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Now known as Fleer, LLC

<p>In the matter of the Assignment for the Benefit of Creditors of FLEER/SKYBOX INTERNATIONAL, LP,</p> <p style="text-align: right;">Assignor,</p> <p style="text-align: center;">To</p> <p>WARREN J. MARTIN, JR.,</p> <p style="text-align: right;">Assignee.</p>	<p>SUPERIOR COURT OF NEW JERSEY: CHANCERY DIVISION, PROBATE PART BURLINGTON COUNTY</p> <p>Docket No.: P-2005-1394</p>
<p>In the matter of the Assignment for the Benefit of Creditors of FLEER COLLECTIBLES, LLC,</p> <p style="text-align: right;">Assignor,</p> <p style="text-align: center;">To</p> <p>WARREN J. MARTIN, JR.,</p> <p style="text-align: right;">Assignee.</p>	<p>SUPERIOR COURT OF NEW JERSEY: CHANCERY DIVISION, PROBATE PART BURLINGTON COUNTY</p> <p>Docket No.: P-2005-1408</p>

**OBJECTION TO VERIFIED APPLICATION FOR ORDER AUTHORIZING  
SALE OF SUBSTANTIALLY ALL OF THE REMAINING ASSETS OF  
FLEER/SKYBOX INTERNATIONAL LP**

FSB Acquisition Company, LLC ("FSB") (now known as Fleer, LLC), owner of all  
Fleer/SkyBox International, LP, intellectual property rights ("IP Rights") objects to the Verified

Application For Order Authorizing Sale Of Substantially All Of The Remaining Assets Of Fler/Skybox International LP (the "Application") as follows:

**Introduction**

1. The Assignee for the Benefit of Creditors (the "Assignee") transferred through a Court approved contract of sale, the Asset Purchase Agreement, (the "Agreement") all of the IP Rights to FSB for \$6,100,000.00. FSB has fully paid these funds to the Assignee for said IP Rights. The Assignee is now refusing to consummate the sale and transfer of the IP Rights as required, which can only be effected by the Assignee providing to FSB copies of the at least 3 million photographic assets (the "IP Photographic Assets") that evidence the IP Rights so acquired by FSB. Instead, the Assignee, in flagrant violation of FSB's IP Rights, and the letter and spirit of the Agreement, now seeks this Court's approval to sell the IP Photographic Assets prior to providing FSB with the copy of the IP Photographic Assets that is required to effect the transfer of the IP Rights.

2. The Assignee must be immediately enjoined and restrained from any attempt to sell the IP Photographic Assets unless and until Assignee provides FSB with a copy of the IP Photographic Assets (the "Copy"). That is, the Assignee is required to provide FSB with the Copy as required under: (1) the Agreement whereby the IP Rights were sold by Assignee to FSB; and (2) applicable United States Copyright laws.

3. More specifically, despite the fact that FSB purchased all the IP Rights in the subject IP Photographic Assets, the Assignee has failed and refused to provide FSB with the Copy, which are the works in which those rights inhere. Said refusal violates and breaches the Agreement's "Seller's Delivery" and "Further Assurances" provisions, which expressly require the Copy to be delivered to FSB. Moreover, in order to effect the full ownership, enjoyment and

exploitation of the IP Rights so obtained, it is absolutely and unequivocally necessary that FSB be provided with the Copy under the United States Copyright Act of 1976.

4. Should the Assignee sell, transfer or otherwise dispose of the IP Photographic Assets prior to providing the Copy to FSB, FSB would be forever precluded from exercising its full ownership, enjoyment and exploitation of the IP Rights, and would be forever and irreparably damaged and harmed. Therefore, due to the imminent danger of irreparable harm that would be caused to FSB if the IP Photographic Assets are sold by the Assignee without first providing FSB with the Copy, FSB hereby strenuously objects to the sale of the IP Photographic Assets, further identified in the Application as the "Image Library" or as "digital images including slides, servers and compact disks" and hereby seeks an order from this Court directing the Assignee to provide FSB with the Copy of the IP Photographic Assets prior to any sale thereof, at Assignee's cost.

5. In the alternative, if the Court denies said request that Assignee provide the Copy at Assignee's expense as required by the Agreement, then, and in that event, FSB hereby requests the Court continue any sale or other disposition of the IP Photographic Assets until the parties can fully brief (and conduct any necessary discovery) the proposed conduct of the Assignee in refusing to provide FSB with the Copy as requested herein (and as required by the Agreement and under U.S. Copyright law) prior to allowing any sale thereof.

