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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.	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

NOTICE OF MOTION FOR ORDER (1) AFFIRMING THE ASSIGNEE'S DECISION TO CONTINUE TO ADMINISTER THE FLEER/SKYBOX AND FLEER COLLECTIBLES ESTATES SEPARATELY, AND (2) APPROVING AN ALLOCATION OF THE AUCTION PROCEEDS BETWEEN THE ESTATES BASED ON THE FAIR MARKET VALUES OF THE ASSETS SOLD FROM EACH ESTATE

TO: ALL PARTIES ON ATTACHED CORE SERVICE LIST

PLEASE TAKE NOTICE that Warren J. Martin Jr. (the "Assignee"), Assignee for the Benefit of Creditors of Fleer/SkyBox International LP ("Fleer/Skybox") and Assignee for the Benefit of Creditors of Fleer Collectibles, LLC ("Fleer Collectibles"), by and through his counsel, Porzio, Bromberg & Newman, P.C., shall move before the Honorable Ronald E. Bookbinder, J.S.C., a Judge of the Superior Court of the State of New Jersey, on the _____ day of _____________, 2005 at ________ __.m., or as soon thereafter as counsel may be heard at the Superior Court of New Jersey, Chancery Division, Probate Part, Burlington County, 49 Rancocas Road, Mt. Holly, New Jersey 08060, for entry of an Order (1) Affirming the Assignee's Decision to Continue to Administer the Fleer/Skybox and Fleer Collectibles Estates Separately, and (2) Approving an Allocation of the Auction Proceeds Between the Estates Based on the Fair Market Values of the Assets Sold From Each Estate (the "Motion").

PLEASE TAKE FURTHER NOTICE that the Assignee will rely upon the attached Brief in Support of Motion for Order (1) Affirming the Assignee's Decision to Continue to Administer the Fleer/Skybox and Fleer Collectibles Estates Separately, and (2) Approving an Allocation of the Auction Proceeds Between the Estates Based on the Fair Market Values of the Assets Sold From Each Estate together with the argument of counsel and any testimony that the Court may require on the return date of the Motion.

PLEASE TAKE FURTHER NOTICE that if you fail to oppose the Motion, the Court may enter an Order Approving the Motion without further notice to you. A proposed form of Order is submitted herewith.

DATED: October 14, 2005

PORZIO, BROMBERG & NEWMAN, P.C.

By: Elizabeth M. McKeever

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

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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.	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

BRIEF IN SUPPORT OF MOTION FOR ORDER (1) AFFIRMING THE ASSIGNEE'S DECISION TO CONTINUE TO ADMINISTER THE FLEER/SKYBOX AND FLEER COLLECTIBLES ESTATES SEPARATELY, AND (2) APPROVING AN ALLOCATION OF THE AUCTION PROCEEDS BETWEEN THE ESTATES BASED ON THE FAIR MARKET VALUES OF THE ASSETS SOLD FROM EACH ESTATE

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On the Brief

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PRELIMINARY STATEMENT

On June 10, 2005 (the "Assignment Date"), the Assignee was appointed to administer the estates of parent corporation, Fleer/Skybox International, LP ("Fleer/Skybox"), and its subsidiary, Fleer Collectibles, LLC ("Fleer Collectibles") pursuant to a Deed of Assignment for the Benefit of Creditors (the "Assignment"). Prior to the Assignment, Fleer/Skybox was engaged in the business of producing and selling a wide variety of sport and entertainment trading cards. By contrast, Fleer Collectibles was engaged in the business of producing and selling die-cast miniature replica vehicles.

At least one creditor of Fleer/Skybox has suggested that the Assignee combine the estates of Fleer/Skybox and Fleer Collectibles for the purpose of administering a single distribution to creditors. This creditor suggested that the two entities may have been operated and conducted as a single unit, and that, therefore, the Assignee should "pierce the corporate veil" and consolidate the two estates.

The Assignee has conducted an investigation of whether Fleer/Skybox and Fleer Collectibles were operated and conducted jointly, as well as an analysis under New Jersey law as to whether the two estates should be substantively consolidated. This investigation has revealed that Fleer Collectibles and Fleer/Skybox operated independently for the most part, observed appropriate corporate formalities and that the subsidiary, Fleer Collectibles, was adequately capitalized. The Assignee has concluded, under New Jersey law, that the two estate should be administered separately.

