REPORT

Prepared By

Richard F. Broude, Esq.

Prepared on behalf of Plaintiff
Prescient Acquisition Group, Inc.

Prescient Acquisition Group, Inc., Plaintiff,
v. MJ Publishing Trust et al., Defendants

United States District Court
Southern District of New York
Case No. 05 Civ. 6298 (PKC)

October 23, 2006

PROFESSIONAL QUALIFICATIONS

I am an attorney at law licensed in the States of New York, California and Illinois. I have more than 40 years of experience, of which more than 30 have been spent specializing in business bankruptcy and financial restructuring, both in and out of court, and in creditors' rights generally. I am a member of the National Bankruptcy Conference, the American Law Institute and the American College of Bankruptcy, and was Co-Chair of the Insolvency and Creditors' Rights Committee of the International Bar Association. I have written and lectured extensively in the field, and am the author of "Reorganizations Under Chapter 11 of the Bankruptcy Code," first published by Law Journal Press in 1986 and supplemented twice yearly. I am also a Member of the Board of Editors (as well as a contributing editor, authoring chapters on the Bankruptcy Court System, Jurisdiction, Venue and Appeals) of COLLIER ON BANKRUPTCY, the leading bankruptcy treatise.

From 1966 through 1971, I was a full-time professor at the University of Nebraska School of Law and then at Georgetown Law Center. I have been a part-time professor almost continuously since then, teaching courses in Bankruptcy and Creditors' Rights and Real Estate Finance. For the past five years I have taught a course entitled "Mass Tort Bankruptcy" in the St. John's Law School's Masters Degree in Bankruptcy program.

Attached as Exhibit 1 is a true and correct copy of my current curriculum vitae, which sets forth my education, professional affiliations and teaching positions, as well as the information required by Fed. R. Civ. P. 26(a)(2)(B).

I am being compensated at the rate of $650 per hour for all activities involved in this engagement. My fees are not contingent on the outcome of this matter.

SCOPE OF ENGAGEMENT

I have been asked by counsel to Prescient Acquisition Group ("Prescient") to render an opinion regarding whether the transfer of certain property by MJ Publishing Trust and MJ-ATV Publishing Trust to New Horizon Trust was a fraudulent conveyance under and pursuant to applicable New York and Delaware law.

In forming my opinion, I have reviewed some of the pleadings filed and depositions taken in the instant action as well as many of the documents that were exhibits to the depositions. A complete list of the documents that I have reviewed is attached hereto as Exhibit 2. In addition, I am conversant with and have read and re-read significant portions of the literature and case law dealing with fraudulent conveyances.

OPINIONS AND UNDERLYING BASES

OPINION NO. 1 (ACTUAL FRAUD): THE TRANSFERS BY MJ PUBLISHING TRUST ("MJPT") AND MJ-ATV PUBLISHING TRUST ("ATVPT" AND, WITH MJPT, THE "TRUSTS") TO NEW HORIZON TRUST ("NEW HORIZON") APPEAR, BASED ON THE GOVERNING STATUTES AND CASE LAW, TO HAVE BEEN MADE WITH ACTUAL INTENT TO HINDER, DELAY OR DEFRAUD CREDITORS.

Statutory Background

Among the panoply of weapons available to creditors is the right to undo certain transfers made by their debtors. A frequently litigated example of this avoidance right goes by the rubric "fraudulent conveyance" or "fraudulent transfer", a type of transfer that has been condemned since 1571. Peter Alces and Luther Dorr, Jr., *A Critical Analysis of the New Uniform Fraudulent Transfer Act*, 1985 U. Ill. L. Rev. 527. As modernized and made relevant to current commercial conditions, the doctrine of fraudulent conveyance is the subject of two uniform statutes promulgated by the National Conference of Commissioners on Uniform State Laws. These are the Uniform Fraudulent Conveyance Act ("UFCA"), codified at sections 270-281 of the New York Debtor & Creditor Law (the "D&C Law"), and its successor, the Uniform Fraudulent Transfer Act ("UFTA"), codified in Delaware at 6 Del. Code § 1301 *et seq.*[1]

These statutes create two distinct types of fraudulent conveyance: those made by a debtor with the actual subjective intent to hinder, delay or defraud creditors, and those that are

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[1] Section 548 of the Bankruptcy Code, 11 U.S.C. § 548, is the bankruptcy version of the UFCA and UFTA. Cases under either of those two statutes are considered persuasive for purposes of interpreting section 548 and vice versa. *HBE Leasing Corp. v. Frank*, 48 F.3d 623, 638 (2d Cir. 1995); 5 COLLIER ON BANKRUPTCY ¶ 548.01[4] (15th ed Rev. 2006).

fraudulent in law; that is, where a transfer of the debtor's property is made at a time when the debtor is subject to certain defined financial circumstances and the transferee does not fairly compensate the transferor for the property transferred. The so-called "actual intent" transfer is the subject of this portion of this Report.[2]

Section 276 of the D&C Law provides that:

> "Every conveyance made and every obligation incurred with actual intent, as distinguished from intent presumed in law, to hinder, delay, or defraud either present or future creditors, is fraudulent as to both present and future creditors."

