STATE OF MICHIGAN

IN THE 20th CIRCUIT COURT FOR THE COUNTY OF OTTAWA
SPECIALIZED BUSINESS DOCKET
414 Washington Avenue
Grand Haven, Michigan 49417
616-846-8320

* * * * *

CHS CAPITAL LLC, a Minnesota Limited Liability Company,

Plaintiff,

v

MICHIGAN MILK PRODUCERS ASSOCIATION, a Michigan non-profit Corporation,

Defendant.
_____/

OPINION AND ORDER REGARDING MOTIONS FOR SUMMARY DISPOSITION

File No. 2018-5551-CB

Hon. A. Jon Van Allsburg

In March 2015, dairy farmers John Willcome and Paul Willcome obtained an agricultural loan from Plaintiff CHS Capital, LLC (CHS) for the purchase of 50 head of dairy cattle. The Willcomes defaulted on the loan a year later and became uncollectible. On October 25, 2018 CHS commenced suit against defendant Michigan Milk Producers Association (MMPA), alleging that MMPA failed to honor CHS's lien in milk that MMPA had received and sold on behalf of the Willcomes' corporation, Windermere Farms, LLC. CHS brings this cause of action for conversion, alleging MMPA converted proceeds from the sale of the milk to its own use in violation of MCL 600.2919a. As of April 15, 2019, the lien amount owed CHS was $132,645.59. The parties present their cases under Article 9, specifically §9-320 of the Uniform Commercial Code, MCL 440.9320 (UCC), and the Food Security Act of 1985, §1324, 7 USC 1631 (FSA).

Each party has requested that the Court enter summary disposition in its favor; MMPA under MCR 2.116(C)(10), and CHS under MCR 2.116(I)(2). A motion brought under MCL 2.116(C)(10) tests the factual support for a party's claim. *Smith v Globe Life Ins Co*, 460 Mich 446, 454; 597 NW2d 28 (1999). In bringing a motion under either MCR 2.116(C)(10) or 2.116(I)(2), the moving party must present pleadings, affidavits, depositions, admissions, and any other admissible evidence to support its claim. MCR 2.116(3) and (5). Viewing that evidence in a light favorable to the non-moving party, the Court must determine whether there exists a genuine and material factual dispute sufficient to warrant a trial. *Smith,* at 454-455, citing *Quinto v Cross & Peters Co*, 451 Mich 358, 362-363; 547 NW2d 314 (1996). A genuine issue of

material fact exists when "the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *West v General Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003).

On May 29, 2019 the Court heard oral argument from the parties regarding summary disposition. After considering those arguments and the parties' respective briefs and accompanying exhibits, the Court finds no genuine issue of material fact requiring resolution by a trial. As a matter of law, the Court finds that pursuant to MCL 440.9320(15), Defendant Michigan Milk Producer Association is not liable to Plaintiff CHS Capital, LLC for its security interest in the milk. Therefore, Defendant's motion for summary disposition under MCR 2.116(C)(10) is GRANTED, and plaintiff's request for relief pursuant to MCR 2.116(I)(2) is DENIED.

STATUTORY HISTORY AND INTERPLAY

In evaluating the statutory and case law in this matter, the Court notes that due to periodic revision, particularly in 1986, Article 9 UCC provisions have been renumbered, and former section 9-307 is currently 9-320. To avoid confusion, this Opinion will consistently refer to that provision as 9-320, except as quoted in prior case law as 9-307. In addition, the FSA became effective in 1986 and has preempted the farm products exception clause contained in Michigan's 9-320(1). In many other respects the FSA and Michigan's 9-320 are compatible. The current version of Michigan's 9-320 and 1631 of the FSA are referenced in this case, and the Court relies on 9-320 in disposition of the parties' motions.

In asserting its security interest in the milk, CHS relies on the UCC, in particular the farm products exception contained in 9-320(1), and UCC notice requirements. CHS argues that its security interest in the cattle was properly filed, and survived from the time the cattle produced the milk through the time the milk was acquired by MMPA. CHS classifies MMPA as a buyer of the milk. CHS asserts it gave MMPA notice of its lien and MMPA took the milk subject to CHS's interest.

MMPA identifies itself as a selling agent of the milk, claims that the FSA has preempted 9-320, and relies on 1631(c)(8) and (g) of the FSA in asserting that CHS's security interest in the milk was extinguished once MMPA acquired the milk as a selling agent. Alternatively, MMPA relies on 9-320(15), as providing that a selling agent of a farm product for one engaged in farming operations is not subject to a security interest, even one that is perfected. It adds that, even if the security interest was not extinguished, MMPA is not subject to the lien because CHS failed to comply with the more detailed FSA notice provisions in making MMPA aware of its lien.

The FSA was passed in response to the increasing lack of uniformity arising in what was intended to be a uniform commercial application of the UCC "buyer in the ordinary course" provision, 9-320(1). Lack of uniformity was caused by the "farm products exception" clause

contained within the buyer in the ordinary course provision. The farm products exception is essentially an exception within an exception to the general rule of Article 9. The general rule is that a security interest in goods survives in the goods despite their sale. 9-315(1). The first exception is that a buyer of goods in the ordinary course of business takes free of a security interest created by the buyer's seller. The reasoning behind this is that when a lender takes a security interest in goods knowing that the debtor is going to sell them to third-party purchasers, the lender is in a better position to bear the burden of the debtor's default than the innocent purchaser who has no method of discovering the lien. However, a farm products exception was carved out of the buyer in the ordinary course provision, resulting in current 9-320(1), which provides:

> [A] buyer in the ordinary course of business, other than a person buying farm products from a person engaged in farming operations, takes free of a security interest created by the buyer's seller, even if the security interest is perfected and the buyer knows of its existence.

Under the farm products exception most security interests created by farmers continued to encumber their farm products after they were sold,[1] leading to the farm products exception becoming one of the most heavily criticized provisions in Article 9. The pre-revised Article 9 definition of "farm products" required goods to be in the debtor farmer's possession to retain their status as a farm product. In the litigation that ensued, in an attempt to protect buyers of farm products, courts interpreted possession liberally, re-characterized farm products as inventory once they left the possession of the farmer, utilized bailment principles, or held that the lender had impliedly authorized the sale free of a security interest or had waived the security interest. Additionally, many states enacted non-uniform versions of 9-320(1), or deleted the farm products exception altogether from their versions of the UCC, in order to correct the seeming injustice to buyers of farm products caused by the farm products exception.

Due to the buyer in the ordinary course provision becoming anything but uniform due to States' various modifications, and in an effort to provide uniformity with respect to buyers of farm products, and to protect those buyers, Congress enacted the Food Security Act of 1985, §1324, 7 USC 1631 (FSA).[2] As noted in White and Summers, Uniform Commercial Code (4th Ed), § 24-14, p 885, the law was passed "under the noses of the bankers and other farm lenders who apparently did not know of the law's existence until the skids were already greased for its passage." The FSA immediately expressed its purpose in its title: "Protection for Purchasers of Farm Products." Congress further states its findings, purpose and intent in § 1631(a) and (b):

> (a) Congressional findings

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[1] See, e.g., *US v Progressive Farmers Marketing Agency,* 788 F2d 1327 (CA 8, 1986).

