IN THE UNITED STATES BANKRUPTCY COURT FOR THE SOUTHERN DISTRICT OF MISSISSIPPI

IN RE: **CHAPTER 11**

FRANK MICHAEL GRILLO **CASE NO. 0602940EE**

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Edward Ellington, Judge

FINDINGS OF FACT AND CONCLUSIONS OF LAW ON *DEVELOPMENT SPECIALISTS, INC.'S, AS TRUSTEE OF THE BERNARD EBBERS SETTLEMENT TRUST, MOTION FOR SUMMARY JUDGMENT*

This matter came before the Court on *Development Specialists, Inc.'s, as Trustee of the Bernard Ebbers Settlement Trust, Motion for Summary Judgment* (Development Specialists) and the *Debtor's Response to Development Specialists, Inc.'s Motion for Summary Judgment* filed by the Debtor, Frank Michael Grillo. After considering the pleadings, briefs and affidavits filed by the

parties, the Court finds that no genuine issue of material fact exists and that Development Specialists, Inc. is entitled to judgment as a matter of law. Accordingly, the motion for summary judgment should be granted for the reasons set forth below.

FINDINGS OF FACT

Frank Michael Grillo (Debtor) was employed at WorldCom, Inc. (WorldCom) from 1993 until 2003. At the time he left WorldCom, the Debtor was Senior Vice President of Global Marketing.

In January of 2001, the Debtor requested a loan in the amount of $150,000 from his employer, WorldCom. According to the Debtor's testimony at his June 30, 2008, deposition, the purpose of the loan was "(t)o pay off some outstanding debts I had on the home construction– the construction of my– the home I was building" *Deposition of Frank Michael Grillo,* p. 14, lines 6-9 (June 30, 2008) (2008 Deposition) in Jackson, Mississippi.

Pursuant to his request, the CEO of WorldCom, Bernard Ebbers (Ebbers), personally made the loan to the Debtor. The Debtor received and cashed the $150,000 check from Ebbers. According to the Debtor's deposition testimony, this loan was evidenced by a promissory note which was due on January 1, 2002. The Debtor does not have a copy of this original promissory note.

The Debtor did not repay the original promissory note. On January 1, 2002, the Debtor executed a *Demand Promissory Note* (Ebbers' Note) in favor of Ebbers. The Ebbers' Note replaced the original 2001 promissory note. The Ebbers' Note was payable to Ebbers in the principal amount of $160,044.24 together with interest at eight percent per annum for the year 2002 and a variable rate thereafter. The Ebbers' Note states that "(t)he unpaid principal and accrued interest shall be

payable on demand." *Demand Promissory Note*, p. 1, January 1, 2002. The Debtor has not made any payments on the Ebbers' Note or repaid the loan.

On April 30, 2002, the State of New York Retirement Fund and other plaintiffs commenced a class action[1] in the United States District Court for the Southern District of New York against WorldCom, Bernard Ebbers and several other entities and individuals seeking to recover against the defendants for damages/loses they sustained as a result of alleged securities fraud by all of the defendants. Subsequently, WorldCom filed a Chapter 11 in the United States Bankruptcy Court for the Southern District of New York on July 21, 2002.

In 2005, a settlement agreement was approved in the district court litigation. Pursuant to one of the terms of the settlement, Ebbers transferred substantially all of his personal assets to a trust established for the benefit of the plaintiffs and the certified class. One of the purposes of the trust was to liquidate Ebbers' assets for the benefit of the trust. The Ebbers' Note was specifically included within those assets transferred by Ebbers.

The Debtor did not join the district court litigation or participate in the district court settlement. The Debtor did not file a proof of claim in WorldCom's bankruptcy.

On September 26, 2005, Development Specialists was appointed to serve as trustee and to administer the trust's assets, which included Ebbers' assets, for the benefit of all claimants. One of the duties of Development Specialists as trustee of the trust was to enforce and collect notes which were owed to Ebbers and which had been transferred to the trust.

On December 21, 2006, the Debtor filed a petition for relief under Chapter 11 in the United States Bankruptcy Court for the Southern District of Mississippi. In his *Summary of Schedules*

[1] *In re WorldCom, Inc. Securities Litigation,* 1:02-cv-03288-DLC (S.D. New York).

(Schedules), Schedule F, the Debtor lists a debt to Bernard Ebbers in the amount of $150,000. The Debtor does not list this debt as contingent, unliquidated or disputed.