6 Del. Code § 1304 (copied verbatim from section 4 of the UFTA) contains similar language, but puts some meat on the bones:

> "(a) A transfer made or obligation incurred by a debtor is fraudulent as to a creditor, whether the creditor's claim arose before or after the transfer was made or the obligation was incurred, if the debtor made the transfer or incurred the obligation: (1) With actual intent to hinder delay or defraud any creditor of the debtor; . . ..
>
> "(b) In determining actual intent under subsection (a)(1), consideration may be given, among other factors, to whether:
>
> (1) The transferor obligation was to an insider;
> (2) The debtor retained possession or control of the property transferred after the transfer;
> (3) The transfer or obligation was disclosed or concealed;
> (4) Before the transfer was made or obligation was incurred, the debtor had been sued or threatened with suit;
> (5) The transfer was of substantially all of the debtor's assets;
> (6) The debtor absconded;
> (7) The debtor removed or concealed assets;
> (8) The value of the consideration received by the debtor was reasonably equivalent to the value of the asset transferred or the amount of the obligation incurred;

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[2] The so-called "constructively fraudulent" transfer is the subject of the second portion of this Report.

(9) The debtor was insolvent or became insolvent shortly after the transfer was mode or the obligation was incurred;
(10) The transfer occurred shortly before or shortly after a substantial debt was incurred; and
(11) The transfer transferred the essential assets of the business to a lienor who transferred the assets to an insider of the debtor."

The Commissioners' Comment to section 4 of the UFTA notes that "[t]he list of factors in [section 4(b)] includes most of the badges of fraud that have been recognized by the courts in construing and applying . . . § 7 of the Uniform Fraudulent Conveyance Act."

One further statute is relevant to the instant discussion. 12 Del. Code § 3805(b) provides that "No creditor of the beneficial owner [of a Delaware statutory trust] shall have any right to obtain possession of, or otherwise exercise legal or equitable remedies with respect to, the property of the statutory trust."

Factual Background

With these statutes as background, and noting that either New York or Delaware law might be applicable in the present case (an issue not addressed in this Report), the circumstances that led to the creation or New Horizon and the transfer to it of all or substantially all of the assets of the Trusts will now be reviewed.

MJPT, of which Michael J. Jackson ("MJJ") is the sole beneficiary, is a Delaware common law trust, the co-trustees of which are currently Katherine Jackson, MJJ's mother, and HH Sheik Abdullah Bin Hamed, a resident of the Kingdom of Bahrain. Fourth Amended and Restated Trust Agreement dated as of March 31, 2006, which is Tab 9 of Binder 1 of the Closing Documentation to the Fortress loans, which is Exhibit 1 to the Deposition of Michael J. Jackson (the "Jackson Dep."). Section 10.2(b) of the Trust Agreement prohibits MJJ from selling,

transferring or assigning his beneficial interest in MJPT, while section 10.3 provides that nothing in the Trust Agreement is intended to confer any benefit upon third persons in, *inter alia*, the trust estate.

ATVPT is a Delaware statutory trust created pursuant to 12 Del. Code § 3801 et seq. MJJ is its beneficial owner. Amended and Restated Trust Agreement dated as of March 31, 2006, which is Tab 10 of Binder 1 of the Closing Documentation to the Fortress loans, which is Exhibit 1 to the Jackson Dep. Section 6.04 of the Amended and Restated Trust Agreement adopts 6 Del. Code § 3805, *supra*, in stating that "no creditor of any Owner shall have any right to obtain possession of or otherwise exercise legal or equitable remedies with respect to, the Trust Property . . .."

The sole trustee of New Horizon is Wells Fargo Delaware Trust Company. Amended and Restated Trust Agreement dated as of March 31, 2006, which is Tab 4 of the closing documents.

Before the transfer, by far the most important asset of MJPT was the so-called MIJAC catalog of music. Declaration of Villiers Terblanche ("Villiers Decl.), ¶ 2. Similarly, the most valuable asset of AVTPT before the transfer was a 50% interest in Sony/ATV, a Delaware limited liability company that owns valuable intellectual property including the music library of the Beatles. *Id.* (The MIJAC catalog, together with the interest in Sony/ATV, are hereinafter referred to as the "Assets".) MJJ is the owner of 100% of the beneficial interest in each of the Trusts. *Id.* The MIJAC catalog and the intellectual property of Sony/ATV are administered by third parties pursuant to a number of agreements and apparently generate a significant stream of revenue each year.

