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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

**MEMORANDUM OF LAW IN SUPPORT OF ORDER  
APPROVING AUCTION RESULTS AS WILL BE  
REPORTED BY ASSIGNEE AND THEREBY  
AUTHORIZING SALE OF FLEER/SKYBOX'S  
INTELLECTUAL PROPERTY AND SUBSTANTIALLY  
ALL OF THE ASSETS OF FLEER COLLECTIBLES  
FREE AND CLEAR OF ALL LIENS AND  
ENCUMBRANCES.**

## PRELIMINARY STATEMENT

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., files this Memorandum of Law in Support of an Order (the "Order") Approving the Results of the Auction as will be Reported by the Assignee and Thereby Authorizing the Sale of Fleer/Skybox's Intellectual Property and Substantially All of the Assets of Fleer Collectibles (the "Memorandum of Law").

As set forth in detail below: (1) the Assignee has broad discretion to convey assets in the timeframe and manner he deems appropriate; (2) the Assignee is entitled to sell assets free and clear of liens when the sale will benefit creditors; and (3) the Assignee is entitled to sell assets free and clear of liens where an alleged lien is unperfected or the perfection has lapsed.

This Memorandum of Law does not further address approval of bid procedures, the break-up fee, or the timing of the auction insofar as an extensive hearing was held on these issues at the Court's request on July 8, 2005 after which time the Court approved these items. An order has been submitted embodying said relief.

## ABBREVIATED PROCEDURAL HISTORY

On June 29, 2005, the Assignee filed his Verified Application seeking approval 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 assigned to the Assignee by Fleer Collectibles (collectively, the "Fleer Collectibles Assets"). The Assignee announced that he would hold an auction on July 14, 2005, where The Upper Deck Company ("Upper Deck")

would act as the “Stalking Horse Bidder,” with an initial bid of Two Million Dollars (\$2,000,000.00). The Assignee also sought a hearing on July 15, 2005 to confirm the results of the auction and to transfer ownership of the Fleer/Skybox Intellectual Property and Fleer Collectibles Assets to the “Highest Bidder.”

On July 8, 2005, this court held a hearing (the “Hearing”) to discuss the Assignee’s proposed sale of the Fleer/Skybox Intellectual Property and Fleer Collectibles Assets free and clear of liens to Upper Deck or any other successful purchaser. At the Hearing, the Assignee presented evidence respecting the provision of notice to creditors, prospective bidders, and governmental authorities about the assets to be sold and the sale procedure. *See* Transcript, from Hearing, pp. 9-11. In addition, the Assignee explained that the sale needed to be conducted in an expedient manner due to the deteriorating value of the assets. *Id.* at 37-39.

**I. The Assignee has Broad Discretion to Convey Assets in the Timeframe and Manner He Deems Appropriate.**

Under the New Jersey statute governing assignments for the benefit of creditors, N.J.S.A. 2A:19-1 *et seq.*, an assignee has the same power to marshal assets as the assignor had prior to the assignment:

Every assignee shall have as full power and authority to dispose of all of the assignor's property, except as otherwise may be provided, as the assignor had at the time of the general assignment. He may sue for and recover in his own name everything belonging or appertaining to the estate. He may compromise, settle and compound all claims, disputes and litigations of the assignor, refer the same to arbitration, agree with any person concerning the same, redeem all mortgages and conditional contracts, and generally act as and do whatsoever the assignor might have lawfully done in the premises.

N.J.S.A. 2A:19-13 (2005).

When conveying assets pursuant to this provision, the assignee is required to show “reasonable care” regarding the manner of conveyance. *Ely, et al. v. Credit Men’s Adjustment, et al.*, 106 N.J. Eq. 472, 474 (N.J. Ch. 1930). Although the assignment cases do not explicitly set forth the measure of duty and accountability conferred to an assignee when conveying assets, the receivership cases, made applicable to assignment cases through New Jersey Court Rule 4:54,<sup>1</sup> clarify that assignees and receivers have “large discretionary powers” to decide the timing and manner of the conveyance. *Potts v. The New Jersey Arms and Ordnance Co.*, 17 N.J. Eq. 395, 398 (N.J. Ch. 1866); see *Twenty Nassau St. Holding Co. v. Twenty Nassau Street, Inc.*, 112 N.J. Eq. 213 (N.J. 1933) (holding that an “order for sale free and clear will be advised – at public or private sale in the receiver’s discretion”); *Fleming v. The Fleming Hotel Company*, 70 N.J. Eq. 509 (N.J. Ch. 1905) (ordering a receivership sale because it was not an abuse of the receiver’s discretion to refuse to adjourn the sale at the request of counsel representing 97% of the creditors, and all the stockholders, on the ground that an agreement had been made by a large part of the creditors for an extension of time).

