never held title to the loans, only a security interest. The TRUSTEE, as successor to IAI, holds title to all of IAI's assets, if not abandoned, by operation of law.

DEFENDANTS argue that the releases clearly and unambiguously released them from their liability for repayment of the stockholder loans. Releases are construed as contracts. The applicable law is concisely summarized in *Loberg v. Hallwood Realty Partners, L.P.,* 323 Ill.App.3d 936, 753 N.E.2d 1020 (Ill.App. 1 Dist. 2001), as follows:

> A release is a contract whereby a party abandons a claim to the person against whom the claim exists. *International Insurance Co. v. Sargent & Lundy,* 242 Ill.App.3d 614, 622, 182 Ill.Dec. 308, 609 N.E.2d 842 (1993). Accordingly, the interpretation of a release is governed by contract law. *Farm Credit Bank v. Whitlock,* 144 Ill.2d 440, 447, 163 Ill.Dec. 510, 581 N.E.2d 664 (1991). Thus, the rights of the parties are limited to the terms expressed in the agreement and a release will not be construed to release claims not within the contemplation of the parties. *International Insurance Co.,* 242 Ill.App.3d at 622-23, 182 Ill.Dec. 308, 609 N.E.2d 842. The intention of the parties controls the scope and effect of the release, and this intent is discerned from the release's express language as well as the circumstances surrounding the agreement. *Carlile v. Snap-on Tools,* 271 Ill.App.3d 833, 838, 207 Ill.Dec. 861,

648 N.E.2d 317, 321 (1995). Where the terms of the release are clear and explicit, the court must enforce the release as written. *International Insurance Co.,* 242 Ill.App.3d at 623, 182 Ill.Dec. 308, 609 N.E.2d 842.

Whether a contract is ambiguous is a question of law for the trial court. *William Blair and Co., LLC v. FI Liquidation Corp.,* 358 Ill.App.3d 324, 358, 830 N.E.2d 760, 770 (Ill.App. 1 Dist. 2005).

Maulsby Release

______The release relied upon by Michael Maulsby is set forth in a Settlement Agreement with the CNH Companies including Case Corporation and Case Credit Corporation. Paragraph 7 of the Settlement Agreement, providing for mutual releases, states as follows:

> 7. **Mutual Releases.**
>
> A. Maulsby and L.C. hereby release, acquit and forever discharge the CNH Companies, their employees and representatives, from any and all liability whatsoever, including all claims, demands and causes of action of every nature that Maulsby or L.C. may have or ever claim to have arising out of any or in any manner or fashion or way related to the Credit Relationships or guaranties.
>
> B. Except for the obligation of Maulsby owing to the CNH Companies under paragraph 4 (and subject to paragraphs 4.A and 6 hereof), the CNH Companies release, acquit, and forever discharge Maulsby from any and all liability whatsoever, including all claims, demands and causes of action of every nature that the CNH Companies may have or ever claim to have arising out of or in any manner or fashion related to the Credit Relationships.
>
> These releases are intended to be as broad and as inclusive as possible and cover all matters. The releases by the CNH Companies apply and extend to (i) the spouse of Maulsby and (ii) all obligations that Maulsby, Maulsby's spouse, or an entity in which Maulsby owned eighty percent (80%) or more of the beneficial ownership on or before September 1, 2002 (including LC), may owe or be claimed to owe to Power Pro or IAI. Persons and entities in whose favor the releases are executed shall be considered to be third party beneficiaries to this Agreement.

The "Credit Relationships" referred to is a term defined in the Settlement Agreement as follows:

> Power Pro, IAI, and their affiliates, on the one hand, and the CNH Companies, on the other hand, were parties to sales and service agreements, dealer agreements, franchise agreements, floor plan arrangements, and documents associated with the foregoing, including but not limited to notes, security agreements, financing statements, and forbearance agreements (collectively, the "Credit Relationships"). Maulsby executed various guaranties with respect to the Credit Relationships.

The TRUSTEE argues that the language of the Maulsby Settlement Agreement shows that Maulsby was released only from his obligations to CASE as guarantor of sums due from IAI and its subsidiaries. The Court disagrees. CASE had a security interest in IAI's general intangibles, including Maulsby's obligation to IAI for his stockholder loan. The scope of the release covers all claims "arising out of or in any manner or fashion related to the Credit Relationships." The Credit Relationships include "security agreements." A claim to enforce a collateral interest in an asset of IAI is one "arising out of" or "related to" the Credit Relationships. In addition, the Agreement provides that the "releases . . . apply and extend to . . . all obligations that Maulsby . . . may owe to IAI."

