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Now known as Fler, LLC

In the matter of the 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 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

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

FSB Acquisition Company, LLC ("FSB") (now known as Fler, LLC), owner of all
Fler/SkyBox International, LP, intellectual property rights ("IP Rights") responds to Assignee's

Brief In Support Of The Fler Estate's Auction Sale Of Photographic Slides & Digital Images
("Assignee's Brief") as follows:

PRELIMINARY STATEMENT

The crux of this dispute is not, as the Assignee claims over whether the FSB is entitled to the objects which the Assignee seeks to sell. Instead, the issue is whether the Assignee is obligated to provide FSB with copies of the photographs embodied in those objects prior to their disposition, by sale or otherwise. The answer under both the Copyright Act and the provisions of the Asset Purchase Agreement ("APA") is yes: the, the Assignee is obligated to provide FSB with copies of the subject photographs prior to selling the digital files and slides. The Assignee cites no law contradicting FSB's position, and the cases they do cite are inapposite.

The Asset Purchase Agreement ("APA") requires the Assignee to provide FSB with copies of the images he intends to sell. APA, pages 8 and 24. This must occur before any disposition of the inventory, because once the inventory is sold, it will be impossible for the Assignee to perform its obligations. It will also dissipate, and irreparably harm, the assets of FSB. The "Further Assurances" and "Seller's Deliveries" provisions of the APA as well as the Copyright protection provisions require the Assignee to deposit copies of all protected works prior to enforcement of any rights granted under that Act. Second, this court must determine whether as FSB claims, it has purchased IP rights in all photographs, thereby entitling it to copies. Assignee has unilaterally labeled certain photographic images as "public domain" and has further claimed that other images' copyrights are owned by third parties and are therefore not part of the IP Rights transferred under the APA. Here, again, Assignee's analysis is misplaced. Despite the fact that Assignee has failed and refused to provide chain of title documentation of its "public domain" and "third party" claims, from the evidence available it is apparent that

Assignee's designations are incorrect and are either not "public domain" materials and/or are subjects of the IP Rights transferred under the APA.

Based on the forgoing, the Assignee cannot attempt to sell the IP Photographic Assets unless and until Assignee provides FSB with a copy as is required the APA and applicable United States Copyright laws.

ARGUMENT

I. FSB Does Not Dispute That Assignee Is Entitled To Sell The Tangible Objects

The Copyright Act, § 202, clearly provides that any lawful holder of any tangible object in which copyrights may inhere is entitled to dispose of that tangible object as they see fit. This is referred to as the "First Sale Doctrine." The application of the First Sale Doctrine to the objects at issue, however, despite what is argued in Assignee's Brief, is not disputed.

(Assignee's Brief, 1: Fn. 1). What is disputed is whether Assignee is obligated to provide FSB with copies of those objects prior to their sale.

As presented in FSB's brief entitled "Objection To Verified Application For Order Authorizing Sale Of Substantially All Of The Remaining Assets Of Fleeer/SkyBox International LP," filed on September 20, 2005, and to be heard concurrently with Assignee's Brief ("FSB's Brief"), both the United States Copyright laws, and the APA, provide that Assignee is obligated to provide FSB with the requested copies prior to any sale of the objects. Furthermore, Assignee's refusal to do so violates and breaches the APA's "Seller's Delivery" and "Further Assurances" provisions, which expressly require these copies 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 copies under the United States Copyright Act of 1976.

II. FSB Is Entitled To, And Assignee Is Obligated To Deliver To FSB, Copies Of All Subject Photographs Prior To Any Sale Thereof

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.

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

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).

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).

Therefore, while the Assignee may have broad discretion to convey assets, that discretion is not limitless and not only must conform to its obligations under the APA, but also cannot be conducted in a manner which knowingly infringes on another's rights. N.J.S.A. 2A:19-13. Furthermore, the Assignee is required to perform according to the letter and spirit of the APA pursuant to the Further Assurances provision thereof.

