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**UNITED STATES BANKRUPTCY COURT
IN AND FOR THE DISTRICT OF ARIZONA**

In Re)
)
SWTV PRODUCTION SERVICES,)
INC.,)
)
HD PARTNERS, LLC,)
)
Debtors.)

Chapter 11 Proceedings
(Joint Administration)

Case No. BR-03-09489-PHX-CGC

Case No. BR-05-00370-PHX-GBN

HD PARTNERS, LLC,)
)
Plaintiff,)

Adv. No. 05-00287

v.)
)
EQ ACQUISITIONS 2003, INC., and)
GREYSTONE CDT ASSOCIATES, LLC))
)
Defendants.)

**UNDER ADVISEMENT DECISION
RE: SWTV PRODUCTION SERVICES,
INC.’s MOTION FOR SUMMARY
JUDGMENT AND EQ’s CROSS-
MOTION FOR SUMMARY
JUDGMENT**

SWTV PRODUCTION SERVICES,)
INC., as assignee of the rights of)
Defendant/Cross-Claimant GREYSTONE))
CDT ASSOCIATES, LLC,)
)
Cross-Claimant,)

v.)
)
EQ ACQUISITIONS 2003, INC.,)
)
Cross-Defendant.)

I. Introduction

Re-organized Debtor SWTV (“SWTV”) seeks summary judgment on its cross-claim against Defendant EQ Acquisitions, 2003, Inc. (“EQ”). SWTV is the assignee of certain rights of Greystone CDT Associates, LLC (“Greystone”) and EQ is the assignee of certain rights of Sony Financial Services, LLC (“Sony”). The dispute involves certain equipment referred to by the parties

1 as the “Disputed Equipment.” Each claims a first-priority security interest in the Disputed
2 Equipment.

3 The Chapter 11 Trustee in the related HD Partners, LLC bankruptcy, Brian Spector, has also
4 filed a Statement of Position urging the Court to refrain from ruling on the validity of Greystone’s
5 lien against all assets of the Debtor¹, on the ground that there is insufficient documentation that
6 Greystone’s lien extends all property of the Debtor, including after acquired property. The Court
7 notes that the Trustee’s pleading is procedurally problematic for two reasons. First, Trustee Spector
8 has not sought to intervene in this adversary and is not a party to this litigation. This raises serious
9 questions as to the Trustee’s standing to participate in this and the impact, if any, of a decision in
10 this matter on the Trustee and the HD Partner’s estate. In any event, the Court concludes that the
11 Trustee’s argument is wrong on the merits as explained in the body of this decision.

12 **II. Facts**

13 In May of 2001, SWTV entered into a loan with Greystone, an affiliate of SWTV’s, whereby
14 Greystone agreed to lend SWTV \$7,025,000 pursuant to a variety of amended and modified
15 agreements. SWTV and Archive Digital, Inc., an affiliate of SWTV, granted Greystone a security
16 interest in all their assets, including without limitation, all equipment and other goods, “whether now
17 owned or hereafter acquired,” “all attachments, accessions, tools, parts, supplies, increases and
18 additions to and all replacements of and substitutions” for all assets and “all proceeds and products”
19 of all such assets.

20 In March, 2002, Sony lent SWTV approximately \$5.4 million to purchase some additional
21 equipment (“Sony Loan”), including a mobile production unit known as “Bonnie and Clyde,” which
22 consisted of a trailer and related equipment. While the precise equipment securing the lien is in
23 dispute, the parties do agree that Sony’s lien included certain specifically identified equipment listed
24 on the collateral schedules plus “all additions, attachments, accessories, substitutions, replacements,
25 repairs, improvements, betterments and appurtenances of whatever description or nature whether
26 now owned or hereafter acquired, and all proceeds, including without limitation, insurance proceeds
27

28 ¹In this case, that means Core Digital Acquisition (“CDA”) as successor in interest to the Debtor.

1 of that specified equipment.”

