

UNITED STATES BANKRUPTCY COURT  
DISTRICT OF SOUTH CAROLINA

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DISTRICT OF SOUTH CAROLINA

In re: )  
)  
Martin Color-Fi, Inc., )  
a South Carolina corporation, )  
)  
Debtor. )

Chapter 11 Case  
Case No. 98-10145-W

In re: )  
)  
Buchanan Industries, Inc., )  
a South Carolina corporation, )  
)  
Debtor. )

Chapter 11 Case  
Case No. 98-10146-W

NationsBank, N.A., )  
)  
Plaintiff, )

vs. )

ADVERSARY PROCEEDING  
No. 99-80033

Martin Color-Fi, Inc., Buchanan Industries, Inc., )  
Premier Corporate Services, Inc. d/b/a Quality )  
Finishers, Premier Corporate Services, Inc. )  
d/b/a Metro Laminators, and Better Backers, Inc., )  
)  
Defendants. )

**JUDGMENT**

Based upon the Findings of Fact and Conclusions of Law as recited in the attached Order of the Court, NationsBank's Motion for Summary Judgment is granted.



John E. Waites  
United States Bankruptcy Judge

Columbia, South Carolina  
September 24, 1999

ENTERED

SEP 28 1999

J.G.S.

UNITED STATES BANKRUPTCY COURT  
DISTRICT OF SOUTH CAROLINA

**FILED**  
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**SEP 24 1999**  
BRINDA K. ARGOE, CLERK  
United States Bankruptcy Court  
Columbia, South Carolina (6)

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)  
Defendants. )

**ORDER**

**ENTERED**  
SEP 28 1999  
**J.G.S.**

THIS MATTER comes before the Court on the Motion for Summary Judgment (the "Motion") filed by NationsBank, N.A., now known as Bank of America, N.A. ("NationsBank"), requesting that the Court grant summary judgment in favor of NationsBank and against the defendants on all causes of action in the complaint (the "Complaint") filed by NationsBank against Martin Color-Fi, Inc., Buchanan Industries, Inc., Premier Corporate Services, Inc. d/b/a Quality

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Finishers, Premier Corporate Services Inc. d/b/a Metro Laminators, and Better Backers, Inc. (together, the “Defendants”); on the basis that there are no genuine issues of material fact between the parties, and NationsBank is entitled to a judgment as a matter of law. After reviewing the pleadings in this matter and considering the evidence presented and arguments of counsels for the parties, the Court makes the following Findings of Fact and Conclusions of Law:

#### FINDINGS OF FACT<sup>1</sup>

1. Defendant Martin Color-Fi, Inc. (“Martin”) is a South Carolina corporation which conducts business in South Carolina.
2. Defendant Buchanan Industries, Inc. (“Buchanan”) is a South Carolina corporation which conducts business in Whitfield County, Georgia. Buchanan is a wholly-owned subsidiary of Martin and is authorized to do business in Georgia as a foreign corporation.
3. Buchanan’s principal place of business in Georgia was in Whitfield County, at 3328 Carpet Capital Drive, Dalton, Georgia (the “Dalton Facility”).
4. Buchanan did not have any business locations anywhere in Georgia except in Whitfield County.
5. Martin conducted business at the Dalton Facility and did not have any business locations anywhere in Georgia except in Whitfield County.
6. On November 16, 1998 (the “Petition Date”), Martin and Buchanan (together, the “Debtors”) filed their petitions for relief pursuant to Chapter 11 of the United States Bankruptcy Code.

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<sup>1</sup> Where appropriate, Findings of Fact shall also be deemed Conclusions of Law and vice versa.

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7. As of the Petition Date, NationsBank held four valid secured claims against each of the Debtors in the approximate amount of \$58,893,068.56.

8. NationsBank's claims against the Debtors arise out of four loans (the "Loans") made by NationsBank to the Debtors.<sup>2</sup> The Loans are evidenced by the following notes: (a) the Third Amended and Restated Term Loan Promissory Note, dated June 2, 1998 in the principal amount of \$20,471,030.25 (the "Term Loan"); (b) the Fourth Amended and Restated Revolving Credit Promissory Note dated June 2, 1998 in the principal amount of \$30,000,000.00 (the "Revolver"); (c) the Amended and Restated 1997 Term Loan Promissory Note dated June 2, 1998 in the principal amount of \$4,461,111.12 (the "1997 Term Loan"); and (d) the Renewal Overline Promissory Note dated June 2, 1998 in the principal amount of \$4,000,000.00 (the "Overline") (together, the "Notes").

9. The Notes are secured by, among other things, a Loan Agreement, Deeds to Secure Debts, Mortgages, and specifically Security Agreements dated July 14, 1994 given by Debtors in favor of NationsBank (together with all amendments, the "Security Agreements").

10. The Security Agreements and other loan documents grant to NationsBank a security interest in all personal property of the Debtors, including inventory, work in process, raw materials, goods, materials, and accounts.

11. To perfect its interests under the various loan documents and the Security Agreements in Georgia, NationsBank filed Financing Statement No. 100528 (the "First Financing Statement") on July 14, 1994 (the "UCC Filing Date") in Whitfield County, Georgia.

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<sup>2</sup> Star Fibers, Inc., a corporation wholly-owned by Martin, also filed its petition for relief on the Petition Date and is a co-obligor on the Loans. Star Fibers is not a party to this adversary proceeding.

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12. An addendum to the First Financing Statement described in detail the personal property subject to NationsBank's security interest and specifically included all of the Debtors' inventory, work in process, raw materials, goods, materials, and accounts.

13. The description of the personal property in the First Financing Statement includes the Disputed Collateral (as defined hereinbelow).

14. The Security Agreements and the First Financing Statement specifically include after-acquired property.

15. On August 14, 1995, NationsBank filed Financing Statement No. 155-95-2581 (the "Second Financing Statement") in Whitfield County, Georgia.

16. The Second Financing Statement was filed in connection with an additional advance and NationsBank received additional collateral at that time to secure the advance and the Loans in the form of a mortgage and an additional security interest in personal property.

