SO ORDERED.
SIGNED this 9th day of October, 2024

THIS ORDER HAS BEEN ENTERED ON THE DOCKET.
PLEASE SEE DOCKET FOR ENTRY DATE.

Suzanne H. Bauknight
CHIEF UNITED STATES BANKRUPTCY JUDGE

IN THE UNITED STATES BANKRUPTCY COURT FOR THE EASTERN DISTRICT OF TENNESSEE

In re

K&L TRAILER LEASING, INC.

Debtor

GREENEVILLE FEDERAL BANK, FSB

Plaintiff

v.

FIRST FARMERS AND COMMERCIAL BANK

Defendant

Case No. 3:20-bk-31620-SHB
Chapter 11

Adv. Proc. No. 3:23-ap-03010-SHB

MEMORANDUM AND ORDER ON MOTION FOR DISCOVERY UNDER RULE 7056

Pending before the Court is the Motion for Discovery Under Rule 7056 of the Federal Rules of Bankruptcy [Procedure] ("Rule 56(d) Motion") filed by First Farmers and Commercial Bank ("Defendant" or "FF&CB") on November 9, 2023[1] [Doc. 27]. Defendant asks the Court to

[1] This adversary proceeding was stayed because of an appeal in a related adversary proceeding, *Greeneville Federal Bank, FSB v. First Peoples Bank of Tennessee*, Adv. Proc. No. 3:23-ap-03003-SHB. [*See* Docs. 33, 35, 36.] With

allow it to conduct discovery under Rule 56(d) on the issue of "whether Greeneville Federal Bank, FSB ('GFB') authorized, approved, or acquiesced in the transfer of the ten trailers that are the subject of GFB's Complaint from K&L Sales and Leasing, Inc. ('Sales') to K&L Leasing ('Leasing')" in support of an argument that "GFB engaged in a pattern and practice of acquiescence to the transfer of trailers from Sales to third parties (including Leasing) that would not be subject to GFB's floorplan financing security interest." [*Id.* at ¶¶ 4, 7.] Plaintiff Greeneville Federal Bank, FSB ("Plaintiff" or "GFB") opposes the Rule 56(d) Motion, relying on its Security Agreement dated October 1, 2010, between it and K & L Trailer Sales And Leasing, Inc. ("Sales") (the debtor in bankruptcy case number 3:20-bk-31619-SHB) and this Court's bench ruling on December 9, 2021, in *Greeneville Federal Bank, FSB v. Kris Fellhoelter, et al.*, Adv. Proc. No. 3:20-ap-3054, ECF Nos. 93, 97. Because the law has not changed, as explained below, the question turns on whether FF&CB relied on any course of performance between GFB and Sales, and because no discovery of GFB is needed for FF&CB to present evidence of such reliance, the Court will deny the Rule 56(d) Motion.

I. PROCEDURAL POSTURE

This adversary proceeding arises out of the Chapter 11 bankruptcy filings by sister companies, Sales and K & L Trailer Leasing, Inc. ("Leasing"), bankruptcy case number 3:20-bk-31620-SHB. Because of the prepetition conduct of Sales and Leasing, after motions by GFB and First Peoples Bank of Tennessee ("FPB") seeking the appointment of a Chapter 11 trustee, both Sales and Leasing consented during an evidentiary hearing to the appointment of a Chapter 11 trustee, and Gary M. Murphey ("Chapter 11 Trustee") was appointed as trustee in both cases.

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resolution of that appeal, this matter has now become ripe for adjudication of this Rule 56(d) Motion and the cross-motions for summary judgment, which will be adjudicated by separate decision in due course.