[2] The Federal Food Security Act of 1985, § 1324, 7 USC 1631 became effective December 23, 1986.

> Congress finds that--
>
> (1) certain State laws permit a secured lender to enforce liens against a purchaser of farm products even if the purchaser does not know that the sale of the products violates the lender's security interest in the products, lacks any practical method for discovering the existence of the security interest, and has no reasonable means to ensure that the seller uses the sales proceeds to repay the lender;
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> (2) these laws subject the purchaser of farm products to double payment for the products, once at the time of purchase, and again when the seller fails to repay the lender;
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> (3) the exposure of purchasers of farm products to double payment inhibits free competition in the market for farm products; and
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> (4) this exposure constitutes a burden on and an obstruction to interstate commerce in farm products.
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> (b) Declaration of purpose
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> The purpose of this section is to remove such burden on and obstruction to interstate commerce in farm products.

Article 9 of the UCC was also revised in 1985. It retained the farm products exception, and relied on the FSA to protect buyers of farm products. Michigan's revised Article 9 became effective in 1986, and that version of 9-320(1) did not contain a farm products exception.[3] Instead of requiring the specific notices contained in the newly-enacted FSA, Michigan's revision added direct notice to sales agents and commission merchants of outstanding security interests in farm products they obtained. In a case addressing whether an auctioneer of cattle was liable for conversion when it did not account to the lender upon the sale of encumbered cattle, the Michigan Supreme Court noted that the intended purpose of the revision was "to shield auctioneers from such liability where they have complied with the statute's requirements and have not received actual notice." *Michigan Nat Bank v Michigan Livestock Exchange*, 432 Mich 277, 301; 439 NW2d 884 (1989).[4] Upon further reorganization of its Article 9 in 2001, Michigan re-added the farm products exception to 9-320(1). The current version of 9-320 contains an exemption for sales agents in 9-320(15), quoted *infra*.

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[3] The parties in this case reference Op Atty Gen 1988, No. 6535, p 377, in which Michigan's Attorney General opined in 1998 that the FSA did not preempt Michigan's UCC 9-320 [9-307]. That opinion was based on the version of 9-320 at the time, which did not contain a farm products exception. In other respects, Michigan's 1985 version of 9-320 is fairly identical today. The Attorney General Opinion is still applicable in holding that the FSA's 1631 notice provisions do not preempt Michigan's direct notice provisions.

[4] However, the Court declined to apply the revised Article 9 provision to protect the auctioneer in that case because the sales of cattle had occurred before its effective date. The Court remanded to the trial court for further findings regarding whether the bank had waived its secured interest.

As will be noted later in this Opinion, Michigan's current version of 9-320, taken as a whole, serves to achieve the same protection for selling agents as does the FSA, and therefore 9-320 as a whole has not been preempted by the FSA.

In addition, the FSA was not intended to modify UCC provisions with respect to creating, perfecting, and prioritizing security interests, and the UCC may protect a lender who fails to comply with FSA notice provisions. *Farm Credit Services of America, PCA v Cargill, Inc*, 750 F3d 965; 83 UCC Rep Serv 2d 535 (8th Cir. 2014), as corrected (May 2, 2014).

SUMMARY OF FACTS

The summary of facts is based upon the undisputed facts in the parties' briefs and accompanying exhibits, and on facts set forth by both moving parties that have not been countered with evidence by the other. Windemere is a dairy farm in Ottawa County that has been operated by the Willcome family for more than 50 years. Windemere has no employees. Rather, Gerald and Kathleen Willcome and their adult sons, John and Paul Willcome, and John's wife Mary, work on the farm and all reside at the same address, which is the address of Windemere. There is a sign on the property that says Windemere Farms, and the family always just referred to it as Windemere Farms.

MMPA is a four-state cooperative association of dairy farmers which, according to its Membership and Marketing Agreement and the affidavit of its 30-year Director of Credit and Risk Management, Cheryl J. Schmandt,[5] was organized for the purpose of marketing its members' milk and is headquartered in Ohio with an office in Novi, Michigan and various locations for receiving milk. MMPA receives members' milk at its facilities in some cases, but does not buy milk directly from its members. Rather, it markets the milk to third parties and coordinates delivery of its members' milk. MMPA receives proceeds from the milk sales and distributes them to its members, retaining dues, members' equity contributions, hauling expenses and marketing expenses. Members may direct MMPA to pay part or all of a member's sales proceeds to third parties by way of assignment. MMPA's statement to Windemere ending October 31, 2016 shows several third-party distributions, including ones to John Deere and Tri-County Feed Services.[6] The one-page MMPA Membership and Marketing Agreement states that MMPA is "engaged in marketing the milk of its members on a cooperative basis." Members designate MMPA "as agent for...the purpose of marketing all of the milk produced on farms owned ... or controlled by the Producer ...." The MMPA agrees "as such agent ... to market the milk which it receives from the Producer to the best advantage of its members as possible, and to

[5] MMPA Membership and Marketing Agreement #221529, ¶ 2, attached as Exhibit 2 to MMPA's May 8, 2019 Brief in Support of its Motion for Summary Disposition. May 8, 2019 Affidavit of Cheryl J. Schmandt, p 1-3, attached as Exhibit 1 to MMPA's May 8, 2019 Brief in Support of its Motion for Summary Disposition.

[6] [CHS's] May 21, 2019 Brief in Response to Defendant's Motion for Summary Disposition, Exhibit M.

account for and guarantee the remittance of the proceeds thereof to the Producer, less dues and other deductions authorized from time to time under the Bylaws ...."

CHS is a Minnesota agricultural financing company, lending money to farmers throughout the Midwest.

The farm milked approximately 159 head of cattle owned by Gerald and Kathleen Willcome, and had an MMPA membership that renewed from year to year. Prior to January 1, 2000 the MMPA Membership was under contract # 221001, which listed Windermere Farms and Kathleen, John and Paul Willcome. From January 1, 2000 to November 1, 2010 the MMPA Membership Agreement listed Kathleen, and sons John and Paul Willcome as a partnership producer under contract number 221529.[7] On June 29, 2010, the Willcomes organized Windemere as a limited liability corporation named Windemere Farms, LLC for estate planning purposes. According to John Willcome in his deposition, "because my parents were getting older, so for the estate planning so stuff would just transition over to my brother and I."[8] On June 29, 2010 Kathleen, John and Paul Willcome signed a letter notifying MMPA that they had formed Windemere Farms, LLC "for accounting, tax and liability purposes," and they desired to "immediately cancel any membership agreement in our individual names and establish our producer account with our company in the name of Windemere Farms, LLC."[9] The MMPA contract number 222764, effective November 1, 2010, listed Windemere Farms, LLC, Kathleen Willcome as manager, and Gerald, John and Paul Willcome as partners, referencing that it replaced previous contract number 221529.[10] There were no contracts between the Willcomes and Windermere regarding transfer of the milk.[11] When addressing Windermere's operating agreement in his deposition, and when asked "What is the operation of Windemere Farms," John Willcome responded, "We're a farm." Counsel for CHS clarified, "It's the entity through which you do your dairy farming at the home farm?" John Willcome responded, "Yes."[12]

All milk produced on the farm was marketed by MMPA and picked up regularly by "independent milk haulers for delivery directly to third parties or one of MMPA's facilities for

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[7] MMPA Membership and Marketing Agreement #221529. *Id.*

[8] March 11, 2019 Deposition of John Kenneth Willcome, p 15, attached as Exhibit 3 to MMPA's May 8, 2019 Brief in Support of its Motion for Summary Disposition.