In an effort to fulfill its duty as trustee of the Ebbers' Trust, Development Specialists filed a proof of claim on March 15, 2007, in the Debtor's bankruptcy. The Ebbers' Note is attached to the proof of claim as evidence of the debt. The proof of claim was filed in the amount of $245,658.40 "plus such other undetermined additional charges of collection, interest and additional costs as may accrue on this note."[2]

On October 5, 2007, the Debtor filed his *Plan of Reorganization.* The Debtor's plan proposed to pay all of his allowed claims a 100% distribution. On May 15, 2008, the Court entered an *Agreed Order Confirming Plan* the Debtor's *Plan of Reorganization.*

In connection with the Debtor's bankruptcy, Development Specialists conducted a deposition on September 20, 2007[3], (2007 Deposition) of the Debtor. At the 2007 Deposition, the Debtor testified that he had entered into the Ebbers' Note and that he did not contest the balance owed on the Ebbers' Note or the fact that the Ebbers' Note was in default.

However, at his second deposition, the 2008 Deposition, the Debtor stated that he no longer owes the Ebbers' Note because he was entitled to setoff and recoupment of the amounts he owed Ebbers due to "(t)he loss of the value of [the Debtor's] exercise and hold and the loss of the future value of the options"[4] related to his WorldCom stock. The Debtor further testified that "there was an implied understanding between Mr. Ebbers and myself that the ability – my ability to pay back

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[2]*Proof of Claim* of Development Specialists, (March 15, 2007).

[3]In Development Specialists' Motion, this deposition is referred to as the *2004 Transcript*. However, the date on the first page of the transcript is September 20, 2007.

[4]*Deposition of Frank Michael Grillo,* p. 65, lines 1-23; pg. 66, lines 1-5 (June 30, 2008).

the note was directly tied to the recovery of the stock and my ability to exercise future options."[5]

On March 21, 2008, the Debtor objected to Development Specialists' proof of claim. In his objection, the Debtor states that Development Specialists "is not entitled to recover any funds from Grillo due to the actions of Bernard Ebbers which give rise to defenses of estoppel, unclean hands and set-off. That under the theory of recoupment, Development Specialist, Inc. (sic), is not entitled to recovery in this proceeding in that the damages to Grillo by Ebbers exceeds the amount sought." *Debtor-In-Possession's Objection to the Proof of Claim Filed on Behalf of Development Specialists, Inc. Trustee, Ebbers Asset Trust (Proof of Claim No. 12)*, p. 1 (March 21, 2008).

In his *Debtor-In-Possession's Amended Objection to the Proof of Claim Filed on Behalf of Development Specialists, Inc. Trustee, Ebbers Asset Trust (Proof of Claim No. 12)* (Amended Objection) filed on June 30, 2008, the Debtor states that he objects to any claim being asserted by Development Specialists because the Ebbers' Note arose from a note due to Bernard Ebbers by the Debtor and

> Ebbers (through his now well-known civil and criminal misconduct at WorldCom), wrongfully (a) created (in whole or in part) the initial need for the loan and (b) impaired and prevented repayment (in whole or in part) of the loan. Debtor is entitled to assert against Development Specialists Inc. all defenses he would have against Ebbers had Ebbers sued to enforce the note.
>
> 2. The actions and misconduct of Bernard Ebbers give rise to defenses of breach of contract, breach of the implied covenant of good faith and fair dealing, frustration of purpose, failure of implied conditions, estoppel, unclean hands and set-off.
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> 3. For the same reasons, under the theory of recoupment, Development Specialists, Inc., is not entitled to recovery in this proceeding in that the damages to Grillo by Ebbers exceeds the amount sought.

Debtor-In-Possession's Amended Objection to the Proof of Claim Filed on Behalf of Development

[5]*Id.* at p. 84, lines 15-20.

Specialists, Inc. Trustee, Ebbers Asset Trust (Proof of Claim No. 12), pp. 1-2 (June 30, 2008).

On August 28, 2008, Development Specialists filed *Development Specialists, Inc.'s, as Trustee of the Bernard Ebbers Settlement Trust, Motion for Summary Judgment* and corresponding memorandum in support of its motion. In its motion and memorandum, Development Specialists asserts that there is no genuine issue of material fact regarding the Debtor's defenses to Development Specialists' proof of claim, and therefore, Development Specialists is entitled to a judgment as a matter of law against the Debtor.

On September 17, 2008, the Debtor filed his *Debtor's Response to Development Specialists, Inc.'s Motion for Summary Judgment* and corresponding brief. The Debtor states that there are genuine issues of material fact, and therefore, summary judgment should be denied.

