

August 17, 2005

The Honorable Michael J. Hogan, J.S.C.  
Superior Court of New Jersey  
Chancery Division  
Burlington Court Courthouse  
49 Rancocas Road  
Mt. Holly, NJ 08060

**Re: Fleeer/ SkyBox International LP - Assignment for the Benefit of Creditors  
Docket No. P-2005-1394  
Fleeer/ Collectibles, LLC - Assignment for the Benefit of Creditors  
Docket No. P-2005-1408**

Dear Judge Hogan:

This firm represents secured creditor PSS Warehousing and Transportation, Inc. (“PSS”) with respect to the above Assignments for the Benefit of Creditors. Please accept this letter memorandum in lieu of a more formal brief in opposition to the application for Order to Show Cause filed by the Assignee of the above matters, Warren J. Martin, Jr., Esq.

#### **THE LEGAL STANDARD**

The Assignee’s application is in the nature of an application for a temporary or preliminary injunction. Under New Jersey law, a preliminary injunction should be imposed only where:

1. the moving party has a reasonable likelihood of ultimate success on the merits;
2. injunctive relief is necessary to prevent irreparable harm;
3. the benefit to the movant outweighs the hardship to the other interested parties;
4. the public interest favors the grant of injunctive relief. Crowe v. DeGioia, 90 N.J.

126, 132-34 (1982); Citizens Coach Company v. Camden Horse Railroad Company, 29 N.J.Eq. 299, 303-306 (E & A 1878).

A court should intervene when necessary to protect the subject-matter of the application from destruction, loss or impairment, and to prevent the final Order of the Court upon the merits from being rendered futile or inefficacious in operation. See, Ferraiuolo v. Manno, 1 N.J. 105, 108-109 (1948). In this case, the Assignee cannot demonstrate that a preliminary injunction is warranted. Indeed, it would be the *issuance* of such preliminary relief that would cause the loss or impairment of the subject matter of the application and would render the ultimate Order of the Court futile or inefficacious in operation.

The issue in dispute is not, as a reading of the Assignee's application might suggest, between PSS and the Assignee, but rather between PSS and an alleged secured creditor, Alex Grass. For the reasons set forth below, it is evident that Mr. Grass does not have a reasonable likelihood of success on the merits; that injunctive relief is not necessary to prevent irreparable harm; that the benefit to the movant does not outweigh the hardship to PSS or other interested parties; and, that the public interest does not favor the grant of injunctive relief.

### **FACTUAL BACKGROUND AND LEGAL ARGUMENT**

PSS is in the warehousing and distribution business. PSS began providing distribution services from its Lester, Pennsylvania location to the Frank H. Fler Corporation in 1990. In or about 1992, Fler's management group purchased the Fler company from the Fler family and relocated the Fler company to Cherry Hill, New Jersey. In order to meet the Fler company's changed distribution needs, PSS opened a distribution facility in Cherry Hill, New Jersey. In or about 1993, Marvel Entertainment Group purchased the Fler company. In or about 1994, the Fler company was merged with Skybox International, a North Carolina trading card company.

In or about 1996, Marvel Entertainment Group filed bankruptcy. PSS worked with Marvel and Fler management through the bankruptcy process. Marvel/Fler honored PSS's warehouseman's lien and PSS's position as a secured creditor. In or about 1999, the Fler company was purchased by the Grass Family. Throughout all of the changes of control, PSS dutifully performed warehousing and distribution services for the Fler company.

According to its pleadings filed in these two Assignment cases, the Fler company comprises two entities – Fler/Skybox International, LLC (“Fler/Skybox”) and Fler/Collectibles, LLC. Although it is not entirely clear from the Assignee's Application, PSS is of the belief that the Application relates only to the Fler/Skybox matter.<sup>1</sup>

In its June 8, 2005 Deed of Assignment to the Assignee, Fler/Skybox identifies PSS as a secured creditor.<sup>2</sup> The Deed of Assignment identifies four other secured creditors with modest claim amounts, and identifies PNC Bank, N.A. as the holder of a secured claim in the amount of \$6,020,282.00. The Assignee has indicated to the Court that the estimated value of the Fler/Skybox assets is substantially less than the sum of the secured claims. Indeed, the Assignee has suggested that the estimated value of the Fler/Skybox assets is less than the amount of the PNC Bank claim.