2 Sony properly perfected its lien in Bonnie and Clyde. SWTV contends that Sony was not
3 granted an interest in “accessions” to the Disputed Equipment or in any other equipment. However,
4 SWTV acknowledges that it did also grant Sony a security interest in a mobile truck known as Virgil
5 and certain other specified equipment, which did specifically include “accessions” as well as
6 additions, replacements and substitutions.

7 For the Sony deal to work, Greystone agreed to subordinate its blanket security interest to
8 the Sony indebtedness and to subrogate Sony to Greystone’s rights in its indebtedness and the
9 related collateral (“Greystone Subordination Agreement”). In return, the parties agreed that Sony
10 would not take any additional collateral to secure the Sony Loan and that any future advances by
11 Greystone would not be subordinated.

12 SWTV filed for Chapter 11 in 2003. To resolve a dispute between it and Sony as to the fair
13 market value of Sony’s collateral, SWTV and Sony reached an agreement on the treatment of Sony’s
14 claims (“Sony Stipulation”); Greystone was not a party to the stipulation. The Sony Stipulation set
15 Sony’s secured claim at \$4.3 million and Sony’s unsecured claim at \$818,703.21. Sony also agreed
16 to subordinate payment of the unsecured claim to payment to all holders of non-subordinating
17 unsecured claims (“Sony Subordination Agreement”).

18 Subsequently, SWTV’s plan was confirmed and the Sony Stipulation was expressly
19 incorporated in the confirmation order. According to EQ, neither the Sony Stipulation nor SWTV’s
20 confirmed plan altered the terms of the Sony Loan or the Greystone Subordination Agreement. In
21 fact, says EQ, the plan never even mentioned the Greystone Subordination Agreement and could not
22 have altered it without the consent of Greystone and Sony. EQ contends that the only thing the Sony
23 Stipulation did was establish the value of Sony’s secured and unsecured claims. SWTV, however,
24 characterizes the Sony Stipulation as *limiting* Sony’s collateral to the amount of Sony’s secured
25 claim under the confirmed plan and, in effect, cancelling the Subordination Agreement.

26 Pursuant to the confirmed plan, SWTV transferred most of its assets to Core Digital
27 Acquisition, Inc. (“CDA”), an affiliate of Greystone. The transfer was free and clear of all liens and
28 security interests except for specified liabilities of SWTV assumed by CDA, which included the

1 blanket security interest of Greystone and Sony’s security interest in the Original Sony Equipment
2 and Bonnie.

3 The plan also confirmed Greystone’s security interest in all existing and after acquired assets
4 of CDA. The question whether the Subordination Agreement extended to after acquired assets of
5 CDA was not addressed by the plan. Subsequently, CDA acquired new equipment, some of which
6 it then transferred to HD Partners, LLC (“HDP”) in early 2005. According to SWTV, this new
7 equipment was separate from any equipment SWTV had transferred to CDA pursuant to the plan
8 and does not include any equipment that replaced malfunctioning or damaged Original Sony
9 Equipment or that repaired or replaced broken parts of Original Sony Equipment. EQ does not
10 appear to dispute this. This property is referred to by the parties as the “Disputed Equipment” and
11 is the subject of this motion.

12 CDA defaulted on its obligations under the confirmed SWTV plan. At the request of the
13 Debtor, an order to show cause was issued to Greystone, among other respondents, to address issues
14 arising from the default. The Debtor then negotiated a resolution of the OSC with Greystone, part
15 of the consideration for which was the assignment by Greystone of its rights under the 2001 loan
16 agreement to SWTV. Again, the issue of whether those rights were or were not burdened by the
17 Subordination Agreement was not addressed either in the stipulation or in the Court Order approving
18 it. Indeed, the Court Order (Dkt. 581) specifically preserved all parties’ rights and stated that
19 “nothing in the Term Sheet affects or releases those claims.”

