

**STATE OF MINNESOTA
IN SUPREME COURT
Case No. A04-866**

Minnesota Voyageur Houseboats, Inc.,
a Minnesota corporation,

Debtor,

Las Vegas Marine Supply, Inc., a
Nevada corporation, et.al.,

Appellant,

vs.

Northern National Bank,
n/k/a Wells Fargo Bank,

Respondent,

APPELLANT'S REPLY BRIEF

SHANNON M. O'TOOLE
Attorney at Law, #0145488
223 South Avon Street
St. Paul, Minnesota 55105-3319
Telephone: 651-224-0290
Facsimile: 651-224-2718
Attorney for Appellant

JOHNSON, KILLEN & SEILER, P.A.
Joseph V. Ferguson, #134806
Paul W. Wojciak, #289735
230 West Superior Street
Duluth, Minnesota 55802
Telephone: 218-722-6331
Facsimile: 218-722-3031
Attorneys for Respondent

TABLE OF AUTHORITIES

<i>Cases</i>	<i>Page Number</i>
<i>Larson v. Vermillion State Bank</i> , 567 N.W.2d 721, 723 (Minn. Ct. App 1997)	3
<i>Minnesota Voyageur v. Las Vegas Marine et al.</i> , 690 N.W.2d 762, 767 (Minn. Ct. App. 2005)	2
<i>Rhodes v. Boardman Computers</i> , 1996 WL 704343 (Ohio App. Dist 11, 1996)	1
<i>Smith v. Akers</i> , 1990 WL 751321 (Va. Cir. Ct. 1990)	1
 <i>Statutes</i>	
Minnesota Statutes Section 336.1-208 (1996)	3

REPLY ARGUMENT

The essence of this case is that a bank may not set off against its customer's account unless the customer's debt to the bank is *due and owing*. The Respondent Bank's position is that the debt merely be *owing*. The difference is crucial. Once a debtor signs a term note, the amount of the loan is *owing*, but it is not *due* until the terms of the note make it due. Thus, a payment is usually *due* on a periodic basis, and the entire amount owing may become *due* under certain conditions set forth in the note, such as if the debtor does not make its payments or the if the debtor defaults and the bank accelerates the note (Appendix 30). Regardless of an Eighth Circuit interpretation of Missouri law, Minnesota law clearly requires that the debt be *due and owing* to the bank, and in this case, the debt may have been owing – over a period ending in 1999 – but it was not due as the debtor was current on its term payments. As the Bank readily agrees, acceleration is not automatic, the Bank must take action to accelerate and it did not.

Factually this case is distinct from any cited by Bank in support of its argument. Minnesota Voyageur was never considered in default by the Bank (before and after the garnishment the Bank considered the loan “performing”), and it was fully up to date on its term note payments - in fact it had prepaid. This is not a case on which a banker's lien is asserted, *Smith v. Akers*, 1990 WL 751321 (Va. Cir. Ct. 1990) Respondent's Appendix 2 – 6); nor a case about garnishment of accounts receivable in connection with a loan in default and considered in default by the bank, *Rhodes v. Boardman Computers*, 1996 WL 704343 (Ohio App. Dist 11, 1996) (Respondent's Appendix 7 – 11).

Both the Court of Appeals and the Bank, in a misplaced surge of concern for debtors, have suggested that Appellant Las Vegas Marine's position could possibly put

debtors out of business “simply to pay the creditors’ judgment.” *Minnesota Voyageur v. Las Vegas Marine et al.*, 690 N.W 2d 762, 767 (Minn. Ct. App. 2005). Assuming that the Court of Appeals does not consider payment of a judgment a bad or inequitable thing, there is no reason that any viable debtor will be put out of business by requiring banks to follow the common law rules for setoff. In fact, the Court of Appeals’ decision, which allows a bank to set off even when its customer is not in default except for the service of the garnishment, is much more dangerous for debtors. Real concern for debtors would require banks to follow the long-standing rules to set off against debts *due and owing*.

When it receives the garnishment summons, a bank has a choice. It looks at its customer’s term note and determines whether the customer has made all of its periodic payments. If it has, then the bank must decide, *do we accelerate the note and setoff, or do we allow the garnishment to proceed?* If its customer has paid its term note timely and the bank holds collateral such that the prospect of payment is not impaired, it should allow the garnishment to proceed unimpeded. To do otherwise would be to assist its customer in depriving its creditors of their rightful payment. If the customer paid the judgment creditor voluntarily, the bank could do nothing to prevent it. If the customer prefers to make its judgment creditor use extraordinary means to collect its judgment, should the bank interfere, even if its own prospect of payment is not in jeopardy? The answer is found in the law that governs the note and security agreements, the UCC.

The Bank is aware both of the choice it must make when it receives a garnishment summons and of the UCC good faith requirements that constrain it when it is deciding whether to accelerate. A term note may not be accelerated unless the holder has a good faith belief that its prospect of payment is impaired. Minn. Stat. §336.1-208 (1996);

Larson v. Vermillion State Bank, 567 N.W.2d 721, 723 (Minn. Ct. App. 1997). In this case, the Bank did not consider the note to be in default even though it knew about the judgment. *The term note never became due.* The Bank never considered the note to be in default, even after the garnishment. If banks may garnish in such instances, when there is a covenant default but the bank does not consider the note to be in default, there will be no limit on set off because it is not longer limited to debts that are *due and owing*.

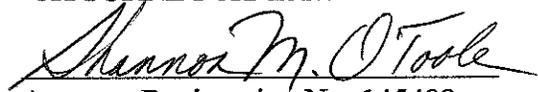
The Bank's argument at the District Court was that it simply did not need to accelerate in order to set off. At the Court of Appeals, the Bank raised a new (and previously unheard of argument in Minnesota) that as long as it possessed the power to accelerate (which every bank does) it could set off. Now it argues that it makes sense not to require it to accelerate because it is a secured creditor – notwithstanding the fact that it released its security interest a few months after the garnishment when it was paid in full. None of the Bank's arguments persuasively address the issue in this case: the Bank could not validly set off because when the Bank received the garnishment summons, it was due nothing from Minnesota Voyageur, that debtor having prepaid all its obligations.

CONCLUSION

Las Vegas Marine respectfully requests that the Court reverse the Court of Appeals and reinstate the decision of the District Court.

Dated: May 25, 2005

SHANNON M. O'TOOLE
ATTORNEY AT LAW

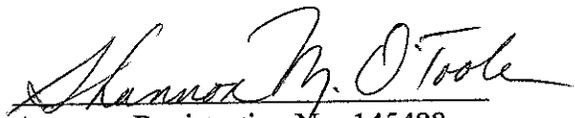

Attorney Registration No. 145488
223 South Avon Street
St. Paul, MN 55105-3319
Telephone (651) 224-0290
Facsimile (651) 224-2718
Attorney for Appellant

CERTIFICATION OF COMPLIANCE

I hereby certify that this brief conforms to the requirements of Minnesota Rules of Civil Appellate Procedure 132.01 Subdivision 1 and 3 for a brief produced with a proportional font. The length of this Reply Brief is 3 pages and 5,581 words. This brief was prepared using WORD 2000.

Dated: May 25, 2005

SHANNON M. O'TOOLE
ATTORNEY AT LAW



Attorney Registration No. 145488
223 South Avon Street
St. Paul, MN 55105-3319
Telephone (651) 224-0290
Facsimile (651) 224-2718
Attorney for Appellant
Las Vegas Marine Supply et al.