17. The Second Financing Statement was terminated by a UCC-3 Financing Statement filed on April 28, 1998 (the "Termination Statement"). The Termination Statement was filed in connection with the release by NationsBank of its lien on the real property previously acquired by the Debtor in 1995, and personal property related to that real property, in exchange for a portion of the sale proceeds received by the Debtors from the sale of said real property in 1998.

18. Defendant Premier Corporate Services, Inc., d/b/a Quality Finishers Inc. ("Quality Finishers") is located in Gordon County, Georgia.

19. Defendant Premier Corporate Services, Inc., d/b/a Metro Laminators, Inc. ("Metro Laminators") is located in Whitfield County, Georgia.

20. Defendant Better Backers, Inc. ("Better Backers") is located in Murray County, Georgia.

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21. Prior to the Petition Date, Buchanan or Martin were in the business of manufacturing carpet at the Dalton Facility located in Whitfield County, Georgia.

22. The Disputed Collateral was manufactured in Whitfield County, Georgia.

23. The Backers contend that they did business with Martin, not Buchanan, and that all the Disputed Collateral was owned by Martin.

24. Generally, after the carpet was manufactured at the Dalton Facility, the carpet was delivered to the Backers, which would perform various "finishing services" such as dyeing, backing, and trimming, and oftentimes ship the carpet to a customer at the direction of Buchanan or Martin.

25. Any Disputed Collateral owned by either Martin or Buchanan and in the possession of Metro Laminators was held by Metro Laminators in its facility at Whitfield County, Georgia and was located in Whitfield County at all relevant times.

26. As of the Petition Date, the Backers were in possession of certain goods (the "Disputed Collateral") owned by Buchanan, Martin, or both.

27. The Backers retained possession of the Disputed Collateral pursuant to their alleged unrecorded possessory lien on the Disputed Collateral for unpaid services, set forth in § 44-14-450, Official Code of Georgia Annotated, generally referred to as the "Laundrymen's Lien."

28. The Laundrymen's Lien is the only possessory lien being asserted by the Backers.

29. The Disputed Collateral was located in Georgia at the time the last event occurred upon which the perfection of NationsBank's security interest is based.

30. Pursuant to an agreement among the Backers, NationsBank, and the Debtors, the Disputed Collateral was sold pursuant to the Order Granting Debtor's Motion to Sell Property Free and Clear of Liens entered on February 11, 1999 in the bankruptcy case of Buchanan and \$1,000,000

(together with the interest thereon, the "Escrow Funds") of the sale proceeds were placed in an interest bearing escrow account with the Debtors' attorney (the "Escrow Agent").

31. The Escrow Funds are being held in escrow by the Escrow Agent until this Court resolves the priority dispute between NationsBank and the Backers.

32. On February 5, 1999, NationsBank filed the Complaint, seeking a determination by this Court that NationsBank has a first priority perfected lien on the Disputed Collateral and a declaratory judgment that NationsBank is entitled to the Escrow Funds.

33. The Backers do not dispute the validity of NationsBank's lien and security interest on the Disputed Collateral, only its perfection and priority.

#### CONCLUSIONS OF LAW

##### I. Standard for granting a motion for summary judgment.

Rule 56(c) of the Federal Rules of Civil Procedure, made applicable to adversary proceedings under the Bankruptcy Code by Bankruptcy Rule 9024, provides that a party may move for summary judgment, and that such judgment "shall be rendered forthwith" if the evidence and pleadings "show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). "On a summary judgment motion, the Court does not try factual issues; rather, it determines whether there are any fact issues to be tried." Dunes Hotel Assoc. v. Hyatt Corp. (In re Dunes Hotel Assoc.), 194 B.R. 967, 976 (Bankr. D. S.C. 1995). Summary judgment should be granted "against a party who fails to make a showing sufficient to establish the evidence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Id. (citing Celotex, 477 U.S. at 322).

“[T]here is no issue for trial unless there is sufficient evidence favoring the non-moving party for a jury to return a verdict for that party . . . . If the evidence is merely colorable . . . or is not

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significantly probative, summary judgment may be granted.” Glover v. Lockheed Corp., 772 F. Supp. 898, 904 (D.S.C. 1991) (quoting, Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986)); see also Beale v. Hardy, 769 F.2d 213, 214 (4th Cir. 1985) (stating that a party opposing summary judgment “cannot create a genuine issue of fact through mere speculation or the building of one inference upon another”).

After the movant has proved the absence of any genuine issue of material fact, “the burden of proof shifts and the party opposing summary judgment may not merely rely on his pleadings but must set forth specific facts which controvert the moving party’s facts and which show the existence of a genuine issue for trial.” Dunes Hotel Assoc., 194 B.R. at 976 (citations omitted). Therefore, once NationsBank has set forth evidence and pleadings to show that there are no genuine issues of material fact and that it is entitled to judgment as a matter of law, unless the Backers present evidence of specific facts showing the existence of genuine factual issues for trial, NationsBank is entitled to summary judgment.

## II. Perfection of NationsBank’s Security Interest

NationsBank and the Backers both claim first priority liens in the Disputed Collateral. The Backers’ claim is based on a possessory lien known as a Laundrymen’s Lien. Ga. Code Ann. § 44-14-320(a)(14). A Laundrymen’s Lien is a possessory lien which attaches to certain goods in the possession of the lienor. NationsBank’s claim is based on its security interest granted pursuant to the Security Agreements which it claims are perfected by the First Financing Statement. This matter is controlled by the law of the state of Georgia.<sup>3</sup> The Backers have stipulated that under Georgia

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<sup>3</sup> Perfection is governed by the Georgia Uniform Commercial Code because the Disputed Collateral was located in Georgia at the time the last event occurred upon which perfection is based. Ga. Code Ann. § 11-9-103(1).

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law, a perfected security interest takes priority over a Laundrymen's Lien, and the Court hereby concludes as such as a matter of law. Ga. Code Ann. § 11-9-310(1); NationsBank v. Hardwick Carpets Int'l, Inc., 506 S.E.2d 174, 175 (Ga. Ct. App. 1998). Therefore, NationsBank's security interest will have priority over the Backers' lien unless NationsBank's security interest is not properly perfected. Perfection of a security interest on the Disputed Collateral is accomplished by the filing of a financing statement. The Backers put forth two arguments regarding NationsBank's perfection. First, the Backers allege that the First Financing Statement is not filed in the proper location to perfect NationsBank's security interest. Second, the Backers allege that the Termination Statement terminated both the Second Financing Statement and the First Financing statement, thereby making NationsBank unperfected.