[*See* Case No. 3:20-bk-31619-SHB, ECF Nos. 7, 23, 43, 55; Case No. 3:20-bk-31620-SHB, ECF Nos. 7, 37, 47.] The Chapter 11 Trustee sold most of the assets of Sales and Leasing, but because both Sales and Leasing incurred debt and pledged trailer inventory as collateral to numerous lenders, the two bankruptcy cases generated thirteen adversary proceedings, mostly to resolve disputes as to priority of the security interests of various creditors in the sales proceeds held by the Chapter 11 Trustee. Sales sometimes transferred ownership of trailers to Leasing when those trailers were subject to the inventory liens of GFB and FPB. Leasing then would pledge those same trailers as collateral to various lenders, some of which attempted to perfect their liens by noting them on the trailer titles.

In one of the adversary proceedings,[2] the Court entered a memorandum opinion (the "UCC Inventory Lien Priority Decision") on the legal issue of whether "GFB's perfected security interest in the inventory of Sales continued in any trailer that was transferred by Sales outside of the ordinary course or without GFB's permission." [*Id.* at 9.] Finding that Tennessee law protects GFB's security interest in such trailers transferred outside the ordinary course of business or without GFB's permission, the Court denied the Chapter 11 Trustee's motion to dismiss GFB's complaint for a declaratory judgment that it has a first priority lien in the proceeds of trailers subject to its security interest in Sales' inventory. [*Id.* at 9-14.] Concerning the Chapter 11 Trustee's strong-arm powers under 11 U.S.C. § 544, the Court likewise held that under Tennessee law,

> unless the trailers at issue were transferred by Sales to Leasing as a buyer in the ordinary course or with GFB's permission, GFB's perfected security interest in those trailers continued in the hands of Leasing, and nothing about § 544(a)(1) or (2) allows the Trustee to overcome GFB's prior perfected security interest.

[2] Memorandum on Motion ot Gary M. Murphey, Trustee, for Judgment on the Pleadings, *Greeneville Federal Bank, FSB v. Fellhoelter, et al.*, Adv. Proc. No. 3:20-ap-3054-SHB ECF No. 46 (May 19, 2021).

[*Id.* at 15.]

Because the legal determinations in the UCC Inventory Lien Priority Decision would govern all of the lien priority disputes between GFB (and, for that matter, FPB, because it also held a perfected lien on Sales' inventory) and the lien creditors of Leasing, the various creditors and the Chapter 11 Trustee began working together to try to resolve the issues of distribution of the sale proceeds held by the Chapter 11 Trustee. Thereafter arose a dispute over priority between Sales' inventory lienholders, GFB and FPB. In that adversary proceeding, the Court ruled[3] that FPB's security interest in new trailer inventory of Sales had priority over GFB's security interest in the same inventory under the parties' Intercreditor Agreement that subordinated GFB's otherwise first priority lien in such new trailers to that of FPB. GFB appealed the Court's decision and then settled with FPB, resulting in the withdrawal of that appeal. During the appeal, however, this adversary proceeding, as well as other pending adversary proceedings, were stayed so that the various creditors could decide with whom they should negotiate to settle claims to sales proceeds held by the Chapter 11 Trustee.

As the Chapter 11 Trustee sorted out the various transfers of trailers from Sales to Leasing and from Leasing to lessees, GFB allegedly learned that ten of the trailers owned by Leasing that were sold by the Chapter 11 Trustee were trailers that were initially inventory of Sales, and through this adversary proceeding, GFB asserts its continuing rights in the trailers because of its priority inventory lien. FF&CB allegedly had provided funding to Leasing and received a security interest from Leasing in those same ten trailers. GFB's Complaint alleges that the Chapter 11 Trustee sold the ten trailers subject to Leasing's leases to third parties, with a portion of future lease payments plus a portion of the residual value at the end of the lease to be

[3] Memorandum and Order on Second Renewed Motion to Dismiss, *Greeneville Federal Bank, FSB v. First Peoples Bank of Tennessee*, Adv. Proc. No. 3:23-ap-03003-SHB, ECF No. 29 (Nov. 8, 2023).

paid to FF&CL. Thus, through this action, GFB seeks a declaratory judgment that its lien in Sales' inventory continued in the ten trailers at issue so that such lien has priority over that of FF&CB and for recovery of amounts paid or to be paid by the Chapter 11 Trustee to FF&CB relating to those trailers.

