

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

PRESCIENT ACQUISITION GROUP, INC.
d/b/a Prescient Capital Corp.,

Plaintiff,

- against -

MJ PUBLISHING TRUST, MJ-ATV PUBLISHING
TRUST, MICHAEL J. JACKSON and NEW
HORIZON TRUST,

Defendants.

05 CV 6298 (PKC) (AJP)

**RULE 56.1 STATEMENT OF
DEFENDANTS MJ
PUBLISHING TRUST, MJ-ATV
PUBLISHING TRUST AND
MICHAEL J. JACKSON**

Pursuant to Local Civil Rule 56.1, the defendants MJ Publishing Trust (“MJPT”), MJ-ATV Publishing Trust (“MJ-ATV”) and Michael J. Jackson (“Mr. Jackson”) respectfully state that there are no genuine issues to be tried on the following material facts:

Background on the MJ-Publishing Trust

1. MJPT is a Delaware common law trust whose principal asset was a music publishing catalog known as the MIJAC Catalog. The MIJAC Catalog is comprised of, *inter alia*, the songs of Mr. Jackson and a number of other well-known artists. See Ex. 21, Terblanche Decl. at 2.

2. MJ-ATV is a separate Delaware statutory trust which held a 50% interest in Sony/ATV Music Publishing LLC (“Sony/ATV”), a 50/50 joint venture between Mr. Jackson, on the one hand, and Sony Music Entertainment Inc. and various other Sony affiliates (“Sony”), on the other hand. Sony/ATV holds a large musical publishing catalog, which includes the songs of well-known artists. See Ex. 21, Terblanche Decl. at 2.

3. Mr. Jackson owned 100% of the beneficial interests in MJPT and MJ-ATV prior to April, 2006. See Ex. 21, Terblanche Decl. ¶ 2.

4. MJ-ATV was the borrower under a loan facility (the “MJ-ATV Facility”) in the original principal amount of \$200,000,000 from the Bank of America, N.A. (“BOA”). See Ex. 21, Terblanche Decl. 2.

5. MJPT was the borrower under a loan facility in the original principal amount of \$72,500,000 from BOA. See Ex. 21, Terblanche Decl. ¶ 2. The \$72 MM loan was also characterized as being a line of credit. See Ex. 1, Pryce Dep.250.

Mr. Dash’s Reliance on Mr. Stabler’s Representations of Authority

6. In or around October 2004, the Third Amended and Restated Trust Agreement of MJPT was the operative trust agreement for the MJPT in effect (the “MJPT Trust Agreement”). See Ex. 26, Bain Decl. ¶ 3. The MJPT Trust Agreement required the trustees of said trust to execute documents on behalf of the trust. See Ex. 6, Bain Decl., Ex. A, § 5.1.

7. At all times herein, Mr. Don Stabler was not a trustee of MJPT (See Ex. 26, Bain Decl. ¶ 6), and did not know who the trustees were of the MJPT in or around November 2004. See Ex. 1, Pryce Dep. 95-96.

8. Prior to execution of the Engagement Letter, Mr. Stabler had discussions with other business associates/attorneys who questioned him about his authority to sign the document, particularly since the document required a signature from a trustee of MJPT. See Ex. 1, Pryce Dep. 92-93.

9. Prior to execution of the Engagement Letter, Mr. Dash, the principal of Prescient Capital Corporation, was placed on notice by his own business associates that Mr. Stabler’s authority to sign the letter was questionable. See Ex. 4, Dash Dep. 156-158. With this notice,

Mr. Dash did nothing to verify Mr. Stabler's signing authority, other than rely upon Mr. Stabler's verbal representations, and post-Engagement Letter documents. Those documents did not expressly or impliedly authorize Mr. Stabler's signature on the Engagement Letter. See Ex. 4, Dash Dep. 114-118; see also Exs. 11-12 (non-binding Letters of Intent).

10. At all times herein, Mr. Dash never met or spoke with Mr. Michael Jackson for any purpose whatsoever. See Ex. 4, Dash Dep. 104.

11. Mr. Dash also did not conduct any independent inquiry into Stabler's authority in November 2004. See Ex. 4, Dash Dep. 109. Mr. Dash testified that he did not try to inquire about MJPT's trustees:

Q In your due diligence, you did not uncover the names of the trustees of the Michael Jackson Publishing Trust?