A. Is the First Financing Statement Properly Filed to Perfect NationsBank's Security Interest in the Disputed Collateral?

In Georgia, the location for filing financing statements to perfect a security interest in the Disputed Collateral is controlled by § 11-9-401 of the Georgia Code Annotated. Prior to July 1, 1994, the statute provided as follows:

§ 11-9-401. Place of filing; erroneous filing; removal of collateral

(1) The proper place to file in order to perfect a security interest is as follows:

(a) When the collateral is crops growing or to be grown, or is minerals or accounts subject to subsection (5) of Code Section 11-9-103, or when the financing statement is filed as a fixture filing and the collateral is goods which are or are to become fixtures, then in the office where a mortgage on the real estate would be filed or recorded;

(b) In all other cases in the office of the clerk of the superior court as follows: when the debtor is a resident individual, then in the county where he

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*resides; or when the debtor is a partnership, a corporation, other business entity not an individual, or a nonresident individual, then in the county of the debtor's principal place of business in this state, but if he has no place of business in this state then in the county where the property is kept or used in this state.* If the debtor has more than one place of business in this state, his principal place of business shall be deemed to be located at his chief executive office in this state.

- (2) A filing which is made in good faith in an improper place or not in all of the places required by this Code section is nevertheless effective with regard to any collateral as to which the filing complied with the requirements of this article and is also effective with regard to collateral covered by the financing statement against any person who has knowledge of the contents of such financing statement.
- (3) A filing which is made in the proper place in this state continues effective even though the debtor's residence or place of business or the location of the collateral or its use, whichever controlled the original filing, is thereafter changed.
- (4) The rules stated in Code Section 11-9-103 determine whether filing is necessary in this state.

Ga. Code Ann. § 11-9-401 (1992) (the "Original Code Section") (emphasis added). The Original Code Section was amended by Act 563 in 1993 (the "1993 Act"). 1993 Ga. Laws 563. The Supreme Court of Georgia issued its opinion in Trust Co. Bank v. Georgia Superior Court Clerks Coop. Auth., 456 S.E.2d 571, 572 (Ga. 1995) holding that the effective date of the amended statute would be January 1, 1995. The parties have stipulated for the purposes of summary judgment that the Original Code Section is the controlling statute.

The Debtors granted a security interest to NationsBank in the Disputed Collateral pursuant to the Security Agreements. NationsBank filed the First Financing Statement on July 14, 1994, in Whitfield County, Georgia. As more fully described below, Whitfield County was the appropriate location for NationsBank to file its financing statement under the Original Code Section in order to perfect its security interest in the Disputed Collateral.

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The arguments of the Backers are summarized as follows: (a) the Disputed Collateral was owned by Martin; (b) Martin did not have a principal place of business in Georgia; therefore, the filing in Whitfield County did not perfect NationsBank's interest in the Disputed Collateral; and (c) the Disputed Collateral was, except for that portion of the Disputed Collateral held by Metro Laminators,<sup>4</sup> kept in Murray County and Gordon County, Georgia, and any financing statement perfecting a security interest in the Disputed Collateral should have been filed in both Murray and Gordon County.

The first step in the Backers' argument is that summary judgment cannot be granted because there is a material issue of fact regarding the ownership of the Disputed Collateral. However, NationsBank claims that it can prevail on its Motion regardless of whether the Disputed Collateral is owned by Buchanan or Martin.

(i) Did Martin have a principal place of business in Whitfield County, Georgia?

The Backers have conceded that if the Disputed Collateral was owned by Buchanan, NationsBank properly perfected its security interest by filing the First Financing Statement in Whitfield County, because it is undisputed that Buchanan's principal place of business was in Whitfield County. However, the Court must look at the facts in the light most favorable to the Backers. Thus, the Court will assume that the Disputed Collateral was owned by Martin and will address perfection and ownership as to Martin.

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<sup>4</sup> The Backers have conceded that this argument only applies to Quality Finishers and Better Backers. The Metro Laminators' facility was located in Whitfield County; therefore, under the Backers' theory, any Disputed Collateral in the possession of Metro Laminators was perfected by the First Financing Statement. Metro Laminators' only argument is discussed in Part B hereinbelow.

The courts have previously distinguished the “principal place of business,” for the purposes of determining the appropriate county to file a financing statement under the uniform commercial code, from the “registered office,” for the purposes of the corporate code and the information required to file a certificate of incorporation. Section 14-2-501 of the Georgia Corporate Code states that each corporation must have and maintain “[a] registered office that may be the same as any of its places of business.” Ga. Code Ann. § 14-2-501. In In re Carmichael Enterprises, Inc., 334 F. Supp. 94 (N.D. Ga. 1971), aff’d 460 F.2d 1405 (5th Cir. 1972), the United States District Court for the Northern District of Georgia declined to hold that the location of a corporation’s registered office for the purposes of the corporate code is the same as the “principal place of business” for the purposes of the uniform commercial code. “[U]sing the term “principal place of business” in Section 109A-9-401 (1)(b), the legislature intended that the proper place for filing of a financing statement be the *factual principal place of business of the debtor corporation* and not, as the Referee concluded, the ‘principal office’ as designated in the corporation charter.” Id. at 99 (emphasis added). Therefore, even though Martin did not register to do business in Georgia, the failure of Martin to have a “registered office” does not change the existence of a factual principal place of business under the uniform commercial code.

