UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF NEW YORK

IN RE:

THE BENNETT FUNDING GROUP, INC.	CASE NO. 96-61376
BENNETT RECEIVABLES CORPORATION	96-61377
BENNETT RECEIVABLES CORPORATION II	96-61378
BENNETT MANAGEMENT AND DEVELOPMENT CORPORATION	96-61379
	Chapter 11
Debtors	Jointly Administered

APPEARANCES:

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Hon. Stephen D. Gerling, Chief U.S. Bankruptcy Judge

MEMORANDUM-DECISION, FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER

This matter is before the Court by way of an Order to Show Cause, dated June 5, 1997. Metrobank, N.A. ("Metrobank") requests limited discovery of employees of The Bennett Funding Group, Inc. ("Debtor" or "BFG") and/or the trustee, Richard C. Breeden ("Trustee"), regarding the places of business of the Debtor and the Debtor's use of the trade name "Aloha Leasing"; an extension of time to file reply declarations and a pre-hearing brief, and a limited adjournment of an evidentiary hearing ("Evidentiary Hearing") on its motion seeking relief from the automatic stay and adequate protection pursuant to §§ 362(d) and 363(e) of the Bankruptcy Code (11 U.S.C. §§ 101-1330) ("Code"), filed May 20, 1996.[1]

In the alternative, Metrobank requests that the Court stay all of the pending hearings on the lift-stay motions filed by various banks in this case and order that a single opportunity be granted to all of the litigating banks to complete the requested discovery from the Trustee and

[1]Metrobank's Evidentiary Hearing is presently scheduled to be held on July 11, 1997, in Utica, New York, pursuant to an Order Scheduling Evidentiary Hearing and Requiring Presentation of Evidence by Declarations/Depositions, dated May 2, 1997 ("Scheduling Order").

its representatives. Metrobank suggests that the Court could direct litigating banks to designate lead counsel to pursue the discovery issues, and then schedule a single hearing regarding only certain Uniform Commercial Code ("UCC") filing issues utilizing the declaration process currently used in these hearings.[2]

Objection to the relief sought herein was filed by the Trustee ("Trustee's Discovery Opposition") on June 10, 1997, and by the Unsecured Creditors Committee ("Committee") ("Committee's Opposition") on June 11, 1997. The Court agreed to expedite the hearing on Metrobank's motion due to the time constraints confronting Metrobank in connection with the evidentiary hearing process and scheduled it to be argued on June 12, 1997, at 11:00 a.m. in Utica, New York. Similarly, the Court determined that it would be appropriate to respond to Metrobank's request, as set forth in its motion papers, in the form of a written decision.

JURISDICTIONAL STATEMENT

The Court has core jurisdiction over the parties and subject matter of this contested matter pursuant to 28 U.S.C. §§ 1334(b), 157(a), (b)(1) and (b)(2)(A), (G) and (O).

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[2]The Court's Scheduling Order provided for the presentation of testimony of witnesses through declarations/depositions, under penalty of perjury, otherwise admissible under the Federal Rules of Evidence, and set forth a schedule for the filing of said declarations/depositions, as well as for the filing of evidentiary objections and reply declarations/depositions over a ten week period. The Court required that the declarant/deponent be present at the evidentiary hearing and subject to cross-examination if the declaration/deposition was to be admissible.

FACTS

On October 22, 1996, this Court issued a decision ("October Decision")[3] setting forth certain criteria for perfecting a security interest in equipment leases alleged to be collateral for loans made to the Debtor by various banks throughout the United States. *See In re The Bennett Funding Group, Inc.*, 203 B.R. 30 (Bankr. N.D.N.Y. 1996). In its October Decision the Court, at footnote 1, indicated that the decision would constitute the "law of the case," unless otherwise reversed on appeal, "if and when the same question again presents itself in this case by other parties similarly situated who have not heretofore filed motions pursuant to § 362(d) or § 362(e)." *See id.* The October Decision included a lengthy discussion concerning whether a financing statement identifying the Debtor as "Aloha Leasing, A Division of The Bennett Funding Group, Inc." served to give notice to a creditor searching the computer records of the Onondaga County Clerk's office and the office of the New York Secretary of State.