In *Potts*, the Court of Chancery granted an order directing the receiver to sell assets “in such mode and parcels, in bulk or detached parcels, as he may deem most advantageous,” despite some creditors urging the assets to be sold as a whole, and other creditors urging the assets to be sold piecemeal. 17 N.J. Eq. At 405. The court found that:

[I]t is the policy of the statute that [the receiver] should be invested with large discretionary powers... [and] the receiver should be directed to proceed and sell the real and personal property, either in bulk or in detached parts, as he may find it expedient. He may find it expedient and for the advantage of his trust to sell the real estate,

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<sup>1</sup> Rule 4:54 provides: “The practice relating to assignments for the benefit of creditors under N.J.S.A. 2A:19-1 *et seq.* shall conform as nearly as practicable to the procedure relating to insolvent corporations.” N.J. R. 4:54; see *Rosner v. Plaza Hotel Associates, Inc.*, 146 N.J. Super. 447, 455 (App. Div. 1977).

The applicable receiver statute, N.J.S.A. 14A-5, provides in relevant part, “a receiver shall have power to...(c) sell, assign, convey or otherwise dispose of all or any part of the property of the corporation.”

with a certain part of the machinery, together, and the residue of the machinery, tools, and personal property in lots; or he may find it most for the interest of those concerned to sell all the machinery, fixtures, and tools in detached lots. Satisfied that it is not only the duty but the desire of the receiver to make this property produce the most money possible for those entitled to the proceeds, my opinion is that the mode of sale should be left to his discretion.”

*Id.* at 399.

Therefore, the court entered an order directing the receiver to sell assets in the timeframe and manner that he deemed appropriate.

Here, the Assignee submits that selling the Fleer/Skybox Intellectual Property and the Fleer Collectibles Assets to Upper Deck (or any other successful purchaser) at the auction scheduled for July 14, 2005, is in the best interest of the estate and its creditors, because this form of sale is likely to recover a significant amount of money for creditors prior to further deterioration in the value of the assets. In determining to hold the sale in this manner and timeframe, the Assignee has relied upon his own experience in liquidating and restructuring companies, as well as the expertise of his retained auctioneer and appraiser. In addition, the Assignee has consulted with numerous experts in the sports and collectibles industries regarding the manner of sale. The testimony of Chris Tobia on July 8, 2005 also established that the timing and manner of the sale were apparently set to obtain the highest price. *See* Transcript, from Hearing, pp. 37-39. Therefore, the Assignee has exercised “reasonable care” and acted well within his “large discretionary powers ” in deciding the manner and timeframe of sale. *Potts*, 17 N.J. Eq. at 399.

## **II. Courts May Authorize an Assignee to Sell Assets Free and Clear of Liens When the Sale Will Benefit Creditors.**

The statute governing receiverships<sup>2</sup> explicitly provides that:

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<sup>2</sup> Again, the receivership statute is made applicable to assignments by virtue of Rule 4:54, *see n.1, supra*.

When property of a corporation for which a receiver has been appointed is, at the time of such appointment, subject to one or more encumbrances, the Superior Court, upon the application of the receiver, may authorize the receiver to sell such property at public or at private sale, clear of encumbrances, for such price and upon such terms as the court may approve. No such sale shall be authorized or made except upon prior notice to the holders of the encumbrances affecting such property, and unless the receiver demonstrates to the satisfaction of the court that the sale of such property may be reasonably expected to benefit general creditors of the corporation without adversely affecting the interests of the holders of the encumbrances. The proceeds of such sale shall be paid into court, there to remain until the further order of the court, subject to the same encumbrances which affected the property at the time of the sale.

N.J.S.A. 14A:14-7 (2005).

Pursuant to this statute, New Jersey courts have the “inherent authority” to order receivers to sell assets free and clear of any and all liens “when the interests of the parties demand it.” *In re Alleged Violations of Law by Valley Road Sewerage Company*, 295 N.J. Super. 278, 292-93 (N.J. Super. Ct. App. Div. 1996) (citing *Wilkinson, Gaddis Co. v. Shannon Lodge Sanitorium*, 132 N.J. Eq. 591, 593 (N.J. Ch. 1943)). A court’s decision to exercise this authority “must be justifiable, in equity and good conscience, by the facts and circumstances of the particular case.” *Wilkinson*, 132 N.J. Eq. at 593 (citing *Sullivan v. James Leo Co.*, 124 N.J. Eq. 317, 326 (1938)).

