

In the Matter of the General Assignment for  
the Benefit of Creditors of FLEER/SKYBOX  
INTERNATIONAL LP,

Assignor,

to

WARREN J. MARTIN JR.,

Assignee.

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

DOCKET NO: P-2005-1394

In the Matter of the General Assignment for  
the Benefit of Creditors of FLEER  
COLLECTIBLES, LLC,

Assignor,

to

WARREN J. MARTIN JR.,

Assignee.

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

DOCKET NO: P-2005-1408

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**ASSIGNEE'S BRIEF IN SUPPORT OF  
THE FLEER ESTATE'S AUCTION SALE OF  
PHOTOGRAPHIC SLIDES & DIGITAL IMAGES**

***(ORAL ARGUMENT REQUESTED)***

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**PORZIO, BROMBERG & NEWMAN, P.C.**

100 Southgate Parkway

Morristown, NJ 07962-1997

Telephone: (973) 538-4006

Facsimile: (973) 538-5146

Attorneys Appearing:

John S. Mairo (JM-0670)

Brett S. Moore (BM-0014)

*Attorneys for Warren J. Martin Jr.,  
Assignee for the Benefit of Creditors of  
Fleer/SkyBox International LP and Fleer Collectibles, LLC*

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**MISCELLANEOUS**

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## PRELIMINARY STATEMENT

This dispute can be summarized as follows: Upper Deck wants the Assignee to give it tangible assets, for free, that were never purchased by Upper Deck and have significant value to the estate. As explained below, there is no valid legal or equitable basis for the Court to order the Assignee to do so.

On July 19, 2005, pursuant to an Asset Purchase Agreement dated June 29, 2005 (the "APA") and an approved bid at auction, the Assignee for the Benefit of the Creditors of Fler/SkyBox International LP ("Fler") sold all of the company's intellectual property, including its copyrights, to FSB Acquisition Company, LLC ("Upper Deck"). The Assignee's sale of the Fler intellectual property rights included nothing other than intellectual property. All remaining assets of Fler were expressly carved out of the sale agreement and reserved for later sale in a separate auction which would take place September 9, 2005. Indeed, the APA expressly recognized that the later auction sale would include copyrighted and trademarked items (where the copyrights and trademarks had been sold to Upper Deck), and Upper Deck expressly consented in the APA to such sale of inventory, items, and articles.

Despite this, Upper Deck now claims ownership and control of certain photographic slides and digital images of Fler, contending that they are solely "intellectual property." On the contrary, although certain of the photographic slides and digital images contain intellectual property, they are themselves tangible objects.<sup>1</sup> The law has long recognized the distinction between tangible objects, and the intangible intellectual property rights in such tangible objects. Neither the APA nor principles of copyright law entitle Upper Deck to demand the photographic

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<sup>1</sup> This dispute concerns only Fler's photographic slides and digital images which contain pictures which are not within the public domain (*i.e.*, not copyrighted) and which are not copyrighted by third parties. Upper Deck has no ownership or intellectual property interest in such slides and images, and the Assignee's freedom to sell them is not at issue. (*See discussion infra at 6,7.*)

slides and digital images, or prevent the Assignee from selling them at auction for the benefit of Fleer's creditors.

### STATEMENT OF FACTS

On June 10, 2005, Fleer and Fleer Collectibles, LLC ("Fleer Collectibles") made an Assignment for the Benefit of Creditors of all of their assets to Warren J. Martin Jr. ("Assignee" or "Seller"). The Assignment conveyed all of the property and rights of Fleer and Fleer Collectibles to the Assignee, including all of the inventory, intangible rights, tangible objects, and other assets which were owned by Fleer and Fleer Collectibles (the "Assets"). (*See Deeds of Assignment, attached as Exhibit A to the Certification of Warren J. Martin Jr. ("Martin Cert.")*) Included within the Assets assigned were the trademarks, copyrights, and other intellectual property of Fleer and Fleer Collectibles. (*See id. at ¶ 2 and Exh. A.*)

#### **Initial Negotiations with Prospective Buyers**

During the initial weeks of this Assignment Proceeding, the Assignee spent substantial time negotiating two proposed asset purchase agreements: the first, with Donruss/Playoff ("Donruss"), for the purchase and sale of the "Fleer" name and related intellectual property of Fleer/Skybox International, L.P. for \$500,000, and the second, with Liss Global, LLC ("Liss"), for the purchase and sale of the entirety of the die cast business of Fleer Collectibles, LLC for \$1,000,000. (*See Martin Cert. at ¶ 3.*) Because Donruss had not expressed interest in buying anything other than Fleer's intellectual property, the draft agreement with Donruss did not envision the sale of any tangible assets or items whatsoever. (*See id. at ¶ 3.*)

**Upper Deck Expresses its Interest**

Because of a dispute between Donruss and Liss,<sup>2</sup> and because the Assignee had been unsuccessful in seeking to resolve that dispute, the Assignee telephoned Michael Hulme, Esq., General Counsel for The Upper Deck Company, LLC (“Upper Deck”), on June 22, 2005 to discuss whether Upper Deck would be willing to make a \$2,000,000 (two-million dollar) offer for both the Fler intellectual property (which Donruss/Playoff was interested in purchasing) and the Fler Collectibles business (which Liss Global was interested in purchasing). (*See id. at ¶ 4.*) The Assignee suggested that for a bid of \$2,000,000 (two-million dollars), he would abandon Donruss and Liss as the “stalking horse” bidders and would proceed to file a single sale motion for both businesses with Upper Deck occupying the stalking horse role. (*See id.*) However, the Assignee made clear that an agreement would need to be signed, and a motion filed to approve that agreement, by June 29, 2005. (*See id.*)

