

August 23, 2005

The Honorable Ronald E. Bookbinder, P.J.S.C.
Superior Court of New Jersey
Chancery Division
Burlington Court Courthouse
49 Rancocas Road
Mt. Holly, NJ 08060

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

Dear Judge Bookbinder:

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 supplemental opposition to the application for Order to Show Cause filed by the Assignee of the above matters, Warren J. Martin, Jr., Esq. For the reasons set forth in this letter memorandum, together with the August 17, 2005 letter memorandum previously filed with the Court, PSS respectfully submits that the remainder of the Application of the Assignee should be denied.

PROCEDURAL STATUS

The Assignee previously filed an Application for Order to Show Cause, seeking an Order directing PSS to permit the Assignee to remove inventory from the PSS warehouse. PSS opposed the Application on both practical and legal grounds. A telephone conference was

conducted by The Honorable Michael J. Hogan, J.S.C. on August 16, 2005. Judge Hogan scheduled the matter for a hearing on August 18, 2005. During the oral argument before Judge Hogan, it became apparent that the Assignee was seeking the immediate removal of only 20 to 40 of the over 100 pallets of Fleeer Inventory in the PSS warehouse. Reckoning that its security interest would be adequately secured by the remaining Inventory,¹ PSS agreed to the entry of an Order that would permit the removal of the 20 to 40 pallets of Inventory,² leaving for another day the argument as to whether PSS should be compelled to permit the Assignee to remove the remainder of the Inventory from the PSS warehouse.

Accordingly, the Court on August 18, 2005 entered an Order: (1) directing PSS to permit the Assignee to remove the 20 to 40 pallets of highly valued inventory from the warehouse; (2) directing the Assignee to escrow \$50,000.00 with PSS's attorneys; (3) providing that PSS's liens shall attach to the funds in escrow as if the funds were proceeds of the Inventory; (4) directing the Assignee to pay all ongoing charges for use of the warehouse and to remove, or to pay for the removal of, all "junk" product stored in the warehouse; and, (5) scheduling a further hearing as to whether PSS shall be ordered to permit the Assignee to remove the remainder of the Inventory.

FACTUAL BACKGROUND AND LEGAL ARGUMENT

The essential facts are set forth in PSS's August 17, 2005 Letter Memorandum. PSS contends, as it did in its prior submission, that its lien is superior to the security interest claimed

¹The Assignee also agreed to deposit \$50,000.00 into escrow to secure PSS's claim.

²PSS was also persuaded by the Assignee's argument that the 20 to 40 pallets of Inventory that the Assignee sought to remove comprised the lion's share of the value of the Inventory. The Assignee sought to maximize the auction price of that most valuable Inventory by cataloguing and making the Inventory available for inspection at the auction site.

by Alex Grass, the Fler Principal who allegedly purchased PNC Bank's security interest in certain Fler assets. Because PSS holds the superior lien claim, it should not be compelled to release the liened Inventory absent payment in the full amount of its lien. Further, because the Assignee cannot demonstrate a likelihood of success on the merits – i.e., that Mr. Grass's alleged claim has priority over PSS's claim – the preliminary injunctive relief sought by the Assignee should be denied.

PSS has a warehouseman's lien and a landlord's lien as to all of the Fler/Skybox Inventory stored in PSS's facility (and, now, as to the \$50,000.00 to be held in escrow as proceeds of the Inventory). The warehouseman's lien is created by N.J.S.A. 12A:7-209, which provides that "A warehouseman has a lien against the bailor on the goods covered by warehouse receipt or the proceeds thereof in his possession for charges for storage or transportation..., insurance, labor or charges present or future in relation to the goods...."³ The Official Comment to N.J.S.A. 12A:7-209 adds, "It is unnecessary to state here, as in Uniform Warehouse Receipts Act 31, *that a bailee with a valid lien need not deliver until the lien is satisfied*. Section 7-403

³In his brief, Mr. Grass inaccurately argues that "N.J.S.A. 12A:7-209(3) limits the effectiveness of a warehouseman's lien as to third parties. That statute provides that the warehouseman's lien "is also effective against any person who so entrusted the bailor with possession of the goods that a pledge of them by him to a good faith purchaser for value would have been valid...." Mr. Grass interprets that plethora of pronouns to mean that PNC Bank, or its assignee would have been the party that so entrusted PSS with possession of Fler's goods such that a pledge of Fler's goods by PSS to a good faith purchaser for value would have been valid. That is not the correct interpretation. The Official Comment to N.J.S.A. 12A:7-209 explains, "As against third parties, subsection (3) continues the rule...that to validate the lien the *owner* [Fler] must have entrusted the goods to the *depositor* [in this case, also Fler], and that the circumstances must be such that a pledge by the *depositor* [Fler] to a good faith purchaser for value would have been valid. Thus the *owner's* [Fler's] interest would not be subjected to a lien or security interest arising out of a deposit of his goods by a thief." The statute does not, as Mr. Grass argues, stand for the proposition that PSS's claim is ineffective as to PNC Bank or as to Mr. Grass.

provides that *a person demanding delivery under a document must be prepared to satisfy the bailee's lien.*" (Emphasis added).

