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UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA

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QUESTECH FINANCIAL CALIFORNIA,  
LLC,

NO. CIV. S-04-2553 FCD GGH

Plaintiff,

v.

ORDER

JYM CORPORATION,

Defendant.

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This matter is before the court on motion by plaintiff, QuesTech Financial California, LLC ("QuesTech"), for a writ of possession of personal property allegedly in the possession of defendant JYM Corporation ("JYM").<sup>1</sup> JYM opposes the motion.

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<sup>1</sup> Because oral argument will not be of material assistance, the court orders this matter submitted on the briefs. E.D. Cal. Local Rule 78-230.

**BACKGROUND**

1  
2 Following are the facts as set forth in the complaint and  
3 supplemented by Questech's papers filed in support of the present  
4 motion. QuesTech is a limited liability company with its  
5 principal place of business in Danbury, Connecticut. On or about  
6 February 20, 2002, QuesTech entered into a Note and Security  
7 Agreement ("the Agreement") with Radhe Investments, Inc., Jay  
8 Mohan, Sheila Mohan, and Nitnin Mohan (collectively "co-  
9 borrowers"), none of whom are named defendants in the present  
10 action. Under the terms of the Agreement, QuesTech loaned monies  
11 to the co-borrowers to facilitate their opening of a Togo's  
12 restaurant ("the restaurant") at 1441 Meadowview Road,  
13 Sacramento, California, and the co-borrowers agreed to make  
14 certain scheduled payments to QuesTech. The Agreement granted  
15 QuesTech a continuing first priority security interest in, and  
16 lien on, the property contained within the Togo's restaurant (the  
17 "collateral"). QuesTech perfected its continuing first priority  
18 security interest in the collateral by filing UCC Financing  
19 Statements with the Office of the Secretary of State of  
20 California. Pursuant to the terms of the Agreement, if the co-  
21 borrowers defaulted, QuesTech was entitled to enter upon the  
22 premises where any or all of the collateral is located, take  
23 possession, remove, and sell, lease or otherwise dispose of the  
24 collateral.

25 On September 1, 2003, the co-borrowers defaulted on the loan  
26 by failing to make the required payment to QuesTech. Thereafter,  
27 pursuant to the terms of the Agreement, QuesTech declared the  
28 entire unpaid balance of the loan immediately due and payable.

1 Apparently, sometime after QuesTech accelerated payment of the  
2 loan, the co-borrowers abandoned the restaurant and the  
3 collateral. Allied Domecq, Togo's parent company, took over the  
4 restaurant, later selling the rights to operate the restaurant to  
5 JYM. QuesTech believes that JYM assumed possession of the  
6 collateral when it took over operation of the restaurant.

7 On or about October 20, 2004, QuesTech made a written demand  
8 upon JYM to turn over the collateral to QuesTech. JYM did not  
9 comply with QuesTech's demand. On December 1, 2004, QuesTech  
10 filed suit against JYM alleging conversion, unjust enrichment,  
11 and claim and delivery of the collateral. On January 5, 2005,  
12 QuesTech filed a notice of application for writ of possession.  
13 JYM opposes the application on the grounds that Questech has  
14 failed to make the requisite showing that the property in the  
15 Togo's restaurant is in fact the same property used as collateral  
16 for the Agreement. In addition, JYM contends that it is a good  
17 faith purchaser who relied upon Allied Domecq's representation  
18 that the property was not encumbered. (See Def.'s Mem. Opp'n to  
19 App. Writ of Possession at 3.)

## 20 ANALYSIS

### 21 I. Choice of law governing the current action.

22 QuesTech appears to contend that the court should apply  
23 Connecticut law pursuant to a choice of law provision in the  
24 Agreement between QuesTech and the co-borrowers. The Agreement  
25 states in pertinent part,

26 This note shall be construed under the laws of the  
27 state of Connecticut, without regard to principles of  
28 conflicts of law or choice of law. The Borrower hereby  
agrees that all actions or proceedings arising directly  
or indirectly from or in connection with this Note or

1 any of the Collateral shall, at the Lender's sole  
2 option, be litigated only in a Court located in  
3 Fairfield County, Connecticut to the exclusion of the  
4 courts of any other state or country.