In its October Decision, the Court commented that "[w]hether the trade name precedes or follows the legal name of the debtor *should not* make a difference, particularly in this age of computer indexing." *See id.* at 37(emphasis added). The Court also indicated that "[a] computer search of the words 'Bennett Funding' *arguably* would have given notice to a potential creditor of a possible pre-existing security interest in the collateral held by the Banks even if indexed only as 'Aloha Leasing, A Division of The Bennett Funding Group, Inc.'" *See id.* at 38 (emphasis added).

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[3]For purposes of this discussion, the Court will assume that the parties are familiar with the background facts set forth in the October Decision.

In the October Decision the Court provided the banks with a list of what it considered to be the requisites for establishing perfection of a security interest in the leases, as well as a security interest in the lease proceeds based on the filing of a proper financing statement. *See Bennett Funding*, 203 B.R. at 41-42. The Court indicated that in order to establish a perfected security interest in the leases, it was necessary to file a financing statement which, *inter alia,* contained (1) proof of filing in both the Onondaga County Clerk's office and the office of the New York Secretary of State, and (2) the "Name of Debtor (The Bennett Funding Group, Inc.), as well as the inclusion of any trade name is also permissible." *See id.* The Court also ordered the Trustee to file and serve a particularized response to each of the banks' motions, including that of Metrobank, "asserting specific objections he might have to each Bank's claim of a perfected security interest in particular leases and the income stream derived therefrom." *See Bennett Funding*, 203 B.R. at 39.

Neither the Trustee nor any of the banks sought reconsideration of the October Decision. However, in his Particularized Response in Further Opposition to Metrobank's Motion for Relief from the Automatic Stay ("Trustee's Particularized Response"), filed December 9, 1996, the Trustee expressly reserved his right

> to appeal from any final Order incorporating or relying upon certain of the conclusions of law set forth in the Memorandum-Decision [October Decision], particularly the conclusion that filing a UCC financing statement filed under the name "Aloha Leasing, a Div. of The Bennett Funding Group, Inc." is sufficient to perfect a security interest in collateral of debtor The Bennett Funding Group, Inc. In order to avoid the possibility of repeating the process of serving particularized responses, the Trustee will object herein to any UCC financings filed under the name of "Aloha Leasing, a Div. of The Bennett Funding Group, Inc." and reserves the right at any factual hearing to offer proof that such financing statements could not have provided notice to subsequent creditors.

See Trustee's Particularized Response at 2, n.2. The Trustee opposed Metrobank's motion "on

the grounds that the UCC financing statement identifies the Debtor as 'Aloha Leasing, a Div. of The Bennett Funding Group, Inc.' and the Bank has failed to produce evidence that the financing statement was in fact filed under the name of the Debtor, The Bennett Funding Group, Inc., in both the Office of the Onondaga County Clerk and the New York Department of State. *See id.* at 5, 7-8, 10. The Trustee also asserted opposition to Metrobank's motion "on the grounds that the Bank has failed to provide evidence that it tendered the filing fee required by New York law for filing the financing statement under more than one name in both the Onondaga County Clerk's office and the office of the New York Secretary of State." *See id.* at 5, 8, 10-11. On May 30, 1997, this Court issued a Memorandum-Decision, Findings of Fact, Conclusions of Law and Order following an evidentiary hearing on March 31, 1997, on a motion by Marine Midland Bank ("Marine").[4] *See In re The Bennett Funding Group, Inc.*, No. 96-61376, Adv. Pro. 96-70061 (Bankr. N.D.N.Y. May 30, 1997) ("Marine Decision"). In the Marine Decision, the Court concluded that

> the assumptions it relied upon in rendering its October Decision, which were based in large part on the arguments of the banks' counsel, were incorrect at least with respect to the filing system in the county in which the Debtor does business in this State. If Onondaga County utilized a system which permitted a search of