Later that same evening, at 8:51 p.m., the Assignee received a letter from Upper Deck’s outside counsel (mistakenly dated June 21, 2005) expressing Upper Deck’s interest in purchasing the referenced assets for \$2,000,000 (two-million dollars), as well as its interest in moving quickly to execute and consummate an asset purchase agreement. (*See id. at ¶ 5 and Exh. B.*)

**The Asset Purchase Agreement Sets Forth those Assets Included Within the IP Auction Sale**

The APA, which was executed on June 29, 2005, and was ultimately reviewed and approved by this Court, listed the precise terms of the sale and was filed with the motion to approve the sale. Section 1.1 of the APA listed those assets of Fler which would be transferred from the Assignee to Upper Deck. (*See APA, Martin Cert., Exh. C, at Section 1.1.*) Section 1.1

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<sup>2</sup> Donruss was to acquire the Fler name and mark in the sale. It became tangled in a dispute with Liss over Liss’s desire to sell a large inventory of die cast vehicles which displayed that name and mark. (*See Martin Cert. at ¶ 4.*)

states that Seller “shall sell, transfer, assign and convey to Buyer, and Buyer shall purchase and accept from Seller, without recourse, all of Seller’s right, title and interest in and to the ‘Fleer/SkyBox Intellectual Property’ (as defined in Section 1.1(a))...” (*Id.*) As defined in Section 1.1(a), “Fleer/SkyBox Intellectual Property” included the trademarks, copyrights, patents, trade secrets, and other intellectual property of Fleer. (*See id. at Section 1.1(a).*) The terms of the APA, however, expressly excluded all other assets of Fleer from the transaction:

(b) Excluded Assets. As a matter of clarification, Fleer/SkyBox Intellectual Property **does not include, and Seller shall retain all right, title and interest in and to, all assets and properties** of Fleer/SkyBox **not expressly included within the definition of “Fleer/SkyBox Intellectual Property”** pursuant to Section 1.1(a).

(*Id. at Section 1.1(b)*)(*emphasis added*).

#### Assignee’s Auction of Intellectual Property

On July 14, 2005, pursuant to a bid-procedures order approved by the Court, the Assignee conducted the auction of the Fleer intellectual property and the Fleer Collectibles assets,<sup>3</sup> which auction commenced with Upper Deck’s stalking horse bid of \$2,000,000 (two-million dollars). (*See Martin Cert. at ¶ 7.*) After some ten (10) hours of spirited bidding with Upper Deck on the one side and a joint venture of Topps (interested in Fleer Intellectual Property only) and Liss Global (interested in Fleer Collectibles assets only), Upper Deck emerged as the successful bidder, with a winning bid of \$6,100,000 (six-million, one-hundred-thousand dollars) from FSB Acquisition Company, LLC, an acquisition company formed by Upper Deck in connection with the transaction (also referenced herein as “Upper Deck,” or as “Buyer”). (*See id.*)

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<sup>3</sup> Although all of the assets of Fleer Collectibles (intellectual property plus everything else) were sold, that portion of the sale is not relevant to this dispute which deals solely with the Fleer/Skybox sale. (*See APA, Martin Cert., Exh. C, at Section 1.1.*)

**The Asset Purchase Agreement Expressly Permits Assignee's Sale of Tangible Assets Which Contain or Display the Intellectual Property Sold Thereunder**

In the APA, both the Assignee and Upper Deck recognized that the Assignee would be conducting a separate and independent sale of Fleer's remaining assets. (*See id. at ¶ 8.*) Both parties were aware that a large portion of those tangible assets contained or displayed some of the Fleer/SkyBox Intellectual Property which the Assignee was transferring to Upper Deck, e.g., trading cards, hats, and memorabilia displaying the "Fleer" logo. (*See id. at ¶ 8.*) In order to avoid any issues or disputes regarding the sale of such assets at auction, the Assignee requested and included a special provision within the APA granting him permission to sell those assets, despite their incorporation and use of Fleer/SkyBox Intellectual Property. (*See APA, Martin Cert., Exh. C, at Section 8.10.*) Upper Deck read, commented upon, and revised Section 8.10, and both parties agreed to its ultimate terms and its inclusion in the APA. (*See Martin Cert. at ¶ 8.*) Section 8.10, which is entitled "Limited Covenant Not to Sue and Consent to Use," provides that "Buyer recognizes that Seller, pursuant to his duties under N.J.S.A. 2A:19-1 et seq., is conducting an auction of the existing inventory of product and items assigned by Fleer/SkyBox to Seller ('Assignee's Inventory') which may contain or display on such articles Fleer/SkyBox Intellectual Property ..." (*APA, Martin Cert., Exh. C.*)(*emphasis added*) The Assignee included this provision specifically so that there would be no problem with Upper Deck objecting to the September 9 auction, despite his transfer of Fleer's Intellectual Property to Upper Deck. (*See Martin Cert. at ¶ 8.*) Section 8.10 continues:

Buyer hereby expressly acknowledges and agrees that: (i) it consents to the incorporation in or display on each article of Assignee's Inventory of any Fleer/SkyBox Intellectual Property and/or Fleer Collectibles Intellectual Property as presently existing for the limited purpose of such sale of Assignee's Inventory with no right of Seller to modify or create a

derivative work using Flee/SkyBox Intellectual Property and/or Flee Collectibles Intellectual Property, with no further obligations to Buyer other than as expressly provided herein; and (ii) it will not and shall not pursue, threaten, or otherwise seek (through litigation, arbitration, administrative, or other proceedings) to enforce any claims or rights in and to the Flee/SkyBox Intellectual Property and/or Flee Collectibles Intellectual Property against Seller arising out of or in connection with such sale of Assignee's Inventory.