#### **Relevant Background**

6. FSB entered into that certain Asset Purchase Agreement dated June 30, 2005, as amended as of July 15, 2005 between FSB, as Buyer on the one hand, and, on the other hand, as Seller, Warren J. Martin, Jr. (the "Assignee") as Assignee for the Benefit of Creditors of Fleer Collectibles, LLC, and Assignee for the Benefit of Creditors of Fleer/SkyBox International LP

("Fleer/SkyBox") (the "Agreement"). See Exhibit "A" (Asset Purchase Agreement, minus exhibits).

7. Prior to the June 10, 2005, recordation and filing of the Deeds of Assignment for the Benefit of Creditors, Fleer/SkyBox was in the business of manufacturing and distributing sports and entertainment related trading cards.

8. By the Agreement, FSB acquired, among other assets, all right, title and interest in and to all intellectual properties held by Fleer/SkyBox ("IP Rights" as hereinbefore defined) as of the date of the Agreement, including but not limited to all rights arising under United States Copyright Law.

9. Despite FSB's request, and as required by the Agreement, Assignee has failed to provide FSB with any underlying documentation evidencing of the IP Rights, namely the works ("IP Photographic Assets" as hereinbefore defined), and any copyright registrations and/or related documents.

10. Further, in spite of FSB's multiple requests, Assignee has further refused to provide FSB with the Copy of the approximately Three Million (3,000,000) photographs, that is, the IP Photographic Assets.

11. Instead, wrongfully, willfully, and with full knowledge that he is breaching the Agreement and in violation of FSB's IP Rights, Assignee claims as Fleer/SkyBox assets the IP Photographic Assets and has indicated through his request for approval of an auction for sale of the IP Photographic Assets, that he intends to sell the IP Photographic Assets without first effecting the transfer of the IP Rights as required by providing the Copy of the IP Photographic Assets to FSB.

### The Asset Purchase Agreement

12. The express and implied terms of the Agreement, as well as United States Copyright law, provide that the Assignee must provide FSB with copies of all of the IP Photographic Assets that evidence the IP Rights of FSB. That is, a Copy of the digital photographs and slide photographs, the IP Photographic Assets, which he intends to sell at any auction of Fleer/SkyBox assets.

13. Paragraph 1.1 of the Agreement provides as follows:

1.1 "Fleer/SkyBox Intellectual Property. At the "Closing" (as defined in Section 4.1), Seller, in its capacity as Assignee for the Benefit of Creditors of Fleer/SkyBox, 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)), free and clear of all "Liens" and "Claims" (as such quoted terms are defined in Section 1.3).

(a) Fleer/SkyBox Intellectual Property. For purposes hereof, "Fleer/SkyBox Intellectual Property" means all of Fleer/SkyBox's right, title and interest in and to the following, as assigned, granted and conveyed to Seller:

(i) Trademarks, Etc. All U.S. and foreign trademarks and service marks (whether pending, registered or unregistered) and the goodwill associated therewith; all partnership or fictitious names, trade names and domain names, and all registrations with respect thereto; all logos, slogans and other trade dress and commercial symbols with which the goodwill of Fleer/SkyBox or any of its products or services may be associated; all renewal rights with respect to any the foregoing, and all translations, adaptations, derivations and combinations of any of the foregoing.

(ii) Copyrights. All U.S. and foreign copyrights (registered and unregistered), and applications therefor.

(iii) Other Intellectual Property. All trade secrets, know-how and other intellectual property of any kind not included in Section 1.1(a) or 1.1(b).

(iv) Claims Against Third Parties. All claims against third parties based on any unauthorized disclosure, unauthorized use, misappropriation, dilution, infringement or other violation of the rights of a holder of Fleer/SkyBox Intellectual Property . . . .