Because the Assignee must administer the estates of Fleer/Skybox and Fleer Collectibles separately, any money he recovers for the benefit of creditors must be properly allocated between them, such that creditors of Fleer Collectibles obtain recoveries of Fleer Collectibles'

assets while creditors of Fleer/Skybox obtain recoveries from the proceeds of Fleer/Skybox's assets. On July 14, 2005, the Assignee held an auction where he sold certain assets from the two estates jointly (the "Auction") to a single bidder.

By this motion, the Assignee seeks the following: (1) that his decision to continue to administer the Fleer/Skybox and Fleer Collectibles estates separately be affirmed by the Court, and (2) that the Court approve an allocation of the Auction proceeds between the estates based on the fair market values of the assets sold from each estate. The Assignee proposes, for the reasons set forth herein, that the correct allocation of the Auction sale proceeds of $6.1 million is $3.5 million to the Fleer/Skybox estate and $2.6 million to the Fleer Collectibles estate.

RELEVANT FACTUAL BACKGROUND

Separateness of Fleer/Skybox and Fleer Collectibles

In January, 2001, Fleer Collectibles, LLC was formed to acquire substantially all of the assets of White Rose Collectibles, LLC ("White Rose"), an established manufacturer and purveyor of miniature diecast vehicles, for $1,050,000.00. *See* Affidavit of Chris Tobia, (the "Tobia Affidavit"), at ¶3 attached hereto as **Exhibit "A"**. Prior to the acquisition, White Rose had been in business for approximately eleven years. *Id.* Within approximately six months of its acquisition, Fleer Collectibles recouped the purchase price of $1,050,000.00 from the liquidation of purchased inventory; Fleer Collectibles was self funded from that point forward. *Id.* at ¶4.

Despite its new official name, Fleer Collectibles continued to do business under the "White Rose" brand name, especially during the first two years following the acquisition. *Id.* at ¶5. In fact, as late as the Assignment Date, Fleer Collectibles was still doing business as White Rose with some of its customers, including certain police organizations. *Id.* Irrespective of whether a particular customer dealt with "Fleer Collectibles," or "White Rose," Fleer Collectibles/White Rose was always operated and held out to the public as a wholly separate entity from Fleer/Skybox. It consistently maintained separate and independent letterhead, checks, bills of lading and purchase invoices, as well as received separate customer payments from its parent corporation. *Id.* at ¶6, **Exhibits "1" through "5"**. In addition, Fleer Collectibles had its own employees, including a vice president of operations, a project engineer, a designer and a project coordinator. *Id.* at ¶12.

Following its purchase of Fleer Collectibles, Fleer/Skybox continued to solely produce and sell trading cards picturing sports and entertainment personalities. *Id.* at ¶13. These trading

cards were exclusively manufactured and printed in the United States. *Id.* Fleer Collectibles, on the other hand, continued to produce and sell die-cast vehicles that were exclusively manufactured in Hong Kong and China. *Id.* at ¶14.

Fleer Collectibles had a "Car with Card" product, in which it would sell a die-cast vehicle and a Fleer/Skybox trading card together. *Id.* at ¶15. Even then, however, Fleer Collectibles bought and paid the respective vendors for each of the trading cards it used in the "Car with Card" product in order to ensure that each company's books and records remained separate and accurate. *Id.*

Fleer Collectibles and Fleer/Skybox each maintained its own distinct customer base through the Assignment Date. *Id.* at ¶16. Accordingly, representatives conducted separate sales calls to promote new products by Fleer/Skybox or Fleer Collectibles, respectively. *Id.* In addition, each company advertised in different magazines and other media targeted towards its own particular customer base. *Id.* at ¶17.

From a financial standpoint, Fleer/Skybox and Fleer Collectibles also operated separately. Each company kept its own books and records and maintained separate operating and checking accounts. *Id.* at ¶6, **Exhibits "1" through "3"**. In fact, whereas Fleer/Skybox suffered substantial operating losses in each of the three fiscal years preceding the Assignment, Fleer Collectibles made approximately $1.0 million in each of the three fiscal years preceding the Assignment. *Id.* at ¶19.