*(APA, Martin Cert., Exh. C, at Section 8.10.)(emphasis added).*

### **The Photographic Slides & Digital Images**

As part of the assets, articles and items of Flee, which were conveyed to the Assignee pursuant to the Deeds of Assignment, the Assignee now owns: (1) roughly 1.1 million photographic slides of various professional athletes;<sup>4</sup> and (2) 344,688 digital images of various professional athletes, entertainers, and celebrities, which are stored in electronic format.<sup>5</sup> *(See Martin Cert. at ¶ 9.)* According to Flee's records, 45% (154,788) of the digital images are within the "public domain" (*i.e.* they do not contain Flee intellectual property), and 12% (40,465) of the digital images appear to be subject to the copyrights of various photographers and related entities (*i.e.* they are copyrighted by third parties – not Flee). *(See Certification of Paul C. Wittekind ("Wittekind Cert.") at ¶ 3 and Exhibit A.)* Thus, only 43% (149,415) of the digital images appear to be subject to copyrights transferred by the Assignee to Upper Deck under the APA. *(See id.)* Similarly, it is likely that many of the photographic slides may be in the public domain or subject to copyrights of photographers and related entities, in which case Upper Deck would have no rights with respect to any intellectual property contained within such

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<sup>4</sup> Additional slides may be contained within boxes which were stored by Flee at Iron Mountain's commercial storage facilities. *(See Martin Cert. at ¶ 9.)*

<sup>5</sup> The photographic slides and digital images at issue contain pictorial depictions of players of the National Football League and Major League Baseball, entertainers of World Wrestling Entertainment and American Idol, as well as other celebrities, individuals, and characters.

photographic slides.<sup>6</sup> Accordingly, the only photographic slides and digital images at issue are those in which Upper Deck owns copyrights (the “Disputed Slides” and “Disputed Images,” respectively). The digital images are stored on a Fleer-owned computer and accessed through Fleer’s licensed MediaBin software (neither of which were purchased by Upper Deck).

**Upper Deck Objects to the Assignee’s Sale of the Photographic Slides & Digital Images**

On August 29, 2005, which was two months after execution of the APA, nearly six weeks after closing on the APA, and just ten (10) days prior to the Assignee’s scheduled public auction of all Fleer tangible assets, Upper Deck contacted Assignee to allege that it believed it had already purchased the photographic slides and digital images when it closed with the Assignee of the purchase its Fleer’s Intellectual Property on July 19, 2005. (*See Martin Cert. at ¶ 10.*) In a letter dated August 29, 2005, Upper Deck objected to the Assignee’s inclusion of the photographic slides and digital images in the auction, and threatened the Assignee with claims of direct and contributory copyright infringement. (*See 8/29/05 Letter, Martin Cert., Exh. D.*) Counsel for the Assignee responded by way of letter dated August 30, 2005. (*See 8/30/05 Letter, Martin Cert., Exh. E.*)

In order to give the parties an opportunity to discuss and brief these issues on a rational schedule, on August 31, 2005 the Assignee voluntarily removed the photographic slides and digital images from his September 9 scheduled auction sale, stating that the sale of these items would be adjourned until September 30, 2005. (*See Martin Cert. at ¶ 10.*) The Auctioneer immediately posted the new date for the sale of the digital images and slides on his website, and has received deposits from interested bidders. (*See id. at ¶ 10.*)

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<sup>6</sup> Unfortunately, Fleer’s records do not shed any light upon the status or ownership of any copyrights in the photographic slides.

## VALUE

The Appraiser has allocated significant value to the photographic slides and digital images. However, the Assignee will maintain the appraiser's valuation of these items as confidential until the auction sale of these items is concluded on September 30, 2005. The Assignee has shared, however, the value of the computer server and hardware in which the digital images are stored as well as the MediaBin software program necessary to access and utilize the digital images. The MediaBin software, together with the computer server and hardware but without any digital images, have a value substantially in excess of \$100,000 (one-hundred thousand dollars). (*See Martin Cert. at ¶ 12 and Exh. F.*) Upper Deck is demanding that the Assignee simply "give-up" these assets, and turn them over to Upper Deck for free. However, even if Upper Deck were to successfully argue that it purchased slides and digital images on July 19, 2005, it is beyond dispute that Upper Deck did not purchase any equipment or licensed software of Fleer/Skybox.

## ARGUMENT

### **I. UPPER DECK PURCHASED COPYRIGHTS BUT NOT THE TANGIBLE EXPRESSIONS OF THOSE COPYRIGHTS.**

#### **A. WHAT IS A COPYRIGHT AND WHAT LEGAL RIGHT DOES IT CONVEY TO THE COPYRIGHT OWNER?**

"Copyright protection subsists ... in original works of authorship fixed in any tangible medium of expression..." including "pictorial, graphic, and sculptural works." *17 U.S.C. §102(a) (emphasis added); see also Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417, 432 (1984); *Dun & Bradstreet Software Serv., Inc. v. Grace Consulting, Inc.*, 307 F.3d 197, 206 (3d Cir. 2002). A copyright is a limited right to control the exploitation of a copyrighted work. Under certain circumstances, when a photographer takes a picture, a

copyright is created in the photograph. *See 17 U.S.C. §101* (defining “pictorial, graphic, and sculptural works” to include photographs). Where Fleer hired photographers it often purchased the photographs and copyrights from them. In other cases, Fleer owned the work, but not the copyright, which remained with the photographer. However, the copyright itself is not ownership of the work; rather, it is the right to control duplication and exploitation of the work. Subject to certain exceptions, “the owner of a copyright has the exclusive rights to do and to authorize any of the following: ... (3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending.” *17 U.S.C. §106; see also Sony Corp. of America*, 464 U.S. at 433; *Dun & Bradstreet Software Serv., Inc.*, 307 F.3d at 206. Again, ownership of a copyright does not create an ownership right in the work itself. *See 17 U.S.C. §§102, 202.*