In this Court's opinion, the Maulsby Settlement Agreement clearly and unambiguously releases Maulsby from any further liability on his stockholder loan. Since CASE had properly obtained stay relief, it had the power to release Maulsby when the Settlement Agreement became effective. IAI would have been bound by the release and, therefore, so is the TRUSTEE. The release of lien that CASE subsequently executed for the purpose of according the TRUSTEE standing to sue to collect the stockholder loans is meaningless as to Maulsby. Having previously settled and released the loan due IAI from

Maulsby in the Maulsby Settlement Agreement, there was nothing left for CASE to release thereafter. The subsequent release of lien is simply a nullity as to Maulsby.

Westbay Release

______Steven Westbay also alleges the defense of release, attaching to his response his own Settlement Agreement with CASE, dated as of August 22, 2002. The Westbay release provision states, in material part, as follows:

> Effective upon receipt of $35,000.00 in cash or immediately available funds (the "Funds"), Case Companies hereby forever release, discharge, and acquit Westbay from liability on the Guaranty or other claim arising from the Case Companies' financial dealings with Borrowers . . . .

The term "Borrowers" is defined in the Agreement to include IAI and four related corporations. If the release language was limited to a release of Westbay's liability on the Guaranty, the TRUSTEE would be correct that the scope of the release does not encompass the stockholder loans. The language is not so limited, however. The release extends to any "other claim arising from the Case Companies' financial dealings" with IAI. Since CASE had a security interest in the stockholder loans to secure the credit it extended to IAI and, therefore, a claim against Westbay for collection of the loan, that claim necessarily arose from CASE'S financial dealings with IAI, one of the Borrowers.[7]

The Westbay release clearly and unambiguously releases Westbay from any further liability for his stockholder loan from IAI. Similar to Maulsby's, the Westbay Settlement Agreement was entered into before CASE gave the lien release to the TRUSTEE. CASE'S subsequent release of lien is a nullity as to Westbay. Therefore, Westbay's defense of

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[7] Another way to say it is that but for its loans to IAI, CASE would not have had a claim against Westbay for payment of his stockholder loan.

release is a valid defense to the TRUSTEE'S claim against Westbay for collection of his stockholder loan.

Nixon Release

______Kent Nixon is in a different situation. He also entered into a Settlement Agreement with CASE, but not until December 8, 2004. The Nixon Settlement Agreement contains mutual release language similar to that of the Maulsby Settlement Agreement. For the same reasons, the Court finds that that language is broad enough to release Nixon from any further liability on his stockholder loan. After receipt of certain payments, CASE gave Nixon a second release in a document entitled Settlement Agreement/Release dated September 21, 2006.

As recognized by Nixon in his response to the TRUSTEE'S motion for summary judgment, the releases he obtained from CASE came after CASE had already released its lien against the stockholder loans on August 25, 2004. Characterizing the timing issue as problematic but not fatal, Nixon contends that the stockholder loans are "accounts" that were scheduled by IAI and abandoned by the TRUSTEE. For the reasons stated earlier, the loans are general intangibles that were not disclosed by IAI on its bankruptcy schedules and not abandoned by the TRUSTEE.

When CASE released its lien against the loans in August, 2004, the loans were property of the estate subject to the TRUSTEE'S unabandoned interest. The TRUSTEE argues that the release of lien operated to unencumber the asset leaving the TRUSTEE free to collect it pursuant to Section 704(a)(1). The Court agrees that, contrary to Nixon's contention, no assignment from CASE to the TRUSTEE was necessary in order to vest the

TRUSTEE with that right. He already possessed the right by operation of law via his status as Chapter 7 Trustee.

But the Court is of the opinion that it must step back and take a big picture view of the effect of CASE'S release of its lien against the stockholder loans. In accordance with this Court's earlier opinion, CASE executed that release of lien on August 25, 2004. Its purpose was to provide the TRUSTEE a basis to proceed to collect the stockholder loans, by getting around the problem that the loans were CASE'S collateral.

At the time of the earlier Opinion, this Court was unaware that CASE was negotiating a settlement with each of the DEFENDANTS of their personal liability. The Court was also unaware that the TRUSTEE did not dispute that CASE held an unavoidable security interest in general intangibles including the stockholder loans. The Court was disconcerted by CASE'S ambivalence toward its interest and the TRUSTEE'S apparent willingness to liquidate a secured creditor's collateral. To the Court, the TRUSTEE and CASE made strange bedfellows.