Allocation of Purchase Price

On June 29, 2005, the Assignee filed the Verified Application for Order (1) Establishing Bidding Procedures Including Approval of Break-Up Fee; (2) Scheduling Auction; and (3) Authorizing Sale of (A) Fleer/SkyBox's Intellectual Property and (B) Substantially All of the

Assets of Fleer Collectibles (the "Sale Motion"). In the Sale Motion, the Assignee sought authority to implement a competitive bidding process to sell a) all of the U.S. and foreign trademarks and goodwill associated therewith, copyrights and other intellectual property assigned to Assignee by Fleer/Skybox (collectively, the "Fleer/Skybox Intellectual Property"), and (b) substantially all of the assets of Fleer Collectibles (collectively, the "Fleer Collectibles Assets"). The Sale Motion was served on all known creditors of Fleer/Skybox and Fleer Collectibles and all known prospective bidders who provided contact information to the Assignee. *See* Certification of Service for Sale Service, attached hereto as **Exhibit "B"**.

In addition to serving the Sale Motion on all interested parties, notice of the Auction appeared in numerous trade articles and newspapers, including *Sports Collectors Digest*, the *Burlington County Times* and *The Philadelphia Inquirer.* Furthermore, as detailed by the testimony of Christopher J. Tobia, former Executive Vice-President and Chief Financial Officer of the Assignors, the Assignors' assets had previously been put "on the market" as far back as September, 2003. *See* copy of the transcript (the "Transcript") from the hearing dated July 8, 2005, at pp. 25 to 62, attached hereto as **Exhibit "C"** (describing in detail the marketing and sales negotiations from September, 2003 through July 8, 2005).

Pursuant to the Sale Motion, parties interested in conducting due diligence were encouraged to contact the Assignee through July 12, 2005, to obtain access to the data, conduct on-site inspections and attend to such other matters which the Assignee, in his sole discretion, designated. The Sale Motion also provided detailed bidding procedures for acquiring the Fleer/Skybox Intellectual Property and Fleer Collectibles Assets (collectively, the "Fleer Assets").

Prior to the Auction, the Court conducted a hearing on July 8, 2005 to hear testimony regarding, among other things, the marketing efforts of Fleer/Skybox, Fleer Collectibles and the Assignee, the Assets to be sold, the Assignee's expressed need to promptly sell the Assets and the notice to be provided in connection with the sale. Following the hearing, the Court entered an Order dated July 14, 2005, approving the Assignee's bid procedures.

The winning bidder at the Auction was FSB Acquisition Company, LLC ("Upper Deck"), which purchased the Fleer Assets for $6,100,000 (the "Winning Bid"). The back-up bidder was a joint venture between Topps Company ("Topps") and SHEL-TAM, LLC ("SHEL-TAM") (collectively, the "Back-up Bidder"). As clearly revealed in the Auction transcripts, Topps was interested only in the Fleer/Skybox Intellectual Property and SHEL-TAM was interested only in the Fleer Collectibles Assets. A copy of the Auction transcript is attached hereto as **Exhibit "D".** No other bidders participated in the Auction.

During the early part of the Auction, Upper Deck would simply state its bid for the combined Fleer Assets as a whole. Throughout the entirety of the Auction, however, the Back-up Bidder submitted joint bids detailing its precise allocation of bid price between the Fleer/Skybox Intellectual Property and the Fleer Collectibles Assets. The final back-up bid was $6 million (the Back-Up Bid"), reflecting an express allocation of $2.6 million for the Fleer Collectibles Assets and $3.4 million for the Fleer/Skybox Intellectual Property. Interestingly, after the back and forth bidding had climbed from an opening bid of $2 million to $3.6, Upper Deck also began to state its bid in terms of both an overall bid, as well as two partial bids divided between the Fleer/Skybox Intellectual Property and the Fleer Collectibles' Assets. In connection with its Winning Bid, Upper Deck allocated $3.5 to the Fleer/Skybox Intellectual Property, leaving $2.6 million for the Fleer Collectibles' Assets.

On July 15, 2005, the Court held a hearing on the results of the Auction. In its order dated July 20, 2005, the Court found that Notice of the Sale Motion and Auction were "fair, adequate, appropriate and sufficient" and the Winning Bid "represented the highest and best value" for the Fleer Assets. A copy of the Order is attached hereto as **Exhibit "E"**. In addition, the Court found that both the Winning Bid and the Back-Up Bid represented "adequate, fair, reasonably equivalent value for the Assets." The Court also found that Upper Deck, Topps and SHEL-TAM were "bona fide, good faith, arms-length purchaser[s], with no affiliation or connection to the Seller," and that there was "proper, timely, adequate and sufficient notice" of the Auction.