Both GFB and FF&CB filed motions for summary judgment before this action was stayed. [Docs. 19, 22.] Although FF&CB filed its own summary judgment motion and responded to GFB's motion [Doc. 25], it raised in its response and filed the Rule 56(d) Motion, seeking time for discovery concerning GFB's alleged "ongoing and longstanding acquiescence in the transfer of . . . trailers without GFB's claimed security interest following." [*Id.* at 6.]

II. RULE 56(d) STANDARD

The Sixth Circuit explained Federal Rule of Civil Procedure 56(d)[4] in *Doe v. City of Memphis*, 928 F.3d 481, 490–91 (6th Cir. 2019):

> The purpose behind Rule 56(d) is to ensure that [non-movants] receive "'a full opportunity to conduct discovery' to be able to successfully defeat a motion for summary judgment." *Ball v. Union Carbide Corp.*, 385 F.3d 713, 719 (6th Cir. 2004) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 257 (1986)). "A party invoking [the] protections [of Rule 56(d)] must do so in good faith by affirmatively demonstrating . . . how postponement of a ruling on the motion will enable [it] . . . to rebut the movant's showing of the absence of a genuine issue of fact." *FTC v. E.M.A Nationwide, Inc.*, 767 F.3d 611,623 (6th Cir. 2014) (quoting *Willmar Poultry Co. v. Morton-Norwich Prods., Inc.,* 520 F.2d 289, 297 (8th Cir. 1975)). The affidavit must "indicate to the [trial] court [the party's] need for discovery, what material facts it hopes to uncover, and why it has not previously discovered the information." *Ball*, 385 F.3d at 720 (quoting *Cacevic v. City of Hazel Park*, 226 F.3d 483, 488 (6th Cir. 2000)).
>
> Moreover, "[t]he party opposing a motion for summary judgment . . . possesses no absolute right to additional time for discovery under Rule 56." *Emmons v. McLaughlin*, 874 F.2d 351, 356 (6th Cir. 1989). **"A [trial] court does not abuse its discretion in denying discovery when the discovery requested would be irrelevant to the underlying issue to be decided."** *Simms v. Bayer Healthcare LLC*, 752 F.3d 1065, 1074 (6th Cir. 2014) (quoting *United States v.*

[4] Rule 56(d) is made applicable in this adversary proceeding by Federal Rule of Bankruptcy Procedure 7056.

> *Dairy Farmers of Am., Inc.*, 426 F.3d 850, 862 (6th Cir. 2005)). Similarly, a [trial] court has "discretion to limit the scope of discovery where the information sought is overly broad or would prove unduly burdensome to produce." *Id.* (quoting *Info–Hold, Inc. v. Sound Merch., Inc.,* 538 F.3d 448, 457 (6th Cir. 2008)).

(Emphasis added.)

The Sixth Circuit also has said that trial courts should construe Rule 56(d) motions generously and has set out five factors for consideration:

> (1) when the appellant learned of the issue that is the subject of the desired discovery; **(2) whether the desired discovery would . . . change[] the ruling below;** (3) how long the discovery period ha[s] lasted; (4) whether the appellant [has been] dilatory in its discovery efforts; and (5) whether the appellee [has been] responsive to discovery requests.

CenTra, Inc. v. Estrin, 538 F.3d 402, 420 (6th Cir. 2008) (emphasis added) (quoting *Plott v. Gen. Motors Corp.*, 71 F.3d 1190, 1196–97 (6th Cir. 1995)).

III. ANALYSIS

FF&CB seeks discovery for the following stated reason:

> Specifically, Defendants [*sic*] would make a discovery request for the GFB's underwriting file and the First Peoples Bank underwriting file to show whether GFB had knowledge that K&L Sales and Leasing was in the practice of purchasing new trailers with funds borrowed from third parties and then selling those trailers to buyers such that GFB waived its right to have a security interest in such collateral after authorizing the sales by implication.