5 (Note and Security Agreement ("Agreement") § 27, Ex. A to Decl.  
6 of Sean P. Dunn in Supp. App. Writ of Possession.) Parties are  
7 free to choose the law applicable to the attachment and  
8 enforcement of the security interest, unless doing so would  
9 violate a fundamental public policy of the state whose law would  
10 apply in the absence of a choice of law clause. U.C.C. § 1-301  
11 (revised). However, the choice of law and venue provisions only  
12 bind *the parties to the Agreement*. The provisions cannot bind  
13 third parties, such as defendant, who were not parties to the  
14 Agreement, and therefore did not specifically agree to the terms  
15 therein. U.C.C. § 9-301 cmt. 2; ALI-ABA, Special Report of the  
16 Tribar Opinion Committee: U.C.C. Security Interest Opinions -  
17 Revised Article 9 at n. 55 (November 6-8, 2003). Therefore, the  
18 choice of law and venue provisions at issue do not apply to JYM.  
19 Pursuant to federal law, this court will apply the law of the  
20 forum state of California in the instant action. Fed. R. Civ. P.  
21 64<sup>2</sup>; Washington Mutual Bank v. Superior Court, 24 Cal. 4th 906,  
22 919-20 (2001).

## 23 **II. Merits**

24 Cal. Civ. Proc. Code § 512.010 provides for the filing of an  
25 application for writ of possession, which is a provisional remedy

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26 <sup>2</sup> Fed. R. Civ. P. 64 provides in pertinent part,  
27 " . . .all remedies providing for seizure of . . . property for  
28 the purpose of securing satisfaction of the judgment ultimately  
to be entered in the action are available . . . in the manner  
provided by the law of the state in which the district court is  
held . . ."

1 that enables a plaintiff to seize specific personal property in  
2 the defendant's possession prior to judgment. Waffer Int'l Corp.  
3 v. Khorsandi, 69 Cal. App. 4th 1261, 1271 (1999). Obtaining  
4 possession prevents a defendant from devaluing, consuming, or  
5 otherwise harming the property while the action is pending. See  
6 generally id. at 1271 n. 11. The granting or denial of the writ  
7 has no determinative effect on the underlying case or the rights  
8 of any party in actions arising out of the same claim. Cal. Civ.  
9 Proc. Code § 512.110.<sup>3</sup>

10 The application must be executed under oath and include:

11 (1) A showing of the basis of the plaintiff's claim  
12 and that the plaintiff is entitled to possession of  
13 the property claimed. If the basis of the plaintiff's  
claim is a written instrument, a copy of the  
instrument shall be attached.

14 (2) A showing that the property is wrongfully  
15 detained by the defendant, of the manner in which the  
16 defendant came into possession of the property, and,  
according to the best knowledge, information, and  
belief of the plaintiff, of the reason for the  
detention.

17 (3) A particular description of the property and a  
18 statement of its value.<sup>4</sup>

19 (4) A statement, according to the best knowledge,  
20 information, and belief of the plaintiff, of the  
21 location of the property and, if the property, or  
some part of it, is within a private place which may  
have to be entered to take possession, a showing that

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22 <sup>3</sup> Cal. Civ. Proc. Code § 512.110 provides: "The  
23 determinations of the court under this chapter shall have no  
24 effect on the determination of any issues in the action other  
25 than the issues relevant to proceedings under this chapter, nor  
26 shall they affect the rights of any party in any other action  
arising out of the same claim. The determinations of the court  
under this chapter shall not be given in evidence nor referred to  
in the trial of any such action."

27 <sup>4</sup> The value of the property must be stated with  
28 particularity to allow the court to properly assess the amount of  
the required undertaking.

1           there is probable cause to believe that such property  
2           is located there.

3           (5) A statement that the property has not been taken  
4           for a tax, assessment, or fine, pursuant to a  
5           statute; or seized under an execution against the  
6           property of the plaintiff; or, if so seized, that it  
7           is by statute exempt from such seizure.

8           Cal. Civ. Proc. Code § 512.010. If the plaintiff fails to make  
9           the required showing entitling it to a writ of possession, then  
10          the property remains with the defendant until the underlying  
11          action is resolved. If the application is granted, but the  
12          plaintiff subsequently loses the underlying case, then the  
13          property will be returned to defendant and statutory damages may  
14          be awarded.<sup>5</sup> Cal. Civ. Proc. Code § 512.020(a).

15          Here, QuesTech has failed to satisfy the statutory  
16          prerequisites for a writ of possession. Most importantly,  
17          QuesTech has not made a prima facie showing that it is entitled  
18          to possession of the property claimed. While it does not appear  
19          disputed that QuesTech has a security interest in *the collateral*,  
20          there is substantial doubt regarding whether some or all of the  
21          collateral was removed and replaced with new property not subject  
22          to QuesTech's security interest. QuesTech filed its complaint  
23          and application for writ of possession over a year after the co-  
24          borrowers defaulted on the Agreement, and after the restaurant  
25          had passed into the possession of Allied Domecq, and then JYM.  
26          JYM contends that the collateral was removed by Allied Domecq and

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27                   <sup>5</sup> Statutory damages include any damages resulting from;  
28                   (1) the levy of the writ of possession, (2) the loss of  
                  possession of property resulting from the levy, and (3)  
                  conversion if the property has been sold by plaintiff and cannot  
                  be redelivered to the defendant. Cal. Civ. Proc. Code §  
                  512.020(a).