LEGAL ARGUMENT

POINT I

THE ASSIGNEE SHOULD ADMINISTER THE ESTATES OF FLEER/SKYBOX AND FLEER COLLECTIBLES SEPARATELY.

When a subsidiary corporation has not operated as a true legal entity, but merely as a conduit for the parent corporation, courts can pierce the corporate veil of the subsidiary and treat the affiliated corporations as a single entity. In making this analysis, New Jersey courts focus on whether "the parent so dominated the subsidiary that it had no separate existence" and whether the "parent has abused the privilege of incorporation by using the subsidiary to perpetrate a fraud or injustice, or otherwise to circumvent the law." *OTR Assoc. v. IBC Services, Inc.*, 353 N.J. Super. 48, 52 (App. Div. 2002) (quoting *State v. Venton Corp.*, 94 N.J. 473, 500-501 (1983)). "Generally, courts will not pierce the corporate veil absent fraud or injustice." *Marascio v. Companella*, 298 N.J. Super. 491, 502 (App. Div. 1997) *(quoting Lyon v. Barrett*, 89 NJ 294, 300 (1982)). When piercing the corporate veil is warranted, however, the court may merge assets and liabilities of the parent and subsidiary corporations.[1] Among courts "there appears almost unanimous consensus that it is a remedy to be used 'sparingly.'" *In re Owens Corning*, 2005 U.S. App. LEXIS 17150, * 30 (3rd Cir. Aug. 15, 2005).

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[1] Similarly, under federal law, the court may pierce the corporate veil to "substantively consolidate" two affiliated corporations. When affiliated corporations are substantively consolidated, a court:

> treats separate legal entities as if they were merged into a single survivor left with all of the cumulative assets and liabilities (save for inter-entity liabilities, which are erased). The result is that claims of creditors against separate debtors morph to claims against the consolidated survivor. *Genesis Health Ventures, Inc. v. Stapleton (In re Genesis Health Ventures, Inc.)*, 402 F.3d 416, 423 (3d Cir. 2005). Consolidation restructures (and thus revalues) rights of creditors and for certain creditors this may result in significantly less recovery.

In re Owens Corning, 2005 U.S. App. LEXIS 17150 at * 21-22.

New Jersey courts have not articulated a specific test for piercing the corporate veil and consolidating the assets and liabilities of two affiliated corporations. Three major factors, however, emerge from a survey of the cases:

1. Whether the corporation has an independent existence or purpose of its own or whether the corporation is a "mere instrumentality" or "alter ego" of its affiliate;

2. Whether the principals have treated the corporation as a corporation; and

3. Whether the corporation is adequately capitalized.

See Venton Corp., 94 N.J. 473; *Miller & Dobrin Furniture Co. v. Camden Fire Ins. Co. Ass'n,* 55 N.J. Super. 205 (Law Div. 1959); *Melikian v. Coradetti*, 791 F.2d 274, 282 (3rd Cir. 1986).[2]

A. Fleer Collectibles was not the simply the "alter ego" or a "mere instrumentality" of Fleer/Skybox.

A key factor courts use in determining whether to pierce the corporate veil is whether the subsidiary is the "alter ego" or a "mere instrumentality" of the parent corporation. In *State v. Venton Corp.*, the New Jersey Supreme Court declined to pierce the corporate veil, despite the fact that the parent had created the subsidiary in order to acquire another company's business and despite the fact that the parent's personnel, including directors and officers, were regularly involved in running the subsidiary's business. The court noted that the subsidiary was not

[2] Likewise, the Bankruptcy Court for the District of New Jersey has also not developed a strict test regarding when to pierce the corporate veil and substantively consolidate affiliated corporations, but six criteria it typically considers are:

1) the degree of difficulty in segregating and ascertaining individual assets and liability;
2) the presence or absence of consolidated financial statements;
3) the commingling of assets and business functions;
4) the unity of interests and ownership between various corporate entities;
5) the existence of parent and intercorporate guarantees on loans; and
6) the transfer of assets without formal observance of corporate formalities.