In 2004, the Assets were owned by the Trusts and were encumbered by security interests

in favor of Bank of America ("BOA") as security for loans totaling approximately $272 million. Villiers Decl. ¶¶ 3, 4. The loans were also secured by real property owned by MJJ and were guaranteed personally by him. In April 2005, MJJ and the Trusts were informed by BOA that the loans were in default. Jackson Dep., Exhibits 9 and 15. MJJ did not have the cash with which to pay off the loans. Jackson Dep., Day 2 at 6. Previously, MJPT had engaged Prescient to attempt to find or furnish replacement financing. Prescient alleges that it introduced MJJ and the Trusts to the Fortress group of companies ("Fortress") and is, under the terms of its agreement with MJPT, entitled to a fee. On or about May 3, 2005, the BOA loans were purchased by Fortress. Deposition of Constantine Dakolias, p. 10, Ex. 14, 15. Shortly thereafter, on May 25, 2005, MJJ accepted the resignation of one of the managers of ATVPT, removed the other managers (excepting himself), and appointed his mother, Catherine Jackson, as co-manager. Jackson Dep. Exh. 17. Ms. Jackson testified that this was done because MJJ "didn't trust many people and he just trust [sic] me." Deposition of Katherine Jackson, p. 20.

Pursuant to the New Advance Agreement dated May 25, 2005, among Fortress, MJJ and the Trusts, Fortress was given a right of last refusal, meaning that it had the right to match any financing offer made by another potential lender. Dakolias Dep., Ex. 24. Citibank subsequently made an offer acceptable to MJJ and the Trusts. This offer was matched by Fortress which, although it had previously contemplated that replacement loans would be made to the Trusts, instead adopted the Citibank proposal, which included the formation of a new statutory trust to take title to the Assets, *in toto*. Deposition of Daniel Gropper (the "Gropper Dep.), p. 57 *et seq*. Thus as part of the Fortress refinancing, the Assets were conveyed to New Horizon. Fortress made New Horizon a loan of $300 million secured by the Assets. The revenue streams from the

various operating agreements also serve as collateral for the loan, and all payments generated by those agreements are made into collateral accounts in which Fortress has a security interest. The real estate that had been part of the collateral for the BOA loans was released and MJJ was discharged from his guaranty. Another Fortress company made a separate loan, secured by the real estate, to MJJ as part of the overall Fortress refinancing transaction. Gropper Dep., pp. 90, 161.

The Fortress refinancing closed April 13, 2006, although almost all of the closing documents are dated as of March 31, 2006. Among the events that occurred at the closing was a payment to a certain John G. Branca and others associated with him, in settlement of pending claims. Branca claimed an interest in the assets of ATVPT.

As noted earlier, New Horizon is a Delaware statutory trust. MJPT has a 15% beneficial interest and ATVPT an 85% beneficial interest in New Horizon, apparently based upon the perceived values of the assets transferred to New Horizon by the Trusts. Section 3.3(a) of the New Horizon Amended and Restated Trust Agreement provides that, until the Fortress loan is paid off, the beneficial interests may not be sold, transferred or assigned (subject to certain exceptions not relevant here). With certain exceptions not relevant here, no distributions of New Horizon income may be made to the Trusts as beneficial owners until the Fortress loan has been paid off. Section 5.02(h) of the Credit and Security Agreement dated as of March 31, 2006, among New Horizon, The Lenders (the sole Lender as of March 31, 2006, was Fortress Credit Corp.), and Fortress Credit Corp. as Administrative Agent and Collateral Agent.

At the time the transfers to New Horizon were made, the Trusts and MJJ were defendants in a lawsuit (the "Prescient Action") filed by Prescient Acquisition Group, Inc. ("Prescient")

seeking a judgment of approximately $48 million. MJJ and the Trusts were aware as early as June 2005, that Prescient claimed it was entitled to fees of at least $30 million, based upon an engagement letter pursuant to which MJJ and MJPT had agreed to pay Prescient an advisory fee based upon monies funded or committed by lenders or investors introduced by Prescient. Prescient claims that Fortress satisfies the criteria of the engagement letter.

Other facts will be noted in the following discussion as they become relevant.