1 replaced with new equipment and supplies prior to the time it  
2 began operating the restaurant. While QuesTech believes the  
3 collateral remains in the restaurant, it concedes that an agent  
4 of Allied Domecq has made representations to JYM and to QuesTech  
5 that he removed all of the property from the restaurant in  
6 December of 2003. (See Supplemental Dec. of Stephen Lerner Supp.  
7 App. Writ Poss'n ("Lerner Dec.") ¶¶ 14-18.) Under these  
8 circumstances, QuesTech has not made a prima facie showing that  
9 it is entitled to the property claimed.

10 QuesTech's inability to demonstrate that the property  
11 currently in the restaurant is the collateral for the Agreement  
12 also presents practical obstacles to granting the writ of  
13 possession. Cal. Civ. Proc. Code § 512.010(b)(3) requires the  
14 applicant to provide a "particular description of the property."  
15 The purpose of this requirement is to enable the levying officer  
16 to identify the property subject to seizure. See Alan M. Ahart,  
17 Cal. Practice Guide: Enforcing Judgments and Debts § 4:687  
18 (Rutter Group 2005). Questech's description of the property is  
19 contained in Paragraph 4 of the Proposed Order, which states in  
20 full:

21 4. QuesTech has established the probable validity of  
22 its claim to possession of the Subject Collateral (as  
23 that term is defined below) located at 1441 Meadowview  
24 Road, Suite 114, Sacramento, California 95816.

24 "Subject Collateral" shall mean "all personal property,  
25 including (without limitation) all (i) equipment,  
26 inventory, goods, accounts receivable, contract rights,  
27 chattel paper, documents, fixtures, furniture,  
28 investment property, general intangibles, instruments,  
cash, deposit accounts, reserves, credits and any other  
funds owned or formerly owned by Radhe Investments,  
Inc., Jay Mohan, Sheila Mohan, or Nitin Mohan which is  
the possession, custody or control of JYM; (ii) present  
and future attachments, accessories and accessions,

1 spare parts, replacements, substitutions and exchanges  
2 or trade-ins with respect to, in connection with or  
3 generated by any of the foregoing; and (iii) the  
4 products, proceeds, offspring, rents and profits of all  
5 of the foregoing, including insurance proceeds payable  
6 in respect of loss or damage to any of the foregoing  
7 and all other proceeds in whatever form, whether now or  
8 hereafter in the possession, custody and control of  
9 JYM," some or all of which may be located at 1441  
10 Meadowview Road, Suite 114, Sacramento, California  
11 95816. "Subject Collateral" shall also include, but  
12 not be limited to, those items inventoried on or about  
13 November 10, 2003 and set forth in Exhibit "A" attached  
14 hereto.

15 (Proposed Order Re: Pl.'s Application for Writ of Possession ¶ 4  
16 (emphasis added).) This "description," which encompasses  
17 anything in the store that belonged to the co-borrowers, provides  
18 no guidance whatsoever to a levying officer in determining what  
19 items to seize. How is the levying officer to determine what  
20 objects were "owned or formerly owned by" the co-borrowers?  
21 There is no indication from the evidence proffered that the items  
22 "owned or formerly owned by" the co-borrowers are labeled or  
23 readily identifiable as such. QuesTech has not provided a list  
24 of property with adequate descriptions and/or serial numbers. As  
25 JYM has been operating the store for many months now, presumably  
26 some or all of, inter alia, the inventory, goods, accounts  
27 receivable, documents, and cash at the store were never owned by  
28 the co-borrowers. However, from the description provided, the  
levying officer could not distinguish property owned by the co-  
borrowers from that brought to the restaurant after they  
relinquished it.

Essentially, QuesTech asks this court to seize the entire  
contents of JYM's restaurant when it offers little in the way of  
evidence that it is entitled to much of the property therein.



1 This is particularly troubling when one considers that a grant of  
2 this application almost assuredly would put the restaurant out of  
3 business until the resolution of this matter. QuesTech's  
4 application for writ of possession is DENIED.

5 IT IS SO ORDERED.

6 DATED: May 23, 2005.

7 /s/ Frank C. Damrell Jr.  
8 FRANK C. DAMRELL, Jr.  
9 UNITED STATES DISTRICT JUDGE  
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