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[4]Metrobank states that Marine was "the first bank who completed a hearing on Declarations with the UCC Filings." *See* Metrobank's Motion for Limited Discovery, Extension of Time, and Expedited Hearing Process ("Metrobank's Motion"), filed June 5, 1997, at ¶5. Marine's hearing was held on March 31, 1997. Heller Financial, Inc. and Heller Financial Leasing, Inc. ("Heller"), although technically not a "bank," was actually the first lender or financing institution to complete a hearing on Declarations on March 24, 1997, and the Court issued a separate decision on May 23, 1997. The issue of the proper name of the Debtor was not addressed therein since Heller had filed financing statements in connection with all four of its loan transactions in the name of "Bennett Funding Group, Inc." despite the fact that some of the underlying documents in its possession referenced "Aloha Leasing", including the Schedule A listings attached to the Assignment of Contracts for both the February 28, 1995, and the May 1, 1995 transactions.

> the full text of the Debtor's name, the Court's prior conclusions with respect to the inclusion of the Debtor's trade name would have had merit. Confronted with the actual operative facts, the Court must reconsider its position. Accordingly, the Court concludes that the UCC-1's filed by Marine in the Onondaga County Clerk's Office in the name of "Aloha Leasing" were ineffective in that they failed to provide a creditor with notice sufficient to warrant further inquiry concerning the leases. . . . A reasonable search for financing statements under the name of "Bennett Funding Group, Inc." would not have revealed financing statements filed in the name of "Aloha Leasing, a Div. of the Bennett Funding Group."

See Marine Decision, at 34.

ARGUMENTS

Metrobank asserts that "[t]he cornerstone of the October Decision was that the Uniform Commercial Code ('UCC') Financing Statements filed on behalf of Metrobank, and other similarly situated banks, with the Onondaga County Clerk and the New York Secretary of State with the 'Debtor box' containing the words 'Aloha Leasing, a Div. of The Bennett Funding Group, Inc.' (the 'UCC Filings') were properly filed as a matter of law under UCC Section 9-402(7)." *See* Metrobank's Motion at ¶2. Metrobank argues that prior to the Marine Decision there was no notice to counsel for the banks which were parties to the October Decision that the Court was going to "reverse its decision." *See id.* at ¶4. Metrobank also contends that "if the Court were inclined to modify its October Decision due process required that all counsel who participated in the briefing process for the October Decision be provided with an opportunity to participate before a new decision was rendered." *See id.* at ¶8; *see also id.* at ¶16 (stating "[w]hen the Court ruled in favor of the Banks in its October Decision, it eliminated from the case any factual issues relating to UCC Filings."). Metrobank takes the position that Marine did not

have a full and fair opportunity to litigate the issues since Marine believed the October Decision controlled. *See id.* at ¶7. Metrobank asserts that the Trustee never made a formal motion to reconsider the October Decision. *See id.* Furthermore, Metrobank notes that the Trustee, in his objection to Metrobank's motion for relief from the stay filed July 15, 1996, made no allegations that any of the UCC filings were invalid because of an alleged improper designation of the Debtor. *See id.* at ¶13; *see also* Letter from Metrobank's counsel, dated June 6, 1997 (indicating that Metrobank's "basic allegation" is that the Trustee's memorandum did not raise the issue of any improper designation of the debtor.").

Metrobank asserts that the "change of position of the Court in the May Decision [Marine Decision] is based upon the Declaration of Jacqueline Dacey ("Dacey") . . ." (*see* Metrobank's Motion at ¶5) who performed a computer search under the name "Bennett Funding Group" at the Onondaga County Clerk's Office which generated a list of filings which did not contain any of the financing statements filed in favor of Marine's predecessor-in-interest which identified the debtor as "Aloha Leasing, a Div. of Bennett Funding Group, Inc." Metrobank also asserts that Marine did not have a full and fair opportunity to litigate the issues relating to the UCC filings because it was justified in believing that the October Decision controlled as the law of the case and that the Declaration of Dacey and all argument relating to improper filing was therefore barred from consideration. *See id.* at ¶7. Metrobank contends that had a similar search been performed in the Office of the Secretary of the State in the name of "Bennett Funding Group, Inc.," a list of the banks' financing statements (both Marine's and Metrobank's) in the name of "Aloha Leasing, a Div. of The Bennett Funding Group, Inc." would have been generated. *See* Exhibit A of Metrobank's Motion, dated March 27, 1997. It is Metrobank's position that since