A In my diligence I wasn't specifically looking for that.

See Ex. 4, Dash Dep. 217, emphasis added. In his recent deposition, Mr. Dash could not identify who the trustees of MJPT were in November 2004. See Ex. 4, Dash Dep. 152-153.

The Alleged Engagement Letter With MJPT

12. The language of the alleged Engagement Letter was drafted by Mr. Dash and an attorney he engaged, Mr. Robert Pryce. See Ex. 4, Dash Dep. 79, 202-203. The Engagement Letter's terms and language state that it was made between "Prescient Capital Corporation" and MJPT, and that its purpose was the refinancing of MJPT's loan with Bank of America. See Ex. 13, Engagement Letter ¶¶ 1,4,5.

13. The Engagement Letter places conditions precedent which Prescient must complete before receiving any fee. See id. ¶¶ 4,5. The Engagement Letter requires MJPT's loan be "debt funded" before allowing any fee for the "principal amount funded or committed" to MJPT. See id. ¶ 4. If MJPT terminates the Engagement Letter, Paragraph 5 applies, which

allows fees for the consummation of funding within 18 months. See Ex. 13, Engagement Letter ¶ 5. The Engagement Letter does *not* allow Prescient any fee for an assignment of MJPT’s loan. The Engagement Letter does *not* allow Prescient any fee for a forbearance of MJPT’s loan. See Ex. 13, Engagement Letter.

14. The Engagement Letter also contains an express anti-assignment provision. See Ex. 13, Engagement Letter ¶ 11. It reads: “This Agreement may not be assigned by Company or PRESCIENT without the prior written consent of the other.” See id. Finally, the Engagement Letter provides that it “may not be amended or modified except in writing” See Ex. 13, Engagement Letter ¶ 12.

Prescient’s and Mr. Dash’s Actions as an Unauthorized Loan Broker

15. “Prescient Capital Corporation” was a corporate shell Mr. Dash created “around the fall of 2004” to collect fees from MJPT. See Ex. 4, Dash Dep. 22-23. “Prescient Capital Corporation’s” office was Mr. Dash’s home, and Prescient’s current business address is an agent’s office in Manhattan. See Ex. 4, Dash Dep. 14-18, 23. Their only employee has been Mr. Dash. See Ex. 4, Dash Dep. 14.

16. Prescient has never acted as anything but “an intermediary” that makes introductions between lenders and borrowers. As Mr. Dash recently testified:

Q When you speak of financing, are you actually providing the capital or are you acting as an intermediary between a lender and a borrower or something else?

A An intermediary.

....

Q In any of the financing deals has it ever done anything other than act as an intermediary between the parties?

A No.

....

Q What do you understand the term intermediary to be?

A Somebody who introduces opportunities to capital.

See Ex. 4, Dash Dep. 45-47 (emphasis added).

17. Concerning MJPT, Mr. Dash understood that his role was to act as a loan broker. Mr. Dash included the alleged title of “exclusive financial advisor” in the Engagement Letter to keep others from collecting fees for making introductions. See Ex. 4, Dash Dep. 204. Mr. Dash testified that he understood his “role was to seek an institution” for loan refinancing. See Ex. 4, Dash Dep. 204 (emphasis added).

18. Mr. Dash was an unauthorized loan broker. From the beginning, Mr. Dash made introductions to others, such as Carl Douglas, who were more experienced in finance. See Ex. 4, Dash Dep. 62. As Mr. Dash testified at his recent deposition:

A It’s my position that I introduced the parties that are in this lawsuit to Fortress and Transitional, and that Fortress ultimately financed the transaction and that under my agreement I am due a fee in exchange for that introduction.
That’s all I am bringing. Nothing else.

See Ex. 4, Dash Dep. 198 (emphasis added).

19. Mr. Dash assigned the majority interest in its alleged fees (5%) to Perfect Circle to delegate many of its same loan broker duties. See Ex. 27, Perfect Circle Eng. Agreement; see also Ex. 4, Dash Dep. 200-203; Ex. 1, Pryce Dep. 108-109. Mr. Dash also assigned and delegated the due diligence review of financial records to Transitional Investors. See Ex. 4, Dash Dep. P. 204. Plaintiff did not obtain the prior written consent of MJPT for these assignments and delegation. See id.