PSS's position is that, pursuant to N.J.S.A. 2A:19-31 and N.J.S.A. 12A:7-209, PSS has a landlord's and/or warehouseman's lien as to all of the Fler/Skybox property stored in PSS's

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<sup>1</sup>The assets of Fler Collectibles, LLC were sold at auction on July 14, 2005. PSS continues to warehouse the Fler Collectibles, LLC property for the auction purchaser.

<sup>2</sup>In the Deed of Assignment, Fler/Skybox lists the amount owed to PSS as being \$24,526.00. The actual amount due is \$34,430.38.

facility. PSS further contends that its lien is superior to the secured claim of PNC Bank.<sup>3</sup> PSS was prepared to discuss the relative priority of the claims with PNC Bank.

During a conference with Judge Bookbinder on July 15, 2005, the Assignee mentioned that Alex Grass, the principal of Fleer/Skybox, had paid PNC Bank's claim, apparently subsequent to the filing of the Deed of Assignment. In Paragraph 24 of the Application, the Assignee states that Alex Grass "purchased the interests of PNC Bank, N.A." and that Mr. Grass claims a security interest in the inventory.

Other than that statement, no documents have been filed with the Court, nor provided to PSS, nor to the best of PSS's knowledge to any other creditors, evidencing the terms and conditions of the transaction between PNC Bank and Mr. Grass. Moreover, no documents have been filed with the Court nor provided evidencing PNC Bank's or Mr. Grass's security interest.

Through conversations with the Assignee, it has been conveyed to PSS that Mr. Grass is of the position that the interests he purchased from PNC Bank, N.A. have priority over the landlord's or warehouseman's lien of PSS. If Mr. Grass prevails, then Mr. Grass most likely will end up being the sole beneficiary of the Assignment. Given that it was under the Grass Family's stewardship that Fleer/Skybox incurred nearly \$40 million in debt for a company now reportedly only a couple million dollars, it is a good bet that some of Fleer/Skybox's creditors, PSS included, will challenge the priority of Mr. Grass's insider interest.

In the context of discussions with the Assignee's office concerning the level of effort that would be required to meet the demands being made upon PSS, PSS requested that Mr. Grass

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<sup>3</sup>In his August 10, 2005 Certification, Randy Fridkis, an employee of the auctioneer hired by the Assignee, claims that PSS "has only recently raised the issue with respect to the Pre-Assignment Rent." In fact, PSS appeared at the very first court appearance in this matter and has asserted its Pre-Assignment claim throughout these proceedings.

agree that PSS's pre-assignment claim be paid from his secured claim, if any, and if his claim is deemed superior to PSS's claim. Mr. Grass has not so agreed.

The priority of claims is of paramount importance in this case. The adjudication of the priority of the claims will require discovery, documentary evidence and the testimony of witnesses. The loan documents upon which Mr. Grass may assert his priority are not before the Court, if indeed they exist. PSS should not be forced to surrender the goods upon which it has a landlord's and/or warehouseman's lien without an adjudication of the priority of the claims.

In fact, N.J.S.A. 12A:7-403(2), provides that a warehouseman is required to deliver goods only where "A person claiming goods covered by a document of title must satisfy the bailee's lien where the bailee so requests or where the bailee is prohibited by law from delivering the goods until the charges are paid." PSS has no obligation to deliver the liened goods until its lien is paid. An Order to the contrary would defeat the purpose of the warehouseman's lien statute.

PSS is entitled to protect its warehouseman's lien. The Assignee has not, and cannot demonstrate a reasonable likelihood of success on the merits.

With respect to the second prong of the Crowe v. DeGioia test, neither the Assignee nor anyone else will suffer irreparable harm if the Assignee's application is not granted. The September 9, 2005 auction date is an arbitrary date selected by Fleer's principals and/or the Assignee. While the alleged secured creditor, Mr. Grass, may like to get some money sooner rather than later (if he is indeed a secured creditor), he will not suffer irreparable harm if the auction is delayed while he is put to the task of proving the priority of his interest. Irreparable means *irreparable*, and inconvenience and delay do not equate to irreparable harm.