The Backers argue that if Martin did business in Georgia, it was through its subsidiary, Buchanan, and that is insufficient under § 11-9-401 to establish a factual principal place of business for the purposes of filing a financing statement. In Trans Union Leasing Corp. v. Alithochrome Corp. (In re Alithochrome Corp.), 40 UCC Rep. Serv. 301, 302 (S.D.N.Y. 1984), aff’d, 751 F.2d 88 (2d. Cir. 1984), the court held that “the existence of a parent/subsidiary relationship between corporations does not preclude a finding that the parent used the subsidiary’s facilities as its own place of business.” In In re Alithochrome, the court reviewed whether a New York parent corporation had a place of business in the Springfield, Massachusetts facility of its subsidiary, requiring the filing of a financing statement in

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Springfield. The court held that determining the existence of a place of business is based on “frequency and notoriety.” Id. at 302. The court first examined the indications of the actual and ongoing presence in Springfield of the parent corporation and determined that based on factors such as using the parent name when answering the telephone and the storage of equipment by the parent corporation at Springfield, the parent corporation established an actual physical presence in Springfield. Second, the court reviewed the question of notoriety and examined whether “Springfield was ‘a place where customers and creditors of the debtor would normally resort to or communicate with by mail or otherwise to trade with the debtor or engage in commercial transactions; a place where persons dealing with the debtor would normally look for credit information.’” Id. at 304. The court concluded that the parent’s customers and creditors dealt with the parent corporation in Springfield and viewed the Springfield plant as part of the parent corporation; therefore, it would have been normal for such creditors to look to Springfield for credit information. Id. at 304.

Evidence shows that the Backers received correspondence from Martin using the Martin name and the Dalton Facility address. When the Backers needed to contact a representative of Martin, they looked for such representative at the Dalton Facility. The Backers sent invoices to Martin at the Dalton Facility. If the Backers wanted to see Martin's records, they would go to the Dalton facility. However, the Backers have also introduced evidence that some creditors also looked to Martin's office in Edgefield, South Carolina, for information about Martin's financial conditions. In fact, when NationsBank communicated with Martin concerning the bank's loans to Martin, the correspondence was sent to Edgefield, South Carolina. Furthermore, NationsBank's UCC-1 filings with respect to the Debtors listed Martin's address as 510 Augusta Road, Edgefield, South Carolina. Because the test set forth by the court in In re Alithocrome is applied on a case-by-case basis and “requires . . . a practical judgment from the

business circumstances," the Court concludes that a genuine issue of material fact remains as to whether Martin has a factual principal place of business in Dalton, Georgia.

(ii) Was the Disputed Collateral "kept or used" in Whitfield County?

The Backers' next argument is that because Martin did not have a principal place of business in Georgia, the appropriate location for filing a financing statement to perfect a security interest granted by Martin would be the county where the Disputed Collateral was "kept or used" in Georgia, which they argue was Gordon County and Murray County. Assuming that Martin did not have a factual principal place of business in Whitfield, Georgia, the Backers' argument nevertheless fails.

The appropriate time to determine where the Disputed Collateral was "kept or used" for determination of perfection is the time of attachment of the security interest. Knapp v. Red Carpet Homes, 575 F.2d 341, 343 (2d Cir. 1987). A security interest attaches and becomes enforceable as soon as (a) the debtor has signed a security agreement with a description of the collateral; (b) value has been given; and (c) the debtor has rights in the collateral. Ga. Code Ann. § 11-9-203(1)(2). The first two parts of the test occurred on July 14, 1994, the date that the Debtors executed the security agreement and NationsBank delivered its loan proceeds. The third part is discussed below.

Inventory, by its very nature, is subject to a "floating lien" under § 11-9-204 of the uniform commercial code which sets forth the after-acquired property clause. Ga. Code Ann. § 11-9-204. In addition, the Security Agreements and the First Financing Statement specifically include after-acquired property. "Because inventory is a single entity, . . . a security interest in after-acquired property attaches at the time it attaches to the initial inventory." Kuemmerle v. United New Mexico Bank, 831 P.2d 976, 981 (N.M. 1992) (citing James J. White & Robert S. Summers, Uniform Commercial Code §22-6 (3d ed. 1988)).

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Once the necessary steps are taken for perfection of the security interest, the lien or security interest floats over and along with this mass as it changes form, and as the debtor receives an interest in after-acquired goods the floating lien descends on these goods and attaches at that point; but for 'perfection' purposes under state law the lien on these after-acquired goods arose on [the date] the financing statement was filed.

Owen v. McKesson & Robbins Drug Co., 349 F. Supp. 1327, 1332 (N.D. Fla. 1972), aff'd. 486 F.2d 1401 (5<sup>th</sup> Cir. 1973). Because the Disputed Collateral is inventory, the lien extends to the Disputed Collateral pursuant to the after-acquired property clause and attachment relates back to, and is effective as of, the date the lien attached to the initial inventory. Ga. Code Ann. § 11-9-204; Kuemmerle, 831 P.2d at 981. Therefore, the third element of attachment occurred effective as of July 14, 1994, the date that the First Financing Statement was filed. Because the Disputed Collateral, in the form of raw materials, work in process, and inventory, was originally located in Whitfield County on July 14, 1994, regardless of the legal owner of the Disputed Collateral, Whitfield County was the location where the goods were "kept or used" on the date perfection is tested. An after-acquired property clause includes all after-acquired property, regardless of its location, so long as it is used in the debtor's business. Hudson Properties, Inc. v. Citizens & S. Nat'l Bank, 308 S.E.2d. 708, 711 (Ga. Ct. App. 1983).

The Backers argue that the Disputed Collateral was "located" in the county of each of the Backers where it was temporarily stored after being "dyed" and "backed"; therefore, they argue the proper place to file a financing statement to perfect NationsBank's interest in the Disputed Collateral was in the counties where the Backers' were located. The Backers' argument misinterprets the meaning of the Original Code Section. The Backers' interpretation of the filing rules ignores § 11-9-401(3) of the Original Code Section which states that "a filing which is made in the proper place in this state continues effective even though the debtor's residence or place of business *or the location of the collateral or its*

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*use*, whichever controlled the original filing, is thereafter changed.” Ga. Code Ann. § 11-9-401(3) (emphasis added). Pursuant to this code section, a filing that was originally correct is not rendered improper or insufficient because of the relocation of the collateral. Any other interpretation of the filing rules would defeat the legislative intent of the provision. Owen, 349 F. Supp. at 1334.

