NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEW JERSEY

In re:	CHAPTER 11
Chopper Express, Inc.,	CASE NO.: 13-31849 (NLW)
Chopper DDS, Inc.,	CASE NO.: 13-31852 (NLW)
Life Trucking, Inc., and	CASE NO.: 13-31847 (NLW)
Pumpernickel Express, Inc.,	CASE NO.: 13-31851 (NLW)
	(Jointly Administered)
Debtors.	
Nissan North America, Inc.,	
Plaintiff,	ADV. PRO. NO.: ~~13-1381~~ 14-01231
v.	
Valley National Bank,	**PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW**
Defendant.	

Before: HON. NOVALYN L. WINFIELD

APPEARANCES:

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This matter came before the United States Bankruptcy Court for the District of New Jersey on the *Motion for Summary Judgment on Claims Against Valley National Bank* filed by Plaintiff, Nissan North America, Inc., and the *Cross-Motion for Summary Judgment and In Opposition to Nissan North America, Inc.'s Motion for Summary Judgment* filed by Defendant, Valley National Bank in the above-captioned adversary proceeding.

The court has jurisdiction to review and determine the matter under 28 U.S.C. §§ 1334(b) and 157(a). The court finds that even if this matter is properly defined as "core" under 28 U.S.C. § 157(b), it may not, as a constitutional matter, be adjudicated as such. Accordingly, the court submits these *Proposed Findings of Fact and Conclusions of Law* for review by the District Court pursuant to the "non-core" procedures under 28 U.S.C. § 157(c)(1) and Fed. R. Bankr. P. 9033.

The determination to send these *Proposed Findings of Fact and Conclusions of Law* to the District Court is in accord with the decision of the Supreme Court of the United States in *Stern v. Marshall*, 131 S. Ct. 2594, 180 L. Ed. 2d 475 (2011) (certain claims labeled by Congress as "core" under 11 U.S.C. § 157(b) may not be adjudicated by a bankruptcy court as a constitutional matter), and *Executive Benefits Insurance Agency v. Arkinson*, 134 S. Ct. 2165, 189 L. Ed. 2d 83 (2014) (where a "Stern claim" satisfies the criteria of 11 U.S.C. § 157(c)(1), a Bankruptcy Court should hear the proceedings and submit proposed findings of fact and conclusions of law to the District Court for de novo review and entry of judgment).

Further, although the parties to this action consented to the jurisdiction of the Bankruptcy Court, this court is not satisfied that consent is sufficient to allow the Bankruptcy Court to issue final judgment. The issue of consent in adjudicating "Stern claims" is currently before the Supreme Court in *Wellness Int'l Network, Ltd. v. Sharif*, 727 F.3d 751 (7th Cir. 2013), *cert.*

granted in part, 134 S. Ct. 2901 (2014); *see also Galaz v. Galaz* (*In re Galaz*), -- F.3d --, 2014 WL 4197213 (5th Cir. Aug. 25, 2014).

FINDINGS OF FACT

A. Procedural Background

On October 3, 2013 (the "**Petition Date**"), Chopper Express, Inc. (the "**Debtor**") filed a voluntary petition for relief under Chapter 11 of Title 11 of the United States Code (the "**Bankruptcy Code**"), 11 U.S.C. § 101 *et seq*. Three other affiliated debtors also filed for bankruptcy and the cases are being jointly administered.

On February 11, 2014, Nissan North America, Inc. (the "**Plaintiff**" or "**Nissan**"), through counsel, filed the *Complaint of Nissan North America, Inc. for the Return of Funds* (the "**Complaint**") against Charles M. Forman, Chapter 7 Trustee for the Debtor (the "**Trustee**") and Valley National Bank (the "**Defendant Bank**" or "**VNB**"), thereby initiating the above-captioned Adversary Proceeding. The Complaint seeks the return of an alleged overpayment from Nissan to the Debtor, which funds were subsequently transferred from the Debtor's debtor-in-possession account ("**DIP Account**") to the account of its pre-petition lender, VNB.

The Complaint includes the following counts against VNB: Count I – Constructive Trust; Count II – Conversion; Count III – Unjust Enrichment.

On March 13, 2014, VNB filed *Valley National Bank's Answer, Affirmative Defenses, and Counterclaim Against Nissan North America, Inc.* (the "**Answer**").

On August 11, 2014, Nissan filed its *Motion for Summary Judgment on Claims Against Valley National Bank* (the "**Summary Judgment Motion**") seeking summary judgment on Counts I and II.