Likewise, with respect to the third prong of the test, the benefit to the movant does not

outweigh the hardship to PSS. Gary Borne, President of PSS, explains in the enclosed Certification the burden that would be imposed upon PSS if the Assignee's application were granted. It is impractical to force PSS and its employees to drop everything else and serve at the beck and call of Fler or its Assignee. It is equally impractical, and according to Mr. Borne probably illegal, for the Assignee's or the auctioneer's employees to descend upon the warehouse to remove the Inventory. If the Assignee, or Mr. Grass, wish to realize the benefit of the removal of the Inventory from the warehouse, then they are in control of the solution: satisfy the lien.

Finally, to the extent that the public interest is implicated in this private dispute, the fourth prong of the Crowe v. DeGioia balancing test also weighs in favor of PSS. The warehouse industry operates on razor-thin margins. PSS is able to stay in business and to provide cost-effective services to its customers because of the assurance provided by the warehouseman's lien law. If the courts of this State were not to give deference to the statutory warehouseman's lien, it would dissuade warehousemen from storing goods, particularly the goods of companies like Fler that are in poor financial condition. The arrangement has always been: the warehouseman stores the goods. If the customer does not pay its rent, then the warehouseman cannot just throw the goods into a dumpster. The warehouseman, as bailee, continues to have a duty to its customer. Because the warehouseman cannot just dump the goods, he is given a security interest in the goods. The warehouseman can, subject to statutory restrictions and procedures, sell the goods, or refuse to release the goods, until his lien is satisfied. It is in the public interest that the Court honor the right of a warehouseman to protect its lien.

For the reasons set forth herein, PSS respectfully requests that the application of the Fler

Assignee be denied.

However, PSS offers an alternative solution. There are sufficient funds in the Flee/Skybox estate to satisfy PSS's lien. PSS respectfully suggests that the Court Order that the Assignee satisfy PSS's lien on the Inventory and direct PSS and the Assignee to work out a plan for the orderly transport of the Inventory from the warehouse to the proposed auction site.

Thank you for the Court's courtesies.

Respectfully submitted,

MASELLI WARREN, P.C.

By: \_\_\_\_\_

PERRY S. WARREN

PSW/kb

cc: Brett S. Moore, Esquire  
Warren J. Martin, Jr., Esquire  
Carol Slocum, Esquire, Klehr Harrison, et al.  
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IN THE MATTER OF THE GENERAL  
ASSIGNMENT FOR THE BENEFIT OF  
CREDITORS OF FLEER/SKYBOX  
INTERNATIONAL, LP

Assignor

to

WARREN J. MARTIN, JR.,

Assignee

IN THE MATTER OF THE GENERAL  
ASSIGNMENT FOR THE BENEFIT OF  
CREDITORS OF FLEER  
COLLECTIBLES, L.L.C.

Assignor

to

WARREN J. MARTIN, JR.,

Assignee

SUPERIOR COURT OF NEW JERSEY  
CHANCERY DIVISION, PROBATE PART  
BURLINGTON COUNTY

DOCKET NO. P-2005-1394

CIVIL ACTION

**CERTIFICATION OF GARY BORNE**

I, GARY BORNE, do hereby certify and state:

1. I am the President of PSS Warehousing and Transportation, Inc. ("PSS"), a secured creditor in this matter, and, as such, I have full knowledge of the facts as set forth herein.
2. PSS is a New Jersey corporation with a principal place of business located at 7 Nicholas Court, Dayton, New Jersey.
3. PSS operates a warehouse facility in Cherry Hill, New Jersey (the "Warehouse").
4. For many years, Fleer/Skybox International, LLC ("Fleer") has stored various items of inventory (the "Inventory") in the Warehouse pursuant to a contract with PSS.
5. On June 10, 2005, Fleer assigned all of its assets to the Assignee for the benefit of

its creditors.

6. Since the Assignment for the Benefit of Creditors, PSS has provided the same warehousing services to the Assignee as had been provided to Fleeer.

7. As a provider of warehouse services, N.J.S.A. 12A:7-209 *et seq.* grants a lien against the Inventory in favor of PSS.

8. The inventory stored in the Warehouse represents a significant portion of the assets of Fleeer which are to be liquidated for the benefit of Fleeer's creditors.