CONCLUSIONS OF LAW

I.

This Court has jurisdiction of the subject matter and of the parties to this proceeding pursuant to 28 U.S.C. § 1334 and 28 U.S.C. § 157. This is a core proceeding as defined in 28 U.S.C. § 157(b)(2)(B).

II.

A.

Rule 56 of the Federal Rules of Civil Procedure[6] provides that in order to grant a motion for summary judgment, the court must find that "[t]he pleadings, the discovery and disclosure materials

[6]Federal Rule of Civil Procedure 56 is made applicable to bankruptcy proceedings pursuant to Federal Rule of Bankruptcy Procedure 7056.

on file, and any affidavits show that there is no genuine issue as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). In addition, when considering a motion for summary judgment, the court must view the pleadings and evidentiary material, and the reasonable inferences to be drawn therefrom, in the light most favorable to the non-moving party, and the motion should be granted only where there is no genuine issue of material fact. *Thatcher v. Brennan*, 657 F. Supp. 6, 7 (S.D. Miss. 1986), *aff'd*, 816 F.2d 675 (5th Cir. 1987)(citing *Walker v. U-Haul Co. of Miss.*, 734 F.2d 1068, 1070-71 (5th Cir. 1984)); *see also Matshushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587-88, 106 S.Ct. 1348, 1356-57, 89 L.Ed.2d 538, 553 (1986). Moreover, "an opposing party may not rely merely on allegations or denials in its own pleading; rather, its response must – by affidavits or as otherwise provided in this rule – set out specific facts showing a genuine issue for trial. If the opposing party does not so respond, summary judgment should, if appropriate, be entered against that party." Fed. R. Bankr. P. 7056(e)(2).

The party moving for summary judgment bears the initial burden of informing the court "of the basis for its motion and identifying those portions of [the record] which it believes demonstrate the absence of a genuine issue of material fact." *Celotex*, 477 U.S. at 323. Once the moving party meets this burden, the burden shifts to the non-moving party. The non-moving party must then show the existence of a genuine issue for trial.

> Where the moving party has met its Rule 56(c) burden, the non-movant "must do more than simply show that there is some metaphysical doubt as to the material facts. . . (T)he non-moving party must come forward with 'specific facts showing that there is a genuine issue for trial.' Where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no genuine issue for trial." *Matasushita, supra*, 745 U.S. at 596-97, 106 S.Ct. at 1361-62 (quoting Fed. R. Civ. P. 56(e)).

Vowell v. G & H Towing Co., 870 F.Supp 162, 165 (S.D. Tex. 1994).

B.

The filing of a proof of claim by a creditor is governed by 11 U. S. C. § 501[7]. A proof of claim filed by a creditor pursuant to § 501 is "deemed allowed, unless a party in interest . . . objects. [I]f such objection to a claim is made, the court. . .shall determine the amount of such claim . . . as of the date of the filing of the petition." 11 U. S. C. § 502(a) and (b) . "A proof of claim executed and filed in accordance with the Bankruptcy Rules constitutes prima facie evidence of the validity and amount of the claim. Bank. R. 3001(f)." *Simmons v. Savell, (In re Simmons),* 765 F.2d 547, 551-52 (5th Cir. 1985)(footnote omitted).

Under Federal Rule of Bankruptcy Procedure 9014[8], an objection to a proof of claim is a contested matter unless it is joined with a counterclaim seeking relief specified in Rule 7001. "It has been said that the filing of a proof of claim is tantamount to the filing of a complaint in a civil action, and the [debtor's] formal objection to the claim, the answer. *See* 3 5 Collier on Bankruptcy ¶ 547.03[1][a] (Alan N. Resnick & Henry J. Sommer eds., 15th ed. rev.) on Bankruptcy ¶ 502.01, at 502-16." *In re Simmons,* 765 F.2d at 552.

III.

A.

As previously noted, in his Amended Objection the Debtor states that Development Specialists' proof of claim should be disallowed because the "actions and misconduct of Bernard Ebbers give rise to defenses of breach of contract, breach of the implied covenant of good faith and

[7]Hereinafter, all code sections refer to the Bankruptcy Code found at Title 11 of the United States Code unless specifically noted otherwise.