In Owen, the court reviewed the issue of perfection of collateral moved to a different location. The inventory at issue was originally perfected by a financing statement filed with the address of the store in one city. The collateral was later moved to a store in a different city not listed on the financing statement. The court held that the creditors’ security interest in the collateral continued to be perfected under the original financing statement that listed only the old location and not the new location. The court stated that:

The underpinnings of this Court’s conclusion rest upon the Code’s intent to adhere to “notice filing” where transient goods such as inventory are *encumbered*. *The purpose of the financing statement is to put third parties on notice that a security interest may exist in certain inventory and that the third party may contact debtor or the secured party to learn the extent of the security interest. See § 9-402(1) and Comment 2 thereto which declares in part: “The notice itself indicates merely that the secured party who has filed may have a security interest in the collateral described.”* The acceptability of this conclusion is buttressed by § 9-401(3) which provides that a security interest in goods will continue effective after an initial proper filing has been made even though debtor’s residence or place of business or location of collateral or its use, whichever controlled the original filing, is later changed. . . . [T]he legislative intent behind the adoption of this statutory enactment was to provide for state-wide filing without the necessity of the secured party having to police the collateral as it moved from county to county or in the ordinary course of debtor’s business.

Owen, 349 F. Supp. at 1334. Owen highlights the intention of the drafters of the uniform commercial code to provide “notice” filing in the location most likely to be checked by creditors and other parties seeking information on the debtors. The drafters of the uniform commercial code did not intend to have

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third parties (a) determine all the vendors that a debtor does business with in the course of a manufacturing process; (b) locate the vendors, and if they have multiple locations, determine where the debtor's property might be temporarily located; and (c) search the records of each county in which each vendor has a facility that might temporarily store any property of the debtor, to determine if any financing statements have been filed against the debtor. This procedure, the end result of the theory put forth by the Backers, would be unduly onerous, result in unreliable searches, and is in contravention to the notice concept of the uniform commercial code and cases interpreting the filing requirements. The "[c]ode eschews any scheme that would require a secured party to maintain regular and continuing surveillance of the debtor. A security interest, once perfected by filing, remains effective regardless of the number of times or places the debtor or the collateral moves." Knapp v. Red Carpet Homes, 575 F.2d 341, 343 (2d Cir. 1978).

The Backers acknowledge that the Disputed Collateral was initially processed and located at the Dalton Facility. Therefore, the Disputed Collateral is "kept" in Whitfield County for the purposes of determining the appropriate county in which to file a financing statement. The Backers also contend that the goods of the Debtors which were in their possession on the petition date were kept at all times in Gordon or Murray County. However, the location of the Disputed Collateral on the Petition Date is not relevant to issues of perfection because perfection is tested on the date of attachment as discussed above. In addition, the Disputed Collateral did not come into the possession of the Backers until manufacturing was "substantially complete[d]" at the facility in Whitfield County. The Disputed Collateral was delivered to the Backers only to "finish." Finally, as discussed above, movement of the Disputed Collateral is not relevant to the issue of perfection.

At the time of attachment, the Disputed Collateral was located in Whitfield County at the manufacturing facility. The Backers have not put forth any evidence that the goods were located in

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Murray County or Gordon County at the time of attachment. Therefore, the appropriate location for filing the First Financing Statement was the county in which the collateral was located at the time the security interest attached, and that county was Whitfield County. The subsequent relocation of the Disputed Collateral does not alter the original perfection. Thus, as a matter of law, NationsBank properly filed the First Financing Statement in Whitfield County, the location where the Disputed Collateral was “kept or used.”

- (iii) Does an alleged sale of the Disputed Collateral from Buchanan to Martin during the manufacturing process affect NationsBank’s perfection?

At the hearing on the Motion, the Backers raised a new legal theory which was not raised in the Backers’ Answer or the Backers’ Objection. Counsel for the Backers acknowledged at the hearing that Buchanan was the entity that operated the Dalton Facility and transformed the raw materials into the products that were later shipped to the Backers for finishing. Therefore, the Disputed Collateral, in whatever its initial form, was owned by Buchanan and subject to NationsBank’s perfected lien. The Backers allege that, because they dealt with Martin, at some point in the manufacturing process the Disputed Collateral was “sold” to Martin. However, they have offered no evidence of such a transaction or as to when this transaction occurred. If the Disputed Collateral was sold to Martin prior to the completion of the manufacturing process that occurred at the Dalton Facility, Martin would have acquired an interest in the Disputed Collateral while it was located in Whitfield County and the Whitfield County filing would be the appropriate location to file a financing statement. The Backers maintain that the transfer could have taken place after the Disputed Collateral had been sent to the Backers. If this was the case, Martin would not have acquired an interest in the Disputed Collateral until after it had left Whitfield County; and, because Martin had no principal place of business in Georgia and the goods were not kept or used in Whitfield County, the First Financing Statement would not be effective to perfect NationsBank’s interest

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in the Collateral. In short, the Backers theory is premised on their speculation that after the Disputed Collateral is processed in the Dalton Facility, it is transferred to a finisher, and at that point, while the Disputed Collateral is located in another county, an internal accounting function or other transaction occurs which transfers ownership of the Disputed Collateral from Buchanan to Martin. Because at that point the Disputed Collateral is being “kept” outside of Whitfield County, and assuming that Martin has no principal place of business, a security interest in the Disputed Collateral can only be perfected by filing in the county where the Backers are located.