[Doc. 27 at ¶ 4.] Thus, FF&CB seeks to show that GFB *impliedly* authorized the transfers by Sales under a theory of waiver or modification by course of performance or usage of trade.

The question of any possible relevance of information gleaned from discovery relating to such implied authorization requires review of the statutory scheme under the Uniform Commercial Code as it is adopted in Tennessee. Because, as this Court finds, FF&CB is required to show reliance on any such implied authorization by course of dealing or course of performance, then FF&CB's failure to allege any such reliance would render irrelevant GFB's actual course of performance or course of dealing with Sales.

Our starting point is Tennessee Code Annotated section 47-1-303, which defines three key terms:

> (a) A "course of performance" is a sequence of conduct between the parties to a particular transaction that exists if:
>
> (1) The agreement of the parties with respect to the transaction involves repeated occasions for performance by a party; and
>
> (2) The other party, with knowledge of the nature of the performance and opportunity for objection to it, accepts the performance or acquiesces in it without objection.
>
> (b) A "course of dealing" is a sequence of conduct concerning previous transactions between the parties to a particular transaction that is fairly to be regarded as establishing a common basis of understanding for interpreting their expressions and other conduct.[5]
>
> (c) A "usage of trade" is any practice or method of dealing having such regularity of observance in a place, vocation, or trade as to justify an expectation that it will be observed with respect to the transaction in question. The existence and scope of such a usage must be proved as facts. If it is established that such a usage is embodied in a trade code or similar record, the interpretation of the record is a question of law.

For the issue before the Court, subsection (d) is the operative portion:

> (d) A course of performance or course of dealing between the parties or usage of trade in the vocation or trade in which they are engaged or of which they are or should be aware is **relevant** in **ascertaining** the **meaning** of the parties' agreement, may **give particular meaning** to specific terms of the agreement, and **may supplement** or qualify the terms of the agreement. A usage of trade applicable in the place in which part of the performance under the agreement is to occur may be so utilized as to that part of the performance.

Tenn. Code Ann. § 47-1-303(d) (emphases added). Subsection (e) then provides important guardrails for application of subsection (d):

> (e) **Except as otherwise provided in subsection (f)**, the **express terms** of an agreement and any applicable course of performance, course of dealing, or usage of trade **must be construed whenever reasonable as consistent** with each other. If such a construction is unreasonable:

[5] Although some courts have loosely used the term "course of dealing" when the proper term for the situation is "course of performance," but "course of dealing" definitionally concerns the parties' conduct before the transaction at issue.

> (1) **Express terms prevail over course of performance, course of dealing, and usage of trade;**
>
> (2) Course of performance prevails over course of dealing and usage of trade; and
>
> (3) Course of dealing prevails over usage of trade.

Tenn. Code Ann. § 47-1-303(e) (emphases added). Finally, subsection (f) provides: "Subject to [section] 47-2-209, a course of performance is relevant to show a waiver or modification of any term inconsistent with the course of performance." Tenn. Code Ann. § 47-1-303(f).

Because subsection (f) indicates that course of performance (and only course of performance) is relevant to show waiver or modification under section 47-2-209, we next review that section, which concerns modification, rescission, and waiver:

> (1) An agreement modifying a contract within this chapter needs no consideration to be binding.
>
> (2) A signed agreement which excludes modification or rescission except by a signed writing **cannot be otherwise modified or rescinded**, but except as between merchants such a requirement on a form supplied by the merchant must be separately signed by the other party.[6]
>
> (3) The requirements of the statute of frauds section of this chapter (§ 47-2-201) must be satisfied if the contract as modified is within its provisions.
>
> **(4) Although an *attempt* at modification or rescission does not satisfy the requirements of subsection (2) or (3) it *can* operate as a waiver.**
>
> (5) A party who has made a waiver affecting an executory portion of the contract may retract the waiver by reasonable notification received by the other party that strict performance will be required of any term waived, unless the retraction would be unjust in view of a material change of position in **reliance** on the waiver.