[8]Hereinafter, all rules refer to the Federal Rules of Bankruptcy Procedure unless specifically noted otherwise.

fair dealing, frustration of purpose, failure of implied conditions, estoppel, unclean hands and set-off." *Debtor-in-Possession's Amended Objection,* ¶ 2 at p. 1. However, at no point does the Debtor state that the Ebbers' Note was not a valid contract between the Debtor and Ebbers. Under Mississippi law, "(a)n enforceable contract requires an offer, acceptance of the offer, and consideration." *Service Elec. Supply v. Hazlehurst Lumber,* 932 So.2d 863, 869 (Miss. App. 2006)(citations omitted). In the case at bar, there is no dispute that an offer to loan money to the Debtor was made, the Debtor accepted the offer and the Debtor then received and deposited the funds. Having found that there exists a legal and binding contract between the parties, the Court must next look to Mississippi law concerning the construction of the contract.

B.

The Mississippi Supreme Court has stated that "(l)egal purpose or intent should first be sought in an objective reading of the words employed in the contract to the exclusion of parol or extrinsic evidence. Thus, the courts are not at liberty to infer intent contrary to that emanating from the text at issue." *City of Grenada v. Whitten Aviation, Inc.,* 755 So.2d 1208, 1214 (Miss.App. 1999)(citations omitted). When determining how to interpret a contract, a court should look to the four corners of the contract. *McKee v. McKee,* 568 So.2d 262, 266 (Miss. 1990). A court is not concerned with what the parties may have intended, but rather with what they said "since the words employed are by far the best resource for ascertaining the intent and assigning meaning with fairness and accuracy." *City of Grenada,* 755 So.2d at 1214 (citation omitted).

In a more recent opinion in which the Mississippi Supreme Court had before it a dispute involving a contract between the City of Starkville and a rural electric association, the court stated:

> 'In construing a written instrument, the task of courts is to ascertain the intent of the parties from the four corners of the instrument. Courts look at the instrument under consideration as a whole and determine what the parties intended by giving a fair consideration to the entire instrument and all words used in it. When a written

> instrument is clear, definite, explicit, harmonious in all its provisions, and is free from ambiguity, a court in construing it will look solely to the language used in the instrument itself.' *Pfisterer v. Noble,* 320 So.2d 383, 385 (Miss. 1975).

City of Starkville v. 4-County Electric, 819 So.2d 1216, 1221, (Miss. 2002).

In an opinion issued in 2008, the Court of Appeals of Mississippi reviewed the law of Mississippi with regard to contract construction and interpretation and reiterated the steps a court should take when it has a question of contract construction and interpretation before it. The Court of Appeals stated:

> Contract construction and interpretation requires that the court first consider whether the contract is ambiguous. . . .
>
> The Mississippi Supreme Court has set out a three-tiered approach to contract interpretation. First, the familiar four-corners test is applied where the court examines the language that the parties used in expressing their agreement, looking within the "four corners" of the agreement whenever possible to determine how to interpret it. We read the contract as a whole in order to give effect to all of its clauses. Particular words or phrases should not control, but rather, the entire document should be examined. However, the four-corners analysis is only feasible when the contract is clear and unambiguous.
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> Second, if the court is unable to clearly determine the parties' intent, then the court should apply the discretionary canons of contract construction. Foremost among these canons is that when the language of an otherwise enforceable contract is subject to more than one fair reading, the reading applied will be the one most favorable to the non-drafting party.
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> Finally, after applying the above steps, "if the contract continues to evade clarity as to the parties' intent, the court should consider extrinsic or parol evidence. It is only when the review of a contract reaches this point that prior negotiation, agreements, and conversations might be considered in determining the parties' intentions in the construction of the contract." *Royer Homes,* 857 So.2d at 753.

Henry v. Moore, 2008 WL 4211702, *5-6 (Miss. App. 2008)(citations omitted).

In applying these standards to the Ebbers' Note, the Court finds that the terms of the Ebbers' Note are basically as follows: the Debtor promised to pay Ebbers the principal amount of $160,044.24 together with interest. The Ebbers' Note is a very clear and unambiguous note due

upon demand. "A court is obligated to enforce a contract executed by legally competent parties where the terms of the contract are clear and unambiguous." *Merchants & Farmers Bank v. State*, 650 So.2d 1060, 1061 (Miss. 1995). Therefore, having found that the Ebbers' Note is clear and unambiguous, the Court may only consider the "four corners" of the contract.