The Backers’ argument fails for several reasons. First, the Backers have put forth no evidence of the alleged “sale” of the Disputed Collateral from Buchanan to Martin. The Backers have failed to produce any bills of sale or other evidence of such a transfer. In order to defeat a motion for summary judgment, the party opposing summary judgment may not rely on mere speculation or inferences, but must set forth specific facts which controvert the moving party’s facts. In this case, NationsBank has produced evidence that the Disputed Collateral was owned by Buchanan. The Backers have failed to provide any evidence of an alleged “sale” of the Disputed Collateral from one debtor to the other and are relying on mere speculation. Counsel for the Backers argues that this matter should be bound over for trial in order for this fact issue to be resolved. However, if the Backers were unable to produce any evidence regarding this alleged “sale” after the close of discovery, the Court is not obligated to deny a summary judgment motion in order to allow the Backers to conduct a fishing expedition at a trial. While there may be an issue of fact regarding whether both companies were operating out of the Dalton Facility, that does not lead to the inference that somehow the facility was operated by one entity and the Disputed Collateral was, during the manufacturing process, sold to another entity.<sup>5</sup>

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<sup>5</sup> The Backers also raised other legal theories later on in the proceedings. Assuming that a sale did occur, the Backers allege that once the Disputed Collateral was transferred by Buchanan

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Second, the Backers' argument fails because it ignores § 11-9-402(7) which provides that "a filed financing statement remains effective with respect to collateral transferred by the debtor even though the secured party knows of or consents to the transfer." Ga. Code Ann. § 11-9-402(7). Official Comment 8 to § 9-402 confirms the plain meaning of this section and states that "any person searching title must make inquiry as to the debtor's source of title, and must search in the name of a former owner if circumstances seem to require it." Official Comment 8, § 9-402. In NCNB Nat'l Bank v. Major Leasing, Inc. (In re Major Leasing, Inc.), 140 B.R. 826 (Bankr. N.D. Ga. 1991), the debtor transferred pledged vehicle inventory to a third party, who moved the vehicle inventory from North Carolina to Georgia. The vehicle inventory was originally properly perfected in North Carolina. The court held that pursuant to § 9-402(7), the original financing statement remained effective despite the transfer of the vehicle inventory to a third party. A debtor cannot be allowed to destroy a creditor's security interest in collateral simply by transferring the collateral to a third party.

Even if the Backers are correct, and the Disputed Collateral was transferred to Martin at some point in the production process, NationsBank's lien as to Buchanan survived and continues in the Disputed Collateral pursuant to § 9-402(7). In addition, any such goods allegedly transferred to Martin would be subject to NationsBank's lien as to Martin under the Security Agreements and the First

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to Martin, NationsBank's security interest in the Disputed Collateral was terminated by operation of § 11-9-306(2) which provides that a security interest "continues in collateral notwithstanding sale, exchange, or other disposition thereof unless the disposition was authorized by the secured party in the security agreement or otherwise." Ga. Code Ann. § 11-9-306(2). The Backers also allege that once the Disputed Collateral was transferred by Buchanan to Martin, NationsBank's security interest in the Disputed Collateral was terminated pursuant to § 11-9-307(1) which provides that "a buyer in the ordinary course of business . . . takes free of a security interest created by his seller even though the security interest is perfected and even though the buyer knows of its existence." Ga. Code Ann. § 11-9-307(1). However, the Backers have failed to set forth any evidence that a sale took place, that NationsBank knew of the alleged transfer or authorized such a transfer, or that Martin was a buyer in the ordinary course of business.

Financing Statement because NationsBank properly perfected its lien as to such items with the filing of the First Financing Statement in Whitfield County, as the principal place of business of Buchanan. As previously noted, the location or movement of collateral does not affect the validity of a properly filed financing statement.

Finally, the Backers also argue that because the alleged transfer was of “finished goods,” NationsBank’s lien as to Buchanan could not be “traced” into the Disputed Collateral after it was allegedly transferred into Martin as finished goods. Therefore any lien on the alleged unfinished or partially manufactured carpet owned by Buchanan does not survive in the finished carpet product which was allegedly transferred to Martin. Again, the Backers’ argument ignores several sections of the uniform commercial code.

The Backers define “inventory” as a “finished product” different from raw materials and work in process. This definition reflects a concept of bookkeeping or accounting in which “inventory” generally means finished product held for resale. However, the definition of “inventory” applicable to the uniform commercial code is significantly broader. Inventory is defined in the Georgia Uniform Commercial Code as goods “held by a person who holds them for sale or lease or to be furnished under contracts of service or if he has so furnished them, or if they are raw materials, work in process or materials used or consumed in a business.” Ga. Code Ann. § 11-9-109(4). Under that definition, “inventory” includes the raw materials, the finished product, and everything between those two points in the process. NationsBank’s lien covers goods, inventory, raw materials, and work in process. Based on the language of the Security Agreements and the uniform commercial code definition, NationsBank’s lien on the Disputed Collateral remains effective regardless of the form that the collateral takes or any transformation of the physical collateral from one form to another. Therefore, whether the Disputed Collateral was raw materials, work in process, or finished goods is not relevant to the perfection of

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NationsBank's security interest, since it covers all the relevant types of collateral, both by language in the Security Agreements and by the relevant statutes.

Whitfield County was the appropriate location for filing to perfect NationsBank's security interest in the Disputed Collateral based on the location where the Disputed Collateral was "kept or used." Therefore, as a matter of law, NationsBank properly perfected its security interest in the Disputed Collateral by filing the First Financing Statement in Whitfield County.

B. Was the First Financing Statement terminated by the Termination Statement?

The Backers claim a legal question exists regarding whether the UCC termination statement of April 28, 1998 released the Plaintiff's collateral, thereby making the interest of the Plaintiff's subordinate to the possessory liens of each Defendant.

The Termination Statement states in Block 8 -F, next to the box to check for "termination" that "[t]he Secured Party no longer claims a security interest under the Financing Statement bearing the file number shown above." This is form language, used in both the Georgia and the South Carolina UCC-3 form. The language is very clear that the release of the security interest applies only to the security interest on the earlier filed financing statement listed on the form. Block 7-A of the Termination Statement is identified as "File Number of Original Financing Statement" and contains the number "155-95-2581," the Second Financing Statement. No other financing statement number is on the Termination Statement.

The Backers claim that the release of the Second Financing Statement also "released" the First Financing Statement; therefore, NationsBank is unperfected as to both financing statements. This interpretation ignores the precise language of the form indexing system and the current status of the record on the indexing system. The Termination Statement only applies to the Second Financing

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Statement, and has no effect on the First Financing Statement. The “check the box” language of the form, which is used in almost every state, cannot be read to release NationsBank’s perfected status as to a financing statement which is not listed by financing statement number on the Termination Statement. Such an interpretation would result in chaos for our existing search and indexing systems. Additionally, a search of the financing statement records of Whitfield County and the Georgia Cooperative Authority, the central indexing authority, reveals that the Termination Statement is indexed as terminating only the Second Financing Statement.