the Court indicated as one of its grounds for the Marine Decision that there were no allegations that the Onondaga County Clerk made an error in its indexing system, the fact that a search of the New York Secretary of State's records generated Metrobank's financing statements filed in the name "Aloha Leasing, a Div. of The Bennett Funding Group, Inc." may be indicative that the Court made an inaccurate finding based upon less than all available facts.

Metrobank argues that since it is likely that the UCC financing statements were properly filed with the Secretary of State and since Metrobank believed that additional discovery concerning the UCC filings was not relevant based on the October Decision, it should now have an opportunity to determine whether the Debtor had another place of business in New York and also to investigate the Debtor's prepetition use of the name "Aloha Leasing." Metrobank asserts that even if the Dacey Declaration is correct, if the Debtor had a second place of business in any other county in NewYork, the filing in the Office of the Secretary of State would be sufficient. *See* Metrobank's Motion at ¶17. Metrobank directs the Court's attention to footnote 2 of its Supplemental Memorandum Brief on Issues of Lien Perfection Relating to Motions for Relief from the Automatic Stay, dated September 26, 1996 ("Supplemental Memorandum"), in which it noted that "if the Debtor had a place of business in more than one county in the State of New York, regardless of the legal standards which the Court ultimately applies, then any filing in the Onondaga County Clerk's Office would be irrelevant."

As an alternative to the individual relief it seeks, Metrobank suggests that all hearings on the numerous motions for relief from the stay be stayed to allow all the banks an opportunity to conduct additional discovery. Metrobank argues that there were certain legal arguments concerning perfection of postpetition rights in proceeds by possession which "were not relevant

and were not implicated in the appendixes to the October Decision in which the Court set forth the submissions required from each bank." *See id.* at ¶20. These include the argument that under Code § 546(b) Metrobank's motion for adequate protection constituted "seizure of 'possession' of proceeds for the purposes of the post-perfection in proceeds under UCC § 9-306(3)(c)," as well as Code § 552, and that the Trustee is "the agent of Metrobank under the Servicing Agreements or alternatively is a bailee under UCC § 9-305, and, therefore, Metrobank is perfected with respect to proceeds of the original Contracts [leases]." *See id.* at ¶19. Metrobank asserts that "due process requires that all banks require a fair opportunity to fully present their legal positions before a final decision on the 'proceeds issue' is rendered." *See id. at* ¶20.

Metrobank proposes to have the banks designate lead counsel and to have the Court schedule a single hearing no later than 60 days after completion of discovery with respect to various UCC filing issues. The banks would then have an opportunity to brief all issues relating to possession and post-petition proceeds, the Court would have "a single legal and factual record from which to render a final decision and would not be faced with the possibilities of new facts or legal theories coming to its attention in subsequent hearings which would alter or modify previous rulings of the Court." *See id.* at ¶22.

The Trustee opposes Metrobank's motion, describing it as "little more than an untimely and meritless attempt to delay a long-planned trial . . . ." *See* Trustee's Discovery Opposition at 1. The Trustee asserts that the discovery sought is "unnecessary and irrelevant." In this regard, the Trustee points out that on June 17, 1997, Metrobank will have the declaration of one of the Debtor's employees, Paul Szlosek ("Szlosek"), who will affirm that the Debtor's only place of business in New York State "at all relevant times was in Onondaga County, New York." *See*