In re John Cooper, 147 B.R. 678, 684 (Bankr. D.N.J 1992)*; See also In re Orfa Corp. of Philadelphia*, 129 B.R. 404, 414-415 (Bankr. E.D. Pa. 1991).

incorporated for an unlawful purpose and did not engage exclusively in business with its parent. The court set out the following rule:

> Under certain circumstances, courts may pierce the corporate veil by finding that a subsidiary was "a mere instrumentality of the parent corporation." Application of this principle depends on a finding that the parent so dominated the subsidiary that it had no separate existence but was merely a conduit for the parent. Even in the presence of corporate dominance, liability generally is imposed only when the parent has abused the privilege of incorporation by using the subsidiary to perpetrate a fraud or injustice, or otherwise to circumvent the law.

Venton Corp., 94 N.J. at 500-501.

In *OTR Associates*, on the other hand, the court pierced the corporate veil of a subsidiary created for the sole purpose of holding the lease on the premises occupied by the parent corporation, a Blimpie franchisee. The court found that the parent's domination and control of the subsidiary was "patent," because the subsidiary had virtually no assets of its own other than the lease, no business premises of its own, no income other than rent payments by the parent, and no employees or office staff of its own. 353 N.J. Super. at 53. Moreover, the parent "affirmatively, intentionally, and calculatedly led" creditors to believe the subsidiary was Blimpie, because it "not only failed to explain its relationship to Blimpie as a purported independent company but it affirmatively, intentionally and calculatedly led [creditors] to believe it was Blimpie." *Id.* at 54. Therefore, the court pierced the corporate veil and treated the two corporations as a single entity.

In the instant case, the subsidiary Fleer Collectibles cannot be characterized as the "alter ego" or "mere instrumentality" of parent corporation Fleer/Skybox. From the outset, Fleer Collectibles was a distinct business, purchased by Fleer/Skybox as a going concern from a third party after it had already been in business for approximately eleven years. Tobia Affidavit, at ¶3.

Fleer/Skybox did not acquire Fleer Collectibles to defraud or deceive creditors, nor did it operate or market Fleer Collectibles in such a way as would suggest that Fleer/Skybox and Fleer Collectibles were a single entity. Following the acquisition, Fleer Collectibles continued to produce and sell miniature diecast vehicles, often under the White Rose name, whereas Fleer/Skybox continued to produce and sell solely trading cards. *Id.* at ¶¶5, 12-13. Each company continued to enjoy its own customer base, engaging in separate sales calls marketing its particular product and advertising in media directed towards its particular customers. *Id.* at ¶¶16-17 .

Fleer/Skybox and Fleer Collectibles were also unique from an operational and financial standpoint. Each company had its own letterhead, invoices and purchase orders, and, in many cases, had separate licenses from professional sports leagues. *Id.* at ¶6, **Exhibits "1" through "4"**. In addition, each company kept its own books and records and maintained separate operating and checking accounts. *Id.* Thus, Fleer Collectibles was not the "alter ego" of Fleer/Skybox and the corporate veil should remain intact.

B. Fleer Collectibles Adhered to All Corporate Formalities.

Another major factor New Jersey courts use in determining whether to pierce the corporate veil is whether the subsidiary corporation adhered to corporate norms, such as keeping separate books and records and segregating funds. *See Miller & Dobrin Furniture Co.,* 55 N.J. Super. 205; *Telis v. Telis,* 132 N.J. Eq. 25 (E & A 1942). However, the "mere fact that a small corporation does not conduct its affairs in strict conformance with the corporation act does not mean that it should not have the advantages permitted by statute." *Miller,* 55 N.J. Super. at 223.

In *Telis*, the court pierced the corporate veil and determined that a widow had a dower right in real estate owned by her husband's corporation. The court found that the corporation did not adhere to corporate formalities:

> The proofs in the case at bar clearly satisfy us that the respondent and not Telise's Bargain Store, the corporation, owns the real estate. The corporation was never perfected; respondent held all of the stock notwithstanding that the two shares were in the name of others; there was never a formal meeting; no bylaws were ever adopted and corporate funds were intermingled with respondent's funds and used in payment of respondent's personal obligations. Form and not substance was effected. These and all other circumstances in the case entirely convince us that the corporate creation was, and its existence is, a mere instrumentality employed for concealing the truth and, therefore, in the equitable sense, fraudulent.