**B. MATERIAL OBJECTS SUCH AS PHOTOGRAPHIC SLIDES & DIGITAL IMAGES ARE SEPARATE AND DISTINCT FROM THE COPYRIGHTS WITHIN THEM.**

The Copyright Act specifically recognizes that ownership of a material object containing a copyrighted work is separate and distinct from the copyright itself:

Ownership of a copyright, or of any of the exclusive rights under copyright, is distinct from ownership of any material object in which the work is embodied. Transfer of any material object, including the copy or phonorecord in which the work is first fixed, does not of itself convey any rights in the copyrighted work embodied in the object; **nor, in the absence of an agreement, does transfer of ownership of a copyright or of any exclusive rights under a copyright convey property rights in any material object.**

*(17 U.S.C. § 202)(emphasis added); see Sony Music Entertainment v. Clark Entertainment Group (In re Clark Entertainment Group)*, 183 B.R. 73, 79 (Bankr. D.N.J. 1995) (stating that “it is well settled that intellectual property rights are separate and distinct from the material objects

in which the work is embodied...”); *see also McClintic v. Sheldon*, 43 N.Y.S.2d 695, 698-99 (N.Y. Sup. Ct. 1943) (“As such, the [copyright] is separate and distinct from the right of ownership in the work itself.”). No agreement transferred the Disputed Slides or Disputed Images to Upper Deck. (*See discussion infra at C.*)

**C. UPPER DECK PURCHASED COPYRIGHTS, BUT PURCHASED NO TANGIBLE OBJECTS WHEN IT CLOSED WITH THE ASSIGNEE ON JULY 19, 2005.**

When it closed with the Assignee on July 19, 2005, Upper Deck purchased only the “Fleer/SkyBox Intellectual Property.”<sup>7</sup> As expressly defined by Section 1.1 of the APA, the “Fleer/SkyBox Intellectual Property” included only intangible rights – namely Fleer’s trademarks, patents, copyrights, trade secrets, and other intellectual property. (*See APA, Martin Cert., Exh. C, at Section 1.1.*) All assets which were “not expressly included within the definition of Fleer/SkyBox Intellectual Property” were retained by the Assignee. (*Id. at Section 1.1(b).*)(*emphasis added*). Because the definition of “Fleer/SkyBox Intellectual Property” makes no mention of any tangible assets or material objects, such as computer equipment or servers or photographic slides, no such items were purchased by Upper Deck. (*See id. at Section 1.1.*); *see also Gabel v. Manetto*, 177 N.J. Super. 460, 464 (App. Div. 1981)(“An affirmative expression ordinarily implies a negation of any other alternative. *Expressio unius est exclusio alterius.*”)

Presumably, Upper Deck, which is in the same businesses Fleer, knew how to say “photographic slides” and “digital images” and could have requested an amendment to the APA to include such items (at an increased purchase price) had it wished to buy them.

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<sup>7</sup> Only those copyrights of Fleer purchased by Buyer under the APA are relevant to this discussion, as none of the photographic slides and digital images contain, display, or embody any of Fleer’s other intellectual property rights (e.g., trademark or patent) purchased by Buyer under the APA. (*See Martin Cert. at ¶ 11.*)

## II. THIS COURT LIKE OTHER COURTS, SHOULD AUTHORIZE THE SALE OF ITEMS CONTAINING COPYRIGHTED WORKS OVER OBJECTIONS OF THE COPYRIGHT HOLDER

In *Sony Music Entertainment*, a New Jersey federal bankruptcy court held that audio tapes embodying and containing copyrights of a third party could be sold by a debtor in bankruptcy if such a sale was in the best interests of the estate. *183 B.R.* at 81. Recognizing the “conflict between fostering the policies under Chapter 11 of the Bankruptcy Code and preserving copyright rights,” the court determined that the **mere potential** for infringement by third parties did not justify destruction of the assets or preclusion of their sale. *Id.* The court explained that:

[The owner of the copyrights] **argues that the injunction should prohibit the sale or lease of the tapes to protect [it] from the actions of the third party purchasers or lessees. Such a provision would be in contravention of the principle** relied upon by [the owner of the copyrights], i.e. **that there is a difference between ownership of the tapes and ownership of the sound recordings embodied therein.**

*Id.* (*emphasis added*). The court held that the mere threat of a copyright infringement or violation was insufficient to prevent the sale of the copyrighted objects, finding that it “must enforce the policies of the Bankruptcy Code and allow the debtor-in-possession to sell the tapes...” *Id.* Although the court found that the debtor was precluded from copying the audio tapes and distributing such copies, he was free to sell the tapes themselves and to maximize the benefit of his ownership interest of the material objects. *Id.* at 82. Interestingly, no special statutory provisions of the Bankruptcy Code were used to achieve this result. Rather, it was based upon the policy goal of maximizing the value of the property of the insolvent estate.

