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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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

Plaintiff,

v.

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

Defendants.

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05 Civ. 6298 (PKC)(AJP)

PLAINTIFF'S MEMORANDUM OF LAW IN SUPPORT OF MOTION TO AMEND THE COMPLAINT AND FOR TRO AND PRELIMINARY INJUNCTION AGAINST FRAUDULENT TRANSFERS

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INTRODUCTION

Plaintiff Prescient Acquisition Group, Inc. ("Prescient") submits this memorandum of law in support of its motion (a) for leave to amend its complaint to assert a claim for fraudulent conveyances and to add a new defendant, New Horizon Trust, and (b) for a temporary restraining order and preliminary injunction prohibiting the defendants from transferring, dissipating, or fraudulently conveying the assets of MJ Publishing Trust ("MJPT") and MJ-ATV Publishing Trust ("MJ-ATV") pending the resolution of this action. This memorandum is supported by the accompanying sworn declarations of Darien Dash (the "Dash Declaration") and Steven Altman (the "Altman Declaration") and the exhibits thereto.

Prescient should be allowed to amend its complaint, and defendants should be preliminarily enjoined from transferring

MJPT's and MJ-ATV's assets, because the defendants are about to transfer substantially all of those assets to New Horizon Trust, another out-of-state entity that they control. Those transfers constitute fraudulent conveyances. An amendment of the complaint to assert a claim for fraudulent conveyance will not unfairly prejudice anybody. The defendants have not yet answered the complaint. They possess most and probably all of the information relevant to the proposed new claim. Additionally, discovery has not been completed.

The defendants should be restrained and enjoined from fraudulently conveying MJPT's and MJ-ATV's assets because the transfers will cause Prescient irreparable harm and Prescient is highly likely to succeed on the merits of its contract and fraudulent conveyance claims. A defendant's threat of fraudulent conveyances constitutes irreparable harm sufficient to support preliminary injunctive relief in an action for money damages.[1] Prescient is likely to succeed on the merits of its contract claim because it has a written contract providing for substantial fees for its assistance in securing financing for the defendants. It in fact did secure large financing commitments and millions of dollars in financing for the defendants from Fortress Investment Group and related entities. Defendants are therefore liable to Prescient for its fee. Prescient is also likely to succeed on its fraudulent conveyance claim because the defendants' proposed

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[1] See Pashaian v. Eccelston Properties, Inc., 88 F.3d 77, 86-87 (2d Cir. 1996)

transfers are not being made in exchange for fair value. They will render MJPT and MJ-ATV insolvent and unable to pay a judgment against them. Additionally, the circumstances indicate that the transfers are being made with the intent to defraud MJPT's and MJ-ATV's creditors, including Prescient.

BACKGROUND

Prescient and Defendant Trusts Enter Into Engagement Agreement.

Prescient is a New York corporation that has done business in the name of Prescient Capital Corporation. (Dash Dec. ¶ 2) Darien Dash acted as Prescient's pre-incorporation promoter and has at all times been its principal. Defendants are Michael Jackson and two trusts that he formed as instrumentalities for his sole benefit to hold certain of his assets and to finance his living costs and obligations.

In late 2004 an acquaintance named Rick Barlowe told Mr. Dash that he had learned that Michael Jackson was looking to refinance loans totalling hundreds of millions of dollars that he had taken from Bank of America ("BOA"). (Dash Dec. ¶ 3) Mr. Barlowe put Mr. Dash in touch with a man named Robert Pryce to conduct discussions about obtaining the financing for Mr. Jackson. (Dash Dec. ¶ 4) Messrs. Pryce and Barlowe stated that Mr. Jackson had established a trust that owned interests in libraries of songs written by himself and the Beatles. The trust had apparently borrowed moneys from BOA for Mr. Jackson's benefit and pledged its assets as collateral for the BOA loans. According to them, Mr. Jackson also sought financing to purchase

the interest in the Beatles library that his trust did not already own from an entity called Sony/ATV Music Publishing Trust. They also said that, in addition to the trust's pledging of the song catalogues, Michael Jackson had pledged the Neverland Ranch to BOA to secure the loans. Mr. Pryce identified Mr. Jackson's trust as "MJ Publishing Trust" (MJPT). Mr. Dash told Mr. Pryce that he was acting for Prescient Acquisition Corporation, a company that Mr. Dash planned to incorporate formally in the near future.