On September 1, 2014, VNB filed a *Cross-Motion for Summary Judgment and In Opposition to Nissan North America, Inc.'s Motion for Summary Judgment* (the "**Cross Motion for Summary Judgment**").

On September 4, 2014, Nissan filed a *Reply in Further Support of Nissan North America, Inc.'s Motion for Summary Judgment on Claims Against Valley National Bank* (the "**Reply**").

On September 5, 2014, Nissan and VNB filed a *Stipulation of Dismissal*, dismissing VNB's Counterclaim against Nissan.

On September 8, 2014, this court heard oral argument on the Summary Judgment Motion and the Cross-Motion for Summary Judgment.

B. Background of the Dispute

As of the Petition Date, the Debtor and its affiliates identified themselves as "third party logistics providers concentrating in the delivery of automotive parts from various automobile manufacturers to their various dealerships."

Nissan is one of the automobile manufacturers that contracted with the Debtor pre-petition.

In the ordinary course of the parties' business, Nissan made payments to the Debtor on a weekly basis and remitted automated payments for services rendered during the prior week. This practice continued post-petition.

Although pre-petition the Debtor maintained an account with VNB, on the Petition Date, the Debtor opened the DIP Account with Bank of America.

On October 4, 2014, the Debtor filed a *Motion for an Order (A) Authorizing the Debtor's Emergent and Interim and Final Use of Cash Collateral Pursuant to 11 U.S.C. §§ 361 and 363 and Granting Adequate Protection and (B) Scheduling Final Hearing Pursuant to Fed. R. Bankr. P.*

4001(b)(2) (the "**Cash Collateral Motion**").

The Cash Collateral Motion identifies VNB as the Debtor's primary pre-petition secured lender.

The Cash Collateral Motion states the pre-petition debt to VNB aggregated approximately $11,184.503.00.

The Cash Collateral Motion states VNB will be adequately protected by virtue of a replacement lien on the Debtor's assets.

On October 7, 2013, the court held a hearing on the Cash Collateral Motion as to the interim relief requested.

The Debtor and VNB had discussions off the record wherein, in addition to the terms offered in the Debtor's Cash Collateral Motion, VNB agreed to the Debtor's use of cash collateral pending the final hearing. Counsel put the additional terms on the record and, at the parties' request, the court "so ordered" the record on the emergent hearing for interim relief with the understanding that the parties would submit and order. No written order was entered.

From the Petition Date to October 15, 2013, the date of the final hearing on the Cash Collateral Motion, the Debtor operated using cash collateral.

On October 15, 2013, the court denied final approval of the Debtor's Cash Collateral Motion.

Without the ability to use cash collateral for operations, the Debtor could not and did not provide services to its clients, including Nissan, after October 14, 2013.

On October 18, 2013, VNB filed the *Verified Motion of Valley National Bank for and Order Granting Relief from the Automatic Stay* (the "**Stay Relief Motion**").

On October 22, 2013, on a motion by the United States Trustee to convert or dismiss the Debtors' cases, the court entered an *Order Converting Chapter 11 Case* (the "**Conversion Order**"), converting the case to a case under Chapter 7 of the Bankruptcy Code.

On the same day, the court entered an *Order on Motion of Valley National Bank Granting Relief from the Automatic Stay* (the "**Stay Relief Order**").

The Stay Relief Order included the following: "[t]he automatic stay . . . is terminated in that it shall not apply to any lawful action by Valley National Bank to recover possession and dispose of its Collateral."

The Stay Relief Order did not include a waiver of the fourteen day stay imposed by Fed. R. Bankr. P. 4001(a)(3).

Also on October 22, 2013, Nissan made an electronic fund transfer of $155,251.46 to the Debtor's DIP Account at Bank of America ("**Nissan's Wire Transfer**").

Nissan's Wire Transfer was on account of two separate invoices, both for services to be rendered during the week ending October 19, 2013.

The Debtor did not render services to Nissan after the evening of October 14, 2013 (as a result of the inability to use cash collateral), and therefore, did not earn the portion paid by Nissan towards the invoices attributable to October 15, 2013 through October 19, 2013.

The unearned amount totaled $116,240.87 ("**Nissan's Overpayment**").

As a result of the conversion to a Chapter 7 case, on October 23, 2013, at 10:25 a.m., the Trustee was appointed.