[9] June 29, 2010 Letter from Windemere Farms, LLC to Cheryl J. Schmandt at MMPA, attached as Exhibit 4 to MMPA's May 8, 2019 Brief in Support of its Motion for Summary Disposition.

[10] Michigan Milk Producers Association Membership and Marketing Agreement #222764, attached as Exhibit 5 to MMPA's May 8, 2019 Brief in Support of its Motion for Summary Disposition.

[11] March 11, 2019 Deposition of John Kenneth Willcome, *supra*, p 14.

[12] *Id.*, p 15-16.

further processing and marketing of the milk."[13] The milk from the farm's cattle was commingled with other farms' milk in a bulk tank by the haulers and MMPA. In 2015, given the favorable price at which milk was selling, John and Paul Willcome desired to purchase an additional 50 head of cattle, and on March 6, 2015 applied in their individual names for an agricultural loan from CHS in the amount of $100,200.00. They executed an Agricultural Loan Agreement, Agricultural Security Agreement, and a List of Potential Buyers, Agents, and Commission Merchants in both of their names individually, but not in the name of Windemere Farms, LLC. John and Paul Willcome signed, but did not list MMPA or any other names on the List of Potential Buyers, Agents and Commission Merchants. When asked the reason for this at his deposition, John Willcome stated, "... when we signed this, they say, 'Sign here, sign there.' I mean, I don't – I can't – I don't recall why it wasn't filled out. I don't know." The Security Agreement provided for a security interest in "all livestock ... products and produce from the Livestock," and the parties do not dispute that CHS's security interest extended from the secured cattle to the milk they produced.

CHS states that John and Paul Willcome never advised that they were operating under the name Windemere Farms, LLC, but both parties agree that John and Paul Willcome provided CHS a voided check for the Windemere Farms, LLC bank account, and CHS electronically deposited the loan funds to that account.[14] In August 2015, CHS loaned John and Paul Willcome an additional $15,000.00, and the entire loan's due date was changed from March 15, 2016 to August 31, 2016. John and Paul Willcome purchased the 50 head of cattle over time from various places, and that cattle's milk was commingled with the milk of the 159 cattle owned by Gerald and Kathleen Willcome. At the time the loans were effected and the security interest attached, Windemere Farms, LLC did not own in its corporate name the land on which the farm was located, the home, the cattle, or any of the equipment on the farm, and did not employ the Willcomes as employees. The family worked the farm, and Kathleen, Gerald, John and Paul Willcome comprised the four members of Windemere Farms, LLC, with Kathleen designated as manager. John Willcome testified in his deposition that Kathleen Willcome controlled the Windemere Farms, LLC bank account, and he did not have access to that account. The funds in that account went to pay the farm's and the family's expenses.

CHS filed a UCC Financing Statement with regard to the Willcomes' loan on March 19, 2015, describing as collateral the cattle and products of the cattle.[15] At the time the loan was executed, CHS did not provide MMPA direct notice of its lien on a portion of the milk coming from the farm in accord with 9-320(9). CHS did not rewrite the loan the following year, and John

[13] May 8, 2019 Affidavit of Cheryl J. Schmandt, *supra*, p 2, ¶ 5.

[14] [CHS's] May 21, 2019 Brief in Response to Defendant's Motion for Summary Disposition, May 20, 2019 Affidavit of Anton Champion, p 2, attached as Exhibit K.

[15] *Id.*, Exhibit C.

and Paul Willcome did not repay the loan on August 31, 2016, citing financial hardship caused by the decrease in the price of milk and other variables such as feed costs and low milk production.[16] Six weeks later, on October 14, 2016 CHS mailed a letter giving notice of its security interest in the Willcome's milk to MMPA at an MMPA location in Constantine, Michigan. The letter notified MMPA that it had a blanket security interest including a lien on all farm products, and that the lien "includes all individual owners as well as any other related entities."[17] CHS directed that:

> Any checks issued by your organization as payment for the farm products ... regardless of [in] which name or entity they may be sold, must include CHS Capital, LLC as a payee on that check. Our lien also covers any crop sold by the above in any other name or names other than specifically designated herein.

CHS recovered 20 head of cattle from the farm, and the Willcomes made some voluntary payment, providing CHS with a recovery of $15,915.55 on the loan. CHS filed suit against John and Paul Willcome in the Ottawa County Circuit Court and obtained a default judgment against them in the amount of $128,673.35 on December 7, 2016. CHS attempted garnishing John and Paul Willcome's MMPA milk proceeds, but MMPA did not direct payment to CHS, reporting in its January 23, 2017 garnishee disclosure that its indebtedness was to Windemere Farms, LLC and not to John and Paul Willcome. MMPA continued issuing checks for milk proceeds to Windemere Farms, LLC without including CHS as a joint payee on the checks. CHS estimates that the milk proceeds paid by MMPA to Windemere between October 14, 2016 and July 2018 for all milk produced by all of the cattle on Windermere Farms was $322,600.00, an amount in excess of the amount required to satisfy CHS's security interest.

John and Paul Willcome individually filed for personal bankruptcy, and the CHS debt was discharged in the U. S. Bankruptcy Court, Western District of Michigan. On October 25, 2018, CHS commenced suit against MMPA alleging MMPA's liability for payment of milk proceeds in satisfaction of CHS's security interest under 1631 of the FSA and 9-320(1) of the UCC, and for conversion of milk proceeds under MCL 600.2919a in the amount of $151,230.60. CHS asks this Court to award treble damages under the conversion statute, in addition to costs and reasonable attorney's fees.

LEGAL ANALYSIS

The issues of law the Court must consider are: (1) Whether the FSA or UCC applies in this case; (2) whether MMPA was a buyer or selling agent of the milk in the ordinary course of business, or had a different relationship to the milk; (3) whether only the Willcomes, or also Windermere Farms, LLC was "engaged in farming operations;" and (4) whether the Willcomes

[16] March 11, 2019 Deposition of John Kenneth Willcome, *supra*, p 39, 74.

[17] *Id.*, Exhibit E.

or Windemere Farms, LLC, or both, were debtors with respect to the milk, i.e., the seller who created the security interest, and, ultimately, (5) whether MMPA converted the milk proceeds.