14. Paragraph 4.2 of the Agreement, provides in pertinent part as follows:

4.2 Deliveries by Seller. At the Closing, Seller shall execute and deliver to Buyer (a) Assignments of Trademarks (U.S. and foreign), substantially in the form of Exhibit B ("Trademark Assignment"), covering all trademarks included in the Purchased Assets, (b) *Assignments of Copyrights (U.S. and foreign), substantially in the form of Exhibit C ("Copyright Assignment")*, covering all copyrights included in the Purchased Assets, (c) a Bill of Sale and Assignment, substantially in the form of Exhibit D (the "Bill of Sale and Assignment"), covering all Fleer/SkyBox Intellectual Property not conveyed by the Trademark Assignment or Copyright Assignment, (d) a Bill of Sale and Assignment, covering all Fleer Collectibles Assets not conveyed by the Trademark Assignment or Copyright Assignment, *and (e) any other transaction documents or instruments listed in Section 11 or otherwise required hereunder or reasonably requested by Buyer, and delivery of which is within Seller's control, in connection with the transactions contemplated by this Agreement*. All of the agreements, instruments and documents to be executed by Seller pursuant to this Agreement are hereinafter sometimes referred to collectively as the "Seller Transaction Documents". (emphasis added).

15. Paragraph 15.5 of the Agreement provides in pertinent part as follows:

"15.5 Further Assurances. Each party agrees that, at any time and from time to time after the Closing, it shall take such actions to execute, acknowledge and deliver such further instruments and documents, including making the appropriate assignment filings with the U.S. Patent and Trademark and U.S. Copyright offices as set forth in Sections 8.2(a) and 8.3(d), *and such further actions as the other party may reasonably request in order to carry out the terms and purposes of this Agreement, including to effect, evidence, record and confirm the sale, transfer, assignment and*

*conveyance of the Purchased Assets to Buyer as contemplated by this Agreement.” (emphasis added).*

### **The Proposed Auction**

16. Pursuant to the Application, the Assignee seeks Authority to sell over Three Million (3,000,000) photographs (the “Photographs”), the IP Photographic Assets, in both digital and slide formats, which (despite the fact that the Assignee has yet to specifically identify each of these Photographs) it is undisputed and indisputable that FSB purchased all IP Rights in the IP Photographic Assets, including without limitation, all Copyrights and other intellectual property rights. See Exhibit B (Copyrights purchased by FSB).

17. The Assignee seeks to sell the IP Photographic Assets at the auction currently scheduled for September 30, 2005, despite the fact that he has failed to provide FSB with the Copy thereof.

18. No detriment will be caused to the Assignee by continuing and/or adjourning the sale of the IP Photographic Assets.

### **Legal Argument**

#### **I. The Sale Of The IP Photographic Assets Should Be Delayed Until The Assignee Provides FSB With The Copy Of The IP Photographic Assets As Is Required Under The Federal Copyright Laws And The Agreement**

19. While the Assignee may have broad discretion to convey assets, that discretion is not limitless and cannot be conducted in a manner which knowingly infringes on another’s rights. N.J.S.A. 2A:19-13. Moreover, the Assignee may not violate and breach the Agreement and is required to perform according to the letter and spirit of the Agreement.

20. The United States Copyright Act, 17 U.S.C. § 101, *et seq.* governs the protections afforded to copyrighted works in the United States, generally from the moment of their fixation in a tangible medium of expression. It is axiomatic that the United States Copyright Act

provides protection for photographic works as they are expressly included within its terms. 17 U.S.C §§ 101 and 102(a)(5).

21. Under 17 U.S.C. § 106, a copyright owner has the exclusive rights in his copyrighted work, including the right to :1) to reproduce the copyrighted work in copies or phonorecords; 2) to prepare derivative works based upon the copyrighted work; 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; 4) to perform the copyrighted work publicly; 5) to display the copyrighted work publicly; and 6) to perform the copyrighted work by means of digital audio transmission.

22. Under 17 U.S.C. § 501, anyone who "violates any of the exclusive rights of the copyright owner" is infringing those rights and a copyright owner is entitled to damages and injunctive relief for said copyright infringement.

23. Full ownership enjoyment of copyright rights in any work requires copyright registration of that work. That is, in order to confirm ownership to enforce any rights under the Copyright laws, copyright registration, is a necessary prerequisite. The enforcement rights afforded under the Copyright Act require the registration of the copyrighted work with the United States Copyright Office. 17 U.S.C. § 411(b). That section states in pertinent part that

“[N]o action for infringement of the copyright in any United States work shall be instituted until registration of the copyright claim has been made in accordance with this title. In any case where the *deposit*, application, and fee required for registration have been delivered to the Copyright Office in proper form . . .” (emphasis added).