On October 23, 2013, at 12:17 p.m., at the direction of VNB, the Debtor wrote a check against its Bank of America DIP Account and deposited the check into the VNB account (the

"**Payment**") which included Nissan's Overpayment.

On October 23, 2013, at 4:03 p.m., VNB debited the entire contents of the Debtor's VNB account and applied the funds to the Debtor's obligation to VNB.

On October 23, 2013 at 4:08 p.m., counsel for Nissan called counsel for VNB to advise of Nissan's Wire Transfer and request the return of Nissan's Overpayment.

On October 23, 2013 at 11:04 p.m., Bank of America honored the Payment written against the DIP Account.

CONCLUSIONS OF LAW

A. Summary Judgment Standard

Federal Rule of Civil Procedure 56, made applicable to this adversary proceeding by Federal Rule of Bankruptcy Procedure 7056, provides for entry of summary judgment where "the pleadings, the discovery and disclosure material on file, and any affidavits show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." FED. R. CIV. P. 56(c); FED. R. BANKR. P. 7056. On a motion for summary judgment, the moving party must demonstrate that no genuine issues of material fact exist. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S. Ct. 2548, 2553, 91 L. Ed. 2d 265 (1986). An issue of material fact is considered genuine if the evidence is such that a reasonable jury could return a verdict for the non-moving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S. Ct. 2505, 2510, 91 L. Ed. 2d 202 (1986).

A properly supported motion for summary judgment "will not be defeated by the mere existence of some factual dispute between the parties," unless the dispute over those facts has the potential to affect the lawsuit's outcome. *Orsatti v. New Jersey State Police*, 71 F.3d 480, 482 (3d

Cir. 1995).

This court concludes that the matter is ripe for summary judgment. The parties agree that there are no genuine issues of material fact. Further, even if the parties disagree on whether, factually, there is a replacement lien, discussed *infra*, the alternative arguments are dispositive of the parties' rights as a matter of law.

B. Replacement Lien and Right to Setoff

This court concludes that, as a matter of law, VNB did have a right to set-off any monies received from the Debtor against the debt owed to VNB by virtue of a valid replacement lien.

The fact that the automatic stay remained in effect because of the fourteen (14) day stay of orders imputed by Fed. R. Bankr. P. 6004(h) is of no moment. The replacement lien granted by the Debtor and "so ordered" by the court on October 7, 2013, allowed VNB to set-off the debt owed to VNB with the receipt of any funds from the Debtor, to the extent VNB had a legal right to the funds received.

C. Bona Fide Payee Status

Both parties agree that Nissan mistakenly paid the Debtor for services the Debtor did not render. Both parties also agree that Nissan had a right to return of that money from the Debtor. The parties disagree on whether Nissan has the right to return of the money now that the funds are in the hands of a third-party, VNB. Specifically, the parties disagree on whether VNB is a bona fide third-party payee.

The Bankruptcy Court concludes that, as a matter of law, VNB is not a bona fide payee and therefore does not have a greater right than Nissan to keep Nissan's Overpayment.

The Bankruptcy Court agrees with VNB that the following principle applies for

determining whether Nissan or VNB has a greater right to the funds:

> [d]espite exercise of dominion or control over money belonging to another, one who innocently received the money in exchange for something of equivalent or comparable value, without knowledge of [the third-party's claim], has a greater right to keep the money than the [third-party] has to its return from that person

Chicago Title Ins. Co. v. Ellis, 409 N.J. Super. 444, 460, 978 A.2d 281, 291 (App. Div. 2009); *see also* RESTATEMENT (FIRST) OF RESTITUTION § 13 (1937) (setting forth the rule that "bona fide purchaser for value" is not liable in restitution to the party with a restitution claim due to mistaken payment); RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 67 (2011) (setting forth "bona fide payee" rule whereby creditor that accepts payment in exchange for reduction of debt without notice of third party's claim in restitution takes payment free of third party's claim).

This principle gives rise to a defense against such claims as unjust enrichment, conversion or constructive trust if it can be established that the recipient of a transfer (i) gave value for the transfer, and (ii) took the funds without notice of a competing claim.