Applicable Law

As noted previously, section 1631 of the FSA was passed to provide uniformity in the treatment and protection of buyers of farm products, including selling agents and auctioneers. The provision of 1631(d) is directly contrary to 9-320(1). Under 9-320(1), a buyer of farm products takes subject to an underlying security interest, thus providing extra protection to agricultural lenders who hold security interests in farm products. The opposite is true for buyers of farm products under §1631(d) of the FSA, who take free of a seller's security interest:

> Except as provided in subsection (e) and notwithstanding any other provision of Federal, State, or local law, a buyer who in the ordinary course of business buys a farm product from a seller engaged in farming operations shall take free of a security interest created by the seller, even though the security interest is perfected; and the buyer knows of the existence of such interest.

It is generally accepted that the FSA has preempted the farm products exception contained in 9-320(1).[18] Whether a federal statute or regulation preempts state law is determined by first examining "the clear and manifest purpose of Congress," and express preemption may apply if Congress explicitly includes a preemption provision in a statutory scheme, thereby stating its intent to displace inconsistent state law.[19] In 1631(a) and (b), the FSA's stated purpose clearly preempts the contrary farm products exception clause in 9-320(1) when it references "laws [that] permit a secured lender to enforce liens against a purchaser of farm products even if the purchaser does not know that the sale of the products violates the lender's security interest in the products …," and declares as its purpose the removal of "such burden on and obstruction to interstate commerce in farm products."

The FSA also preempts the farm products clause contained in 9-320(1) by conflict. Conflict preemption applies when compliance with both federal and state regulations is a physical impossibility, or when state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.[20] In situations where there is a conflict between state and federal law, it is well established that the state laws are "without effect."[21] In

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[18] White and Summers, Uniform Commercial Code (6th Ed), § 33.33, p 485, § 33.36, p 492.

[19] *Forest City Residential Management, Inc, ex rel Plymouth Square Ltd Dividend Housing Assoc. v Beasley*, 71 F Supp 3d 715, 726-727 (ED Mich 2014), citing *Cipollone v Liggett Grp, Inc*, 505 US 504, 516, 112 S Ct 2608, 120 L Ed 2d 407 (1992), quoting U.S. Const. Art. VI, cl. 2.

[20] *Forest City, supra* at 726-727, citing *Fid Fed Sav & Loan Ass'n v de la Cuesta*, 458 U.S. 141, 153, 102 S Ct 3014, 73 L Ed 2d 664 (1982) (with internal citations and quotations omitted).

[21] *Id.*

this case, 1631(d) clearly conflicts with the farm products exception clause in 9-320(1), and the FSA controls.

In addition to the clear language of the statute, express preemption, and conflict preemption, the intent of Congress to preempt 9-320(1) in enacting FSA 1631 was made manifest in House Committee Report on Pub. L. 99–198, No. 99–271, Part 1, September 13, 1985, at pages 108 et seq.[22]

However, as will be discussed *infra*, under the facts of this specific case the Court finds that MMPA was a selling agent of the milk, and that the farm products exception clause relating to buyers of farm products in 9-320(1) does not apply.[23] Pursuant to the facts contained in the MMPA Membership and Marketing Agreement, and in the Affidavit of Cheryl J. Schmandt, *supra*, as detailed previously in this Opinion, the Court finds that MMPA was not a buyer of the milk, but marketed and sold the milk as a selling agent. MMPA never assumed an ownership interest in the milk. As a selling agent, it is not subject to the buyer in the ordinary course of business provision in 9-320(1), or the farm products exception clause contained therein. Since the FSA preempted only the farm products exception clause with respect to buyers, that clause is not applicable in this case, and preemption is not an issue.

Additionally, Michigan's 9-320 as a whole does not conflict with the FSA's treatment of selling agents. In providing direct notice provisions in 9-320(6) to (14), and allowing selling agents to take free of a lender's security interest in farm products under 9-320(15) to the extent that the selling agent has not become a lender to the debtor, Michigan's 9-320 provisions as a whole comport with the FSA's protection of selling agents under the FSA's notice provisions. Therefore, Michigan's 9-320, as applied to the facts of this case, does not conflict with the provisions of the FSA, and the FSA does not preempt Michigan law in this case.

Therefore, the Court finds as a matter of law that the FSA has not preempted 9-320 in this specific case. The Court will apply the provisions of 9-320. Case law relying on the UCC after enactment of the FSA, and application of case law interpreting terms under the FSA, may be relevant.[24]

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[22] For additional analysis, see 55 UMKC L. Rev. 454 (Spring, 1987), Charles W. Wolfe, "SECTION 1324 OF THE FOOD SECURITY ACT OF 1985: CONGRESS PREEMPTS THE 'FARM PRODUCTS EXCEPTION' OF SECTION 9-307(1) OF THE UNIFORM COMMERCIAL CODE"

[23] The Court notes that 9-320(13) states that "person buying farm products" or "buyer" includes a sales agent who sells farm products in the ordinary course of business for a person engaged in farming operations, but that definition is limited to application in subsections (6) through (12), and does not serve to classify MMPA as a buyer under 9-320(1).

[24] White and Summers, *supra*, § 33.33, p 485.

Application of 9-320 to MMPA as a Selling Agent

As a selling agent, MMPA will take free of CHS's security interest in the milk if the conditions of 9-320(15) are met:

> Except as otherwise provided by subsection (16), a commission merchant or selling agent who sells farm products, in the ordinary course of business, for a person engaged in farming operations is not liable to the holder of a security interest in those farm products even though the security interest is perfected and even though the commission merchant or selling agent knows of its existence.

Thus, to take free of a security interest, even one that is perfected and of which it has notice, MMPA must sell:

- farm products
- in the ordinary course of business
- for a person engaged in farming operations

Additionally, as will be seen below, the definition of "farm products" also requires that the one engaged in farming operations be "the debtor."[25] Thus, a fourth requirement is that MMPA must sell

- for a person who is a debtor with respect to the milk.

(1) Was the Milk a Farm Product?

Under original Article 9, products of livestock ceased to be farm products if they were not "in the possession of a debtor engaged in raising, fattening, grazing, or other farming operations." As noted above, this led to case law that described farm goods such as cotton and grain as inventory, relied on bailment principles, or found that a farmer retained constructive possession of his farm goods.

Revised Article 9 provided a new definition of "farm products" in 9-102(hh):

> "Farm products" means goods, other than standing timber, *with respect to which the debtor is engaged in a farming operation* and which are 1 of the following:
>
> ***

[25] In this way, the UCC definition of farm products is compatible with the FSA provision that a selling agent takes free only of a security interest "created by the seller" in 1631(g). Though worded differently, 9-320(15) and 1631(g) have the same effect.

> (iv) Products of crops or livestock in their unmanufactured states. (Italics added.)

The new definition essentially traded the "possession" requirement for an "engaged in farming operations" requirement. It requires that the encumbered farm product which a buyer or selling agent obtains must remain closely related to the farmer, or risk a change of status into regular goods. A farm product is now specifically excluded from "Inventory" in 9-102(vv), which is defined as "goods, other than farm products …." However, if the farm product is not sold by one engaged in farming operations, and thus becomes too far removed from the farmer debtor, the farm product could be reclassified as inventory or regular goods, under which the one obtaining those goods may be clothed with buyer in the ordinary course status. Thus, a security interest might be avoided in goods sold by a "front" or third party instead of the farmer debtor. This is how CHS characterizes the Willcomes' sale of milk through Windemere in this case. CHS notes that Windemere was a legally separate entity from the Willcomes, while MMPA characterizes Windemere as the Willcomes alter ego, viewing both as one and the same seller, farmer, and debtor.