Thereafter Mr. Dash spoke to Mr. Pryce and also defendants' agent Don Stabler about Prescient's engagement. (Dash Dec. ¶ 5) Mr. Stabler told Mr. Dash about MJPT, its ownership of interests in the Beatles and Michael Jackson song catalogues, the BOA loans to the trust, and the need to refinance those loans. Not long thereafter Mr. Stabler executed the November 17, 2004 engagement agreement (the "Agreement") (Dash Dec. Exh. A) on behalf of MJPT. Only later did Mr. Dash (Prescient) learn that the enterprise they had identified as "MJPT" was, at the time of the Agreement, really comprised of two trusts, MJPT and MJ-ATV.[2] After execution of the agreement, Mr. Dash met Mr. Stabler in California and discussed the refinancing and their efforts to obtain it.

The Agreement (Exh. A) provides for payment of a nine percent fee to Prescient upon "funding" of or "commitment" to a

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[2] The confusion probably resulted from the fact that the enterprise had not always been split into the two trusts.

financing through any lender or introduction of a new qualified lender during the six-month term of the Agreement or for 18 months thereafter. Also pursuant to the Agreement, Mr. Jackson's trusts are liable to Prescient for reasonable attorneys' fees it spends to enforce the Agreement.

Prescient Finds Financing for Defendants.

After execution of the Agreement, Mr. Dash undertook efforts in Prescient's name to find financing for the defendants. He found some people who were interested in and apparently capable of providing the financing that Michael Jackson wanted. (Dash Dec. ¶ 7) Mr. Dash spoke with representatives of a California company called Transitional Investors, which was engaged in the business of originating loans for Fortress Investment Group and several other substantial lenders. He introduced Transitional, and through it Fortress, to Messrs. Pryce and Stabler. His involvement in the subsequent discussions with Transitional was reflected in numerous documents, including a December 30, 2004 letter of intent between Transitional and the "Michael Jackson Trust" (Dash Dec. Exh. D).[3] Michael Jackson executed that letter, which was addressed to him "c/o Don Stabler." Mr. Dash is named at pages 5-6 of that document.

Fortress's involvement through Transitional is reflected in a January 27, 2005 commitment letter from Fortress and Transitional to Mr. Jackson (again care of Mr. Stabler) (Dash Dec. at ¶ 8 and Exh. E). Fortress executed a revised version of

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[3] See Dash Dec. Exhs. B, C and D.

that commitment letter dated February 1, 2005 (Exh. F). It thereby "committed" itself to financing in the amount of $330,000,000. Mr. Stabler signed the term sheets attached to those letters as the defendants' representative. Mr. Dash continued to participate in discussions regarding Fortress's refinancing of the BOA loans well into 2005.[4]

Mr. Dash formally incorporated Prescient in early 2005. Thereafter Prescient continued its performance under the Agreement. (Dash Dec. ¶ 9) Later, in mid-2005, it demanded performance of that agreement and ultimately instituted this action to enforce its rights.

Fortress acquired or refinanced the BOA loans in or about early May 2005. (Dash Dec. ¶ 10) It also entered into several agreements with the defendants pursuant to which it agreed to extend additional financing to them and to forbear from enforcing its rights pursuant to existing defaults. Two of those agreements, dated May 25, 2005, are annexed as Exhibits H and I to the Dash Declaration. Fortress also agreed on other occasions to forbear from declaring the defendant trusts in default under the loan agreements and extended certain rights that were otherwise due to expire. See e.g Dash Exhs. J and K: December 20, 2005 Forbearance Agreement and Put Extension Agreement.