In *Chicago Title Insurance Co.*, on a motion for summary judgment, the court examined a situation where the defendants' daughter participated in a scheme to defraud Lehman Brothers Bank ("Lehman") out of millions of dollars. 409 N.J. Super at 449. For her part in the mortgage scheme, the daughter fraudulently received over $2,800,000.00. *Id.* at 451. The daughter subsequently transferred $268,000.00 to her mother and $244,345.00 to her father. *Id.* at 452-53. When Lehman discovered the fraud and traced the funds, Lehman brought suit against the mother and father for conversion of Lehman's funds.[1] *Id.* at 451-52. Lehman successfully established its claim for conversion against both parents. *Id.* at 460. The court stated "[t]he crux of conversion is wrongful exercise of dominion or control over property of another without

1 Chicago Title Insurance Company was eventually subrogated to Lehman's claims after settling with Lehman.

authorization and to the exclusion of the owner's rights in that property . . . Conversion does not require that defendant have an intent to harm the rightful owner, or know that the money belongs to another." *Id.* at 456 (citations omitted). However, the court recognized that the defendants could avoid liability if they established receipt of the funds for value and without knowledge of the fraud. *Id.* at 460. The court appeared to accept that the parents did not have knowledge of the fraud and instead focused on whether the parents gave value for the funds. Ultimately, the mother created a fact issue as to a small portion of the transfer based on her testimony that she loaned her daughter $15,000 for student loans and part of the transfers from the daughter satisfied that debt. *Id.* at 463. The defendants failed to create an issue of fact with regard to value given for the remaining funds. *Id.* at 465-66.

The defense is applicable to the counts in Nissan's complaint for conversion and constructive trust. *See Chicago Title Ins. Co.*, 409 N.J. Super at 461-62 (in analyzing Lehman's conversion claim for recovery of the funds from the fraudulent mortgage scheme, the court noted that courts also rely on constructive trust and unjust enrichment claims where a party seeks return of monies lost through fraud); *see also Hirsh v. Travelers Ins. Co.*, 134 N.J. Super. 466, 470, 341 A.2d 691, 693 (App. Div. 1975).

As to the first prong of the defense, "if a prior debt was owed to the innocent recipient of the money, the discharge or reduction of debt is value given in exchange for the money." *Chicago Title Ins. Co.*, 409 N.J. Super at 461. The parties do not dispute that VNB gave value for the Payment from the Debtor to VNB by virtue of the reduction of the debt owed by the Debtor to VNB.[2] As of the Petition Date, the Debtor owed VNB approximately $11,184,503.00. Upon the

2 Nissan only disputes whether VNB has a right to receive funds from the Debtor and reduce the debt where, as Nissan alleged, VNB did not have a replacement lien and the automatic stay was still in effect. As discussed *supra*,

deposit of the Payment into VNB's account, VNB gave the Debtor a credit against the outstanding debt. Accordingly, it is evident that VNB gave value in exchange for the payment.

The more difficult question is whether VNB meets the second prong, *i.e.*, whether, as a matter of law, VNB lacked knowledge of Nissan's competing claim to the Payment. To establish this prong of the defense, the payee must have legal control over the funds prior to receiving notice of a competing claim. *See* RESTATEMENT (THIRD) OF RESTITUTION § 66 (2011). As applied to the matter at hand, we must determine whether VNB had legal control over the funds when it debited the Debtor's account at 4:03 p.m. or whether VNB only gained legal control over the funds when the check was honored at 11:04 p.m. If VNB had legal control over the funds at 4:03 p.m., then it lacked knowledge of Nissan's competing claim as the call from Nissan's counsel did not come in until 4:08 p.m. If VNB did not have legal control over the funds until 11:04 p.m., then Nissan's call at 4:08 p.m. gave VNB notice of the competing claim prior to its receipt of the Payment.

The Bankruptcy Court concludes that VNB did not have a legal right to the funds until the check was honored at 11:04 p.m. In reaching this decision, the Bankruptcy Court agrees with Nissan's reliance on the Uniform Commercial Code (the "UCC"), as adopted by New Jersey, and case law interpreting the UCC. As described *infra*, VNB's reliance on the common law is misplaced as the relevant common law principles are preempted by the UCC.

As an initial matter, the court notes that the Supreme Court has stated: "'[w]hat constitutes a transfer and when it is complete' is a matter of federal law." *Barnhill v. Johnson*, 503 U.S. 393, 397-98, 112 S. Ct. 1386, 1389, 118 L. Ed. 2d 39 (1992), *quoting McKenzie v. Irving Trust Co.*, 323 U.S. 365, 369-70, 65 S. Ct. 405, 407-08, 89 L. Ed 305 (1945). Moreover, in *Barnhill*, the Court

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the Bankruptcy Court disagreed with Nissan's position on the replacement lien.

further explained that "[i]n the absence of any controlling federal law, 'property' and 'interest in property' are creatures of state law." *Barnhill*, 503 U.S. at 398, *citing Butner v. United States*, 440 U.S. 48, 54, 99 S. Ct. 914, 918, 59 L. Ed. 2d 136 (1979). Thus, as there is no controlling section of the Bankruptcy Code, this court must look to New Jersey law.

