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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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

Plaintiff,

05 Civ. 6298 (PKC)(AJP)

v.

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

Defendants.

PLAINTIFF'S REPLY MEMORANDUM OF LAW IN FURTHER 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 reply memorandum of law in further 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 initial April 3, 2006 declarations of Darien Dash (the "Dash Declaration") and Steven Altman (the "Altman Declaration"), the accompanying reply declarations of Steven Altman and Darien Dash (the "Altman Reply Declaration" and "Dash Reply Declaration," respectively), and the exhibits thereto.

In their opposition papers the defendants do not come close to rebutting Prescient's showing that it is entitled to a preliminary injunction. Their central contention, that their proposed asset transfers will not impair Prescient's ability to enforce a judgment against them, is emphatically and demonstrably false. The defendants admit that the very purpose and

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effect of the transfers is to remove their assets from their own potential bankruptcy estates. That admission alone establishes that they are fraudulent conveyances because it shows that the transfers are intended to and will diminish Prescient's ability to enforce its judgment in the event of bankruptcy. Yet the defendants' proposed impairment of Prescient's rights is in fact not limited to the circumstance of the defendants' future bankruptcies. If the assets are effectively removed from the defendants' potential bankruptcy estates then judgment creditors cannot attach them absent a bankruptcy. Prescient's only effective remedy is therefore the one that it presently seeks to employ: an application to enjoin and/or set aside the fraudulent conveyances.

Defendants' backhanded argument that Prescient is unlikely to succeed on the merits of its contract claim is also meritless. The defendants assert at the outset of their papers that Prescient's motion is a gambit to force a settlement before its claims are dismissed. Yet the only defenses that they have asserted to Prescient's claims are manifestly inadequate. The defendants' main defense, that they can avoid payment according to the terms of the contract because Prescient had not yet been formally incorporated when it was executed, is preposterous. The most that the defendants could conceivably achieve through that argument would be to replace Prescient with its principal as the plaintiff herein. Even that result is highly unlikely.

Additionally -- though Prescient need not show it -- the balance of equities does not favor the defendants. The defendants admit that many lenders are clamoring to extend to them the financing that they seek. They do not even contend that their proposed transfers are necessary to obtain that financing. Due to the value of the collateral the defendants are posting, which far exceeds the loans they seek, Prescient's claims are immaterial to the terms of the financing that lenders will offer them.

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ARGUMENT

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

A. Factual Disputes Do Not Prevent Preliminary Relief.

Appropriately enough, defendants begin the argument section of their brief with a misstatement of law. Quoting an outdated New York state case, DeLury v. City of New York, 48 A.D.2d 595, 596-97, 378 N.Y.S.2d 49, 50-51 (1st Dep't 1975), they assert that a plaintiff must prove an "undisputed" right in order to obtain preliminary relief. That quotation does not reflect federal law. Nor does it even accurately recite New York state law. As stated in the 1996 supplement to Vincent Alexander's commentary at 7B McKinney's CPLR § C6312:5:

> A new subdivision (c) was added to CPLR 6312 (effective January 1, 1997) to make clear that the existence of an issue of fact on a motion for a preliminary injunction is not, standing alone, a sufficient basis for denial of the motion. The amendment was considered necessary to overcome the language of several judicial opinions to the effect that preliminary injunctive relief must be denied whenever there exists a "sharp issue of fact." [citations omitted]
>
> The approach suggested by the caselaw, however, is neither mandated by Article 63 of the CPLR nor consistent with the authority conferred by CPLR 2218 for the convening of a hearing to resolve disputed issues of fact that arise in connection with a motion. (The motion for a preliminary injunction is not, after all, a motion for summary judgment.)[1]

In any event, the facts material to this motion are really not in dispute. It is undisputed that Prescient or its principal entered into a written agreement with at least one (and Prescient alleges two) of the defendants. The defendants have not denied that Prescient found financing for the defendants through Fortress Investment Group. They now admit that Fortress is about to lend them $300,000,000. Prescient is entitled to nine percent of that amount, plus other amounts already earned, pursuant to the contract. Finally, as shown below, the defendants do not

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[1] The more recent caselaw, as well as most of the old caselaw, is of course in accord with that explication of the law. See e.g. Four Times Square Assocs. v. Cigna Investments, Inc., 306 A.D.2d 4, 764 N.Y.S.2d 1, 2-3 (1st Dep't 2003); Stylmark Holdings Ltd. v. Silicone Zone Int'l Ltd., 5 Misc.3d 285, 783 N.Y.S.2d 758, 770 (S. Ct. N.Y. Co. 2004).

effectively contest Prescient's showing that their transfers to New Horizon constitute fraudulent conveyances. Thus, although the law clearly does not require such a high standard of proof, Prescient has in fact decisively shown that it is entitled to the relief it seeks.