132 N.J. Eq. at 29-30; *see* OTR *Assoc.*, 353 N.J. at 55.

Fleer Collectibles, on the other hand, consistently observed corporate formalities, despite being a subsidiary corporation of Fleer/Skybox. First of all, Fleer Collectibles had its own formal operating agreement. *See* Tobia Affidavit, at ¶6. Secondly, Fleer Collectibles kept separate books and records from those of Fleer/Skybox. *Id.* Third, Fleer Collectibles had its own letterhead, purchase order forms and bills of lading forms. *Id.* at ¶6, **Exhibits "1" through "4".**¶. Finally, Fleer Collectibles had its own bank accounts in which it deposited and withdrew its own funds. *Id.* at ¶6, **Exhibits "2", "5".** Accordingly, Fleer Collectibles maintained all corporate formalities and the corporate veil should not be pierced.

C. Fleer Collectibles was Never Significantly Undercapitalized.

Another factor courts use in considering whether to pierce the corporate veil is whether the subsidiary corporation is significantly undercapitalized. *Ventron Corp.*, 94 N.J. at 501 (acknowledging that inadequate capitalization is a factor when it noted that the corporation was not inadequately capitalized); *see also Coppa v. Taxation Div.* Director, 8 N.J. Tax 236, 245

(Tax Ct. 1986) (noting that "the enterprise must be established on an adequate financial basis" to avoid piercing). *Melikian*, 791 F.2d at 282 (indicating that inadequate capitalization would be a factor under New Jersey law).

Although no New Jersey case explicitly defines under-capitalization, the "inadequate capitalization test has a number of variations with regard to computation of the debt-capitalization ratio and the significance of a computed ratio as it applies to various types of business." *P.M. Finance Corporation v. IRS*, 302 F.2d 786, 787 (3d Cir. 1962). As one court explained:

> A corporation is undercapitalized when the amount of capital invested in its equity securities is insufficient for the requirements of the particular business. Courts and commentators have stated many different tests for determining whether a corporation is sufficiently undercapitalized to consider treating all or part of its "debt" to shareholders as equity. Some, for example, propose that the test should be whether an outsider would have made a loan to the corporation under the circumstances... . Others say a corporation is undercapitalized when only a nominal amount is invested in equity... . It has also been suggested that a debt/equity ratio of about 4:1 can be considered "safe" ... Whatever test is used, it is clear that the exact definition of undercapitalization varies according to the type of business or industry involved, and even according to the features of the particular business being examined.

Intertherm, Inc. v. Olympic Home Systems, Inc., 569 S.W. 2d 467 (Ct. App. Tenn. 1978).

No matter what definition of under-capitalization is applied, however, courts are generally reluctant to find that a corporation was under-capitalized absent overwhelming evidence. Even in cases where there was no capital, or hardly any, many courts still refused to pierce the corporate veil. *Kinney Shoe Corp. v. Polan*, 939 F.2d 209 (4th Cir. 1991); *But see Trustees v. Lutyk*, 332 F.3d 188, 195 (3d Cir. 2003) (piercing the corporate veil because corporate equity was negative and liabilities exceeded assets at the time of incorporation).

There is no question that Fleer Collectibles was adequately capitalized. Within approximately six months of its acquisition, Fleer Collectibles recouped its purchase price through the liquidation of purchased inventory; Fleer Collectibles was self-funded from that point forward. *See* Tobia Affidavit, at ¶4. Moreover, whereas Fleer/Skybox suffered operating losses for each of the three years preceding the Assignment, Fleer Collectibles made approximately $1.0 million in each of the three fiscal years preceding the Assignment. *Id.* at ¶19. Therefore, piercing the corporate veil is not warranted in this case.

POINT II

THE AUCTION PROCEEDS SHOULD BE ALLOCATED BETWEEN THE FLEER/SKYBOX AND THE FLEER COLLECTIBLES ESTATES BASED ON THE FAIR MARKET VALUE OF ASSETS SOLD FROM EACH ESTATE.

Because piercing the corporate veil is not warranted in the instant case for the reasons stated above, the Auction proceeds must be allocated between the Fleer/Skybox and Fleer Collectibles estates pursuant to the fair market value of assets sold from each estate. It is well-established that a well-advertised auction with arms-length bidders will recover the fair market value of assets. Thus, the Winning Bid represents the fair market value of the Fleer Assets as a whole. An examination of the Auction transcript also reveals the fair market value of each component of the Fleer Assets, since participants stated their bids in terms of both an overall price for the assets, as well as partial prices for just the assets from each individual estate. Therefore, the Assignee submits that the allocation should be based on the values of each estate's assets as exposed through the Auction process.