As noted, this section recognizes the *deposit* prerequisite required for registration, which is more fully set forth at 17 U.S.C. § 408(b).

24. In that section, the requirements of providing a deposit copies are specifically delineated and include the provision of two (2) complete copies of the “best edition” for published works and only (1) complete copy for an unpublished work. 17 U.S.C. § 408(b)(1-2).

25. Here, the Agreement, at paragraph 1.1(a)(iii), recognizes that at one of its purposes was to transfer all registered and unregistered Copyrights. The Assignee further promised therein, at paragraph 4.2, to deliver all documents necessary, and within his control, in connection with the transactions “contemplated by [that] Agreement.” Finally, the Assignee made a further promise, at paragraph 15.5 that he would “. . .deliver such further instruments and documents . . . and take such further actions as the other party may reasonably request in order to carry out the terms and purposes of this Agreement, including to effect, evidence, record and confirm the sale, transfer, assignment and conveyance” of the assets contained in the Agreement.

26. Without a copy of each of the IP Photographic Assets, FSB cannot register the underlying work with the U.S. Copyright Office, as necessary to confirm the ownership of each of the IP Photographic Assets sufficient for FSB to be able to police and enforce its rights in each of the IP Photographic Assets. FSB will be forever precluded from enjoying, policing and enforcing said rights without access to the Copy, as without the Copy it cannot confirm ownership sufficient to enable it to enjoy its ownership rights.

27. In spite of its obligation under the Agreement, and the deposit copy and registration requirements of the United States Copyright Office, and U.S. Copyright laws, the Assignee has failed and refuses to deliver FSB with the Copy of the IP Photographic Assets.

28. The Assignee’s refusal to deliver the requested Copy is not only contrary to the terms of the Agreement, it deprives FSB of its IP Rights, it leaves FSB without a means to enjoy its IP Rights as provided by the copyright statute, because it affords FSB with no way to enforce

its exclusivity to its IP Rights. That is, it leaves FSB without the means to confirm its ownership through copyright registration of its IP Rights. In so refusing to provide the Copy, the Assignee has breached the Agreement, thereby significantly and substantially reducing the value of the IP Rights to FSB's detriment.

29. Without the Copy, FSB is left without any way to exercise its copyright rights so transferred, to confirm its ownership of the IP Rights, or any ability to enforce its IP Rights in its copyrights without the Copy. Thus, the Assignee's refusal to provide the Copy is an express breach of the letter and spirit of the Agreement, including, *inter alia*, paragraph 15.5 of the Agreement because those copies are absolutely necessary to "carry out the terms and purposes of [that] Agreement."

30. Therefore, FSB respectfully requests this Court order the Assignee to perform its obligations under the Agreement, and enjoin and continue any sale of the IP Photographic Assets until such time as the Assignee has complied with the Agreement, that is, until the Assignee has delivered to FSB the Copy of the IP Photographic Assets, and said delivery is confirmed by this Court.

**II. If The Court Does Not Order The Assignee To Deliver Copies Of The IP Photographic Assets, Then FSB Requests That The Sale Of The IP Photographic Assets Be Adjourned In Order To Allow FSB To Bring A Fully Noticed Motion Regarding The Propriety Of The Requested Relief**

31. As the intellectual property rights holder in the subject IP Photographic Assets, FSB has the right and duty to police all future uses of those its IP Rights. Additionally, the Assignee will also have a duty to police all future uses of the IP Photographic Assets as the Assignee may become liable for contributory infringement should a subsequent owner of any of the IP Photographic Assets use the IP Photographic Asset in a manner inconsistent with FSB's IP Rights. More specifically, before any buyer of the subject IP Photographic Assets does anything with an IP Photographic Assets<sup>1</sup>, they must necessarily have permission, through a license or otherwise, from FSB.

32. Despite the risk of contributory infringement, the Assignee is seeking to sell the IP Photographic Assets to companies in the same or similar field as FSB, i.e. commercial distributors of sports and entertainment memorabilia. Therefore, these potential buyers can have no other purpose for buying the IP Photographic Assets than for future commercial distribution, which would be a direct violation of the Asset Purchase Agreement<sup>2</sup>. Any future commercial distribution however, will require that the buyer obtain a license from FSB. Therefore, it is necessary that prior to any sale the Assignee must specifically identify what exactly is being sold and to whom, and it is therefore further necessary that FSB be provided with copies of the IP Photographic Assets to create a system for cataloguing what buyers have what IP Photographic Assets in order to best police their rights. Furthermore, because the Assignee has failed to

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<sup>1</sup> The photographic images have no commercial use.