The Second Financing Statement was filed in connection with a real estate acquisition by Buchanan in 1995. It was released when Buchanan sold the real estate in 1998. The fact that some of the generic collateral described in the Second Financing Statement was also listed in the First Financing Statement does not mean that once the Second Financing Statement was terminated, NationsBank also forfeited its perfected position with respect to the Disputed Collateral established by the First Financing Statement. The Termination Statement only reversed the perfection granted by the Second Financing Statement and released the collateral related to the sale of the assets sold in 1998.

The Backers argue that NationsBank amended its Loans in 1995, and in the process paid off the Original 1994 Term Loan Note in full and created an entire new loan referred to as the August 1995 Term Note. The Backers argue that because a new loan was established, NationsBank was required to terminate the First Financing Statement and file a new financing statement (the Second Financing Statement) which was later terminated. The Backers’ argument misconstrues both the transaction and the applicable law.

Although the Amended and Restated Loan Agreement uses the word “satisfy” in connection with a reference to the Original 1994 Term Loan Note in the recitals, this is not a clear reference because the recital in issue also states that NationsBank will “continue to extend,” which implies a renewal or

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extension, not a payoff. Elsewhere in the Amended and Restated Loan Agreement and in the August 1995 Term Note it is clearly stated that the transaction is a renewal. Moreover, the August 1995 Term Note is the operative debt instrument, not the Amended and Restated Loan Agreement, and on its face it states clearly in bold letters: "AMENDED AND RESTATED TERM LOAN PROMISSORY NOTE." Finally, on page 4, the August 1995 Term Note clearly states that "[t]his is intended to be an amendment to and restatement of that certain Promissory Note dated July 14, 1994 and it is the intent of the parties that this Note be construed as such and not as a novation." Under the generally accepted rules of contract construction, the intent of the parties controls, and the intent "must be gathered from the entire agreement and not from any one particular phrase thereof." Reyhani v. Stone Creek Cove Condominium II Horizontal Property Regime, 494 S.E.2d 465, 468 (S.C. Ct. App. 1997). "If the recitals are clear and the operative part is ambiguous, the recitals govern the construction. If the recitals are ambiguous, and the operative part is clear, the operative part must prevail. If both the recitals and the operative part are clear, but they are inconsistent with each other, the operative part is to be preferred." Wilson v. Towers (In re Annapolis & Chesapeake Bay Power Co.), 55 F.2d 199,200 (4<sup>th</sup> Cir. 1932) (quoting Ex Parte Dawes, L.R. 17 Q.B.D. 275). A review of the August 1995 Term Note shows there are no ambiguities regarding the intent of the parties that the transaction is an amendment and renewal.

The Backers have failed to set forth any facts to support their proposition that the Original 1994 Term Loan Note was in fact satisfied and paid in full. The Backers claim that the August 1995 Term Note extinguished the Original 1994 Term Loan Note; therefore, NationsBank was obligated to terminate the First Financing Statement, or alternatively, the security interest was extinguished because there was no outstanding debt. This argument is wrong on both points. First, there is no evidence other than the use of the term "satisfy" that the parties intended to satisfy the Original 1994 Term Loan Note. "A payment of a debt is not considered made until it is accepted by the creditor with the intention of

extinguishing the debt." Guardian Fidelity Corp. v. First S. Savings Bank, 374 S.E.2d 690, 692 (S.C. Ct. App. 1988) (citing In re McElmurray, 47 F. Supp. 15, 19 (E.D. S.C. 1942)). Second, even if the August 1995 Term Note was a novation, NationsBank was not obligated to terminate the First Financing Statement in 1995 because the entire debt had not been paid in full. Pursuant to § 11-9-404, a creditor is not required to file a termination statement until there are no outstanding secured obligations nor commitments to make advances. At the time the August 1995 Term Note was executed, the Debtors were also indebted to NationsBank pursuant to the Original 1994 Revolving Credit Note in the amount of \$25,000,000, which note was amended and restated by the August 1995 Revolving Credit Note, and which the Backers have failed to address. NationsBank also had outstanding commitments to make future advances under the Security Agreements, as discussed below. Furthermore, if the Backers are correct that a novation occurred, NationsBank had an outstanding commitment to loan funds and was not required to terminate the First Financing Statement. Because the Original 1994 Revolving Credit Note remained outstanding, and commitments for future advances existed, NationsBank had no obligation to terminate the First Financing Statement.

The Backers attempt to address the existence of the Original 1994 Revolving Credit Note and the August 1995 Revolving Credit Note by implying that there is only one "secured obligation" because the two loans were secured by a single security agreement. As shown in the Complaint, there were actually four separate security agreements and two separate notes. The documents clearly establish that in 1995 the Debtors had two separate debt obligations to NationsBank, with two separate principal amounts and repayment terms.

Whether the August 1995 Term Note is a new loan or a renewal of an existing loan, it remains perfected under the First Financing Statement despite the existence or termination of the Second Financing Statement. The Georgia Uniform Commercial Code contemplates and approves the use of

subsequent future advances perfected by a financing statement filed only at the time of the original transaction. Section 11-9-312(7) provides as follows:

If future advances are made while a security interest is perfected by filing, . . . the security interest has the same priority for the purposes of subsection (5) of this Code Section . . . with respect to future advances as it does with respect to the first advance. If a commitment is made before or while the security interest is so perfected, the security interest has the same priority with respect to advances made pursuant thereto. In other cases a perfected security interest has priority from the date the advance is made.

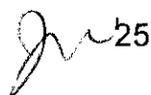
Ga. Code Ann. § 11-9-312(7). Section 11-9-204(3) provides as follows:

Obligations covered by a security agreement may include future advances or other value whether or not the advances or value are given pursuant to commitment.