B. Prescient Meets the Requirements for Grant of a Preliminary Injunction.

i. Prescient Has Shown Irreparable Harm and Likelihood of Success on Its Fraudulent Conveyance Claims.

As shown in Prescient's initial papers, a conveyance is fraudulent if either it is made without fair consideration and renders the debtor/defendant insolvent or it is intended to hinder creditors.[2] The law does not require a plaintiff to show both intent and insolvency/lack of consideration, as defendants seem to suggest.[3] None of the defendants' cases supports that suggestion. Indeed, a careful reading of one of those cases, Nirvana Restaurant v. Paul's Landmark, Inc., 337 B.R. 495, 501 (S.D.N.Y. 2006), shows that the court stated that very rule. In Prudential Sav. Bank v. Grant, 99 N.Y.S.2d 602, 603 (S. Ct. N.Y. Co. 1950), the court recited that fraudulent conveyances "as a matter of law" (that is, not requiring intent, pursuant to DCL § 273) require the transfer to render the debtor insolvent or unable to pay its debt to the plaintiff. It also stated that for fraudulent conveyances "as a matter of fact" (those requiring intent alone, pursuant to DCL § 276), actual intent is required. Neither kind of claim requires both elements.

The issue of whether a debtor/defendant received "fair consideration" for a transfer is determined from the creditors' point of view. If the exchange will render the assets more difficult for the creditor to reach, then the value is not "fair" regardless of whether the defendant or debtor obtains value in the exchange from its point of view. See Interpool Ltd. v. Patterson, 890 F. Supp. 259, 267 (S.D.N.Y. 1995) and cases cited therein. Therefore, where a

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[2] See plaintiffs' initial memorandum of law at pp. 10-11 and authorities cited therein. Sections 273, 273-a, and 276 of the Debtor-Creditor Law (the "DCL") make that distinction clear.

[3] See defendants' opposition brief at p. 4.

debtor or defendant transfers his assets to a trust in exchange for an interest in the trust, he can be deemed to have received "fair value" only if the plaintiffs/creditors could just as easily collect a judgment against the defendant/debtor after the transfer as they could before the transfer. Id. The law could hardly be otherwise. Transfer of assets to a trust or partnership is a classic method of fraudulent conveyance. A failure to prohibit it would leave a gigantic loophole in the law.

The defendants' factual presentation only confirms that the transfer of their assets to New Horizon is an intentional fraudulent conveyance and that it will cause Prescient irreparable harm. They admit that they are transferring substantially all of MJPT's and MJ-ATV's assets to New Horizon.[4] Prescient will therefore not be able to levy on those assets if it obtains a judgment against those defendants.[5]

In place of those real assets MJPT and MJ-ATV will obtain interests in New Horizon. (Terblanche Dec. ¶ 18) However, the defendants effectively admit that the very purpose and effect of New Horizon is to ensure that MJPT's and MJ-ATV's creditors cannot reach the assets in New Horizon's hands. Specifically, they admit that those assets would not likely be "consolidated with the assets and liabilities of New Horizon" in a bankruptcy and that New Horizon would be "shielded from the subsequent bankruptcy" of those defendants. (Id. at ¶¶ 9, 22) That is simply another way of saying that the defendants' creditors will not be able to attach those assets. Certainly they would not be able to do so in a bankruptcy; that is the admitted purpose and effect of the transfer. That alone negates "fair value" because it makes the assets less available to satisfy any judgment Prescient obtains, at least in the event of bankruptcy.

The same is true without a bankruptcy: if, as the defendants admit, a bankruptcy

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[4] See April 7, 2006 declaration of Villiers Terblanche (the "Terblanche Declaration") at ¶¶ 12, 17. See also Altman Reply Dec. at ¶ 7-8 and Exh. BB-FF thereto.