Regarding FSB's rights, the United States Copyright Act, 17 U.S.C. § 101, *et seq.* governs the protections afforded to copyrighted works in the United States, including photographic works. 17 U.S.C §§ 101 and 102(a)(5). The rights provided by that Act, 17 U.S.C. § 106, are at a minimum the exclusive rights: 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. Furthermore, 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. 17 U.S.C. § 501. Nonetheless, 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). Most importantly, that section expressly states that registration requires that a copy of the copyrighted work be deposited with the Copyright Office.

Hence, because the APA, 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 to deliver all documents necessary, and within his control, in connection with the

transactions “contemplated by [that] Agreement,” at paragraph 4.2, and 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. The Assignee, therefore, promised to provide FSB with copies of all copyrighted works purchased under the APA, because 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 police and enforce its rights.

Therefore, the Assignee’s refusal to deliver the requested copies is not only contrary to the terms of the APA, it deprives FSB of its IP Rights, it leaves FSB without a means to enjoy its IP Rights as provided by the copyright statute, and it affords FSB with no way to enforce its IP Rights. In so refusing to provide the copies, the Assignee has breached the APA, thereby significantly and substantially reducing the value of the IP Rights to FSB's detriment.

Therefore, FSB respectfully requests this Court order the Assignee to perform its obligations under the APA, and enjoin and discontinue any sale of the photographs until such time as the Assignee has complied with the APA, that is, until the Assignee has delivered to FSB copies of said photographs, and said delivery is confirmed by this Court.

III. FSB Is Entitled To Copies Of ALL Photographs Because Assignee’s “Third Party” And “Public Domain” Designations Are Incorrect

Assignee’s Brief explains the derivation of ownership of the subject photographs by assigning them to three (3) categories, (1) “[w]here Fleer . . . purchased the photographs and copyrights;” (2) where “Fleer owned the work, but not the copyright, which remained with the photographer;” and (3) photographs within the “public domain.” (Assignee’s Brief, p. 1 Fn. 1

and p. 9). The first category is indisputably subject to the APA, as is conceded by Assignee. (Assignee's Brief, p. 10). Assignee is under the mistaken assumption, however, that the second two categories do not include properties transferred to FSB under the APA. FSB *did*, however, acquire copyright, and other intellectual property interests in the photographs which Assignee includes in these two categories. For purposes of the ensuing discussion the second category is referred to as "Third Party Owned Works" and the third category is referred to as "Assignee Designated Public Domain Works."

First, with regard to the Third Party Owned Works, Assignee mistakenly assumes that FSB has no interests, copyright or otherwise in those works. This is not true. To the contrary, FSB has the same intellectual property interest in those works that Fleer/SkyBox had as of execution of the APA. Based upon the fact that Assignee has failed and refused to provide any documentation regarding ownership of these works, let alone showing that they are actually owned by third parties, as an initial matter it is disputed that their copyrights are not owned by FSB. Assuming for purposes of argument, however, that the copyrights in these works are actually owned by third parties, FSB may very well still have a beneficial intellectual property interest in these works. For example, while the photographer may have maintained legal ownership of the copyright, it may have granted Fleer/SkyBox a right to use that photograph in its course of business. That right to use *is* an intellectual property interest in and of itself and was expressly transferred to FSB by the APA. Therefore, FSB has an interest in obtaining all underlying documentation regarding these photographs as well as copies thereof. For instance, if Fleer/SkyBox obtained the exclusive right to use those photographs in sports memorabilia from the photographer, then not only does FSB have the same right, but FSB also has the right to file notice of that exclusive license with the Copyright Office, and police it as if it owned the entire

copyright therein. (17 U.S.C. §§ 201(d)(2), 205 and 501(b)). Therefore, not only is it disputed that anyone other than FSB owns the intellectual property rights in this second category of works, but even if such is the case, FSB may, at a minimum, still hold a beneficial interest entitling it to at least some of the same rights and protections of the Copyright Act.