Under New Jersey common law, "if, when the check is delivered, the drawer has funds in the drawee bank to meet it, and if the check is, upon presentment, honored and paid . . . payment will be deemed to have been made as of the time of the delivery of the check." *Hayes v. Fed. Shipbuilding & Dry Dock Co.*, 5 N.J. Super. 212, 214, 68 A.2d 766, 767-68 (App. Div. 1949).

However, to the extent this approach conflicts with New Jersey's version of the UCC, it is preempted. "[T]he UCC is to be 'liberally construed and applied to promote its underlying purposes and policies,' which include simplifying and clarifying the law governing commercial transactions, fostering the expansion of commercial practices, and standardizing the laws of the various jurisdictions." *New Jersey Bank, N.A. v. Bradford Sec. Operations, Inc.*, 690 F.2d 339, 345 (3d Cir. 1982), *citing* N.J.S.A. 12A:1-102(1)-(2). The general principals of common law will remain applicable unless otherwise preempted. N.J.S.A. 12A:1-103 ("[u]nless displaced by the particular provisions of this Act, the principles of law and equity, including the law merchant and the law relative to capacity to contract, principal and agent, estoppel, fraud, misrepresentation, duress, coercion, mistake, bankruptcy, or other validating or invalidating cause shall supplement its provisions.").

Under the UCC, "a check is simply an order to the drawee bank to pay the sum stated, signed by the maker and payable on demand." *Barnhill*, 503 U.S. at 398, *citing* UCC §§ 3-104(1) and (2)(b). "Receipt of a check does not, however, give the recipient a right against the bank. The

recipient may present the check but, if the drawee bank refuses to honor it, the recipient has no recourse against the drawee." *Barnhill*, 503 U.S. at 398, *citing* UCC § 3-409(1).

Pursuant to Section 3-408 of the UCC, "[a] check or other draft does not of itself operate as an assignment of funds in the hands of the drawee available for its payment." N.J.S.A. 12A:3-408. In turn, "[i]f settlement for an item is made by cashier's check or teller's check and the person receiving settlement, before its midnight deadline: (1) presents or forwards the check for collection, settlement is final when the check is finally paid." N.J.S.A. 12A:4-213.

An item is finally paid by the payor bank when the payor bank:

> (1) paid the item in cash;
>
> (2) settled for the item without having the right to revoke the settlement under statute, clearing-house rule, or agreement; or
>
> (3) made a provisional settlement for the item and failed to revoke the settlement in the time and manner permitted by statute, clearing-house rule, or agreement.

N.J.S.A. 12A:4-213. Accordingly, a transfer by check is not made until it is settled (*i.e.*, honored) by the payor bank.[3]

Because the common law cited by VNB conflicts with the UCC, the common law is preempted and the UCC controls. Under a plain reading of the relevant sections of the UCC, discussed above, the Bankruptcy Court concludes that VNB did not have legal control of the Payment until the check was honored at 11:04 p.m.

This is the same conclusion reached by courts in this district interpreting the date of the transfer of a check for purposes of a preference analysis under Section 547(b) of the Bankruptcy Code. *See In re Jolly N, Inc.*, 122 B.R. 897, 903-04 (Bankr. D.N.J. 1991) ("Under New Jersey's

3 This case did not involve certified funds or a cashier's check and, accordingly, this court will not discuss treatment of such a tender.

version of the Uniform Commercial Code, a check does not operate as an assignment of funds until accepted by the drawee bank. N.J.S.A. 12A:3-409(1). This court finds the majority view persuasive.").

On October 23, 2013 at 4:08 p.m. VNB received notice of Nissan's claim to the Payment by virtue of a phone call from counsel for Nissan to counsel for VNB. This notice occurred nearly seven hours prior to the time VNB received legal control of the funds at the time the check was honored at 11:04 p.m. The Bankruptcy Court concludes that VNB had knowledge of Nissan's Overpayment prior to receipt of the Payment and, therefore, VNB does not qualify for the bona fide payee defense. Nissan has a greater claim than VNB to the portion of the Payment attributable to Nissan's Overpayment.