Trustee's Discovery Opposition at 4. Trustee asserts that Metrobank will have an opportunity to cross-examine Szlosek at its Evidentiary Hearing on July 11, 1997. The Trustee also takes the position that the Debtor's pre-petition use of the name "Aloha Leasing" is irrelevant since the Trustee is given "most favorable creditor" status without knowledge of the Debtor's use of a trade name. *See id.*

The Trustee takes exception to Metrobank's position that it did not conduct any discovery regarding UCC filing issues because no mention was made by the Trustee of a problem when it first opposed Marine's motion on July 15, 1996. The Trustee asserts that from the moment Marine filed its motion for relief from the automatic stay it should have been "prepared to establish a *prima facie* case that its trade-name filing validly perfected its security interest." *See id.* at 6, n. 2.

In response to Metrobank's assertion that the October Decision "established undisputed rights of the banks in the proceeds of these Contracts," the Trustee contends that the October Decision "did not purport to finally adjudicate any party's rights" and could not have a preclusive effect. *See id.* at 6. In support of his position, the Trustee cites to *Kay-R Electric Corp. v. Stone & Webster Constr. Co.*, 23 F.3d 55 (2d Cir. 1994) in which the Second Circuit stated in *dicta* that "preclusion would be folly, as to decisions that are merely tentative and contemplate further proceedings." *See id.* at 59. The Trustee argues that this Court clearly contemplated holding evidentiary hearings to adjudicate the rights of individual banks and, accordingly, ordered the Trustee to file and serve his Particularized Response on each of the banks which had sought relief from the automatic stay. The Trustee contends that Metrobank was given notice in the Particularized Response that the Trustee intended "to avail himself of the Court's invitation and

proceed with his vigorous challenge to the UCC financing statements which failed to identify the Debtor." *See* Trustee's Discovery Opposition at 9. The Committee supports the position taken by the Trustee, pointing out that the October Decision did not decide the issue of whether any particular bank had a perfected security interest. According to the Committee, it appears that Metrobank "chose to simply ignore the Trustee's claim" that the financing statements were not properly filed. *See* Committee's Opposition at 4.

With respect to any assertion by Metrobank that it has been deprived of due process and an opportunity for a full and fair opportunity to litigate, the Trustee points out that Metrobank has been given an opportunity to establish its case through the declaration process set by this Court to which Metrobank asserted no objection. The Committee suggests that Metrobank's Motion "demonstrates that it failed to adequately prepare for the July 11, 1997, hearing . . .", and Metrobank now seeks "a second bite at the apple to get it right." Committee's Oppostion at 2.[5]

DISCUSSION

Metrobank's motion is replete with unjustified conclusions about the legal effect of certain statements found in the October Decision and its reliance thereon. Specifically, the Court did not rule "in favor" of any party in issuing its October Decision and made no finding that any bank was perfected as a matter of law. It could not have "reversed" itself in the Marine Decision

[5]The Committee also raises the argument that Metrobank's Motion "reads as if Metrobank is asking this Court to reconsider its May 30, 1997 Decision denying Marine Midland Bank's motion for relief from the automatic stay. It correctly states that Metrobank was not a party to that contested matter and reconsideration of the Marine Decision is not appropriate relief to be granted to Metrobank.

as to "effectiveness of the UCC Filings" because it made no determination in October as to the effectiveness of any specific bank's filings. Furthermore, the October Decision did not establish the banks' rights to anything, nor did the Court eliminate any factual issues relating to the UCC filings in its October Decision. The statement in the October Decision at footnote 1 that the it was to be the "law of the case," unless reversed on appeal, was intended to clarify that the "blueprint" set forth therein was applicable not only to those banks with pending lift stay motions filed in the case, but also to those banks that might file similar motions in the future.[6] The October Decision set forth certain conclusions based on the Court's *assumptions* concerning the nature of filing systems available in the Onondaga County Clerk's Office and the New York Secretary of State. It made no final adjudication regarding any specific bank's rights.