9. By way of Order to Show Cause, the Assignee seeks to compel PSS to permit the removal of the inventory stored at the Warehouse in contravention of the statutory lien in favor of warehousemen.

10. I make this Certification in Opposition to the Assignee's Application for Order to Show Cause, seeking to order directly PSS to "permit the Assignee to remove inventory from the warehouse."

11. Because of the nature of the warehouse industry, including the governmental regulation thereof and the practical realities of such an undertaking, the relief sought by the Assignee is impractical and would impose undue hardship on PSS for the reasons set forth herein.

12. The Inventory consists of several hundred pallets of various items.

13. To ensure proper removal of the Inventory, PSS would be required to shrink-wrap each pallet so that the Inventory would not be lost or damaged in transit.

14. Many of the pallets would have to be re-stacked and reconfigured to ensure that the Inventory would not be damaged in transit.

15. All of the pallets would have to be weighed individually by PSS prior to shipping

to ensure compliance with highway regulations governing the weight of products in transit.

16. Even if the Assignee were to remove the Inventory, it would not be practical to transport the Inventory to Fleer's former headquarters, as requested, because the Inventory would need to get from ground level to Fleer's one-deck door up into its office space.

17. Former Fleer employees, the Assignee and his colleagues and employees, the Auctioneer and his employees, lawyers, appraisers, and other persons have demanded unfettered access to the warehouse.

18. No documentation or representation has ever been presented to PSS demonstrating that the individuals examining the Inventory are covered by a workman's compensation insurance policy that covers individuals working in a warehouse environment or other similar SIC code.

19. It is my understanding that the United States Department of Labor, through Occupational Safety and Health Administration ("OSHA") regulations, requires every person who operates warehouse equipment to be OSHA certified by PSS as a condition precedent to their undertaking such an activity in the Warehouse.

20. As a result, PSS and the Assignee could face potential liability in the event an injury occurred to one of the Assignee's employees or contractors if OSHA regulations are not followed or if the individuals examining or removing the inventory are not covered by workmen's compensation insurance that would cover an individual participating in warehouse labor.

21. PSS also services other clients in the Warehouse.

22. Two of PSS's other clients who utilize the Warehouse store food products in the Warehouse.

23. It is my understanding that federal law requires that every person who has access to food products in a warehouse facility be personally escorted through the warehouse facility at all times by a representative of the warehouse facility to protect the public against acts of bio-terrorism.

24. To accompany each person that the Assignee sends to the warehouse throughout the warehouse facility would impose a significant administrative burden and cost on PSS.

25. Because PSS cannot cease servicing its other clients, much of the work would have to be performed after normal business hours or on weekends by PSS's employees.

26. As a result, PSS would be obligated to compensate its employees at overtime and double-time rates—thereby further increasing the cost of this unnecessary undertaking sought by the Assignee.

27. If the Assignee's application is granted, then PSS would also have to provide additional staffing to safeguard the property of its other clients who utilize the Warehouse throughout the entire removal of all of the Inventory.

28. PSS's contract with Fler requires 30 days written notice of termination.

29. No notice has been given.

30. The urgency expressed by the Assignee is an unnecessary urgency. There is no reason why the auction of the Fler assets has to be held on September 9, 2005. Indeed, given the vast amount of inventory in the warehouse, that date is unrealistic.

31. In connection with the other related Assignment of Fler Collectibles, LLC, the auction was held on July 14, 2005, supposedly because the Fler Collectibles inventory consisted of NFL-related items and their value would be substantially diminished if the auction were not conducted well in advance of the NFL season.

32. The Fleer Collectibles auction was held on July 14, 2005 as scheduled. A month later, virtually all of the Fleer Collectibles assets are still in the warehouse.

33. PSS has tried very hard to work with the Assignee and his associates and professionals. PSS has permitted access to the inventory and has permitted people to enter and work in the warehouse in a manner that no other PSS customer does. The facility is a warehouse. It is used for storage. There are other customers of the warehouse.

34. PSS has not acted unreasonably in placing some limits on the Assignee's access to the warehouse.

I certify that the statements made herein are true. I am aware that if any of the within statements are wilfully false, I am subject to punishment.

DATED:

\_\_\_\_\_  
GARY BORNE