In his affidavit which is attached to his response to the motion for summary judgment and in his two depositions, the Debtor states that he suffered substantial losses due to the downturn in the price of WorldCom's stock and that those loses were caused by the actions and conduct of Ebbers. The Debtor further states in his affidavit that because of Ebbers' actions, he has defenses to the repayment of the Ebbers' Note. In addition, the Debtor testified in his depositions that he and Ebbers had an agreement that his repayment of the Ebbers' Note was conditioned upon WorldCom's stock recovering which would enable the Debtor to exercise his stock options and then repay the note.

However, upon a review of the "four corners" of the Ebbers' Note, the Court finds nothing in the Ebbers' Note which conditions the repayment by the Debtor on anything. The note simply states that it is due upon demand by the holder. There is nothing in the "four corners" of the Ebbers' Note which would support the Debtor's position.

The Debtor is an educated man, and at the time he entered into the Ebbers' Note, he had risen to the position of Senior Vice President of Global Marketing at WorldCom. Currently, the Debtor is an Executive Vice President of Enterprise Services for Cypress Communications. The Debtor testified that he had previously made money in the stock market and that he understood the risks associated with the stock market and that stocks could rise and fall.[9] In other words, the Debtor is not an unsophisticated investor who did not understand the stock market, or for that matter, the

[9]*Deposition of Frank Michael Grillo,* p. 97, lines 10-23; p. 98, lines 1-2 (June 30, 2008).

promissory note he signed. If the repayment of the Ebbers' Note was contingent upon the price of WorldCom stock rebounding, then the Debtor should have made certain that language to that affect was contained in the Ebbers' Note, but he did not. "(W)here a party, by his own contract, engaged to do an act, it is deemed to be his own fault and folly, that he did not thereby expressly provide against contingencies, and exempt himself from liability in certain events; . . . ." *Hendrick v. Green,* 618 So.2d 76, 78 (Miss. 1993).

While the Court accepts as true the Debtor's statements that because WorldCom's stock did not rebound, he could not exercise his stock options and repay the Ebbers' Note, upon a review of the "four corners" of the Ebbers' Note, that is of no relevance to his duty to repay the Ebbers' Note. "The mere fact that a contract becomes burdensome or even impossible to perform does not for that reason alone excuse performance." *Id.* Consequently, after reviewing the "four corners" of the Ebbers' Note, the Court finds that it is clear and unambiguous, and therefore, the Debtor may not alter the terms of the note by introducing parol evidence. Consequently, the Court finds that the Debtor is obligated to pay the note upon demand.

IV.

A.

In his objection to Development Specialists' proof of claim, the Debtor alleges that he has defenses to the Ebbers' Note which relieve him of any obligation to repay the note, namely: breach of contract, breach of the implied covenant of good faith and fair dealing, frustration of purpose, failure of implied conditions, estoppel, unclean hands and setoff. "The burden rests upon the defendant, not the plaintiff, to prevail on an affirmative defense." *R.J. Reynolds Tobacco Co. v. King,* 921 So.2d 268, 272 (Miss. 2005)(citations omitted).

In his Response, the Debtor states that "if the facts alleged by Mr. Grillo are found to be true by this Court after an evidentiary hearing, he has a defense to payment of the Promissory Note in

question."[10] In support of his position that summary judgment should be denied, the Debtor attaches as exhibits to his Response, his own affidavit, the *Stipulation of Settlement with Bernard J. Ebbers*[11] and the order denying Mr. Ebbers' request for a new trial after he was found guilty in his criminal trial[12] (collectively, Debtor's Exhibits).

Rule 18 of the Uniform Local Bankruptcy Rules for the United States Bankruptcy Courts in the Northern and Southern Districts of Mississippi (Uniform Local Rules) pertains to motions for summary judgment. Uniform Local Rule 18(B)(1) states that the respondent must "(l)ist any material facts recited by the movant about which the respondent contends there is a genuine issue of fact and cite and attach the factual authorities that create the issue of fact."[13] In neither his Response nor his accompanying brief does the Debtor list any facts which he contends are in dispute. Nor do the Debtor's Exhibits raise any facts which are in dispute: there is no dispute that Ebbers was convicted of various security violations nor is there any dispute that the Debtor suffered losses due to the loss in value of WorldCom's stock. The issue before the Court is whether Development Specialists has a valid proof of claim. In that regard, the Debtor's Response, Exhibits and brief have not shown the existence of any material facts which are in dispute which would invalidate the Ebbers' Note.

The Debtor's mere assertion that facts exist is not sufficient to rebut a motion for summary

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[10]*Brief*, p. 3 (September 17, 2008).