20 Therefore, this dispute is a priority battle between Greystone and Sony over the Disputed
21 Equipment owned by CDA. Debtor is asserting Greystone’s rights under the assignment that arose
22 from the OSC; EQ is asserting Sony’s rights as its successor in interest to the security interest
23 originally granted by the Debtor and subsequently assumed by CDA.²

24 **III. Issues**

25 There are two broad issues argued by the parties.

26 The first is the Debtor’s assertion that EQ’s security interest does not extend to the Disputed
27

28 ²The Debtor is *not* asserting the SWTV’s estate’s rights under the plan or as Debtor in Possession.

1 Equipment because such items of equipment are not “additions, attachments, accessories,
2 substitutions, replacements, repairs, improvements, betterments and appurtenances of whatever
3 description or nature whether now owned or hereafter acquired” to the original Sony collateral.
4 Therefore, Debtor argues that Greystone’s blanket lien in such equipment is superior. EQ rejoins
5 that the Disputed Equipment does in fact lie within the broad language quoted above and therefore
6 its lien, which is indisputably senior to Greystone on assets within its scope, is superior.

7 The second is EQ’s assertion that, even if Greystone’s blanket lien is superior, EQ still
8 prevails because it is entitled to the proceeds of that collateral under the Subordination Agreement
9 until its debt is paid. The Debtor’s rejoinder is that the Subordination Agreement did not survive
10 confirmation of the Plan and the Sony Stipulation.

11 These issues will be addressed in reverse order.

12 **IV. Discussion**

13 A. The Subordination Agreement

14 1. What it says.

15 Under the confirmed plan, Greystone held a first priority interest in all of CDA’s assets,
16 including after-acquired assets, by way of the security interest it was originally granted by SWTV.³
17 Debtor succeeded to Greystone’s rights. The issue is, first, whether the Subordination Agreement
18 survived confirmation, and, if so, whether the subordination extended to property, such as the
19 Disputed Equipment, acquired by CDA after the transfer of the SWTV assets pursuant to the plan.

20 The Subordination Agreement, dated as of March 14, 2002, was entered into to govern the
21 rights between Greystone, which held a blanket lien on all of SWTV’s assets, and Sony, which
22 advanced several million dollars to fund the purchase of certain equipment. Its operative terms may
23 be summarized as follows:

- 24 a. Greystone subordinated the Greystone note, and the collateral securing it, to payment
25 of the Sony note. Greystone and Sony agreed that Greystone could enforce its rights
26 against all of its collateral so long as it turned over proceeds of any of the Sony

27
28 ³See discussion on pages 10 and 11.

1 collateral directly to Sony. Greystone further agreed that Sony would receive any
2 proceeds of non-Sony collateral,⁴ other than proceeds from the liquidation of Virgil,
3 another mobile production unit, until Sony was paid in full.

4 b. Greystone subrogated Sony to the indebtedness and related collateral of the
5 Greystone note, agreed to assign the note to Sony, irrevocably authorized Sony to
6 collect on the note and realize on the related collateral, and authorized Sony to
7 present claims based on the Greystone note in any bankruptcy or related proceeding.

8 c. For its part, Sony agreed that its collateral was limited to the description in its loan
9 documents, that any advance made by it above the initial amount of \$5.5 million
10 would not have the benefit of the subordination, and that additional advances made
11 by Greystone would not be subordinated.⁵

12 d. The Agreement is specifically binding on the parties' successors and assigns.

13 As a starting point, the language of the Subordination Agreement supports the conclusion
14 that Sony is entitled to receive the benefit of Greystone's senior position unless (a) the Agreement
15 was canceled, superceded or annulled by the Sony Stipulation and the confirmation of the plan, or
16 (b) even if still effective post-confirmation, its effects do not extend to after-acquired property.⁶

17 2. Did it survive?

18 a. The Claims of the Parties

19
20 ⁴Although they were not parties directly to the Subordination Agreement, two other creditors,
21 Compass Bank and CIT, are also referenced in the Agreement. They are to receive proceeds of their
22 own collateral plus a pro rata share of any collateral encumbered only by the Greystone lien. For
23 sake of simplicity, their rights will not be addressed as they are neither parties to this dispute nor has
either of them asserted any rights to the Disputed Equipment. Therefore, the Agreement will be
construed as only between Greystone and Sony.