After Mr. Dash learned that Fortress had extended financing to Prescient he asked about payment of Prescient's fee.

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[4] See e.g. Dash Dec. Exh. G: April 18, 2005 electronic mail message from Fortress counsel Edward Prokop to Robert Pryce, which was copied to Mr. Dash.

(Dash Dec. ¶ 11) The defendants' representatives failed to pay it. Prescient therefore retained counsel to press its demands. The result was this lawsuit.

Proceedings to Date in this Action

Prescient Commenced this action by complaint dated July 11, 2005. (Altman Dec. ¶ 2) The defendants did not answer the complaint. (Id. at ¶ 3) Instead, they sought extensions of their time to answer, then indicated their intention to move to dismiss the action for lack of personal jurisdiction over them. (Id.) Prescient therefore began to take jurisdictional discovery in late 2005. However, that discovery was soon brought to a halt by defendants' counsel's withdrawal from this action. In early 2006, defendants' new counsel, Wachtel & Masyr, informed Prescient and the Court that the defendants would not proceed with their motion to dismiss for lack of personal jurisdiction. The Court therefore executed a case management plan and counsel commenced litigation of the merits.

Prescient served an amended complaint in mid-February 2006 in order to add MJ-ATV as a party defendant. (Altman Dec. ¶ 4 and Exh. L thereto) Shortly thereafter the defendants moved to dismiss the complaint notwithstanding the Court's expressed doubts about the motion. (Id.) To this day, less than a month before the current discovery deadline, the defendants have therefore managed to avoid answering the complaint.

In the meantime, the parties served discovery notices on each other and subpoenas on nonparties. (Altman Dec. ¶ 5 ff.)

Among the first subpoenas were those directed to Fortress Investment Group and related entities. The Fortress entities had produced some 1,600 pages of documents in jurisdictional discovery in late 2005. (Altman Dec. ¶ 5) However, they stubbornly resisted compliance with the new subpoenas. (Id. at ¶¶ 6-10 and exhibits) They asserted unreasonable objections, delayed their document production and deposition, and initially produced only a small handful of documents. (Id.) After counsel communicated with the Court regarding those matters, the Fortress entities agreed to a March 30, 2006 deposition date. They produced 5,000 more pages of documents the night before and day of that deposition and 9,000 more documents on April 3.

The documents that Fortress belatedly produced and the testimony of its first witness showed that Fortress is in the process of extending substantial additional financing to MJ-ATV and MJPT. Among them are offers for $300,000,000 of financing. (Altman Dec. ¶ 10 and Exh. T) However, those documents also indicate that the defendants have established a new Delaware trust, the New Horizon Trust, and that they plan to transfer their valuable assets to it. (Id. at ¶¶ 10-11 and Exhs. T and U thereto)

ARGUMENT

I. PRESCIENT SHOULD BE ALLOWED TO AMEND ITS COMPLAINT.

Fed.R.Civ.P. 15(a) provides, in pertinent part, that ". . . a party may amend the party's pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires." "A liberal pro-amendment ethos dominates the intent and judicial construction of Rule 15(a)." 3 Moore's Federal Practice at ¶ 15.14[1] (1997). As the Court of Appeals for the Second Circuit stated in Rachman Bag Co. v. Liberty Mutual Ins. Co., 46 F.3d 230, 234-35 (2nd Cir. 1995), in upholding leave to amend an answer more than four years after commencement of an action:

> . . . Rule 15(a) specifies that "leave shall be freely given when justice so requires." Id. The Supreme Court has emphasized that amendment should normally be permitted, and has stated that refusal to grant leave without justification is "inconsistent with the spirit of the Federal Rules." Foman v. Davis, 371 U.S. 178, 182, 83 S.Ct. 227, 230 (1962). Accordingly,
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> > [i]n the absence of any apparent or declared reason -- such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party . . ., etc. -- the leave sought should as the rules require, be "freely given."
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> Id. Delay alone unaccompanied by such a "declared reason" does not usually warrant denial of leave to amend.