As in *Sony Music Entertainment*, Upper Deck’s claim that the digital images and photographic slides might be used by the buyer to create unauthorized copies of the copyrighted works has no impact upon the Assignee’s ownership of them as material objects, nor upon his

ability to sell them.<sup>8</sup> (See discussion of ownership *supra* at A.,B.,C.) Like a debtor or trustee in bankruptcy, the Assignee cannot simply surrender the photographic slides and digital images to Upper Deck, on a claim that “our copyrights might be infringed,” but rather must attempt to get the most value possible from those assets for the benefit of Fleer’s creditors. An Assignee has the same responsibilities to maximize value of the estate as a trustee in a federal bankruptcy case. See *In re Kampelman*, 165 N.J. Super. 352, 355 (Ch. Div. 1979). (Where New Jersey State statutory or judicial precedent is unclear, Court should look to the "provisions of the federal bankruptcy laws, supplemented where appropriate by equitable principles reflecting the special circumstances giving rise to this type of proceeding."); compare N.J.S.A. 2A:19-13 with 11 U.S.C. § 541.

**III. UPPER DECK HAS GIVEN THE ASSIGNEE WRITTEN PERMISSION TO SELL THE DISPUTED SLIDES & DISPUTED IMAGES AT AUCTION.**

Although such permission is unnecessary (*see discussion concerning court authorization of such sale supra at II.*), Upper Deck has consented to the auction sale of the Disputed Slides and Disputed Images. In connection with negotiating the APA, the Assignee recognized that numerous tangible assets either embossed with the name “Fleer” (e.g., hats, t-shirts, and trading cards), or containing other Fleer intellectual property, would need to be sold separately at his September 9 auction, following the sale to Upper Deck. As a result, the Assignee expressly requested, and negotiated, Section 8.10 of the APA. Under Section 8.10, the Assignee was provided with the authority to sell the Disputed Slides and Disputed Images without violating or

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<sup>8</sup> As explained previously herein, the majority of the digital images are in the public domain or are copyrighted by third parties, and a number of the photographic slides may share that status. As such, Upper Deck has no rights (copyright or otherwise) in such images and slides, and thus has no standing to object to their sale. See *Dun & Bradstreet Software Serv., Inc.*, 307 F.3d at 206 (holding that in order to “establish a claim of copyright infringement, a plaintiff must establish: (1) ownership of a valid copyright; and (2) unauthorized copying of original elements of the plaintiff’s work”). In particular, of 344,668 digital images, it appears that only 149,415 (43%) of the images were not either in the public domain or copyrighted by third parties. (See *Wittekind Cert., Exh. A.*) As such, Upper Deck has no claim to a majority of the digital images.

infringing upon any of Upper Deck's rights. Although copyright law ordinarily precludes the unauthorized distribution or sale of copyrighted works, here, Upper Deck expressly consented in writing to such sale. In particular, Upper Deck expressly authorized the Assignee's sale of "existing inventory of product and items assigned by Fleer/SkyBox to Seller ("Assignee's Inventory") which may contain or display on such articles Fleer/SkyBox Intellectual Property and/or the trademarks, copyrights, and other intellectual property of Fleer Collectibles ("Fleer Collectibles Intellectual Property")." (*APA, Martin Cert., Exh. C, at Section 8.10.*)(*emphasis added*) The "Assignee's Inventory" was defined as an "inventory of products" and "items." (*See id.*) Buyer acknowledged and agreed that it "consents to the incorporation in or display on each article of Assignee's Inventory of any Fleer/SkyBox Intellectual Property and/or Fleer Collectibles Intellectual Property as presently existing for the limited purpose of such sale of the Assignee's Inventory . . . with no further obligations to Buyer other than as expressly provided herein." (*Id.*)(*emphasis added*).

Without question, the plain and unambiguous meaning of Section 8.10 was to permit the Assignee's sale of all assets (i.e., inventories, items, and articles) to third parties, even though such assets contained the "Fleer" name or other intellectual property owned by Fleer. Indeed, much of the assets sold at the auction held on September 9, 2005 contained such intellectual property, and Upper Deck raised no objection to any such sales, save for the slides and digital images. As the photographic slides and digital images fall within the ordinary meaning of "articles" and "items," Assignee is permitted to sell them under Section 8.10. *See WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE (UNABRIDGED)*, at 123 (Merriam-Webster, Inc. 1986) (defining "article" as "a material thing: ITEM, OBJECT"); *id.* at

1203 (defining “item” as “an individual thing ... singled out from an aggregate of individual things”).

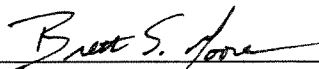
In addition to the consent to use, Upper Deck also provided a covenant not to sue, agreeing that “it will not and shall not pursue, threaten, or otherwise seek (through litigation, arbitration, administrative, or other proceeding) to enforce any claims or rights in and to the Fleer/SkyBox Intellectual Property and/or Fleer Collectibles Intellectual Property against Seller arising out of or in connection with such sale of Assignee’s Inventory.” (*Id.*)(*emphasis added*). Accordingly, Upper Deck has no grounds to object or to assert any claims, for either direct or contributory infringement, against the Assignee in connection with any items of Assignee’s Inventory to be sold at auction.

The Assignee is free – and, under his duties, obligated – to sell the photographic slides and digital images, regardless of any copyrights held by Upper Deck in the works embodied therein, in order to benefit the creditors of Fleer. Upper Deck does not own these assets, but only some limited copyrights within some of the digital slides and photograph images. (*See discussion of slides and images within public domain and copyrighted by third parties supra at 1,6,7.*) The creditors of Fleer deserve the substantial value which the photographic slides and digital images are capable of generating at auction.