Second, with regard to the Assignee Designated Public Domain Works there are two issues: (1) whether these works are actually in the “public domain” - a word of art in the law of Copyright and (2) since they most likely are not actually in the “public domain,” are they also owned by FSB. The “public domain” refers to works which are not protected by copyright. This unprotected class of works however is very limited. Since January 1, 1978, Federal copyright protection applies to a work from the moment it is fixed in a tangible medium of expression, and lasts for 95 years from that time or until 70 years after the death of the “author.” (17 U.S.C. § 302). Therefore, in order for something to be in the “public domain,” it must fall into four very narrow, but complex, categories of works. The first category of such works are those works created (i.e. pictures taken) prior to January 1, 1924. As to these works, they have lost all copyright protection based merely upon the amount of time since their creation, whether they were ever published or not. The second category of such works are those works which were created, and met other conditions, prior to January 1, 1964, and for which their Copyright was not renewed in the 28th year of their protection. (17 U.S.C. §§ 302-304). The final category of works are works which were created and published prior to March 1, 1989, but which did not contain the copyright symbol (i.e. “©”) when published and also failed to meet one of three (3) exceptions. (17 U.S.C. § 405).

Here, Assignee has failed to provide any documentation to substantiate his claim that any of the photographs are not protected by Federal Copyright on the grounds that they are within the

“public domain” as defined above. As a matter of fact, all that the Assignee has provided with regard to this issue is a Microsoft Excel spreadsheet which designated certain digital photographs as “public domain.” Nonetheless, upon a closer review of that list alone, some of those photographs appear as if they can not possibly be in the “public domain.” For example, one such entry, taken from a digital file entitled “MLB Products 2003,” reads “Avant 2003 - Basic - 060703GriffeyKen051.jpg - Public Domain.” Based upon a review of these documents it can be assumed that the referenced photograph is a photo of the Major League Baseball player Ken Griffey taken on June 7, 2003, and is *clearly* not subject to the “public domain” under the laws of Copyright¹. More specifically, it is *impossible* for a photograph taken after March 1, 1989 to be in the “public domain.” Put another way, any photograph taken after that date is protected by Federal Copyright law.

Furthermore, if they are not in the “public domain,” then they are protected by copyright. At that point the question lies, who owns that copyright? Again, to determine ownership, it is necessary to review the underlying documentation regarding the creation, and subsequent history of the work. Because Assignee has failed and refused to provide any of the underlying copyright documentation regarding *any* of the photographs, this cannot be determined at this time.

However, to the extent that those rights were owned by Fleer/SkyBox at the time of the APA, they are now owned to that same extent by FSB. Therefore, without any proof offered by Assignee to the contrary, it can once again be assumed that the copyright in these photographs are also owned by FSB and FSB is therefore entitled to copies of each of the Assignee Designated Public Domain Works.

¹ Please see Evidentiary Objections to the Certification of Paul C. Wittekind filed concurrently herewith and incorporated herein by this reference


CONCLUSION

Based upon the above, as well as the arguments presented by FSB's Brief, the Court should order Assignee to provide FSB with copies of *all* photographs which it intends to sell prior to any disposition thereof.

Dated: September 23, 2005

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By



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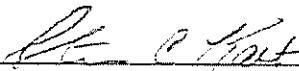
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Attorneys for FSB Acquisition Company,
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VERIFICATION

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 23, 2005



Steve Kalt, Vice President Finance for
FSB Acquisition Company, LLC
Now known as Fler, 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 23, 2005, I served the within document(s) described as:

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

on the interested parties in this action as stated below:

**Assignee for the Benefit of Creditors of
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(BY MAIL) By placing a true copy of the foregoing document(s) in a sealed envelope addressed as set forth above. I am readily familiar with this firm's practice for collection and processing of correspondence for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing contained in affidavit.

(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 23, 2005, at Los Angeles, California.

Toni Stewart
(Type or print name)


(Signature)