24 ⁵The agreement contains additional provisions not relevant here.

25 ⁶It is clear that after-acquired property purchased by Debtor and financed by Greystone would
26 be free of the subordination. However, all parties agree that the funds to purchase the Disputed
27 Equipment did not come from Greystone. And, it does not matter that such property was acquired
28 by CDA, rather than SWTV, as CDA fully assumed all obligations of SWTV pursuant to the plan
and therefore should be treated the same as SWTV would have been treated had it acquired the
property directly.

1 Debtor argues that the Greystone Subordination Agreement could not survive confirmation
2 because confirmation resolved all claims against SWTV by its creditors and determined the priority
3 of the liens and interests in SWTV's assets. The confirmed plan provides explicit payment rights
4 to all the different creditors. With respect to Greystone, it was provided with a first priority lien in
5 all of CDA's assets then existing or after-acquired, except for the specific equipment collateral of
6 other creditors, including Sony's. Nothing in the plan provided that Greystone's collateral was
7 subordinated to Sony or that Sony was subrogated to Greystone's rights. According to Debtor, the
8 plan extensively modified SWTV's payments obligations to Sony, Greystone and other creditors.
9 Nothing in the plan or Sony Stipulation provided that this obligation of SWTV applied to CDA post-
10 petition.

11 EQ responds that SWTV has painted itself into a corner. SWTV admits that Greystone has
12 a lien on all assets of CDA, including the Disputed Equipment. This lien is with respect to the debt
13 that CDA assumed from SWTV under the terms of the confirmed plan. Under the Greystone
14 Subordination Agreement, Sony was subrogated to the right of Greystone to collect the Greystone
15 secured debt assumed by CDA. EQ is still owed \$3,158,718.10 on its secured debt by way of its
16 Amended Proof of Claim, to which no one objected. Similarly, Greystone claims it is owed at least
17 \$2,526,923.29 in secured debt. Therefore, EQ concludes it should be granted summary judgment
18 for at least the amount of Greystone's remaining claim of \$2,526,923.99, secured by the Disputed
19 Equipment.

20 In addition, EQ challenges SWTV's *res judicata* argument, stating that creditors routinely
21 make agreements among themselves that do not have any effect on the estate and its reorganization
22 and over which Bankruptcy Courts have no jurisdiction. "The priority of secured creditors' claims
23 as to a given piece of collateral falls neither in the core or non-core categories, so long as the amount
24 of these secured claims is not at issue. Such matters are widely held to be resolved by reference to
25 state law, not to the reorganization power of the Bankruptcy Court."

26 EQ contends that if SWTV had wanted to address the Greystone Subordination Agreement
27 and priority of the lien interests of Greystone and Sony, it could have explicitly done so in its plan.
28 But, it did not. Those questions therefore should be left to state law, resolution of which would

1 affect only Sony and Greystone, now in the guise of EQ and Debtor.

2 b. Analysis

3 Debtor's argument, boiled to its essence, is that EQ's rights post-confirmation were not only
4 defined by the Sony Stipulation but limited to the specific treatment of its claim as provided therein.
5 In effect, the argument is that if Sony wanted to preserve its rights under the Subordination
6 Agreement, it needed to take affirmative steps to do so; otherwise, its rights are forever altered and
7 *res judicata* binds all parties and prevents revisiting the issue.

8 The difficulty with this argument is that a close reading of the Sony Stipulation, as
9 incorporated in the plan, indicates that Sony in fact took just such affirmative steps. The Sony
10 Stipulation contains express carve-outs that tellingly *do not* include the Greystone Subordination
11 Agreement. Specifically, Paragraph 27 provides that

12 Nothing in this Stipulation, nor any act by Sony in performance of this Stipulation,
13 shall be construed as a waiver, release or compromise by Sony of any right, claim or
14 cause of action Sony may have against persons or entities who are not parties to this
15 Stipulation *except that*, upon the Effective Date under the Plan, Core Digital shall no
16 longer have liability to Sony under the Master Loan Agreement or related loan
17 documents.