**CONCLUSION**

For all the foregoing reasons, this Court should: (1) permit and approve Assignee's auction sale of the photographic slides and digital images, without any restrictions or compensation due to Upper Deck.

**PORZIO, BROMBERG & NEWMAN, P.C.**

By:   
Brett S. Mobre (BM-0014)

*Attorneys for Warren J. Martin Jr., Assignee for the  
Benefit of Creditors of Fleer/SkyBox International  
LP and Fleer Collectibles, LLC*

DATED: September 20, 2005

**PORZIO, BROMBERG & NEWMAN, P.C.**

100 Southgate Parkway  
Morristown, NJ 07962-1997  
Telephone (973) 538-4006  
Fax (973) 538-5146

Attorneys Appearing: John S. Mairo (JM-0670)  
Brett S. Moore (BM-0014)  
Elizabeth M. McKeever (EM-9715)

Attorneys for Warren J. Martin Jr., Assignee for the  
Benefit of Creditors of Fleer/SkyBox International LP  
and Fleer Collectibles, LLC

In the Matter of the General Assignment for  
the Benefit of Creditors of FLEER/SKYBOX  
INTERNATIONAL LP

Assignor,

to

WARREN J. MARTIN JR.,

Assignee.

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

DOCKET NO: P-2005-1394

In the Matter of the General Assignment for  
the Benefit of Creditors of FLEER  
COLLECTIBLES, LLC,

Assignor,

to

WARREN J. MARTIN JR.,

Assignee.

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

DOCKET NO: P-2005-1408

**CERTIFICATION OF WARREN J. MARTIN JR.**

Warren J. Martin Jr., of full age, hereby certifies and states:

1. I am the Assignee for the Benefit of the Creditors of Flear/SkyBox International LP (“Flear”) and Flear Collectibles, LLC (“Flear Collectibles”) in connection with the above-captioned matter (the “Assignment Proceedings”).

2. On June 10, 2005, Flear and Flear Collectibles made an Assignment for the Benefit of Creditors (“Assignment”) of all of their assets to me. The Assignment conveyed all of the property and rights of Flear and Flear Collectibles to me, including all of the inventory, intangible rights, tangible objects, and other assets which were owned by Flear and Flear Collectibles (the “Assets”). True and correct copies of the Deeds of Assignment, as amended, dated June 8, 2005 and July 14, 2005 are attached hereto as Exhibit A. Included within the Assets assigned were the trademarks, copyrights, and other intellectual property of Flear and Flear Collectibles.

3. During the initial weeks of this Assignment Proceeding, I spent substantial time negotiating two proposed asset purchase agreements: the first, with Donruss/Playoff (“Donruss”), for the purchase and sale of the “Flear” name and related intellectual property of Flear/Skybox International, L.P. for \$500,000 (five-hundred thousand dollars), and the second, with Liss Global, LLC (“Liss”), for the purchase and sale of the entirety of the die cast business of Flear Collectibles, LLC for \$1,000,000 (one-million dollars). Because Donruss had not expressed interest in buying anything other than Flear’s intellectual property, the draft agreement with Donruss did not envision the sale of any tangible assets or items whatsoever.

4. A dispute arose between Donruss and Liss in connection with Liss’s desire to sell a large inventory of die cast vehicles which displayed the “Flear” name and mark, which would have been some of the main assets purchased by Donruss in that sale. Unable to resolve that dispute, I telephoned Michael Hulme, Esq., General Counsel for The Upper Deck Company,

LLC (“Upper Deck”), on June 22, 2005 to discuss whether Upper Deck would be willing to make a \$2,000,000 (two-million dollar) offer for both the Fler intellectual property (which Donruss/Playoff was interested in purchasing) and the Fler Collectibles business (which Liss was interested in purchasing). I suggested that for a bid of \$2,000,000 (two-million dollars), I would abandon Donruss and Liss as the “stalking horse” bidders and would proceed to file a single sale motion for both businesses with Upper Deck occupying the stalking horse role. However, I made it clear that an agreement would need to be signed, and a motion filed to approve that agreement, by no later than June 29, 2005.

5. Later that same evening, at 8:51 p.m., the Assignee received a letter from Upper Deck’s outside counsel (mistakenly dated June 21, 2005) expressing Upper Deck’s interest in purchasing the referenced assets for \$2,000,000 (two-million dollars), as well as its interest in moving quickly to execute and consummate an asset purchase agreement. A true and correct copy of the June 22, 2005 letter from Upper Deck’s counsel (sent via e-mail) is attached hereto as Exhibit B.

6. The Asset Purchase Agreement (the “APA”), which was executed on June 29, 2005, was ultimately reviewed and approved by this Court and listed the precise terms of the sale and was filed with the motion to approve the sale. A true and correct copy of the APA is attached hereto as Exhibit C.

7. On July 14, 2005, pursuant to a bid-procedures order approved by the Court, I conducted the auction of the Fler intellectual property and the Fler Collectibles assets. The auction commenced with Upper Deck’s stalking horse bid of \$2,000,000 (two-million dollars). After some ten (10) hours of spirited bidding with Upper Deck on the one side and a joint venture of Topps (interested in Fler Intellectual Property only) and Liss (interested in Fler

Collectibles assets only), Upper Deck emerged as the successful bidder, with a winning bid of \$6,100,000 (six-million, one-hundred-thousand dollars) from FSB Acquisition Company, LLC, an acquisition company formed by Upper Deck in connection with the transaction (herein also referred to as "Upper Deck," or "Buyer").