The Court now has a better understanding of what transpired and why. Without taking into consideration their liability for the stockholder loans, the DEFENDANTS were already on the hook to CASE for a large unsecured deficiency balance that likely exceeded their combined net worths. CASE had no use for the extra liability of the DEFENDANTS on the loans; it didn't add anything to what CASE already had, which was the right to compel each DEFENDANT to fork over the totality of their nonexempt assets. So, to CASE, its security interest in the DEFENDANTS' debts to IAI for the stockholder loans was worthless.

As of August, 2004, CASE was negotiating with the DEFENDANTS for a blanket resolution of their personal liability to CASE. When the Court's Opinion and Order came down on August 4, 2004, conditioning the TRUSTEE'S continued prosecution of the claims to collect the loans on a release of CASE'S security interest, CASE had nothing to lose and everything to gain by granting the release. With a large unsecured deficiency balance, CASE is likely to hold the largest unsecured claim against IAI and will receive the largest distribution from the assets of the estate. Why wouldn't CASE want to enable the TRUSTEE to proceed with a cause of action to collect an asset of IAI, even though that asset was subject to CASE'S lien and, therefore, not available to the TRUSTEE?

It is clear that the settlement agreements between the DEFENDANTS and CASE were intended to be comprehensive. By paying CASE to settle their liability on their personal guaranties, as well as CASE'S interest in any and all assets of IAI that were its collateral, the DEFENDANTS bought their peace to that extent. Releasing its lien on the stockholder loans while at the same time negotiating comprehensive settlements with the DEFENDANTS, allowed CASE, in effect, to unfairly manipulate the process, exposing the DEFENDANTS to double liability for the loans. Furthermore, it is only Nixon who stands to suffer that result because of the bad luck of having his settlement with CASE postdate the release of its lien.

If the stockholder loans had been properly scheduled, the TRUSTEE would have rightfully abandoned them in December, 2001. Under the circumstances as they have now come to light, it is neither fair nor just that Nixon, and he alone, should suffer the adverse financial consequences of IAI's error. If the Court had been aware of these circumstances

in 2004, it would not have permitted the TRUSTEE to proceed on these claims even with a release of lien from CASE. Justice requires that it not do so now. Count I shall be dismissed. In light of this ruling, it is not necessary to address the DEFENDANTS' defense of setoff.

Conclusion

______There is no material question of fact with respect to the validity and timing of the releases relied upon by Maulsby and Westbay. Those releases defeat the TRUSTEE'S claims under Count I against them. Although, the releases given by CASE to Nixon came after CASE released its lien against the stockholder loans, the interests of justice require the lien release to be disregarded. So Nixon's release from CASE also defeats the TRUSTEE'S claim under Count I. The TRUSTEE'S Motion for Partial Summary Judgment will be DENIED.

This Opinion constitutes this Court's findings of fact and conclusions of law in accordance with Federal Rule of Bankruptcy Procedure 7052. A separate Order will be entered.

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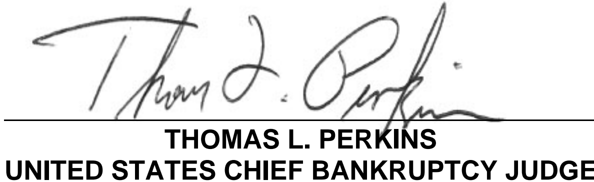
IT IS SO ORDERED.

SIGNED THIS: February 26, 2007



THOMAS L. PERKINS
UNITED STATES CHIEF BANKRUPTCY JUDGE

UNITED STATES BANKRUPTCY COURT
CENTRAL DISTRICT OF ILLINOIS

IN RE:	)	
	)	
INTEGRATED AGRI, INC.,	)	**No. 01-84536**
Debtor.	)	
	)	
	)	
RICHARD E. BARBER, Chapter 7 Trustee for INTEGRATED AGRI, INC.,	)	
Plaintiff,	)	
	)	
vs.	)	**Adv. No. 03-8261**
	)	
MICHAEL W. MAULSBY, KENT A. NIXON, STEVEN L. WESTBAY,	)	
Defendants.	)	

O R D E R

For the reasons stated in an Opinion entered this day, IT IS HEREBY ORDERED that the Plaintiff's Motion for Summary Judgment on Count I of the First Amended Complaint is DENIED and Count I is dismissed with prejudice.

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