Milk certainly falls under the UCC description of "[p]roducts of crops or livestock in their unmanufactured states," and the parties do not dispute that the milk was a good with respect to which debtors John and Paul Willcome were engaged in farming operations. Therefore, milk falls under the UCC definition of "farm product" with respect to the debtor Willcomes. Whether milk was a farm product in the hands of Windermere, or whether it changed status to regular goods or inventory, is contingent upon the Court's findings, as a matter of law, *infra*, whether Windemere was engaged in farming, and whether Windemere was the debtor.

(2) Whether MMPA Sold Milk in the Ordinary Course of Business

The UCC does not define a *seller* in the ordinary course of business, nor does the FSA, but under Article 9's § 1-201(i) definition of a buyer in the ordinary course of business, ordinary course is one that "comports with the usual or customary practices in the kind of business in which the seller is engaged or with … usual or customary practices." Similarly, Black's Law Dictionary defines "course of business" as "[t]he normal routine in managing a trade or business. Also termed ordinary course of business …."[26]

MMPA asserts in its brief that MMPA was acting in the ordinary course of business in marketing and selling milk for others in obtaining milk from Windemere. In support, MMPA provides MMPA's Membership and Marketing Agreement and the Affidavit of Cheryl Schmandt showing that in selling the milk it obtained from Windemere, MMPA was acting in accord with its usual or customary practice. CHS does not present evidence countering MMPA's detailed description of its activities.

[26] *Black's Law Dictionary* (11th ed), p 443.

The facts show that MMPA was acting as a selling agent, and the Court finds as a matter of law under 1-201(i) that MMPA was acting in its ordinary course of business in marketing the milk.

(3) Whether Windemere Farms, LLC was "Engaged in Farming Operations"

Since Windemere Farms, LLC was the producer member under the MMPA membership and marketing agreement during all times relevant to this cause of action, whether the milk remained a farm product in its hands, and thus whether MMPA sold a farm product on behalf of Windemere, depends upon whether Windemere was "engaged in farming operations" when MMPA obtained the milk. The analysis of that factor depends upon how, as a matter of law, the Willcomes and Windemere are related under Michigan corporate law, and on how Article 9 and FSA case law define "engaged in farming operations."

CHS asserts that as a limited liability entity separate and distinct from the Willcomes, Windemere was not engaged in farming operations, but only the Willcomes who did the actual farm work were so engaged. MMPA asserts that Windemere was so closely identified with the Willcomes that they were alter egos and both engaged in farming operations. The facts presented to the Court show that before Windemere's organization, the producer providing milk to MMPA under a membership and marketing contract was first the Willcomes, and then a Willcome partnership. Following organization, and during all times relevant to the dispute between the parties, the producer under agreement with MMPA was Windemere Farms, LLC. The parties agree at one point in their respective briefs that, in regard to its relationship with MMPA, Windemere was a direct continuation of the Willcomes.[27]

The parties agree that John and Paul Willcome were engaged in farming operations as persons who actually worked on the dairy farm. They agree that Windemere is a separate legal entity as a limited liability company. Michigan views a limited liability company as a completely separate entity from its members, and the rules regarding "piercing the corporate veil" are applicable in determining whether to pierce the veil of an LLC. *Florence Cement Co v Vettriano*, 292 Mich App 461, 468-469; 807 NW2d 917 (2011).

The term "engaged in farming operations" is not defined under either the UCC or FSA. Likewise, there is no Michigan case law interpreting "engaged in farming operations" for the purpose of the UCC or FSA. Revised Article 9 defines "farming operation" in 9-201(ii) as "... raising, cultivating, propagating, fattening, grazing, or any other farming, livestock, or aquacultural operation." That definition does not particularly narrow things down for our analysis, but the Court finds as a matter of law that "[a]ny other farming ... operation" includes dairy farming.

[27] Plaintiff's May 21, 2019 Brief in Response to Defendant's Motion for Summary Disposition, p 3; Defendant's May 8, 2019 Brief in Support of its Motion for Summary Disposition, p 10.

Michigan also defines "farm operation" in the Right to Farm Act,[28] MCL 286.472(b):

> (b)… [T]he operation and management of a farm or a condition or activity that occurs at any time as necessary on a farm in connection with the commercial production, harvesting, and storage of farm products, and includes, but is not limited to:
>
> (iii) the movement of … farm products … on the roadway as authorized by the Michigan vehicle code …
>
> (*vii*) The fencing, feeding, watering, sheltering, transportation, treatment, use, handling and care of farm animals.
>
> (*x*) The employment and use of labor.
>
> ***
>
> (e) "Person" means an individual, corporation, partnership, association, or other legal entity.

Subsection (e), above, of the Right to Farm Act shows that Michigan allows for a farm in corporate form. Additionally, a farmer has been held in Michigan to include a corporation such as a cooperative of farmers.[29]

Case law specifically addressing the term "engaged in farming operations" is scant, and does not provide a clear definition, often relying on trade practice or how far removed the collateral was from the debtor farmer's possession. While the farmer may be engaged in farming operations, his business may not necessarily be so engaged. Some of these cases analyze the relationship of the farmer to his business entity in construing the "created by the seller" provision found in 9-320(1) and 1631(g), and are cited as indicative of the facts under which a farmer and his business entity are deemed as acting in concert. In a pre-FSA and pre-revision Article 9 case, *US v Hext*, 444 F2d 804 (5th Cir. 1971), cotton farmer Hext was also the sole owner of a cotton ginning business, W.A. Hext and Sons Gin Co., Inc. Hext ginned his own and other farmers' cotton through Gin Co. and then transferred all of the ginned and baled cotton to a warehouseman and selling agent for sale. When both Hext and the Gin Co. became insolvent and the lender sued the warehouseman and selling agent for conversion of the collateral, the court found:

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[28] MCL 286.471, et seq.

[29] See, e.g., *Eaton Farm Bureau v Eaton Twp (On Remand)*, 231 Mich App 622, 626; 588 NW2d 142 (1998); *Michigan Apple Packers Co-op, Inc v. Sparta Tp and Michigan State Tax Com'n*, MTT (Docket No. 266781), issued June 24, 2003, citing OAG, 1967, No. 4582, p. 52 ("The term 'farmer,' as used in MCL 211.9(j), engulfs property actually being used by a farmer in agricultural operations and a farming corporation").

> [I]n light of the general trade practice of buyers dealing with the gins ... we do not think that the buyers here can be regarded as buying from a person engaged in farming operations when they purchased cotton from the W.A. Hext and Sons Gin Co., Inc. *Id.* at 813-814.