A. The Auction Exposed the Fair Market Value of the Fleer Assets.

Case law and academic literature widely confirm that auctions with arms-length bidders after adequate advertisement will yield a winning bid that represents the "fair value" of the assets.[3] As defined by the American Society of Appraisers, fair market value is "the amount at which property would change hands between a willing seller and a willing buyer when neither is acting under compulsion and when both have reasonable knowledge of the relevant facts." *American Society of Appraisers, Business Valuation Standards-Definitions.*

[3] Although economists do not speak in terms of fairness, the economics literature agrees that a properly conducted single object auction, subject to certain assumptions, results in the revenue-maximizing price for the seller. *See, e.g.,* Colin Campbell and Dan Levin, *When and Why Not to Auction*, 27 Econ. Theory 3, 583 (2006).

Sales pursuant to Section 363 of the United States Bankruptcy Code, 11 U.S.C. § 363 ("Section 363 Sale"), are often conducted in a procedurally similar manner to the Auction. Under Section 363, bankruptcy courts may only approve a Section 363 Sale that is fair and reasonable or satisfies some other equivalent standard. *In re Matter of Phoenix Steel Corp.*, 82 B.R. 334, 336 (Bankr. D. Del. 1987); *Van de Walle v. Unimation, Inc.*, 1991 WL 29303, at 17 (Del. Ch. March 7, 1991) (recognizing "the fact that a transaction price was forged in the crucible of objective market reality (as distinguished from the unavoidably subjective thought process of a valuation expert) is viewed as strong evidence that the price is fair" in the context of a shareholder appraisal proceeding).

Accordingly, bankruptcy courts have recognized that "the auction procedure has developed over the years as an effective means for producing an arm's length fair value transaction," which gets rid of the need for a "formal fairness opinion because the auction proceeding itself [is] expected to reflect the market value of the assets sold." *In re Trans World Airlines, Inc.*, 2001 Bankr. LEXIS 980 at 13 (Bankr. D. Del. April 2, 2001); *See In re Del. & Hudson Ry. Co.*, 124 B.R. 169, 177 (D. Del. 1991) (making a fair valuation determination because the purchase price was the highest and best offer, there was reasonable opportunity for others to make a higher and better offer, and the sale was the result of an arms-length transaction).

The Auction was adequately advertised and all participants were arms-length bidders, as reflected in the Court's order approving the Winning and Back-Up Bids. Specifically, notice of the Sale Motion was provided to all known creditors of Fleer/Skybox and Fleer Collectibles, as well as prospective bidders that had provided their contact information to the Assignee. In addition, several trade publications and local newspapers published articles about the Auction.

Moreover, interested bidders were given the opportunity to conduct due diligence prior to the Auction. Accordingly, the Auction produced the fair market value for the Fleer Assets.

B. The Auction Proceeds Should be Allocated According to the Fair Market Value of Assets from Each Estate.

The most logical method of allocating the Winning Bid between Fleer/Skybox and Fleer Collectibles is assigning the fair market value of assets sold from each estate to that estate. When courts presented with similar allocation problems have not had the benefit of a market-determined price, they have resorted to professional appraisals to determine fair market value. *See, e.g., In the Matter of Boros & Reiss Art Weave Mills, Inc.*, 149 F.Supp. 28 (D.N.J. 1957); *In re Hetzel*, 23 F.Supp. 530 (M.D.Pa. 1938).

In this case, however, there is no need to use an artificial valuation technique since the Auction itself gave sufficient indication of the fair market value of each component of the Fleer Assets. Since the Winning Bid represented the fair market value of the Fleer Assets, logic compels that the partial bids submitted by the three separate, unaffiliated bidders for either the Fleer/Skybox Intellectual Property and/or the Fleer Collectibles Assets, also represents the fair market value of each of the respective components.

As discussed above, the Back-Up Bidder was a joint venture of SHEL-TAM, interested in acquiring Fleer Collectibles Assets, and Topps, interested in acquiring the Fleer/Skybox Intellectual Property. The Back-up Bidder submitted competing bids to each of Upper Deck's bids, and stated with each successive bid, its express allocation between Fleer/Skybox Intellectual Property and Fleer Collectibles Assets. The final Back-up Bid was $6 million, reflecting a state allocation of $2.6 million for Fleer Collectibles Assets and $3.4 million for the Fleer/Skybox Intellectual Property.