Metrobank relies upon the October Decision in arguing that the Court somehow validated the actual UCC-1 filings that were filed in the name of "Aloha Leasing, a Div. of The Bennett Funding Group, Inc.," despite the fact that the Court actually discussed how the placement of the corporate and trade names of a debtor *should* have no effect on the ability of a creditor to locate a financing statement filed in the corporate name of the debtor particularly *in this age of computer indexing*. Specifically, the Court wrote that "[a] computer search of the words "Bennett Funding" *arguably* would have given notice to a potential creditor of a possible pre-existing security interest in the collateral held by the Banks even if indexed only as "Aloha Leasing, a Division of The Bennett Funding Group, Inc." *See Bennett Funding*, 203 B.R. at 38 (emphasis

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[6]At the time the Court rendered its October Decision, more than ninety motions had been filed by various banks. There had been statements made in the case, however, which suggested that there were an equal number of additional banks that had not as yet filed motions seeking relief from the automatic stay.

added). At the time of the October Decision, the Court was presented only with various memoranda of law and made a general observation about the level of sophistication and technology that it believed was utilized in the Onondaga County Clerk's office, as well as that of the office of the Secretary of State. The Court was not presented at that time with any evidence that the Onondaga County Clerk's Office utilized a computer filing system that would not automatically do a full-text search of the debtor box on a financing statement and generate a list of all financing statements that contained the words "Bennett Funding Group, Inc." in that box, regardless of whether the debtor was designated as "Aloha Leasing, a Div. of Bennett Funding Group, Inc.".[7]

In light of the proof presented at the evidentiary hearing of Marine's lift-stay motion, however, it became apparent to the Court that a computer search of the records of the Onondaga County Clerk's Office in the name of "Bennett Funding" would *not* have given notice to a

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[7]It appears that one may be able to do a full-text search at the Office of the Secretary of State. According to the Official Compilation of Codes, Rules & Regulations of the State of New York , in response to a search request in the name of a debtor, information will be provided by the Department of State showing the name and address of a debtor, as requested, including

> when the named debtor is a trade name and any of the filings reflect the name of the person doing business under such name, those for such person at the listed address (to the same extent as if such person was originally named as debtor). Except as otherwise provided by these rules, when the debtor to be searched is a corporation, all active filings will be provided without regard to address or difference in the corporate indicator.

N.Y.Comp. Codes R. & Regs. tit. 19, § 143.7(c)(4) (1996). However, neither the banks nor the Trustee have presented any proof of the exact methodology utilized in either the Onondaga County Clerk's office or the office of the Secretary of State. Dacey's declaration in Marine's evidentiary hearing and the exhibits attached thereto, as well as Exhibit A attached to Metrobank's motion, merely indicate the end result of a search in the name of "Bennett Funding Group."

potential creditor of a possible pre-existing security interest in the leases held by Marine if the financing statements were indexed in the name of "Aloha Leasing, A Div. of The Bennett Funding Group, Inc." Based on testimony and exhibits presented at the evidentiary hearing on Marine's motion, in order for a search under the name "Bennett Funding" to have generated a list of financing statements identifying the "debtor" as "Aloha Leasing, A Division of The Bennett Funding Group," it would have been necessary to pay a separate fee to have the entry cross-indexed under the name "Bennett Funding Group, Inc." No evidence was provided by Marine that it or its predecessor-in-interest had paid a separate fee to have its financing statements cross-indexed and that the filing officer had simply erred in failing to index them. The evidence which was presented to the Court left it no choice but to reconsider the assumptions upon which it relied in issuing its October Decision.