See also Nerney v. Valente & Sons Repair Shop, 66 F.3d 25, 28-29 (2nd Cir. 1995) (reversing denial of leave to amend).

Leave should be granted Prescient to file a second

amended complaint (Altman Dec. Exh. X) because it has just become aware of MJPT's and MJ-ATV's plans to convey their assets to New Horizon and nobody will be unfairly prejudiced by the (pre-answer) amendment. Those transfers constitute fraudulent conveyances pursuant to several sections of the Debtor Creditor Law (the "DCL"). DCL § 276 provides that [e]very conveyance made . . . with actual intent . . . to hinder, delay, or defraud either present or future creditors, is fraudulent . . ."[5] The defendants' fraudulent intent can be inferred from the circumstances. As the court recited in Citibank v. Benedict, 2000 WL 322785 at * 10-11 (S.D.N.Y. 2000):

> [t]he pleader is allowed to rely on badges of fraud . . . circumstances so commonly associated with fraudulent transfers that their presence gives rise to an inference of intent." Wall Street Assoc. v. Brodsky, 257 A.D.2d 526, 684 N.Y.S.2d 244, 247 (App. Div. 1999) (citations omitted). These badges of fraud include:
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> > [A] close relationship between the parties to the alleged fraudulent transaction; a questionable transfer not in the usual course of business; inadequacy of consideration; the transferors' knowledge of the creditors' claim and the inability to pay it and retention of control of the property by the transferor after the conveyance.

The application of the relevant factors indicates that the defendants' transfers of assets to New Horizon are being effected with fraudulent intent. As beneficiaries of New Horizon, the defendants obviously have a "close relationship" with it. The transfers are certainly not made in the usual

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[5] Delaware and California have similar provisions. See 6 Del. Code § 1301 et seq.; Cal Civ. Code § 3439.01 et seq.

course of their business. MJPT and MJ-ATV are apparently receiving no consideration from New Horizon in return for the transfers. They indisputably have knowledge of Prescient's and Perfect Circle's claims in this action. The transfers will leave MJPT and MJ-ATV unable to pay any judgment that Prescient obtains. As trust beneficiaries they will retain some control over those assets, which New Horizon apparently will maintain for their benefit. Additionally, the defendants and their lender, Fortress, have planned the transfers to New Horizon in secrecy. Fortress stubbornly resisted discovery of it. Application of the factors therefore indicates that the transfers to New Horizon are fraudulent conveyances.

The imminent transfers to New Horizon also promise to constitute fraudulent conveyances pursuant to DCL §§ 273 and 273-a. Section 273 governs transactions not for fair value or not in good faith that render a debtor insolvent. Section 273-a provides that "[e]very conveyance made without fair consideration when the person making it is a defendant in an action for money damages . . . is fraudulent as to the plaintiff in that action without regard to the actual intent of the defendant if, after final judgment for the plaintiff, the defendant fails to satisfy the judgment."[6] Pursuant to each of those Sections, the determination of "fair value" is made from the creditors' point of view: if the exchange will render assets more difficult for

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[6] See Berner Trucking v. Brown, 281 A.D.2d 924, 722 N.Y.S.2d 656, 658 (4th Dep't 2001).

the creditor to reach, then the value is not "fair."[7] Defendants MJPT and MJ-ATV obviously created New Horizon long after Prescient filed its claim. The transfers will certainly render those trusts insolvent. They are therefore fraudulent conveyances pursuant to DCL § 273. When, as appears virtually certain if the transfers are allowed to proceed, those defendants fail to pay any judgment that Prescient obtains, those transfers will also become fraudulent pursuant to DCL § 273-a.