D. Attorneys' Fees

Nissan submits that it is entitled to attorneys' fees and costs as consequential damages stemming from VNB's conversion of Nissan's Overpayment.

The Bankruptcy Court is not persuaded and sees no basis to diverge from the well-settled principal that "New Jersey has a strong public policy against the shifting of costs and that [the New Jersey Supreme Court] has embraced that policy by adopting the 'American Rule' which prohibits recovery of counsel fees by the prevailing party against the losing party." *Litton Indus., Inc. v. IMO Indus., Inc.*, 200 N.J. 372, 405, 982 A.2d 420, 439 (2009)(further citations omitted). "Under the American Rule, 'which is the law of this State, a prevailing party may not be granted attorney's fees unless authorized by the parties' contract, court rule, or statute.'" *Litton Indus., Inc.*, 200 N.J. at 405, *quoting Rock Work, Inc. v. Pulaski Const. Co, Inc.*, 396 N.J. Super. 344, 350-51, 933 A.2d 988, 991 (App. Div. 2007), *cert. denied*, 194 N.J. 272 (2008).

There is no contract relevant to the within matter and Nissan has not cited to any court rule, statute, or other persuasive authority that would warrant an exception to the American Rule against fee shifting.

The Bankruptcy Court therefore concludes that Nissan's request for attorneys' fees and costs should be denied.

CONCLUSION

It is recommended that Nissan's Summary Judgment Motion be granted on Counts I and II of the Complaint, and VNB's Cross Motion for Summary Judgment be denied. The court also recommends that Nissan's request for reimbursement of fees and expenses be denied.

Attached hereto as Exhibit A is a form of Order for review by the District Court if it concludes that the Proposed Findings of Fact and Conclusions of Law call for entry of same.

Dated: October 29, 2014

NOVALYN L. WINFIELD
UNITED STATES BANKRUPTCY JUDGE

EXHIBIT A

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

In re:	:	CHAPTER 11
Chopper Express, Inc.,	:	CASE NO.: 13-31849 (NLW)
Chopper DDS, Inc.,	:	CASE NO.: 13-31852 (NLW)
Life Trucking, Inc., and	:	CASE NO.: 13-31847 (NLW)
Pumpernickel Express, Inc.,	:	CASE NO.: 13-31851 (NLW)
	:	(Jointly Administered)
Debtors.	:	
Nissan North America, Inc.,	:	
	:	ADV. PRO. NO.: 13-1381
Plaintiff,	:	
	:	**ORDER GRANTING SUMMARY JUDGMENT TO THE PLAINTIFF, DENYING DEFENDANT'S CROSS MOTION FOR SUMMARY JUDGMENT AND DENYING PLAINTIFF AN AWARD OF ATTORNEYS FEES AND COSTS**
v.	:	
Valley National Bank,	:	
Defendant.	:	

This matter having come before the United States District Court for the District of New Jersey on the *Proposed Findings of Fact and Conclusions of Law* submitted by Judge Novalyn L. Winfield, United States Bankruptcy Court for the District of New Jersey, pursuant to 28 U.S.C. § 157(c)(1) and FED. R. BANKR. P. 9033, with respect to the application of the Plaintiff, Nissan North America, Inc., for *Summary Judgment on Claims Against Valley National Bank* in the above-captioned adversary proceeding, and Defendant, Valley National Bank, having filed a *Cross-Motion for Summary Judgment and In Opposition to Nissan North America's Motion for Summary Judgment*; and the Bankruptcy Court having heard oral argument; and for good cause

having been shown, it is hereby

ORDERED that Plaintiff is granted summary judgment on Counts I and II of the Complaint and such counts shall be dismissed; and it is further

ORDERED that Defendant's cross-motion is denied; and it is further

ORDERED that Defendant shall return the sum of $116,240.87 to Plaintiff within ten (10) business days of entry of this Order; and it is further

ORDERED that Plaintiff's request for reimbursement of fees and expenses is denied and each party shall be responsible for their own fees and costs; and it is further

ORDERED that Count III of the Complaint is deemed moot; and it is further

ORDERED that the Clerk of the Bankruptcy Court shall mark the above-captioned adversary proceeding closed and shall close such adversary proceeding; and it is

ORDERED that the Plaintiff shall serve a copy of this Order on the Defendant within seven (7) days of the entry of this Order.

DATE: _____ _____

, U.S.D.J.