The Court found that Hext's business, although a sole proprietorship that looked like an alter ego of farmer Hext, was not engaged in farming. However, the *Hext* Court found that because the lender knew farmer Hext was the owner of the Gin Co. at the time the security interest was created, the cotton was akin to inventory that the lender knew would be sold in the ordinary course of Gin Co.'s business, which had the same effect as finding farmer Hext and the Gin Co. to be one and the same in creating the security interest in the cotton:

> Section 9-307(2) requires that in order for the buyer to purchase unencumbered by such a prior lien, the security interest in question must have been "created by his seller." ... [I]n the instant case Hext, the farmer who created the security interest, was the sole owner of the Gin Co. which sold the cotton to the buyer, and this state of affairs was known to the secured party at the time the security interest was created.
>
> ***
>
> ... [T]he FHA took a security interest in goods (the 578 bales of cotton) as farm products, knowing that the debtor had the capability of transferring them into the category of inventory and selling them in the ordinary course of his gin business.

In *US v Continental Grain Co*, 691 F Supp 1193 (W.D. Wis. 1988), a case in which the Western District Court of Wisconsin noted that applying either the UCC or the FSA made no difference to the outcome, farmer Messner was a partner in a grain farming operation and also a partner in Messner Grain and Feed, a grain dealer that marketed and sold the grain of the Messners and other farmers. When the farming operation defaulted on its government loan, the government sued Continental Grain Co. as the buyer of the Messners' encumbered grain. The court found that as soon as the grain left the possession of the farmer it became inventory. Then, it was sold by a dealer, Messner Grain and Feed, and not by a person engaged in farming operations. *Id.*, at 1199. However, in analyzing the "created by the buyer's seller" condition in 9-320(1), the court found that both the farming partnership and Messner Grain and Feed had created the security interest in the grain because of their close identity and joint ownership, and because the lender knew of that relationship. *Id.*, at 1200. The court ultimately found that the farm products exception in 9-320(1) did not apply and Continental Grain purchased the grain free of the government's security interest. The court in that case also noted the history of pervasive fraud that the Messner farming partnership had perpetrated on other lenders, and the previous criminal conviction of Billy Messner for misuse of government funds. *Id.*, at 1196.

In *Finn-Ag, Inc v Hufnagle, Inc*, 720 NW2d 579 (Minn. 2006), the Minnesota Supreme Court addressed the "created by the seller" issue in determining whether Fin-Ag's security interest in farmer Buck's corn crop extended to obligate the corn's buyer, Meschke poultry farms. Meschke knew from Minnesota's central filing system that Fin-Ag possessed a security interest in Buck's corn, and when Meschke purchased corn directly from Buck he made payment jointly to Buck and Fin-Ag. Four other persons (two with the last name of Buck but referred in the case as the Tookers), also sold corn to Meschke, but Meschke did not find them listed in the central filing system. Meschke paid the Tookers for the corn without including Fin-Ag, and the Tookers deposited the proceeds directly into farmer Buck's bank account to the exclusion of Fin-Ag. Buck defaulted, and when Fin-Ag learned that Meschke purchased Buck corn without including Fin-Ag in the payment, it sued Meschke for conversion of its collateral in the corn. The Minnesota Court held that, while Buck had created the security interest, the Tookers fronting for Buck were the sellers, and therefore Meschke did not buy the corn free of a security interest "created by the seller" under either § 1631(d) of the FSA or Minnesota's UCC § 9-320.

The Minnesota Supreme Court recognized the case as a "fronting" sale, where a seller of farm products subject to a security interest has a third party sell them under the third party's name. No evidence was presented to explain the circumstances under which the Tookers became involved in selling Buck's corn, but the Court noted that regardless of whether they acted as agents of an undisclosed Buck, selling agents of Buck under § 1631(8), or owners of the corn themselves, the outcome was the same. The security interest was not created by the seller, i.e., the Tookers.

In *Fin-Ag, Inc v Cimpl's, Inc*, 754 NW2 1 (SD 2008), the neighboring South Dakota Supreme Court acknowledged that the "created by the seller" provision did not protect a seller from a security interest created by an undisclosed debtor. It considered a conversion case involving the sale of cattle owned by debtors Calvin and Michael Berwald that were subject to Fin-Ag's security interest. The Berwalds sold the secured cattle to Cimpl's through their d.b.a., C&M Dairy. In that case, and three other cases that were similarly decided involving the sale of Berwald secured cattle to other parties,[30] Cimpl's was not aware that seller C&M Dairy was an assumed name used by Calvin and Michael Berwald, and C&M Dairy did not appear on the central listing as having cattle subject to a security interest. Cimpl's issued checks for its purchase of the cattle to C&M Dairy in the care of Arlen Berwald, to the exclusion of Fin-Ag and Fin-Ag sued Cimpl's for conversion of its collateral.

The *Cimpl's* Court distinguished *Hufnagle* as involving the farmer's transfer of his farm product to other separate and distinct persons for sale, while *Cimpl's* involved the Berwalds' sale of the cattle themselves through their assumed name. It described the assumed name situation as "far different than *Hufnagle* where separate and distinct sellers sold the collateral without having

[30] *Fin-Ag, Inc v Watertown Livestock Auction, Inc*, 2008 SD 49; 754 NW2d 23, *2, listing other cases involving the similar instances of sales of Berwald cattle.

any business relationship or interest in the debtor's business." *Id.*, at 13. It further distinguished *Hufnagle* as apparently involving collusion and a scheme to defraud the creditor on the part of buyer Meschke, who had an extensive sales relationship with Buck and issued sales-proceeds checks to the Tookers, which consisted of Buck's farm help and a five-year-old child. The Court in *Cimpl's* found that C&M Dairy was the name under which the Berwalds conducted business and that legally C&M was the alter ego of the Berwalds. Therefore, both the Berwalds and C&M Dairy were the sellers who created the security interest. *Id.*, at 16.

First Bank of N.D. (N.A.)-Jamestown v Pillsbury Co., 801 F2d 1036, 1038-1040 (8th Cir. 1986) is a case cited in *Cimpl's* that was also considered, but rejected, by the Court in *Hufnagle*. First Bank loaned money to grain farmer Mutschler, who also owned the grain elevator. Mutschler sold his grain to his elevator, but did not apply the proceeds to his loan. He commingled his grain with other farmers' grain, some of which was sold to Pillsbury. When both Mutschler and the elevator filed for bankruptcy, First Bank sued Pillsbury for conversion of its collateral. The Eighth Court of Appeals found that although the grain elevator was the immediate seller of the grain to Pillsbury, it had created the security interest along with Mutschler:

> There can be little doubt that the lien was 'created by his seller' under UCC § 9-307(1), since the Mutschlers, who created the security interest, were the owners of both the farming operation and the elevator. Article 9 is intended to protect innocent buyers (citations omitted). Given this important desire, (citations omitted), '[T]he relationship between the former owner [of the collateral] and the seller may be such that the security interest created by the former owner may be regarded as having been created by the seller, in which case UCC § 9-307(1) is applicable.' See also *Hext*, 444 F 2d at 814. *First Bank, supra*, at 10.