II. THE DEFENDANTS SHOULD BE ENJOINED FROM DISSIPATING MJPT'S AND MJ-ATV'S ASSETS.

A. Preliminary Injunctive Relief Is Appropriate to Prevent the Defendants' Fraudulent Conveyances.

Federal courts may issue preliminary injunctions with notice to the affected parties pursuant to Fed.R.Civ.P. 65(a). Pursuant to Rule 65(b), they may issue temporary restraining orders without notice to the adverse parties where they show that the applicant will suffer immediate and irreparable harm before the adverse parties can be heard or the applicant's attorney certifies that he has attempted to provide notice to the adverse parties.

The courts may grant preliminary relief to prevent defendants from frustrating the collection of potential judgments through fraudulent conveyances. "A preliminary injunction may issue to preserve assets as security for a potential monetary judgment where the evidence shows that a party intends to

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[7] See Interpool Ltd. v. Patterson, 890 F. Supp. 259, 267 (S.D.N.Y. 1995).

frustrate any judgment on the merits by making it uncollectible.'" Bank of China v. NBM LLC, 192 F. Supp.2d 183, 191-92 (S.D.N.Y. 2002), quoting Pashaian v. Eccelston Properties, Inc., supra, 88 F.3d at 86-87. See also Citibank v. Benedict, 2000 WL 322785 at * 16 (S.D.N.Y. 2000) (same). Additionally, DCL § 279 specifically provides for court-imposed restraints of fraudulent conveyances. Pursuant to that Section:

> Where a conveyance made or obligation incurred is fraudulent as to a creditor whose claim has not matured he may proceed in a court of competent jurisdiction against any person against whom he could have proceeded had his claim matured, and the court may:
>
> a. Restrain the defendant from disposing of his property, . . .
>
> c. Set aside the conveyance or annul the obligation, or
>
> d. Make any order which the circumstances of the case may require.

B. The Instant Circumstances Warrant Preliminary Relief.

i. The Preliminary Injunction Standards Favor Prescient.

The standards for determining a preliminary injunction or TRO motion are well established. As the court recited in Bank of China v. NBM LLC, supra, 192 F. Supp.2d at 191-92:

> To justify the issuance of a preliminary injunction, the movant bears the burden of proving: (1) absent injunctive relief, it is likely to suffer irreparable injury; and (2) either it is likely to succeed on the merits, or there are "sufficiently serious questions going to the merits to make them a fair ground for litigation, and that the balance of hardships tips decidedly in favor of the moving party." [citations omitted]

Prescient is likely to suffer irreparable injury absent the preliminary relief it seeks because the defendants will otherwise fraudulently convey their assets and thereby render themselves judgment proof. Attempts to frustrate future judgments by making them uncollectible constitute irreparable harm. Pashaian v. Eccelston Properties, supra, 88 F.3d at 86-87. For that reason, where a "plaintiff asserts a claim for fraudulent conveyance, the irreparable injury and success on the merits prongs merge." Citibank v. Benedict, supra, 2000 WL 322785 at * 16. As shown above, Prescient is highly likely to succeed on the merits of its fraudulent conveyance claim.

Prescient is also likely to succeed on the merits of its contract claim. It indisputably has a written contract with MJPT, and also has one with MJ-ATV, that provides for a nine percent fee upon the "commitment" to or "funding" of financing.[8] Fortress expressly "committed" to lend $330,000,000 to MJPT (really, both trusts) through its February 1, 2005 commitment letter. (Dash Exh. F) Thereafter Fortress entered into additional agreements with the defendant trusts and advanced moneys to them. Documentary evidence shows that they are on the