And, indeed, N.J.S.A. 12A:7-403 says just that. "A person claiming goods covered by a document of title must satisfy the bailee's lien where the bailee so requests...." N.J.S.A. 12A:7-403(2). PSS is entitled to payment of its lien as a condition of delivering the Flear Inventory.

Further, with respect to the priority of competing lien claims, PSS has priority over any claim that could be asserted by Mr. Grass. N.J.S.A. 12A:9-333(b) states:

Priority of possessory lien. A possessory lien on goods has priority over a security interest in the goods unless the lien is created by a statute the expressly provides otherwise.

PSS's lien is created by N.J.S.A. 12A:7-209. That statute does not "expressly provide otherwise." Accordingly, PSS's possessory lien has priority over any security interest alleged by Mr. Grass. Indeed, as if to dispel any doubt, the Official Comment to N.J.S.A. 12A:9-333 explains, "...the possessory lien has priority over a security interest unless the possessory lien is created by a statute that expressly provides otherwise. If the statute creating the possessory lien is silent as to its priority relative to a security interest, this section provides a rule of interpretation that *the possessory lien takes priority even if the statute has been construed judicially to make the possessory lien subordinate.*" Thus, under this recently revised Uniform Commercial Code, PSS has priority over any allegedly competing security interest, Mr. Grass's included.⁴

PSS is entitled to a lien on the Flear Inventory. PSS is not required to surrender the Flear

⁴In his brief, Mr. Grass argues that N.J.S.A. 12A:9-312 governs the priority of the liens as between PSS and Mr. Grass. It does not. N.J.S.A. 12A:9-312 addresses the priority of competing security interests. (For example, it would govern the competing claims of two banks). It does not address the priority of a possessory lien as against a non-possessory security interest. The relevant statute is N.J.S.A. 12A:9-333, not N.J.S.A. 12A:9-312.

Inventory until its lien claim is satisfied. PSS has priority over any allegedly secured creditor.

Moreover, PSS also is a landlord entitled to a landlord's lien pursuant to N.J.S.A. 2A:19-31, which, as cited by the Assignee in his Application, provides:

[w]here the assignor is a tenant, all of his goods and chattels on the premises, in his possession, shall be subject to a lien for the payment of rent due to the landlord. The claim for rent in favor of the landlord, not exceeding 1 year's rent, shall be first paid and satisfied by the assignee out of the goods and chattels of the tenant which were on the demised premises at the time of the assignment.

Thus, PSS is entitled to be *first paid* out of Fleeer's Inventory. Immediately after citing the statute, the Assignee notes that "there are at least two competing potentially secured parties," but, in fact, there is no competition at all. PSS is entitled to be "first paid." Indeed, the Assignee, noting the dearth of cases under the Assignment for Benefit of Creditors statute, argues that receivership cases are applicable to assignment cases. At least one of those cases, *Philadelphia Dairy Products Co., Inc. v. Summit Sweets Shoppe, Inc.*, 113 N.J. Eq. 458 (Ch. Ct. 1933), sets forth the order of priority and preference of distribution of the estate in possession of the receiver, which is insufficient to pay expenses of receivership and allowed claims in full: "(1) Expenses of administration of receivership; (2) claims of employees for [certain] wages...; (3) franchise taxes; (4) municipal taxes; (5) *claim of landlord against corporation for not exceeding one year's rent*; (6) *claims of other preferred creditors*; (7) claims of general creditors." PSS's claim is for less than one year's rent. Thus, PSS is to be "first paid," before any distribution is to be made to Mr. Grass, or to any other allegedly secured or unsecured creditor.

The Assignee's Application does not meet the standard set forth in *Crowe v. DeGioia*, 90 N.J. 126 (1982) for the imposition of preliminary injunctive relief. Indeed, it is PSS that has demonstrated a likelihood of success on the merits. The best outcome for everyone involved, the

Assignee and even Mr. Grass included, would be for the Court to deny the Assignee's Application, and instead to Order that the Assignee pay the amount of PSS's lien so as to facilitate the expeditious sale of the Fleeer Inventory and the settlement of the Fleeer Estate.

For the reasons set forth herein and in PSS's August 17, 2005 Letter Memorandum, PSS respectfully requests that the Application of the Fleeer Assignee for an Order directing PSS to permit the Assignee to remove the Inventory from the warehouse be denied. PSS further requests that the Assignee be Ordered to pay the amount of the lien to PSS, in return for the removal of the Inventory from the warehouse.

Thank you for the Court's courtesies.

Respectfully submitted,

MASELLI WARREN, P.C.

By: /s/ Perry S. Warren
PERRY S. WARREN

PSW/kb

cc: Brett S. Moore, Esquire
Warren J. Martin, Jr., Esquire
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PSS Warehousing and Transportation; Attn: Gary Borne