18 (Emphasis added). Greystone was not a party to the Stipulation, but was an entity against which
19 Sony had rights. Further, the parties clearly knew and understood how to carve out an exception to
20 the provision that the Stipulation was not a waiver, release or compromise by Sony of any other
21 rights or claims it may have against any other entities: The parties effectively carved out such an
22 exception for CDA. The parties also agreed that all other terms of the Master Loan Agreement
23 between Sony and SWTV not expressly modified by the Stipulation would remain in full force and
24 effect.

25 As EQ points out, moreover, Sony and SWTV also agreed in the Stipulation that if any
26 inconsistency were later discovered between the Stipulation and any subsequently confirmed plan,
27 the terms of the Stipulation would govern and "any such inconsistent provisions of any plan of
28 reorganization or any confirmation order thereon [would] be null and void to the extent of any such
inconsistency."

Based upon the express terms of the Sony Stipulation, therefore, the Subordination

1 Agreement did survive, was not canceled or terminated, and continued to attach to Greystone's
2 collateral now in the hands of CDA. Bottom line, a confirmed plan does not automatically alter the
3 rights of parties where those rights have been reserved by express language such as the above. Sony
4 had no reason to object to the plan language incorporating the Sony Stipulation; by its express terms,
5 rights against third parties, such as Greystone, were expressly preserved. Debtor's arguments to the
6 contrary are simply not sustainable.

7 3. Does the Subordination Agreement apply to after-acquired Greystone collateral?

8 Debtor argues, first, that the Subordination Agreement extended only to Sony's original
9 collateral and, second, that Greystone never agreed under the plan to subordinate its first priority
10 security interest in CDA's assets to Sony.

11 The first point is palpably incorrect. The whole point of the Subordination Agreement was
12 to provide a source of payment to Sony if its own collateral was insufficient. Greystone was clearly
13 involved in facilitating the acquisition of capital by Debtor and acted as much like the holder of
14 equity as like a straight asset based lender. Indeed, it specifically retained in the Subordination
15 Agreement its ability to convert its debt to equity at its discretion, which would have, in effect,
16 deprived Sony of the benefits of the Subordination Agreement. Conversion would make economic
17 sense, however, only if the venture thrived and all debts were either paid or the enterprise generated
18 sufficient cash to cover the debts. Sony, meanwhile, had no such upside; it was a straight lending
19 deal. So, the real import of the Subordination Agreement was not the provision allowing Greystone
20 to liquidate Sony's collateral if it paid the proceeds to Sony, but rather the provision that provided
21 payment to Sony from non-Sony collateral up to the full amount of Sony's debt.

22 The second point likewise fails. Greystone did not have to agree, as part of the plan process,
23 that the Subordination Agreement covered after acquired collateral; it already had so agreed. Sony
24 was subrogated to Greystone's rights and those rights included a security interest in after acquired
25 collateral. Rather, in order to terminate the effect of the subordination, the plan would have had to
26 do so specifically. Not only is this language lacking in the treatment of Greystone's claim, but the
27 Sony Stipulation specifically reserved Sony's rights against third parties such as Greystone. In sum,
28 the Debtor has it backwards. Greystone, not Sony, was the one with the burden to modify its

1 contractual obligations rights and it failed to do so. Debtor, as assignee, holds no rights greater than
2 those held by Greystone and is burdened by the same obligations. One of those obligations is the
3 Subordination Agreement.

4 B. Trustee's Spector's Concerns

5 As mentioned at the beginning of this decision, Trustee Spector is concerned that any ruling
6 here today would become law of the case and establish that Greystone has a valid lien in the
7 Disputed Equipment. According to the Trustee, it has repeatedly asked counsel for Debtor SWTV
8 to provide it with evidence that Greystone has a blanket lien in all of Debtor's assets, including after
9 acquired property. In response, Debtor's counsel has responded that Greystone obtained its interest
10 through Debtor's plan. The Trustee has contended that no such conclusion can be reached from the
11 plan's language or from the Acquisition Agreement. While counsel's response to the Trustee's
12 requests may have been insufficient to establish Debtor's position that Greystone has a blanket lien
13 in all of Debtor's assets and after acquired property, the record in this case does in fact support such
14 a conclusion.