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[8] Although defendants have argued in their motion to dismiss that MJ-ATV is not a party to that agreement, the mistaken omission of that name from the contract is insignificant where, as here, the plaintiff can show that the parties intended both trusts to be parties. See e.g. Page v. U.S., 49 Fed.Cl. 521, 524 (Ct. Cl. 2001); Skyline Enterprises of N.Y. Corp. v. Amuram Realty Co., 288 A.D.2d 292, 732 N.Y.S.2d 881 (2d Dep't 2001); and Mail & Express Co. v. Parker Axles, Inc., 204 A.D. 327, 198 N.Y.S. 20 (1st Dep't 1923) (misnomer in contract of no import).

verge of agreeing to a new $300,000,000 refinancing. (Altman Dec. ¶ 10-11 and Exh. T) Certainly the defendants owe Prescient substantial fees as a result of those commitments and fundings.

Finally, though Prescient need not show it in light of the other two factors, the balance of hardships does not favor the defendants. Although honoring their obligations will no doubt be inconvenient for them, they can certainly refinance their loans without fraudulently conveying their assets to a new trust. By contrast, the defendants' transfers of assets to New Horizon and beyond that entity are likely to render them judgment proof. That situation is particularly sensitive where, as here, the individual defendant, who controls the defendant trusts, has apparently moved overseas. In this Court, Prescient's right to enforce a judgment should outweigh the "New Horizon" that Mr. Jackson seeks without the burden of some of his creditors.

ii. The Defendants' Defenses to This Action Are Meritless.

As set forth in more detail in Prescient's memorandum in opposition to defendants' motion to dismiss the complaint (Altman Dec. Exh. M), the defenses that the defendants have asserted in this action are meritless. They assert that Prescient does not have standing to enforce the Agreement because it was not yet incorporated when the parties entered into the Agreement. Yet, as accurately comprehended, that circumstance could as a practical matter not extinguish their liability but rather could at most render them liable to Darien Dash rather

than Prescient.[9] In fact, Prescient is the proper party to enforce the Agreement. (Altman Dec. Exh. M at pp. 6-10) Prescient's extremely high likelihood of success on its contract claim -- or any part of it[10] -- alone, together with that of its fraudulent conveyance claim, amply justifies the preliminary relief that it seeks.

Though not necessary for purposes of this motion, Prescient has also asserted a viable quantum meruit claim as an alternative to its contract claim. Defendants' contention, that that claim is barred by the statute of frauds and by the Agreement, should be rejected. (See Altman Dec. Exh. M at pp. 12-14. The statute of frauds argument is meritless because the Agreement satisfies the statute even if it somehow is held not to be enforceable as a contract. (Id.) That argument is also meritless because it depends on the application of New York law. Although the Agreement provides that New York law will govern its interpretation, that choice of law provision by its terms is inapplicable to Prescient's quantum meruit claim. The law of the State of California (where Michael Jackson and his agents reside and from which they engaged in much of their relevant conduct) does not require "finders' fee" or "introduction" agreements to

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[9] Altman Dec. Exh. M: Prescient's opposition brief at p. 6.

[10] Prescient is likely to succeed on its claims against both MJPT and MJ-ATV. See Altman Dec. Exh. M at pp. 11-12; Dash Dec. ¶¶ 3-6 and Exhs. C, D and E thereto. However, any success against either of them would implicate the challenged fraudulent transfers.

be memorialized in writing. See e.g. Cal.Civ.Code § 1624 (California Statute of Frauds). The same is true of the law of the State of New Jersey, where Darien Dash and Prescient reside and from which Prescient conducted some of its performance.[11] Thus, even if the defendants could somehow avoid the Agreement, they cannot escape liability for the services that Prescient performed for them.

CONCLUSION

For the foregoing reasons, Prescient's motion for leave to amend the complaint and for preliminary relief enjoining the defendants from dissipating their assets should be granted.

Dated: New York, New York
April 3, 2006

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[11] See N.J.S.A. 25:1-5 et seq.; Around the World Merchandisers v. Rayovac Corp., 585 A.2d 437, 439-40 (N.J. Super. 1990), quoting 72 Am.Jur.2d Statute of Frauds.