Significantly, this statute was adopted “only” 52 years ago in 1953, to “authorize the Superior Court to approve a sale of property free and clear of liens, whenever the court is satisfied that such sale may reasonably by [sic] expected to benefit general creditors.” N.J.S.A. 14A:14-7, Commr. Com. (1968). Under the prior statute, *see* R.S. 14:14-20, courts could only authorize a receiver to sell encumbered property, when the legality of the encumbrance was

questioned *and* the property was of a character likely to materially deteriorate in value pending litigation. *See id.*

However, even prior to the change in the statutory language, New Jersey courts mainly considered the benefits accruing to general creditors when deciding whether or not to authorize a free and clear sale. In *Wilkinson*, for example, the Chancery Court found that the “manifest intent and object of the legislature was to prevent mischief arising from the depreciation in value of property of a nature destined materially to deteriorate during the period of a litigation likely to be protracted.” 132 N.J. Eq. at 593 (citing *Middleton v. New Jersey West Line Railroad Co.*, 26 N.J. Eq. 269 (N.J. Ch. 1875); *reversed, sub nom., Randolph v. Larned*, 27 N.J. Eq. 557 (N.J. 1876)).

Indeed, although there is no case law explicitly interpreting the 1953 statute, the evolution in the common law can be seen from earlier cases where the courts went far beyond the strict language of the old statute, paving the way for enactment of the new statute in 1953. Despite the absence of statutory authority, early cases recognized an assignee’s authority to sell assets free and clear of any and all liens, so long as all lienholders were party to the proceedings. *People’s-Pittsburgh Trust Co. v. Hirsch*, 65 F.2d 972 (3d Cir. 1933); *Miner’s Bank of Wilkes-Barre v. Acker*, 66 F.2d 850, 853 (3d Cir. 1933); *Chapman v. Schiller*, 95 Utah 514, (Utah 1938) (listing cases upholding the right of courts to order receivers to hold a free and clear sale when lienholders were parties to the proceedings).

In *Hirsch*, the Third Circuit upheld a decision ordering the receiver to sell a hotel free and clear of liens, despite the mortgagee’s objection. 65 F.2d at 974. The court found that the mortgagee was a member of each of the three classes of creditors: mortgagees, bondholders and general creditors. *Id.* at 974. In addition, the mortgagee not only consented to the appointment

of a receiver, but consulted and cooperated with the receiver in the company's operation. Even though the receiver's sale of the hotel would not recover an amount sufficient to cover the indebtedness on the mortgage, the court found that the order for sale free and clear of liens was appropriate. *Id.* The court's decision was also based on its finding that the hotel contained valuable furnishings and furniture that were not covered by the mortgage, and it was in the interests of the receivership that the hotel furnishings be sold at the same sale as the hotel property. *Id.* Therefore, the court held that "a sale by the receiver would have certain decided advantages over a sale upon the foreclosure proceedings and would be at no greater expense...[W]e feel that the interests of the mortgagee will be fully protected." *Id.* at 974-75.

Similarly, in *Acker*, the Third Circuit upheld a decision authorizing a receiver to sell property free and clear of liens despite the mortgagee's contention that he had not been properly noticed about the sale. 66 F.2d at 853. The mortgagee complained that the District Court erred in entering the order because the mortgagee was not served with due and timely notice of the receivership. *Id.* The Third Circuit, however, found that the mortgagee was not prejudiced by the lack of proper notice, because it received actual notice of the receivership and was privy to the receivership proceeding:

[A]s fact, [the mortgagee] knew of the appointment of the receivers at or about the time they were appointed on October 31, 1930. Its trust officer sat in conference with them, did not object to the receivership, nor the operation of the road by the receivers, from that date until October 20, 1931. So while it might not have had the legal notice to which it was entitled, it had actual notice and apparently acquiesced in the receivership for a year. It did not object to the receivership when it could and should have done so, if it intended to stand on its technical rights, and now it is rather late to object.

*Id.* at 853 (internal citations omitted). Therefore, the court ordered the sale free and clear of liens.

Here, as the Affidavit of Service filed herewith reveals, due and proper notice has been provided to all creditors via actual notice, the <www.FleerABC.com> website, telephone calls and extensive press coverage. In addition, the Assignee submits that selling the assets to Upper Deck (or any other successful purchaser of the Fleer/Skybox Intellectual Property and Fleer Collectibles Assets) will benefit creditors by recovering a significant amount of proceeds for the estate and its creditors. Moreover, since the assignee proposes that valid liens attach to the proceeds of sale, no lienholders will be adversely affected.