[5] Prescient would be able to levy on the assets in the defendants' hands -- that is, if they do not transfer them to New Horizon -- because their value far exceeds the liens on them. See Altman Reply Dec. ¶¶ 15-17 and Exhs. GG, NN-PP; and Dash Dec. Exhs. D-F: value of assets exceeds $1,000,000,000.

trustee could not attach those assets after their transfer, then neither could a judgment creditor of MJPT and MJ-ATV (e.g. Prescient) do so. A bankruptcy trustee has the rights of the debtor himself and of a judgment lien creditor to the debtor's putative property. See Gaylord Grain v. Burns, 306 B.R. 624, 629-29 (8th Cir. 2004); Leasing Consultants Inc. v. Feldman, 592 F.2d 103, 108 (2d Cir. 1979). Judgment creditors also have only the rights of (or "stand in the shoes of") their debtors. Vantrel Enterprises v. Citibank, NA, 272 A.D.2d 609, 708 N.Y.S.2d 452, 453 (2d Dep't 2000). It is therefore a contradiction to say, as do the defendants, that the transferred assets would not be part of a bankruptcy estate but would be available to Prescient if it won a judgment. "Bankruptcy remote" means "creditor remote" or in this case, "Prescient remote."[6] Prescient's only satisfactory remedy is therefore a fraudulent conveyance claim.

Defendants' assertion, that Prescient at one time also proposed a "bankruptcy remote" entity, is a red herring. A bankruptcy remote entity is not per se wrongful. The transfer of assets to such an entity may be appropriate if the transferor satisfies or otherwise fully provides for any existing debts and claims. However where, as here, it leaves those debts and claims behind without secure provision for their payment, it constitutes a fraudulent transfer.

The proposed refinancing does not, as defendants contend,[7] benefit Prescient by eliminating the risk of "imminent" foreclosure on the existing loans and providing for a lower interest rate. Those benefits obviously help the defendants but at the cost of defrauding Prescient. Further, the defendants overstate in several ways the risk of foreclosure on the present loans absent Prescient's involuntary sacrifice. The fact that the loans are technically in default is hardly startling because they have been in default for at least a year now. They were in default when Fortress obtained the loans. (SA Reply Dec. at ¶¶ 16-17 and Exhs. QQ and RR; Dash Dec.

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[6] Indeed, the evidence indicates that two of the purposes of the New Horizon arrangement are to ensure that Prescient itself cannot impair the defendants' assets by enforcing a judgment against them and to favor one creditor, Mr. Jackson's former attorney and business manager John Branca. See Altman Reply Dec. ¶¶ 10-13 and Exhs. GG-MM thereto.

[7] Terblanche Dec. at ¶ 24.

Exh. K at Recital E) BOA and Fortress have therefore repeatedly forborne from defaulting the defendants. (Dash Dec. Exh. J; Altman Reply Dec. at ¶¶ 16-17) They have done so because the value of the collateral -- largely the Beatles and Michael Jackson song libraries -- far exceeds the sum of the loans and the lenders are earning huge sums on those loans. (See fn. 5 above.) That is, of course, also why so many lenders, including most recently Fortress and Citigroup, are clamoring to refinance those loans (Terblanche Dec. ¶¶ 7, 14). In sum, the defendants will easily be able to obtain the financing they desire without defrauding Prescient.

The case is quite similar to Interpool Limited, supra, an authority that the defendants neglected to address in their papers.[8] There the defendant judgment debtor transferred his assets to a limited partnership and then transferred his partnership interest to a family trust. The court held that the first step of that scheme -- the transfer of the defendant's assets to the partnership in exchange for an interest in the partnership -- was itself a fraudulent conveyance. The reason for that holding was that "[c]reditors can reach only [the defendant's] receipt of whatever distributions that the partnership . . . chooses to make, but cannot reach his rights reach his rights in specific partnership property . . ." Id., 890 F. Supp. at 267. Much the same is true in the case at bar, as the defendants' real assets will be replaced by interests in a trust the very purpose and effect of which is to avoid Prescient and other creditors.

ii. The Authorities that the Defendants Cite Do Not Undermine Prescient's Application.

The defendants' cases are inapposite. Both Chemical Bank v. Haseotes, 13 F.3d 569 (2d Cir. 1994) and Vantico Holdings SA v. Apollo Mgt., 247 F. Supp.2d 437 (S.D.N.Y. 2003) involved applications for mandatory preliminary relief, which requires a higher standard of proof than the prohibitory relief that Prescient seeks. See Chemical Bank, 13 F.3d at 572-73; Vantico Holdings, 247 F. Supp.2d at 451 (explaining differing standards). In Chemical Bank, the court affirmed a finding that the challenged transaction was not intended to put assets out of the

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8 Prescient cited that case at p. 12, fn. 7 of its initial brief.

reach of creditors. 13 F.3d at 573. Yet that is exactly the thing that the defendants intend to do in the instant action. Shuster v. Nassau County, 948 F. supp. 282 (S.D.N.Y. 1996) was also decided under heightened standards because the plaintiff sought a preliminary injunction against governmental action. Id., 948 F. Supp. at 284. There the plaintiff, an obvious crackpot, had received fifty-five driving suspensions for failures to respond to summonses. In denying his motion to enjoin the police from arresting him, the court found that he showed no likelihood of imminent arrest (harm) and that he was unlikely to succeed on the merits of his claims. Id.