As the Trustee correctly points out, the October Decision was not a final adjudication as to the validity of filed financing statements of any of the banks. The Court presented a scenario in which financing statements filed in the Onondaga County Clerk's Office in the name of "Aloha Leasing, a Div. of The Bennett Funding Group, Inc." could be located by performing a search which included the words "Bennett Funding." To the extent that an actual search conducted in the Onondaga County Clerk's Office using the words "Bennett Funding" to identify the "debtor" would not have generated a list of financing statements indexed alphabetically under the name "Aloha Leasing, a Div. of The Bennett Funding Group, Inc.," it was incumbent on the parties to assure themselves that the Court's assumptions could be factually substantiated. To now argue that Metrobank and the other banks have not had a full and fair opportunity to do just that is without merit. The banks received the Trustee's Particularized Response in December 1996, in

which the Trustee reserved his right to offer proof that the financing statements could not have provided notice to subsequent creditors if filed in the name of "Aloha Leasing, A Div. of The Bennett Funding Group, Inc." It cannot be legitimately argued that Metrobank or Marine did not have notice that the Trustee disputed the validity of the filed financing statements and that he intended to present evidence that would establish that the Court's October assumptions were in error.

If a search in the Onondaga County Clerk's Office using the words "Bennett Funding" would not locate financing statements beginning with "Aloha Leasing," even though the Court stated that "arguably" it should, does Metrobank suggest that the Court, presented with factual evidence to rebut its hypothetical scenario in the October Decision, should ignore the fact that such financing statements could not be located in this manner? The Court did not find as a matter of fact or of law that the Onondaga County Clerk's Office either had or did not have a system sophisticated enough to perform a full-text search of the "debtor box" on a UCC-1 financing statement. The Court stated that whether a trade name precedes or follows the legal name of the Debtor *should not* make a difference, especially in this age of computer indexing. As a matter of *fact*, however, it does. The October Decision was not meant to alter facts, and it cannot and should not be read to do so. The October Decision did not abrogate any bank's responsibility to show that it properly filed its financing statements in accordance with the facts as they exist, not in accordance with an assumed scenario presented by the Court.

Furthermore, to argue now that the October Decision somehow prevented the banks from litigating any of the issues relating to the UCC filings is disingenuous. For example, in their pre-trial briefs both Marine and Heller took issue with certain statements made by the Court in its

October Decision relative to the need for serial numbers identifying the equipment on the leases and/or the need for the signature of the lessee on the lease. However, neither Marine nor Heller sought reconsideration of the October Decision on these issues or on the Court's comment that the parties agreed that the Debtor had a place of business in only one county in New York. In addition, it is evident that Marine did not rely entirely on the October Decision since it argued in the alternative that if the financing statements had not been properly filed, it still had a perfected security interest in the leases and the income derived therefrom based on its possession of the ink-signed originals, which it provided to the Court at its evidentiary hearing. It would appear that Marine, at least, was somewhat selective in its reliance on the October Decision and was at least cognizant that additional facts might exist which could persuade the Court to "reconsider" October's position.

Metrobank argues that it should be given an opportunity to obtain discovery concerning whether the Debtor has a place of business in more than one county in New York. Yet, Metrobank, in its Supplemental Memorandum in September 1996, apparently recognized that the indexing of the financing statement in the Onondaga County Clerk's office would be "irrelevant" if Metrobank later established that the Debtor had a place of business in more than one county in New York. *See* Metrobank's Supplemental Memorandum at footnote 2. In connection with the evidentiary hearings, there was nothing in the October Decision which misled or prevented Metrobank from submitting additional factual evidence in the form of a deposition from an employee of the Debtor in order to establish that the Debtor did business in more than one county

in the State if it believed that was the case.[8] Paragraph 1(d) of the Scheduling Order allows a party to "offer the direct testimony of a witness who is an agent of or affiliated with an opposing party or is otherwise considered hostile to the party seeking to offer the testimony" in the form of a deposition transcript to be offered into evidence at the hearing. Paragraph 1(c) also permitted oral testimony from witnesses in the form of rebuttal testimony.

At the hearing on June 12, 1997, Metrobank's counsel made the argument that the banks' interpretation of the October Decision, whether right or wrong, was reasonable and that fundamental fairness requires that additional discovery be allowed on the limited issue of whether the Debtor has a place of business in more than one county in New York. Metrobank suggested that the Court designate lead counsel to pursue the discovery issues and then schedule a single hearing with the parties submitting briefs in support of their respective positions.