8. In the APA, both Upper Deck and I recognized that I would be conducting a separate and independent sale of Fleer's remaining assets and the Fleer Collectibles assets. Both Upper Deck and I were aware that a large portion of those tangible assets contained or displayed some of the Fleer/SkyBox Intellectual Property which I was transferring to it, including trading cards, hats, and memorabilia displaying the "Fleer" logo. In order to avoid any issues or disputes regarding the sale of such assets at auction, I requested and included a special provision within the APA granting me permission to sell those assets despite their incorporation and use of Fleer/SkyBox Intellectual Property. Upper Deck read, commented upon, and revised Section 8.10. Upper Deck and I agreed to Section 8.10's ultimate terms and its inclusion in the APA. I specifically included Section 8.10 so that there would be no problem with Upper Deck objecting to the September 9 auction, despite my transfer of Fleer's Intellectual Property to it.

9. As part of the assets, articles and items of Fleer, which were conveyed to me pursuant to the Deeds of Assignment, I currently own: (1) roughly 1,100,000 (one-million, one-hundred thousand) photographic slides of various professional athletes; and (2) 344,688 (three-hundred forty-four thousand, six-hundred sixty-eight) digital images of various professional athletes, entertainers, and celebrities, which are stored in electronic format. I have recently discovered that additional photographic slides may be contained within boxes which were stored by Fleer at Iron Mountain's commercial storage facilities. The photographic slides and digital images contain pictorial depictions of players of the National Football League and Major League

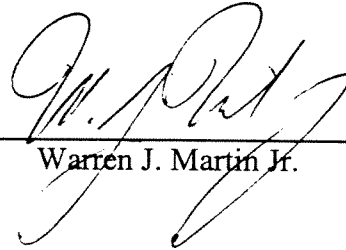
Baseball, entertainers of World Wrestling Entertainment and American Idol, as well as other celebrities, individuals, and characters. The photographic slides are currently boxed at my offices (sorted by sport), and the digital images are stored on a computer server/system which utilizes a software program known as "MediaBin." The digital images are stored on a computer server which belongs to Fleer and are accessed through the MediaBin software licensed by Fleer, neither of which were purchased by Upper Deck.

10. On August 29, 2005, which was two months after execution of the APA, nearly six weeks after closing on the APA, and just ten (10) days prior to my scheduled public auction of all Fleer's tangible assets, Upper Deck contacted me, alleging that it believed it had already purchased the photographic slides and digital images when it closed with me on its purchase of Fleer's Intellectual Property on July 19, 2005. In a letter dated August 29, 2005, Upper Deck objected to my inclusion of the photographic slides and digital images in the auction, and threatened me with claims of direct and contributory copyright infringement. A true and correct copy of the letter from R. Hooke to W. Martin Jr. dated August 29, 2005 is attached hereto as Exhibit D. My attorneys responded by way of letter dated August 30, 2005. A true and correct copy of the letter from M. Gilleece to R. Hooke dated August 30, 2005 is attached hereto as Exhibit E. In order to give the parties an opportunity to discuss and brief these issues, on August 31, 2005 I voluntarily removed the photographic slides and digital images from the auction sale scheduled for September 9, 2005, stating that the sale of these items would be adjourned until September 30, 2005. The Auctioneer immediately posted the new date for the sale of the digital images and slides on his website, and has received deposits from bidders interested in purchasing those items.

11. The photographic slides and digital images themselves do not contain or display any trademarks, slogans, or logos.

12. Attached hereto as Exhibit F is a true and correct copy of the MediaBin, Inc. MediaBin Software License Agreement ("MediaBin Agreement") dated June 30, 2003. According to Attachment A of the MediaBin Agreement, the software purchased by Fleer from MediaBin in 2003 had a value of \$100,000 (one-hundred thousand dollars). MediaBin has informed my staff that the cost to acquire similar software today would be approximately \$160,000 (one-hundred sixty thousand dollars). I am also advised that the associated hardware and server have substantial value as well.

I certify that the forgoing statements made by me are true. I am aware that if any of the forgoing statements made by me are willfully false, I am subject to punishment.



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Warren J. Martin Jr.

Dated: September 20, 2005

**PORZIO, BROMBERG & NEWMAN, P.C.**

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DOCKET NO: P-2005-1408

**CERTIFICATION OF PAUL C. WITTEKIND**

I, Paul C. Wittekind, of full age, hereby certify and state:

1. I am the Director of Information Technology Services for Porzio, Bromberg & Newman, P.C. ("Porzio"), counsel for Warren J. Martin Jr. as the Assignee for the Benefit of


Creditors of Fleer/SkyBox International LP (“Assignee”) in the above-captioned matter. I have an A.B. degree in Chemistry and Physics from Harvard College, and I have had responsibility for overseeing Porzio’s computer systems and other technology for more than 17 years. During that period, I have developed significant expertise in evaluating, assessing, purchasing, and configuring computer systems and software. I also have developed expertise in working with the New Jersey court system on implementing technology to be used at trials and other court proceedings. I am currently the only non-attorney member of the Technology Committee that the Honorable Marina Corodemus established five years ago to advise the Mass Tort Division in Middlesex County, New Jersey as to the technology that should be used for trials in the phenylpropanolamine (“PPA”) and other mass tort litigation.