Tenn. Code Ann. § 47-2-209 (emphases added).

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[6] Subsection (2) creates a private statute of frauds if the parties so provide, as they have here, and such a clause is valid and binding absent waiver under subsection (4). *See* Tenn. Code Ann. § 47-2-209 cmt. 3 ("Subsection (2) permits the parties in effect to make their own Statute of Frauds . . . .").

So, again, the underlying question is whether the course of performance between GFB and Sales altered their agreement either by waiver or modification such that FF&CB as a transferee-lienholder can claim to be the beneficiary of such a waiver or modification.

Numerous cases preclude such a finding – especially absent reliance by the third party. The older case of *Wabasso State Bank v. Caldwell Packing Co.*, 251 N.W. 2d 321 (Minn. 1976), is instructive. The Minnesota Supreme Court reversed the trial court's ruling that the plaintiff bank could not maintain a conversion action against transferees of the bank's collateral because the bank had authorized the sale by its course of performance with its debtor – the seller. The court reviewed a split of authority on the question of whether authority to sell collateral free of a lien may be implied even when a security agreement prohibits implied authority. *Id.* at 323. Then the court noted that the bank had complied with all of the provisions of Article 9 to protect its interests and it had no prior knowledge of its debtor's plans to sell the collateral. *Id.* at 324. The court also noted that defendant transferees were charged with constructive notice of the bank's security interest and they could have checked the records and made a simple phone call to determine whether the bank had authorized the sale, or the transferees could have named the debtor and the bank as joint payees on their check. *Id.* Either of these actions, the court noted, "would have fully protected" both the bank and the transferees. *Id.* The court also noted: "In any event, this is not a case of detrimental reliance since defendants had no way of knowing whether or not the bank had reminded [its debtor] of the necessity for prior approval of sales." *Id.* The *Wabasso* court further noted that the courts which had taken a contrary position concerning implied authorization by a course of performance had not reviewed the then-existing provision of Uniform Commercial Code section 1-303(e), stating: "Article 9 of the Code is an attempt to bring simplicity and certainty to the law of secured transactions through a system of written agreements and recorded notice." *Id.* at 325.

The Tennessee Court of Appeals, like the Minnesota Supreme Court, has acknowledged a split of authority over whether a secured party authorizes the debtor to sell collateral by not objecting to a course of performance in which the debtor previously sold collateral without consent. *First Tenn. Production Credit Ass'n v. Gold Kist, Inc.*, 653 S.W.2d 418, 421 & n.1 (Tenn. Ct. App. 1983). The Tennessee Court of Appeals expressly followed *Wabasso* and held that the bank could not have done more to protect its security interest when the bank was not aware of sales of collateral before they occurred. *Id.* at 421. "Moreover," the court said, "the express terms of an agreement will control when their construction is inconsistent with the course of [performance] by the parties." *Id.* Most importantly, the court discussed the requirement for reliance, quoting a Kansas Supreme Court decision that quoted a Nebraska Supreme Court decision:

> [The transferee defendant] here, must necessarily rely upon a previous course of dealing between the lender and the debtor, amounting to nothing more than a failure to object or rebuke the debtor for selling without written consent. At the same time [the secured creditor] was entitled to rely upon its agreement and the provisions of the code giving it a continuing perfected security interest in the identifiable proceeds of the sale. Considering the realities involved in accomplishing a simultaneous exchange of property for money, we can find nothing in [the secured creditor's] choice of alternatives in its previous course of dealing from which an inference could be drawn that it had waived its security agreement or that [the transferee] was entitled to ignore the provisions of the code because of a private and undisclosed arrangement or course of dealing between the debtor and the lender alone. It must be borne in mind that in this case we are dealing with a controversy between the lender and a third party purchaser who had no knowledge of the course of dealing between the debtor and borrower. We are not called upon here to resolve a controversy between the lender and the debtor in which such agreement or arrangement or course of dealing might be relevant to the enforcement of a security interest against the debtor's property.