In Michigan, whether a corporate entity was a farm operation for the purpose of exempting equipment from taxation has been considered in Michigan Tax Tribunal cases. They are not binding on this Court, but may be instructive. In *Fruit Ridge Apple Co v Alpine Twp*, MTT (Docket No. 235116), issued July 15, 1997, the Tribunal held that the incorporated Rasch brothers who grew apples were farmers in a farming operation, but that another of their corporations that washed, sorted, waxed, packaged and shipped the apples, was not a farm operation. Therefore, machinery owned by the corporation was subject to tax.

In *Kalamazoo Valley Plant Growers Cooperative v Comstock Charter Twp*, MTT (Docket No. 26947), issued March 3, 1980, the Tribunal found that, although all of the shareholders who controlled the Plant Growers Cooperative were bedding plant growers, the cooperative became more than a mere extension of the growers when it engaged in additional activities such as distribution of plants. As such, the cooperative was not a farm operation and was subject to tax.

As a whole, in deciding whether a farmer and his business entity are so closely related to both be engaged in farming operations, or to have both created a security interest, the cases cited above look to factors such as whether the business changed the nature of the farm product or processed it (*Hext* and *Fruit Ridge Apple*); whether the business extended its activity beyond that of farming (*Hext, Continental Grain,* and *Kalamazoo Valley Plant Growers*); whether the relationship between the farmer and his business entity was a close one (*Cimpl's* and *First Bank*), or whether the debtor and seller are unrelated entities (*Hufnagle*); whether there is an indication that the business is a mere front or being used to perpetrate a fraud upon the creditor (*Hufnagle* and *Cimpl's*); whether the lender knew the collateral would also be possessed by the business and implicitly acquiesced to that fact (*Hext* and *First Bank*); and whether the particular court perceives that the intent of the UCC is to protect innocent buyers (*First Bank*).

Turning to the specific facts of this case, the affidavit of John Willcome shows, and CHS does not counter with opposing evidence, that before the organization of the LLC the farm was known as Windemere Farms, and commonly known as a dairy farm that produced milk. The relationship between the Willcomes and Windemere was a close and long-standing one, so that the family farm had before organization always been known as Windemere. When asked if, when entering into the limited liability form he intended to operate the farm under the name of the LLC, John Willcome answered, "We just always operated under Windemere Farms, so ...."[31] The facts presented to the Court show that Windemere financially supported the operation of the farm by paying the farm's and family's expenses out of the Windermere Farms, LLC bank account. Windemere uses the labor of all of the Willcomes.

The various producer contracts with MMPA over time, both before and after organization, reference Windemere along with the Willcomes. Windemere did not alter the nature of the milk or process it, or extend its activity beyond that of farming. Windemere was the producer name of the dairy farm as to MMPA, but Windemere did not market the milk. Windemere was generally known from the viewpoint of MMPA in the general trade of milk production as a farm engaged in milking dairy cows. As noted previously, both parties agree at one point that with respect to its relationship with MMPA, Windemere Farms was a direct continuation of John and Paul Willcome.

CHS asserts that Windemere was a mere front for the Willcomes, just as in *Hufnagle* the Tookers were a front for Buck for the purpose of perpetrating a fraud on Fin-Ag. The factual reasons for organizing as an LLC (as presented to the Court) were estate planning, accounting, tax and liability purposes. CHS has not countered with evidence of a nefarious motive. CHS has not asserted, or advanced any evidence, that the organization of Windemere five years prior to the Willcome's obtaining a loan from CHS was done as a scheme to defraud CHS. In addition, the Court notes that CHS paid the loan funds for the purchase of cattle directly to Windemere's corporate bank account, indicating that CHS knew, or should have taken care to discover, who its

[31] March 11, 2019 Deposition of John Kenneth Willcome, *supra*, p 79.

true borrower was and that Windemere would have some interest in or possession of its collateral.

Windemere, in its limited liability company form as a dairy farm, falls under the description of a farming operation under 9-201(ii), and also under that definition in the Right to Farm Act, MCL 286.472(b). The Court need not pierce Windemere's limited liability veil to find that it, as well as the Willcomes, were engaged in farming operations. There is no prohibition on a farmer himself and his corporate entity being considered as engaging in farming operations simultaneously.

The Court finds as a matter of law that Windemere Farms, LLC was "engaged in farming operations."

(4) Was Windemere a Debtor with Respect to the Milk?

Whether MMPA meets the criteria to take the milk free of CHS's lien under 9-320(15) depends on whether the milk remained a farm product in its hands, and a farm product, as defined in 9-102(hh), requires that the milk be a good "with respect to which *the debtor* is engaged in farming operations." (Italics added.) Thus, whether MMPA received and marketed the milk as a farm product or ordinary goods depends upon whether Windemere had created the security interest along with the Willcomes.

As noted previously in fn 25, by including the "debtor" requirement in its definition of farm products, the UCC is compatible with the FSA provision that a selling agent takes free only of a security interest "created by the seller" in 1631(g). The "created by the seller" language is also found in 9-320(1), and while the purpose of that condition is not obvious, it is suggested that it is added because the lender, when it takes a security interest in something it knows the debtor will be selling, expects and "authorizes" that sale to third parties. *Continental Grain, supra at* 1199-1200. Courts have acknowledged this rationale where the identity of the farmer and its dealer are such that the secured party knows that the debtor farmer will sell the secured farm products as inventory in the guise of dealer. *Id.*, citing *First Bank* and *Hext.*

CHS asserts that the seller of the milk was Windemere, the only entity under a membership and marketing contract with MMPA, but that the security interest was created by John and Paul Willcome. CHS notes that as an LLC, Windemere was legally separate and distinct from the Willcomes, and was not the debtor that created the security interest.

MMPA asserts that the Willcomes owned the milk and sold it through Windemere's membership with MMPA. Therefore, MMPA sold the milk for both the Willcomes and Windemere, who as one entity and alter egos were both debtors who created the security interest.

CHS argues that the Willcomes sold the milk through the "front" of Windemere in an attempt to obtain proceeds from the sale of milk free of the lien. It cites *Hufnagle, supra*, in

support of its position that the UCC will not protect buyers (or selling agents) in a fronting situation where the security interest was created by an undisclosed owner of the goods. MMPA cites *Cimpl's, supra* in support of its contention that, regardless of Windemere's legal status as a separate legal entity, it was an alter ego of the Willcomes and also a creator of the security interest. MMPA asserts that the facts in *Cimpl's* are closer to the facts in the present case and more in keeping with the purpose of the revised UCC and the FSA to protect buyers, selling agents, auctioneers and commission merchants of farm products.