15 In resolving this dispute, the Court has reviewed a number of documents that are part of the
16 record in this bankruptcy, but not necessarily provided as exhibits to these motions for summary
17 judgment. In particular, and by way of judicial notice, the Court has reviewed Greystone's Proof
18 of Claim, which was filed in November, 2003, and to which no objections were filed. The
19 supporting documentation resolves the question of the scope of Greystone's lien.

20 Greystone entered into the underlying loan with Debtor in May, 2001. In the beginning,
21 Greystone was not granted a blanket lien on all assets of Debtor, but rather was granted a security
22 interest in specifically identified equipment described in Schedule A to the security agreement.
23 However, over time, the loan agreement was modified. In particular, in December 5, 2001, the
24 parties entered into a Second Modification Agreement. As part of that modification, in paragraph
25 5, the parties agreed to expand the definition of "Collateral" under the Security Agreement "to
26 include all property or assets of Debtor, or all rights or interests of Debtor in such property or assets,
27 whether now owned or existing or hereafter acquired or arising and wherever located and all
28 proceeds thereof, including" Such security interest was perfected by UCC-1 filing the

1 following day.

2 The plan does not affect this security interest. Indeed, Paragraph 4 of the plan expressly
3 states that Greystone retains its liens. At the time of confirmation, Greystone held a properly
4 perfected blanket lien on all of Debtor's assets, then owned or thereafter acquired. That lien
5 survived confirmation and encumbers the Disputed Assets.

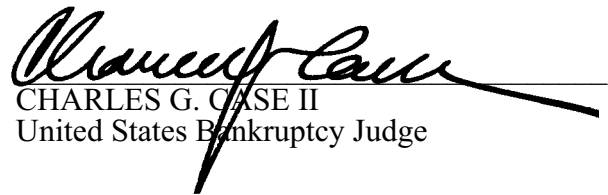
6 VI. Conclusion

7 For the foregoing reasons, the Court grants EQ's motion for summary judgment. EQ is
8 subrogated to the rights of Greystone to receive the benefit of the collateral, including the Disputed
9 Equipment, securing Greystone's senior lien. Because the result would be the same whether or not
10 the scope of Sony's lien were to extend to the Disputed Equipment, the Debtor's motion will be
11 denied as moot.

12 Counsel for EQ is to submit a form of judgment.

13 So ordered.

14 DATED: September 28, 2006

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16 
17 CHARLES G. CASE II
18 United States Bankruptcy Judge

19 COPY of the foregoing mailed by BNC and/or
20 sent by auto-generated email to:

21 OFFICE OF THE U.S. TRUSTEE
22 230 N. First Avenue, Suite 204
23 Phoenix, Arizona 85003-1706

24 Philip G. Mitchell
25 Craig J. Bolton
26 John G. Sinodis
27 Jennings, Haug & Cunningham, LLP
28 2800 N. Central Ave., Suite 1800
Phoenix, Arizona 85004-1049
Attorneys for Defendant EQ Acquisitions 2003, Inc.

1 Carolyn Johnsen
Danelle G. Kelling
2 201 E. Washington Street
Phoenix, Arizona 85004-2385
3 Attorneys for Chapter 11 Trustee

4 John Dawson
John Harris
5 Hilary L. Barnes
Quarles Brady Streich Lang
6 2 N. Central Ave.
Phoenix, Arizona 85004-2391
7 Attorneys for Greystone CDT Associates

8 Shelton L. Freeman
DeConcini, McDonald, Yetwin & Lacy, PC
9 7310 N. 16th Street, Suite 330
Phoenix, Arizona 85020
10 Attorneys for Debtor SWTV Production Services, Inc.

11 /s/ Shirley Dunbar, Judicial Assistant
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