[11]As stated previously, this settlement was entered in litigation in the United States District Court in the Southern District of New York. It resolved a lawsuit filed by the State of New York State Retirement System, et. al., against WorldCom, Bernard J. Ebbers, et. al. and resulted in the creation of the Bernard Ebbers Settlement Trust.

[12]*United States v. Ebbers*, 1:02-cr-01144-BSJ (July 11, 2005).

[13]Uniform Local Bankruptcy Rules for the United States Bankruptcy Courts in the Northern and Southern Districts of Mississippi, Rule 18(B)(1).

judgment. While the non-moving party "should be given the benefit of every reasonable doubt,"[14] as stated previously, "an opposing party may not rely merely on allegations or denials in its own pleading; rather, its response must – by affidavits or as otherwise provided in this rule – set out specific facts showing a genuine issue for trial." Fed. R. Bankr. P. 7056(e)(2). Of particular importance is that it must be a genuine issue of *material fact*.

> 'The presence of fact issues in the record does not per se entitle a party to avoid summary judgment. The court must be convinced that the factual issue is a material one, one that matters in an outcome determinative sense . . . the existence of a hundred contested issues of fact will not thwart summary judgment where there is no genuine dispute regarding the material issues of fact.'

Oaks, 953 So.2d at 1080 (quoting *Simmons v. Thompson Mach. of Miss., Inc.*, 631 So.2d 798, 801 (Miss. 1994)).

As found above, the Ebbers' Note is clear and unambiguous; therefore, parol evidence is not admissible to alter the terms of the note. Viewing the facts most favorably toward the Debtor, the Court does not find where the Debtor has shown the existence of a genuine issue of material fact.

B.

Even though the Court has found that the Debtor has not shown the existence of any material facts, assuming for the sake of argument that the Debtor's alleged defenses raise a dispute of fact, they are not disputes of material facts. As for the defense of frustration of purpose, this defense is barred. The Mississippi Supreme Court "has not recognized frustration of purpose as a defense to a breach of contract action." *City of Starkville,* 819 So.2d at 1225.

As for the Debtor's defenses of setoff and collateral estoppel, neither are applicable in this case. In order for setoff to apply, there must be a mutual indebtedness between the parties. "'A mutual account is one in which there must be reciprocal demands, charges by each party against the

[14] *Oaks v. Sellers,* 953 So.2d 1077, 1080 (Miss 2007).

other, like accounts between merchants. If the demand is only on one side, the account is not mutual.'" *Gerald v. Foster,* 168 So.2d 518, 521 (Miss. 1964) (quoting *Hoover Commercial C. v. Humphrey,* 66 So. 214 (Miss. 1914)). In the case at bar, there is not a mutual indebtedness between the parties.

As for the defense of collateral estoppel, "(a) prerequisite to application of the doctrine of collateral estoppel is that the issue arising in the subsequent civil action be identical to the question previously litigated and decided." *United States v. Shaw,* 725 F.Supp 896, 898 (S.D. Miss. 1989). *Shaw* involved a civil suit brought to recover damages against a person who had been convicted of bribery. The court held that the defendant's conviction for bribery collaterally estopped him from denying in the civil suit that the bribery occurred. Unlike the case at bar, the parties in *Shaw* were not only the same parties involved in both the criminal and civil actions, but the identical question was involved in both the criminal and civil actions, namely bribery. In the case at bar, the prior criminal action was the security fraud charges against Ebbers. The current civil action before the Court involves the validity of the Ebbers' Note; therefore, collateral estoppel does not apply as the issues are not identical and have not been previously litigated and decided.

CONCLUSION

In 2001, the Debtor entered into a promissory note in 2001 for $150,000 with Ebbers. Development Specialists filed a proof of claim based upon that same promissory note. The Debtor alleged that he and Ebbers had an implied understanding that he would have to pay the loan back only if WorldCom's stock rebounded. Following Mississippi law of contract construction, the Court examined the four corners of the Ebbers' Note and found the note to be clear and unambiguous, and therefore, parol evidence was not admissible to alter the terms of the Ebbers' Note. Since the Ebbers' Note is a valid and binding contract under the laws of the State of Mississippi, the Court

finds that there is no genuine issue as to any material fact and that Development Specialists is entitled to a judgment as a matter of law.

A separate judgment will be entered in accordance with Federal Rules of Bankruptcy Procedure 7054 and 9021.

This the 7th day of November, 2008.

/S/ EDWARD ELLINGTON
EDWARD ELLINGTON
UNITED STATES BANKRUPTCY JUDGE