<sup>2</sup> If the Court is not inclined to rule in FSB's favor, FSB requests that it be permitted to propound discovery on any of the potential purchasers

specifically identify all of the IP Photographic Assets and because intellectual property laws are more often than not territorial in nature, the threat of foreign distribution is an imminent danger from which the harm is wholly irreparable.

33. Nonetheless, if the Court is not inclined to order the Assignee to adjourn or continue the sale of the IP Photographic Assets until the Assignee has provided FSB with a full set of copies thereof, a Copy, FSB hereby respectfully requests that the Court order that any sale of the IP Photographic Assets be delayed to afford the parties an opportunity to fully brief the propriety of the requested relief.

34. Neither the Assignee, nor the creditors, will suffer any prejudice by this Court ordering an adjournment of the sale in order to protect the IP Rights of FSB.

#### Notice

35. Notice of these Objections has been served on the Assignee for the Benefit of Creditors of Fleer/SkyBox International LP, Warren J. Martin, Jr.

WHEREFORE, FSB respectfully prays for the entry of an Order Adjourning The Auction Of All Photographic Assets Of Fleer/SkyBox Until FSB Is Provided With A Full Set Of Copies Of The Photographic Images At The Assignee's Expense.

Dated: September 20, 2005

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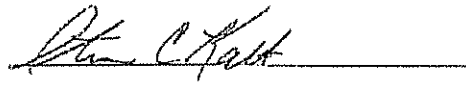
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Attorneys for FSB Acquisition Company,  
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VERIFICATION

I, Steve Kalt, Objector in the foregoing Objection do hereby make solemn oath that the statements contained therein are true according to the best of my knowledge, information and belief. I am aware that if any of the foregoing statements made by me as contained therein are willfully false, I am subject to punishment.

Dated: September 20, 2005

A handwritten signature in cursive script, appearing to read "Steve Kalt", is written over a horizontal line.

Steve Kalt, Vice President Finance for  
FSB Acquisition Company, LLC  
Now known as Fleer, LLC

**PROOF OF SERVICE**

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action. My business address is 1100 Glendon Avenue, 14th Floor, Los Angeles, California 90024-3503. On September 20, 2005, I served the within document(s) described as:

**OBJECTION TO VERIFIED APPLICATION FOR ORDER AUTHORIZING  
SALE OF SUBSTANTIALLY ALL OF THE REMAINING ASSETS OF FLEER/SKYBOX INTERNATIONAL  
LP**

on the interested parties in this action as stated below:

**Assignee for the Benefit of Creditors of  
Fleer/SkyBox International LP and Fleer  
Collectibles LLC**  
Warren J. Martin Jr.  
100 Southgate Parkway  
Morristown, NJ 07962-1997

**Attorneys for the Assignee for the Benefit of  
Creditors of Fleer/SkyBox International LP  
and Fleer Collectibles LLC**  
Brett S. Moore  
100 Southgate Parkway  
Morristown, NJ 07962-1997

Facsimile No.: (973) 538-5146

Facsimile No.: (973) 5146

(BY OVERNIGHT DELIVERY) I deposited in a box or other facility regularly maintained by Federal Express, an express service carrier, or delivered to a courier or driver authorized by said express service carrier to receive documents, a true copy of the foregoing document(s) in a sealed envelope or package designated by the express service carrier, addressed as set forth above, with fees for overnight delivery paid or provided for.

(BY FAX) By transmitting a true copy of the foregoing document(s) via facsimile transmission from this firm's facsimile machine, to each interested party at the facsimile machine telephone number(s) set forth above. Said transmission(s) were completed on the aforesaid date at the time stated on the transmission record issued by this firm's sending facsimile machine. Each such transmission was reported as complete and without error and a transmission report was properly issued by this firm's sending facsimile machine for each interested party served. A true copy of each transmission report is attached to the office copy of this proof of service and will be provided upon request.

(BY E-MAIL) By transmitting a true copy of the foregoing document(s) to the e-mail addresses set forth above.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on September 20, 2005, at Los Angeles, California.

\_\_\_\_\_  
Toni Stewart  
(Type or print name)

\_\_\_\_\_  
  
(Signature)