The Court must deny Metrobank's request that it, or any of the other banks, be given opportunity for further discovery in order to address the UCC filing issues concerning the Debtor's place of business for purposes of a "single legal and factual record from which to render a final decision." Conceivably, this would place the Court in a similar position as that in which it now finds itself - having to address due process arguments based on a decision that made no final adjudication of any party's rights. Each bank is entitled to its own evidentiary hearing at which to create its own factual record from which the Court may render a decision.

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[8]In the Trustee's Discovery Opposition, he indicates that the declaration of Szlosek, an employee of the Debtor, will be filed on June 17, 1997, pursuant to the Scheduling Order. In prior evidentiary hearings, Szlosek has stated that the Debtor has had its sole place of business in Onondaga County since he joined the Debtor in 1992. The Trustee states that Metrobank will have an opportunity to cross-examine Szlosek if it disputes this "fact." *See* Trustee's Discovery Opposition at 4.

Metrobank asserts that in its October Decision "the Court correctly noted that it was not necessary to address the post-petition proceeds issues because it found that the UCC Filings were valid." *See* Metrobank's Motion at ¶18. Metrobank argues that the issue was not fairly raised at any of the prior evidentiary hearings because the banks did not believe the issues were relevant in light of the October Decision. Therefore, Metrobank requests that the banks be given an opportunity to present their legal positions before a final decision on the "proceeds issue" is rendered.

In the October Decision, the Court declined to analyze what was necessary to perfect a security interest in proceeds when the security interest in the underlying collateral, the leases, was perfected by possession since an "overwhelming" number of banks had asserted that they were perfected by virtue of having properly filed financing statements. As noted above, however, the Trustee provided the banks with notice in his Particularized Response that he took exception to the filing of financing statements in the name of "Aloha Leasing" as being proper for purposes of perfecting the banks' alleged security interests. Therefore, it was and is incumbent upon the banks, including Metrobank, to make whatever legal arguments they deem(ed) appropriate to establish an alternative basis for perfection in the proceeds in the event that the Trustee was or is able to provide the Court with evidence that the Court's assumptions were not accurate with respect the computer capabilities in the office of the Onondaga County Clerk. There was nothing in the October Decision which would prevent any of the banks from presenting their legal arguments in their pre-hearing briefs. In the Scheduling Order issued in connection with the Evidentiary Hearing, Metrobank was given until July 8, 1997, to file its pre-hearing brief asserting whatever legal arguments it deems appropriate. Specifically, there is nothing to prevent

Metrobank in its pre-hearing brief from presenting its arguments under Code § 546(b) with respect to perfection in proceeds and its position that the Trustee was actually an agent of Metrobank under the Servicing Agreements or a bailee for purposes of UCC § 9-305.

Finally, the Court observes that a motion seeking relief from the automatic stay pursuant to Code § 362(d) is generally heard in a summary fashion, *see* Code § 362(e), and it is left to the Court's discretion whether or not to grant the relief sought. Due to the initial chaos of this case and the critical need for stabilization of the Debtor's operations, the Court on several occasions extended the time for the final hearings on the banks' motions. Over the past year or so, Metrobank and other banks similarly situated have had an opportunity to conduct discovery and to prepare for their Evidentiary Hearing. Documents have exchanged hands between the banks and the Trustee, providing information that might otherwise not have been available to either party had the motions been finally adjudicated within the first thirty days following the filing of their motions. Furthermore, pursuant to the Scheduling Order, both parties will have had an opportunity to examine the declarations and exhibits of their opponent in advance of the evidentiary hearing and in advance of any cross-examination or the submission of pre-hearing briefs. The Court is unable to accept Metrobank's assertions that it has been denied due process under these circumstances.

Based on the foregoing, it is hereby

ORDERED that Metrobank's motion seeking limited discovery, an extension of time to file reply declarations and a pre-hearing brief, and a limited adjournment of the Evidentiary Hearing scheduled for July 11, 1997, is denied.

Dated at Utica, New York

this 13th day of June 1997

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STEPHEN D. GERLING
Chief U.S. Bankruptcy Judge