Ga. Code Ann. § 11-9-204(3). The August 1995 Term Note and the August 1995 Revolving Credit Note state on the face of the document that they are secured by the Security Agreements. The Security Agreements provide for future advances. Based on the relevant code sections and the language in the Security Agreements, NationsBank only needed to file one financing statement to perfect its security interest under the original 1994 loans, and any renewals, modifications, or future advances secured by the Security Agreements. Therefore, whether the August 1995 Term Note was a renewal or a new loan, it was secured by the Security Agreements and properly perfected by the First Financing Statement.

The drafters of the Uniform Commercial Code contemplated and specifically overruled the theory suggested by the Backers, which theory originated with a line of cases beginning with Coin-o-Matic Serv. Co. v. Rhode Island Hosp. Trust Co., 3 UCC Rep. 1112 (Superior Ct. R.I.) holding that each loan was required to have its own financing statement:

The Committee disapproves this line of cases, and believes that an appropriate financing statement may perfect security interests securing advances made under agreements not contemplated at the time of the filing of the financing statement, even if the filing of the advances then contemplated have been fully paid in the interim.

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In re Gilchrist Co., 403 F. Supp. 197, 202-03 (E.D. Penn), aff'd, 535 F.2d 1246 (3d Cir. 1976). There are numerous cases holding that once a financing statement has been filed; the lender may advance funds, pay off loans, and readvances funds, all of which will be perfected by the original financing statement without the need to file additional financing statements. See, e.g., Comprehensive Review Tech., Inc. v. Star Bank (In re Comprehensive Review Tech., Inc.), 138 B.R. 195, 199 (S.D. Ohio 1992) (holding that a financing statement filed to perfect a creditor's security interest in an original loan was sufficient to perfect creditor's interest in the original loan and subsequent future advances).

The Backers argue that even if the transaction that occurred in 1995 was a renewal, the termination of the Second Financing Statement terminated the First Financing Statement, because the Second Financing Statement included some of the same collateral listed in the First Financing Statement. The Backers cite to In re Silvermail Mirror & Glass, 142 B.R. 987 (Bankr. M.D. Fla. 1992), in which the Court held that "[t]he UCC-3 Termination Statement did not specify which property would be affected by the release, either on the face of the agreement, or via an attachment, but merely stated that 'secured party no longer claims a security interest under the [filed] Financing Statement,' thereby releasing all of [the creditor's] interests under the Financing Statement." Id. at 989. However, in In re Silvermail, unlike in this case, only one financing statement was at issue. A recent Georgia case has held that a second financing statement filed by a creditor, describing the same collateral, and securing a modification that renewed and advanced additional funds, was a separate financing statement with its own independent priority status as to the collateral, and was not a continuation or amendment to the first financing statement. Giddens v. Pioneer Credit (In re Giddens), 205 B.R. 349 (Bankr. M.D. Ga. 1997). The intervening creditor in In re Giddens urged the court to deny the original creditor its perfected security status based on the original financing statement, and argued that the original loan was subordinate to the

intervening creditor based on the second financing statement. The court refused, holding that the priority was established by the first financing statement and that the second financing statement was a "back-up financing statement" with its own separately established priority. *Id.* at 353. *In re Giddens* affirms NationsBank's position that each financing statement has its own separate identity, and termination of the Second Financing Statement does not affect the validity of the First Financing Statement.

The Backers claim that the searchers are presented with a dilemma as to "what is the status of the collateral?" The UCC is a "notice filing" procedure, not intended to provide the complete history of the relationship between creditor and debtor, but only to provide notice to third parties that such a relationship exists, and further inquiry of the debtor or creditor is called for. The First Financing Statement satisfied this requirement by placing third parties on notice that NationsBank had an interest in the Disputed Collateral, and if the Termination Statement raised an issue, the third party was on notice to contact the debtor or NationsBank to clarify that issue.

#### CONCLUSION

The Court finds as a matter of law that even though a genuine issue of material fact exists as to whether the Dalton facility was considered to be Martin's principal place of business in Georgia, the Disputed Collateral was kept or used in Whitfield County for the purposes of the uniform commercial code. NationsBank did not terminate or release its security interest perfected under the First Financing Statement, and the release of the Second Financing Statement has no affect on the perfection established by the First Financing Statement. NationsBank has set forth sufficient evidence to show that there are no genuine issues of material fact and it is entitled to judgment as a matter of law.<sup>6</sup> The Backers have failed to set forth specific facts showing the existence of a genuine

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<sup>6</sup> After the proceedings concluded, the Backers raised a new legal argument in their proposed orders. They contended that even if the Court determined that NationsBank's interest

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issue for trial. Therefore, the Court finds that NationsBank's security interest is properly perfected by the filing of the First Financing Statement and summary judgment should be granted in its favor on all counts.

NOW, THEREFORE, IT IS ORDERED, that:

- (a) NationsBank has a first priority perfected security interest in the Disputed Collateral;
- (b) NationsBank's security interest in the Disputed Collateral has priority over any lien claimed by the Backers; and
- (c) NationsBank is entitled to immediate payment of the Escrow Funds together with all accrued interest thereon by the Escrow Agent and the Escrow Agent is hereby ordered to make such disbursement forthwith.



John E. Waites

United States Bankruptcy Judge

September 24, 1999

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was perfected, the bank's claim should be subordinated in order to avoid unjust enrichment. "Inherent in unjust enrichment is the requirement that the receiving party knew of the value being bestowed upon them by another and failed to stop the act or to reject the benefit." Reidling v. Holcomb, 483 S.E.2d 624 (Ct. App. Ga. 1997). The Backers have offered no evidence that NationsBank knew that the Backers were performing any services for Martin or Buchanan, that such services benefitted NationsBank, or that NationsBank was aware of the Backers' existence prior to the Petition Date.

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**CERTIFICATE OF MAILING**  
The undersigned deputy clerk of the United States  
Bankruptcy Court for the District of South Carolina hereby certifies  
that a copy of the document on which this stamp appears  
was mailed on the date listed below to:

SEP 28 1999

~~DEBTOR, DEBTOR'S ATTORNEY, TRUSTEE~~

JUDY G. SMITH

Deputy Clerk

*w/ judgment*

*Bisson*

*Johnson*

*Beal*

*McCarthy*

*Quilley*