In addressing whether Windemere was a "debtor" with regard to the milk, the Court considers the case law cited, *supra*, regarding a security interest "created by the seller." In *Continental Grain,* the secured party knew that the relationship between the farming partnership and the dealer was not only close, but cross-owned. Therefore, both farmer and dealer were considered the debtors. Both were partnerships, and not separate legal entities. *Hufnagle* addressed a true fronting scheme where seller Tookers and debtor Buck were separate and distinct, but also completely unrelated, and the court found the security interest in the corn was created only by debtor Buck and not by seller Tookers. *Cimpl's* involved farmers and their assumed name, an entity indistinguishable from its owners, and the court found that the acts of the brother cattle farmers could not be separated from that of C&M Dairy because the brothers utilized the assumed name to sell the cattle themselves. Unlike *Hufnagle*, there was no evidence of a fronting scheme by the dairy farmers in *Cimpl's*. In *Hext*, the farmer and his separately incorporated gin were considered as both having created a security interest in cotton because the lender knew that farmer Hext had the "capability of transferring [the cotton bales] into the category of inventory and selling them in the ordinary course of his business." In *First Bank*, the court also found that the grain was inventory and that "there can be little doubt that the lien was 'created by his seller' because the farmer also owned the grain elevator." The court in that case also noted that the purpose of 9-320 was to protect buyers.

In sum, in determining whether the farmer and his business both created a security interest, the courts in the above-cited cases primarily assessed whether the relationship between the farmer and his business was either so closely interrelated that they were essentially one and the same, or whether it was so obvious that the farm product would or could be sold through the farmer's business that the lender knew or should have known that the farmer and his business were both creating the security interest.

At first blush, this would not appear to be the case here. Although the Willcomes and Windemere are closely related, Windemere has a separate legal identity as a limited liability company. The Court declines to pierce the veil of Windemere's limited liability status. The same rules regarding piercing the corporate veil are applicable in determining whether to pierce the veil of an LLC. *Florence Cement Co v Vettriano*, 292 Mich App 461, 468-469; 807 NW2d 917 (2011). Those rules require that the LLC be a mere instrumentality of another entity or person; the instrumentality must have been used to commit a wrong or fraud; and the plaintiff must have suffered an unjust injury or loss. *Id.* In short, piercing will ordinarily occur only where

organizational formalities have been disregarded and the avoidance of an injustice is a consideration. The Court has not been presented with facts showing that the Willcomes disregarded the organizational formalities of Windemere's LLC form, or evidence of the Willcomes using Windemere to perpetrate a fraud. Damage was sustained by CHS, but as will be addressed later in this Opinion, the loss was not unjust.

Additionally, while CHS first appears to have had no knowledge that the Willcomes were related to Windemere Farms, LLC, in that CHS avers that the Willcomes never advised it of that fact, the parties agree that CHS transferred $100,200.00 of loan funds to Windermere, LLC. The Court finds that mutually agreed upon fact dispositive in this case. The Court observes that in *Hext*, the Court relied on the lender's knowledge that farmer Hext would gin and sell his cotton through Gin Co. in finding that both Hext and his separately incorporated Gin Co. were deemed to have created the security interest. The Court need not pierce Windemere's LLC veil to find that both Windemere and the Willcomes were debtors with respect to the milk, since in extending the loan CHS tendered the loan proceeds to both the Willcomes and Windermere for purchase of dairy cattle. However, CHS legally obligated only the Willcomes to repay the loan. CHS now seeks to have MMPA reimburse it for its failure to exercise due diligence in distributing loan proceeds to Windemere Farms, LLC. Although CHS's October 14, 2016 letter to MMPA notes that "[o]ur lien also covers any crop sold by the above in any other name or names other than specifically designated herein," it is not MMPA's obligation to ensure that CHS legally bound those "other names" under its security interest.

The Court notes that the events leading to this litigation were seemingly small oversights by both CHS and the Willcomes, but were ones that CHS was in the best position to prevent, and ones in which CHS certainly had the greatest interest in preventing. First, CHS paid funds directly into Windemere's bank account without first ascertaining who Windermere was. It did not require Windemere as a corporate entity to assume liability for those funds. CHS did not require the Willcomes to sign as agents of Windemere, or ascertain whether the Willcomes had authority to do so. In addition, CHS did not ensure that the Willcomes completed the List of Potential Buyers, Agents and Commission Merchants when signing the loan paperwork. The only fact presented to the Court regarding the Willcomes's failure to do so is John Willcome's statement in his deposition indicating that, at the closing, CHS had him sign so many different papers that he did not know why that list was not completed. CHS has not set forth contrary facts showing the Willcomes's either refused to complete the list, or concealed their selling agent, or had a fraudulent motive in not completing the list. The Court notes that 9-320(7) requires the lender to request the debtor to provide a list of potential buyers and points of delivery, thus placing the responsibility of obtaining the list on the lender:

> If requested by the secured party, a debtor engaged in farming operations who gives a security interest in farm products shall provide to the secured party a written list identifying potential buyers and points of delivery of the farm products....

It was certainly of essential interest to CHS to ensure that the Willcomes completed the list of potential selling agents, given that the milk was of no use unless it was sold. CHS did not ensure that a list of potential buyers was executed. As a result, the Willcomes and Windemere did not violate 9-320(8) in transferring the milk to MMPA for marketing and sale without providing CHS notice:

> A debtor engaged in farming operations who provides a written list of potential buyers to a secured party pursuant to subsection (7) shall not sell farm products that secure the debt to a buyer who is not identified on the list without the prior written consent of the secured party.

More importantly, CHS did not provide MMPA direct notice of the lien. Therefore, MMPA did not violate 9-320(12) and (13) in failing to make joint payment to Windemere and CHS for the milk proceeds:

> (12) A buyer of farm products who receives notice pursuant to subsection (9) of a security interest in the farm products shall make payment for the farm products by check or other instrument made payable to the seller and the secured party jointly ....
>
> (13) As used in subsection (6) to (12), "person buying farm products" or "buyer" includes a commission merchant or selling agent who sells farm products in the ordinary course of business for a person engaged in farming operations.

And, ultimately, under 9-320(15), *supra*, as a selling agent MMPA is not liable for CHS's security interest even though MMPA had notice of it.

Conversion

Conversion is defined under MCL 600.2919a as:

> (a) Another person's stealing or embezzling property or converting property to the other person's own use.
> (b) Another person's buying, receiving, possessing, concealing, or aiding in the concealment of stolen, embezzled, or converted property when the person buying, receiving, possessing, concealing, or aiding in the concealment of stolen, embezzled, or converted property knew that the property was stolen, embezzled, or converted.

Given no liability for CHS's security interest, MMPA has not converted the milk proceeds to its own use. CHS has admitted it advanced loan funds to Windemere, but has not advanced any evidence to show that it took steps to legally bind Windemere under its security

interest. MMPA is obligated only to Windemere for milk proceeds, and absent Windemere's obligation to CHS, MMPA has as a matter of law not converted the proceeds.

CONCLUSION

The Court finds as a matter of law under 9-320(15) that, as a selling agent, MMPA sold farm products in the ordinary course of business for a person engaged in farming operations, and is not liable to CHS for its security interest in those farm products. This is the case even where CHS filed a UCC financing statement regarding the security interest, and MMPA eventually received notice of its existence. Finally, MMPA did not convert CHS's collateral.

Defendant Michigan Milk Producers Association's motion for summary disposition under MCR 2.116(C)(10) is GRANTED.

IT IS SO ORDERED.

Date: July 18, 2019

Hon. Jon VanAllsburg, Circuit Court Judge