Id. (quotations omitted). The Tennessee Court of Appeals then summarized its ruling:

> In the case at bar, plaintiff had a perfected security agreement, and defendant purchased the property covered by the security agreement without investigating for such liens. **A point that seems often overlooked, or at least granted little attention, in the cases dealing with this problem is that the purchaser of the**

> **goods acts at his own risk when he fails to make the minimal investigation contemplated by the notice-filing system. The purchaser, thus, must in our opinion, carry a heavy burden to overcome the secured party's valid and perfected security interest.** [The secured creditor] did not authorize by written consent or otherwise the sale of the property described in the security agreement, nor did [it] waive the provisions of its security agreement. Thus, the purchase by [the transferee] was a conversion and entitled [the creditor] to damages as awarded by the court.

Id. at 422.

Notably, in *Gold Kist*, the transferee had reached out to the secured creditor to ask for a list of the farmers who had used their crops as collateral to obtain loans from the secured creditor, but the creditor refused the request, instead choosing to rely on its recorded security agreement. *Id*. at 420. Also notable is in the four years that the debtor had financed his crops with the secured creditor, the secured creditor had never enforced the provision of their contract that required written consent of the lender for the sale or disposition of crops. *Id.*

The Tennessee Supreme Court denied the petition for certiorari in *Gold Kist*. Moreover, less than a year later, the Tennessee Supreme Court quoted the *Gold Kist* decision for the proposition that "the purchaser of the goods acts at his own risk when he fails to make the minimal investigation contemplated by the notice-filing system." *Allen v. Simmons Mach. Co.*, 666 S.W.2d 44, 48 n.5 (Tenn. 1984). There, the supreme court held that the purchaser was liable for conversion of equipment that was collateral under the Uniform Commercial Code notwithstanding that his conversion might have been in good faith and without tortious intent because he was "charged with notice of the prior outstanding security interest . . . at the time [he] purchased the [collateral]." *Id.* at 47-48. The court upheld the lower court's rejection of the contention that the creditor lost its security interest by authorizing the sale of collateral, expressly or impliedly. *Id*. at 48.

Nearly three years after *Gold Kist*, the Tennessee Court of Appeals again rejected an argument that a waiver occurred by the secured creditor's failure to require compliance with the procedure by which the debtor paid the secured creditor when collateralized cattle were sold. *Dyersburg Prod. Credit Ass'n v. Kile*, 1986 WL 1874, at *4 (Tenn. Ct. App. 1986) (relying on *Gold Kist* and *Wabasso*).

In this district, United States Magistrate Judge Susan Lee ruled similarly in 2010, in *Bank of Lincoln County v. GE Commercial Distribution Finance Corp.*, No. 4:10-cv-19, 2010 WL 4392913 at *3-4 (E.D. Tenn. Oct. 29, 2010), when she rejected a "course of dealing" argument raised in a lien priority suit between a properly perfected inventory lienholder and the holder of a purchase money security interest ("PMSI") in the same equipment – used horse trailers. The PMSI holder argued that the security interest in inventory was limited to new trailers because, notwithstanding broad language that covered all inventory in the security agreement between the debtor and the inventory secured party, the course of dealing showed that only new trailers were covered by the lien. *Id.* at *3. The court relied on the Tennessee Court of Appeals' decisions in *Gold Kist* and *Kile*, stating:

> A "course of dealing" is "a sequence of conduct concerning previous transactions between the parties to a particular transaction that is fairly to be regarded as establishing a common basis of understanding for interpreting their expressions and other conduct." Tenn. Code Ann. § 47–1–303(b). [The PMSI holder] argues that whenever new trailers were sold, the proceeds were paid to [the inventory lienholder], and whenever used trailers were sold, the proceeds were paid to [the PMSI holder]. [The PMSI holder] has not, however, pointed to any evidence of this practice, and **even if proven, those facts would not be sufficient to modify the terms of the security agreement**. Tennessee courts have held in similar circumstances that the unilateral actions of a debtor cannot prove a course of dealing, even when the secured creditor accepts the proceeds of the debtor's sales.