In Lippe v. Bairnco Corp., 249 F. Supp.2d 357 (S.D.N.Y. 2003), the court noted the distinction between DCL 276, for which the plaintiff need not prove the defendant's insolvency or inability to satisfy a debt, and DCL 273, for which it need not prove intent. Id. 249 F. Supp.2d at 374-76. The court added, rather unremarkably, that the plaintiff must show it was damaged by the conveyance: that is, that the conveyance diminished the assets available to the creditors. Prescient has shown just that. And in Moore v. Consolidated Edison Co., 409 F.3d 506 (2d Cir. 2005), the court affirmed denial of a preliminary injunction where plaintiff's injuries were compensible in money-damages. The plaintiff made no showing that defendant Con Ed might render itself judgment proof through fraudulent transfers or otherwise. All of those cases are, to put it mildly, distinguishable from the case at bar.

iii. Prescient Has Shown A Likelihood of Success on Its Contract Claims.

The defendants mount only a conclusory rebuttal of Prescient's showing that it is likely to succeed on the merits of its contract claim. Indeed, they criticize Prescient's argument of the issue as a clandestine "sur-reply" brief in further opposition of their pending motion to dismiss, as if it were improper even to address the matter on this motion. Prescient amply shows in its initial papers that its contract claim is very strong. The defendants have not shown otherwise. Indeed, their papers add to the strength of Prescient's claim because in them they admit that Fortress will be extending $300,000,000 in financing to the defendants very soon. Prescient is of course entitled to nine percent of those moneys pursuant to its written contract.

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iv. The Balance of Equities Tips in Prescient's Favor.

In contrast to the obvious harm that Prescient will suffer if the defendants are allowed to proceed with their fraudulent transfers, the defendants have not shown that an injunction will harm them. They will obtain the financing that they desire, and probably from Fortress, the very lender that Prescient found for them. They will obtain that financing because the collateral at their disposal is more than sufficient to secure them and to pay Prescient's judgment. The defendants do not contend that the transfers are necessary (as opposed to convenient) to their refinancing. Because the defendants' collateral is so ample, Prescient's claim is not even material to the loan transactions.

C. Prescient Should Not Be Required to Post a Bond.

Prescient should not be required to post a bond as a condition of a grant of its motion because (1) the defendants have not shown that they will be harmed by an injunction and (2) Prescient cannot afford a substantial bond. Courts have wide discretion in determining whether to require a bond upon the grant of a preliminary injunction. Doctor's Assocs. v. Stuart, 85 F.3d 975, 985 (2d Cir. 1996). They need not do so if the defendants do not prove that they will likely be harmed by the injunction. Id.; Interlink Int'l Fin. Svces. v. Block, 145 F. Supp.2d 312, 314-05 (S.D.N.Y. 2001). Courts can also decline to require a bond where the plaintiff's inability to post one would frustrate relief he deserves. See Kamine/Besicorp Allegany LP v. Rochester Gas & Elec. Corp., 908 F. Supp. 1180, 1194 (W.D.N.Y. 1995). As shown above, defendants have not proven that they will be substantially harmed by a preliminary injunction. Prescient is also not in a position to post a substantial bond. (See Dash Reply Aff. at ¶¶ 2-3) It should therefore be waived.

If the defendants really believed that the proposed injunction will harm them then they should offer to post a bond to secure Prescient's future judgment against them. The defendants could then transfer all of their assets to New Horizon and to Bahrain without

defrauding Prescient. They should be required to do so as a condition of any denial of Prescient's motion.

II. PRESCIENT SHOULD BE ALLOWED TO AMEND ITS COMPLAINT.

For many of the same reasons why Prescient's application for preliminary relief should be granted, Prescient should also be granted leave to amend its complaint. As shown above and in Prescient's initial motion papers, it states viable claims against the existing defendants and New Horizon in its proposed second amended complaint. The defendants have not even explicitly opposed that part of Prescient's application.

CONCLUSION

For the foregoing reasons, and those set forth in Prescient's initial motion papers, 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 10, 2006

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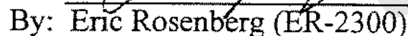

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