MJPT Seeks to Refinance its Loan With Citigroup

20. On May 3, 2005, Bank of America assigned its \$72.5 million loan with MJPT to Fortress Investment Group LLC through an Assignment and Assumption Agreement. See Ex. 21, Terblanche Decl. ¶ 3. Throughout 2005 and 2006, MJPT sought to refinance its old Bank of America loan with new lenders. See Ex. 21, Terblanche Decl. ¶ 7.

21. Among the lenders that approached MJPT with refinancing offers was Citigroup Global Markets. See Ex. 21, Terblanche Decl. ¶ 7. In January 2006, Citigroup offered to refinance MJPT's old \$72.5 million loan with Bank of America on attractive new terms. See Ex. 21, Terblanche Decl. ¶ 11.

22. Under the Citigroup proposal, Citigroup had offered a more favorable interest rate, the opportunity to lock in a fixed interest rate through an interest rate swap, and the removal of Mr. Jackson's personal guarantee, among other favorable terms. See Ex. 21, Terblanche Decl. ¶ 11.

MJPT and New Horizon Trust

23. MJPT sought to complete the refinancing with Citigroup. See Ex. 21, Terblanche Decl. ¶ 11. In December 2005, Fortress had obtained a contractual right to match any offer made to MJPT to refinance the old Bank of America loan. See Ex. 8, Dakolias Dep. 20-21. Fortress thereafter sought to exercise its option. Id. Fortress matched the Citigroup proposal on substantially the same terms. Id.; see also Ex. 21, Terblanche Decl. ¶¶ 14-15.

24. Under Fortress' match of the Citigroup proposal, MJPT transferred its \$72.5 million loan using as collateral MJPT's pledge of its ownership interests in the intellectual property rights of its extensive musical publishing catalogue to New Horizon Trust, a Delaware statutory trust. See Ex. 24, MJPT Trust Assignment and Acceptance Agreement; see also Ex. 21, Terblanche Decl. ¶¶ 17-18. In exchange, following the transfer, MJPT's \$72.5 million Bank of America loan was paid off, and MJPT received a 15 percent beneficial ownership interest in New Horizon Trust. See Ex. 21, Terblanche Decl. ¶¶ 17-18; see also Ex. 7, Gropper Dep. 94-105.

25. MJ-ATV's \$200 million dollar loan was also paid off under the Fortress match of the Citigroup proposal, with MJ-ATV using as collateral its ownership interests in the

intellectual property rights of its own extensive musical publishing catalogue. MJ-ATV also transferred its own intellectual property interests in the musical catalogue to New Horizon Trust in exchange for a 85 percent beneficial interest in New Horizon Trust. See Ex. 25, MJ-ATV Trust Assignment and Acceptance Agreement; see also Ex. 21, Terblanche Decl. ¶¶ 17-18; see also Ex. 7, Gropper Dep. 94-105.¹

26. Under the New Horizon Trust deal, Mr. Jackson's personal pledge of the Neverland Ranch for the guarantees on the prior \$72 million BOA loan for MJPT, and the guarantees on the \$200 million BOA loan for MJ-ATV, was removed. See Ex. 10, Broude Dep. 71, 113; see also Ex. 21, Terblanche Decl. ¶ 11.

27. The loan by Fortress to New Horizon Trust was for \$300 million, and closed on or about April 13, 2006. See Ex. 9, Terblanche Dep. 130-139.

28. The \$300 MM loan was used to satisfy an antecedent debt; namely, the separate \$72.5 MM and \$200 MM BOA loans assigned to Fortress. See Ex. 21, Terblanche Decl. ¶¶ 19-20; see also Ex. 10, Broude Dep. 271-272.

29. There has not been any judgment in favor of the plaintiff and against any of the MJ Defendants up to the present time. See Ex. 10, Broude Dep. 294-295; see also Ex. 19, Broude Rep. 15.

Dated: New York, New York
January 5, 2007

¹ A separate, personal loan of \$20 million was later made to Michael J. Jackson, with a personal pledge of his ownership interests in Neverland Ranch. (See Ex. 28, Jackson Closing Docs.)

Respectfully submitted,
THE MCMILLAN FIRM

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