**III. Courts May Authorize an Assignee to Sell Assets Free and Clear of a Lien when the Legality of the Lien is Questioned, Such as Where the Lien is Unperfected, or the Perfection has Lapsed.**

In addition to conferring the assignee with the power to convey assets, the assignment statute also gives the assignee additional authority as the representative of the assignor's creditors.

The assignee, in addition to the powers which he may exercise as the successor to the assignor, shall also at all times be the representative of the creditors of the assignor, and shall have the same power to set aside conveyances, and to recover or reach assets for the benefit of the creditors as a creditor would have who was the holder of a judgment and levy against the assignor and his property at the date of the assignment. All conveyances, mortgages and transfers of property, real or personal, made by the assignor, which are void or voidable as against the creditors of the assignor, shall in like manner be void or voidable as against the assignee.

N.J.S.A. 2A:19-14 (2005).

New Jersey courts have explicitly recognized that, as the representative of creditors, an assignee has superior rights to the assignor to conduct a free and clear sale when the legality of the liens is unclear. *Vonins v. Raff*, 101 N.J. Super. 172, 178 (App. Div. 1968); *In re General Assignment for the Benefit of Creditors of Brill's Hardware Company, Inc.*, 67 N.J. Super. 289, 292 (Bergen Cty. Ct. 1961) ("the declared intent of [N.J.S.A. 2A:19-14] is to remove the

assignee from a status of mere succession and to place him in an adversary position with respect to the assignor's property for the benefit of creditors"); *General Electric Co. v. Pettingell Supply Co.*, 347 Mass. 631 (Mass. Sup. Jud. Ct. 1964).

In *Vonins*, for example, the court authorized a free and clear sale, despite a lienholder's objection that it held a valid lien in the property. In that case, Crest executed an assignment of its corporate assets to Raff for the benefit of creditors. *Id.* at 175. Crest had been party to a consignment contract with Vonins, a plumbing supplier, whereby Vonins agreed to furnish supplies to Crest in return for Crest's agreement to assign all installation contracts to Vonins. As assignee, Raff sold the majority of Crest's assets free and clear of liens at a public auction, including a large quantity of materials that Vonins had supplied to Crest under consignment. Two days after the auction, the probate court entered an order confirming the sale "free and clear of all liens, liens, if any to attach to the proceeds." *Id.*

Following entry of the order, Vonins brought an action in the Chancery Division, challenging the ability of the assignee to sell the assets free and clear of its liens. The trial court held that "since the assignee for the benefit of creditors' rights in this property could be no better than the rights of his assignor, determination of Crest, Inc.'s claim to this property necessarily fixes Raff's rights and plaintiff's claim to the proceeds of the assignee's sale." *Id.* at 177-78.

On appeal, the Appellate Division reversed. The court found that an assignee "not only has the general powers of a successor to his assignor, but also is vested with additional powers as the representative of creditors." *Id.* at 178. Thus, Raff was entitled to the proceeds from the sale of Vonin's equipment, even though Crest would not have been entitled to the proceeds if it sold the equipment. *Id.* at 180. The court determined that the UCC section providing that a

consignor's right to equipment is generally greater than the consignee's right to equipment was not applicable to Raff:

The agreement [between Vonins and Crest] ostensibly was executed to protect the accounts receivable due the related supplier under its former sales arrangement with Crest. To allow plaintiff to prevail would be to allow Vonins, by the use of this ambiguous contract, to secure an advantage over all innocent creditors of Crest... [T]he supply arrangement between plaintiff and Crest, insofar as it may affect the rights of the assignee, in spite of its label, should be deemed a "sale or return."

*Id.* at 181. Therefore, the court held that the assignee was authorized to sell assets "free and clear" of Vonin's lien and approved the sale as such.

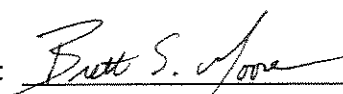
Here, certain secured creditors who were once of record, i.e., Bank of America, N.A. and Commerce Bank, N.A., have allowed their UCC-3's to lapse, without filing continuation statements. Because the Assignee holds the status of a fully protected judicial lien creditor as of the date of assignment, he holds superior rights in the assets and holds the authority to convey them irrespective of such unperfected liens. *See* N.J.S.A. 2A:19-14.

### CONCLUSION

For all the foregoing reasons, this court should enter an Order Approving the Results of the Auction as will be Reported by the Assignee and Thereby Authorizing the Sale of Fleer/Skybox's Intellectual Property and Substantially All of the Assets of Fleer Collectibles, and for such other and further relief as is fair and equitable under the circumstances.

DATED: July 14, 2005

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

By:   
Brett S. Moore