If SHEL-TAM had valued Fleer Collectibles Assets to be worth more than $2.6 million, then it surely would have increased its bid. Likewise, if Topps had valued the Fleer/Skybox Intellectual Property to be worth more than $3.4 million, then it surely would have increased its bid. Moreover, approximately midway through the auction, Upper Deck began offering its own allocation of purchase price between Fleer Collectibles Assets and Fleer/Skybox Intellectual Property, Upper Deck's, Winning Bid included a partial bid of $3.6 million for the Fleer/Skybox Intellectual Property. Thus, Upper Deck valued the Fleer Collectibles Assets to be worth no less than $2.5 million. Accordingly, a price for Fleer/Skybox between $3.4-3.6 million and for Fleer Collectibles between $2.5-2.6 million were those formed "in the crucible of objective market reality." *Van de Walle,* 1991 WL 29303, at 17.

As stated by the Assignee's accounting, valuation and financial expert, Gary Stetz, who reviewed the auction transcripts and the Sale Motion papers and order:

> Upper Deck and Topps are experts in their respective industries. Accordingly, they are well-qualified as to the allocation and appropriateness of their bids. The correct allocation of the purchase price lies in the mean of the winning bid and the immediately preceding bid. Accordingly, it is my opinion that the correct allocation of the winning bid (rounding to the nearest $100,000) is $3,500,000 for the Fleer/Skybox Trademarks and $2,600,000 for substantially all of Fleer Collectibles, LLC's assets.

See Affidavit of Gary Stetz, attached hereto as **Exhibit "E".**

CONCLUSION

For all the foregoing reasons, this Court should (1) affirm the Assignee's decision to continue to administer the Fleer/Skybox and Fleer Collectibles estates separately and, (2) approve an allocation of the Auction proceeds between the estates based on the fair market values of the assets sold from each estate.

Respectfully submitted,

PORZIO, BROMBERG & NEWMAN
A Professional Corporation

By: Elizabeth M. McKeever
Elizabeth Martin McKeever
An Attorney of the Firm

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

Dated: October 14, 2005

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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.	SUPERIOR COURT OF NEW JERSEY CHANCERY DIVISION, PROBATE PART BURLINGTON COUNTY DOCKET NO: P-2004-1394
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

ORDER (1) AFFIRMING THE ASSIGNEE'S DECISION TO CONTINUE TO ADMINISTER THE FLEER/SKYBOX AND FLEER COLLECTIBLES ESTATES SEPARATELY, AND (2) APPROVING THE ALLOCATION OF THE AUCTION PROCEEDS BETWEEN THE ESTATES BASED ON THE FAIR MARKET VALUES OF THE ASSETS SOLD FROM EACH ESTATE

THIS MATTER having been presented to the Court upon the Motion to (1) Affirm the Assignee's Decision to Continue to Administer the Fleer/Skybox and Fleer Collectibles Estates Separately, and (2) Approve an Allocation of the Auction Proceeds Between the Estates Based on the Fair Market Values of the Assets Sold From Each Estate (the "Motion") by Warren J. Martin Jr. (the "Assignee") for the Benefit of Creditors of Fleer/SkyBox International LP ("Fleer Skybox") and Fleer Collectibles, LLC ("Fleer Collectibles"), by and through his counsel, Porzio, Bromberg & Newman, P.C., and the Court having considered the Motion, oral argument, and any opposition thereto, and for good and sufficient cause appearing for the entry of this Order;

IT IS ON THIS _______ DAY OF _________, 2005

ORDERED that no substantive consolidation of the Fleer/Skybox and Fleer Collectibles Estates shall be required and the Assignee shall continue to administer the Estates of Fleer/Skybox and Fleer Collectibles separately; and it is further

ORDERED that the proceeds from the Auction of Fleer/Skybox's Intellectual Property and substantially all of the assets of Fleer Collectibles be allocated based on their fair market values, such that the correct allocation of Auction sale proceeds of $6.1 million is $3.5 million to the Fleer/Skybox estate and $2.6 million to the Fleer Collectibles estate; and it is further

ORDERED that notice of the Motion was fair, adequate and sufficient; and it is further

ORDERED that a copy of the within Order shall be served upon the purchaser of the Assets within seven (7) days from the date hereof.

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