2. Fleer/SkyBox International LP (“Fleer”) owned a digital asset management system (“DAMS”) that catalogued and tracked digital images Fleer received from various sources. The DAMS contains both hardware and software components. The hardware comprises two file servers that maintain the database used to catalogue the images, a drive array containing the hard drives that store the actual digital images, and various ancillary components. The software that runs the DAMS is Interwoven’s MediaBin. Fleer acquired three MediaBin components: MediaBin Asset Manager (licensed for 10 concurrent users), MediaBin Deployment Agent, and MediaBin COM API (collectively, “MediaBin”). Fleer used all MediaBin components, and the associated hardware, to access and utilize its portfolio of digital images.

3. At the Assignee’s request, I examined the digital images stored in Fleer’s DAMS. Each digital image is associated with an electronic file that stores textual information, known as “metadata,” relating to the digital image. Using the MediaBin software, I was able to extract

certain metadata regarding the digital images on Fleer's DAMS, including information concerning the copyright status of the digital images. I was able to separate the images into three categories based upon their copyright status, as reflected in the metadata itself: (1) images copyrighted by photographers and other third-party individuals and entities; (2) images within the "public domain" (not containing any copyrights); and (3) images which are neither copyrighted by third-parties nor within the public domain, and in which Fleer potentially owned copyrights. Attached hereto as Exhibit A is a true and accurate copy of a spreadsheet I generated, based upon the metadata in Fleer's DAMS, that itemizes the number of images in each of the three categories ("Copyright Status Spreadsheet"). I have reviewed and analyzed the Copyright Status Spreadsheet and have conducted a sampling of the metadata itself, and am confident that the Copyright Status Spreadsheet accurately reflects the metadata associated with the digital images contained within Fleer's DAMS.

I certify that the forgoing statements made by me are true. I am aware that if any of the forgoing statements made by me are willfully false, I am subject to punishment.

  
\_\_\_\_\_  
Paul C. Wittekind

Dated: September 20, 2005

# EXHIBIT A

**FLEER - MEDIA BIN SERVER  
ANALYSIS OF IMAGES TAGGED AS PUBLIC DOMAIN OR AS COPYRIGHTED**

Category	Total Images	Total Public Domain	Percentage Public Domain	Total Copyright or Name Listed	Percentage Copyright/Name	Total Neither	Percentage Neither
NFL	108,058	52,474	49%	14,741	14%	40,843	38%
MLB	231,781	101,696	44%	25,296	11%	104,789	45%
Entertainment	4,829	618	13%	428	9%	3,783	78%
<b>TOTALS</b>	<b>344,668</b>	<b>154,788</b>	<b>45%</b>	<b>40,465</b>	<b>12%</b>	<b>149,415</b>	<b>43%</b>

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DOCKET NO: P-2005-1408

**CERTIFICATION OF SERVICE**

I, Brett S. Moore, do hereby certify:

1. I am a an attorney-at-law of the State of New Jersey and an associate employed at the law firm of Porzio, Bromberg & Newman, P.C., attorneys in the within matter for Warren J.

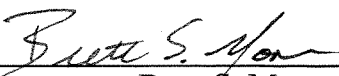
Martin Jr., Assignee for the Benefit of Creditors of Fleer/Skybox International LP and Fleer Collectibles, LLC.

2. On September 20, 2005, I caused to be delivered via Messenger the following documents (collectively, the "Documents") upon the Surrogate's Office, Attn: Linda Kushing, Superior Court of New Jersey, 49 Rancocas Road, Mt. Holly, New Jersey:

- i) Assignee's Brief in Support of the Fleer Estate's Auction Sale of Photographic Slides & Digital Images; and
- ii) Certification of Warren J. Martin Jr., together with accompanying exhibits; and
- iii) Certification of Paul C. Wittekind, together with accompanying exhibits.

3. On September 20, 2005, I caused to be delivered via regular mail and electronic mail, to the persons on the attached service list, at their last known addresses, a properly addressed and sealed envelope containing a copy of the Documents.

I hereby certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

  
\_\_\_\_\_  
Brett S. Moore

Dated: September 20, 2005

## Service List

Julie Stewart, Esq.  
Leslie Cohen, Esq.  
Liner, Yankelevitz Sunshine & Regenstreif LLP  
1100 Glendon Avenue, 14<sup>th</sup> Floor  
Los Angeles, Ca 90024-3503  
**Attorneys for Upper Deck**

Joe Threston, Esq.  
Burlington County Consumer Affairs  
49 Rancocas Road  
Mt. Holly, NJ

Carol A. Slocum, Esq.  
Klehr, Harrison, Harvey  
Branzburg & Ellers, LP  
457 Haddonfield Road  
Suite 510  
Cherry Hill, NJ 08002-2220  
**Attorneys for Alex Grass**

Menachem O. Zelmanovitz, Esq.  
Morgan, Lewis & Bockius LLP  
101 Park Avenue  
New York, NY 10178-0060  
**Attorneys for NFL Properties LLC**

Joseph W. Beatty, Esq.  
Jeffrey H. Butwinick, Esq.  
Andrea Porter, Esq.  
Foley & Lardner LLP  
One Maritime Plaza  
Suite 600  
San Francisco, CA 94111

Joseph A. Gorman, Esq.  
Neal Solomon, Esq.  
Pellettieri, Rabstein & Altman  
Tarnsfield Plaza  
Suite 6  
790 Woodlane Road  
Mount Holly, NJ 08060  
**Attorneys for Major League Baseball Properties, Inc.**

Eric L. Scherling, Esq.  
Neal Colton, Esq.  
Cozen O'Connor  
1900 Market Street  
Philadelphia PA, 19103  
**Attorneys for Major League Baseball Players Association**