Id. (emphasis added).

Although the then-existing version of Uniform Commercial Code section 1-303(e) did not include the cross-referenced exception to section 2-209 concerning modification, rescission,

and waiver when *Wabasso, Gold Kist, and Kile* were decided, the addition of the cross-reference concerning the intersection of course of performance with modification, rescission, and waiver does not change the analysis.

Indeed, the Seventh Circuit, in a decision authored by renowned Judge Posner, held that reliance is baked into the waiver provisions of section 2-209. *See Wisconsin Knife Works v. Nat'l Metal Crafters*, 781 F.2d 1280 (7th Cir. 1986). There, the court stated:

> The path of reconciliation with subsection (4) [of section 2-209] is found by attending to the precise wording of (4). It does not say that an attempted modification "is" a waiver; it says that "it can operate as a waiver." It does not say in what circumstances it can operate as a waiver; but if an attempted modification is effective as a waiver only if there is reliance, then both sections 2–209(2) and 2–209(4) can be given effect. Reliance, if reasonably induced and reasonable in extent, is a common substitute for consideration in making a promise legally enforceable, in part because it adds something in the way of credibility to the mere say-so of one party. The main purpose of forbidding oral modifications is to prevent the promisor from fabricating a modification that will let him escape his obligations under the contract; and the danger of successful fabrication is less if the promisor has actually incurred a cost, has relied. There is of course a danger of bootstrapping—of incurring a cost in order to make the case for a modification. But it is a risky course and is therefore less likely to be attempted than merely testifying to a conversation; it makes one put one's money where one's mouth is.
>
> ****
>
> Our approach is not inconsistent with section 2–209(5), which allows a waiver to be withdrawn while the contract is executory, provided there is no "material change of position in reliance on the waiver." Granted, in (5) there can be no tincture of reliance; the whole point of the section is that a waiver may be withdrawn unless there is reliance. But the section has a different domain from section 2–209(4). It is not limited to attempted modifications invalid under subsections (2) or (3); it applies, for example, to an express written and signed waiver, provided only that the contract is still executory. Suppose that while the contract is still executory the buyer writes the seller a signed letter waiving some term in the contract and then, the next day, before the seller has relied, retracts it in writing; we have no reason to think that such a retraction would not satisfy section 2–209(5), though this is not an issue we need definitively resolve today. In any event we are not suggesting that "waiver" means different things in (4) and (5); it means the same thing; but the effect of an attempted modification as a waiver under

> (4) depends in part on (2), which (4) (but not (5)) qualifies. Waiver and estoppel (which requires reliance to be effective) are frequently bracketed.
>
> The statute could be clearer; but the draftsmen were making a big break with the common law in subsections (1) and (2), and naturally failed to foresee all the ramifications of the break. The innovations made in Article 9 of the UCC were so novel that the article had to be comprehensively revised only ten years after its promulgation.[citation omitted] Article 2 was less innovative, but of course its draftsmanship was not flawless—what human product is? . . . .
>
> We know that the draft[s]men of section 2–209 wanted to make it possible for parties to exclude oral modifications. They did not just want to give "modification" another name—"waiver." Our interpretation gives effect to this purpose. It is also consistent with though not compelled by the case law. There are no Wisconsin cases on point. Cases from other jurisdictions are diverse in outlook. Some take a very hard line against allowing an oral waiver to undo a clause forbidding oral modification. Others allow oral waivers to override such clauses, but in most of these cases it is clear that the party claiming waiver had relied to his detriment.

Id. at 1286–88 (citations omitted).

Notably, one of the cases cited for that last proposition that oral waivers may override clauses that forbid oral modification is a Tennessee Court of Appeals decision from 1979, *Gold Kist, Inc. v. Pillow*, 582 S.W.2d 77 (Tenn. Ct. App. 1979). There, the court found that as between the debtor and the creditor, the creditor was estopped to rely on a provision in the contract because "it would be repulsive to all equitable principles to permit a party to request a change in terms of a written agreement and then escape liability because the other party had, in good faith, granted the request." *Id.* at 80. The court found that "[e]quitable principles supplement the provisions of [Tennessee Code Annotated section] 47-1-103." *Id.* Critically, the **debtor** in *Pillow* had relied on the creditor's conduct so that the court found a waiver. This point in the decision of the court of appeals in 1979 stands as an important distinction from the court of appeals decisions in the 1983 *Gold Kist* and 1986 *Kile* cases.

The court acknowledges the split of authority – not every court has agreed with Judge Posner's opinion in *Wisconsin Knife Works*. But given the cited Tennessee decisions and the

facts of this case – including that the express terms of the loan documents here make abundantly clear that neither modification nor waiver may be accomplished absent an express writing – the court adopts Judge Posner's reasoning.

Also, section 47-1-303(e) does not permit resort to section 47-2-209 unless the express terms of the agreement cannot reasonably be construed as consistent with any course of performance, course of dealing, or usage of trade. The express provisions of the Security Agreement (at ¶ 13) state the following:

> (a) No amendment of any provision of this Security Agreement shall be effective unless it is in writing and signed by the Grantor and Bank, and no waiver of any provision of this Agreement, and no consent to any departure by the Grantor therefrom, shall be effective unless it is in writing and signed by Bank, and then such waiver or consent shall be effective only in the specific instance and for the specific purpose for which given.
>
> (b) No failure on the part of Bank to exercise, and no delay in exercising, any right hereunder or under any other instrument or document shall operate as a waiver thereof; nor shall any single or partial exercise of any such right preclude any other or further exercise thereof or the exercise of any other right. The rights and remedies of Bank provided herein and in the other instruments and documents are cumulative and are in addition to, and not exclusive of, any rights or remedies provided by law. The rights of Bank under any Loan Agreement between the parties, any guaranty, any other instrument which now or hereafter evidences or secures all or part of the Obligations, or any related document against any party thereto are not conditional or contingent on any attempt by Bank to exercise any of its rights under any other such instrument or document against such party or against any other party.

[Doc. 19-3.]

Given section 47-1-303(e)'s provisions, which by use of the word "must" requires construction, whenever reasonable, as consistent with course of performance, course of dealing, and usage of trade, in the face of the Security Agreement's express language concerning not only modification but waiver, the Court will follow the Seventh Circuit's construction that places a higher burden on someone who wants to show waiver by a course of performance.

The Uniform Commercial Code is a complex statutory scheme that allocates risk, and the risk under the facts here is allocated to the transferee lien creditor, namely FF&CB. The Court finds that, even assuming there was some course of performance that altered the agreement between GFB and Sales (either by modification or by waiver), the transferees and transferee lienholders cannot benefit absent some showing of reliance. Further, evidence of any such reliance is within the knowledge of the transferees and transferee lienholders so that discovery of GFB as to course of performance is irrelevant to the underlying issue of whether GFB's security interest has priority of that of FF&CB. Thus, because the discovery requested by FF&CB's Rule 56(d) Motion "would be irrelevant to the underlying issue to be decided," *In re Bayer Healthcare*, 752 F.3d at 1074, the Court can perceive no need for FF&CB's requested discovery before providing its complete response to GFB's summary judgment motion.

IV. ORDER

For these reasons, the Rule 56(d) Motion [Doc. 27] is DENIED.

# # #