Discussion

It is frequently difficult to ascertain the subjective state of mind of a debtor accused of making an "actual intent" transfer. Debtors seldom if ever testify to having had an intention to hinder, delay or defraud creditors. However, "actual fraudulent intent . . . may be inferred from the circumstances surrounding the transaction . . .." *HBE Leasing Corp. v. Frank,* 48 F.2d 623, 639 (2d Cir. 1995). Consequently, the courts have looked for objective manifestations of intent–the so-called "badges of fraud"-- from which that subjective intent may be inferred. *White Rose Food v. Musdtafa,* 251 A.D.2d 653, 674 N.Y.S.2d 438 (2d Dept. 1998); *Kittay v. Flutie N.Y. Corp. (In re Flutie N.Y. Corp.),* 310 B.R. 31, 56 (Bankr. S.D.N.Y. 2004) (applying D&C Law § 276). Courts interpreting the UFCA have looked to certain repetitive factual settings to find those badges of fraud. In *Salomon v. Kaiser (In re Kaiser),* 722 F.2d 1574, 1582-1583 (2d Cir. 1983), a case interpreting both section 548 of the Bankruptcy Code, 11 U.S.C. § 548, and section 276 of the D&C Law, that court said that the badges of fraud may include:

"(1) the lack or inadequacy of consideration;[3] (2) the family,

[3] This factor may be taken into consideration by a court even though an "actual intent" transfer can be fraudulent "[e]ven where fair consideration is given in exchange for the debtor's property." *HBE, supra,* 48 F.3d at 634-635.

> friendship or close associate relationship between the parties; (3) the retention of possession, benefit or use of the property in question; (4) the financial condition of the party sought to be charged both before and after the transaction in question; (5) the existence or cumulative effect of a pattern or series of transactions or course of conduct after the incurring of debt, onset of financial difficulties, or pendency or threat of suits by creditors; and (6) the general chronology of the events and transactions under inquiry."

Section 4(b) of the UFTA, set out earlier in this Report, contains a list of indicia of actual intent. Even though neither the list contained in *Kaiser* nor in the UFTA is exclusive, it is instructive to go through them to determine those that are present in this case:

- At the time the transfers were made, MJJ and the Trusts were defendants in litigation seeking recovery of $48 million.
- The transfers were of substantially all of the assets of the Trusts.
- The value[4] of the consideration received by the Trusts was **not** reasonably equivalent to the value of the assets transferred.

The first two badges are obviously present and need no elucidation. The third badge is at once the most subtle and the most meaningful. First, the statutes make clear that it is sufficient to prove that a fraudulent conveyance has occurred if only one of the prerequisite requirements of actual intent to hinder, delay, or defraud creditors is present. *Atlanta Shipping Corp. v. Chemical Bank*, 631 F. Supp. 335, 347 (S,D,N,Y, 1986); 5 COLLIER ON BANKRUPTCY ¶ 548.04[1] (15th ed. Rev. 2006) (discussing section 548 of the Bankruptcy Code). Secondly, "the existence of a fair

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[4] "Value" is defined in Del. Code § 1303 in part as follows: "(a) Value is given for a transfer or an obligation if, in exchange for the transfer or obligation, property is transferred . . .." The Commissioners' Comment to this definition states that "'Value' is to be determined in light of the purpose of the Act to protect a debtor's estate from being depleted to the prejudice of the debtor's unsecured creditors."

exchange must be determined from the perspective of creditors rather than from the vantage point of the debtor." *Interpool Limited v. Patterson*, 890 F. Supp. 259, 267 (S.D.N.Y. 1995). Looking at the effect of the New Horizon transaction from the perspective of Prescient discloses the following: Prior to the transfers, a judgment in favor of Prescient against the Trusts would permit Prescient, as a judgment creditor, to execute upon the Assets–the music library and the 50% interest in Sony/ATV–of the Trusts, and perhaps interdict payment of the funds due from the entities that were managing the intellectual property. Those assets are now located in another entity, New Horizon, and unless the transfers are set aside, unavailable to Prescient as to a means to satisfy any judgment it obtains. The New Horizon trust agreement quoted above so provides. The only assets of the Trusts are the beneficial interests in New Horizon, and these interests cannot be sold, transferred or conveyed, directly or indirectly, by the Trusts. Prescient, then, would be left with no means by which its judgment could be satisfied.

Generally, a transfer by a debtor to a newly-formed corporation in return for the stock of the corporation is for equivalent value because the value of the stock is equal to the value of the assets transferred to the corporation (or here, a transfer in return for a beneficial interest in a Delaware statutory trust). Assuming that the 15/85% split in the beneficial interests in New Horizon may be equivalent to the value of the assets transferred by the Trusts, it would appear at first glance that the Trusts had received equivalent value. However, a close examination demonstrates that this appears not to be the case because the *quality,* and therefore the *value,* of the beneficial interest is inferior to that which previously was the case. This is not only true from the point of view of the creditor Prescient, but also from the point of view of the Trusts. Before the New Horizon transaction, the Trusts could have sold the assets which they owned (being

required to pay off the existing debt to do so, of course, unless the debt were assumed by the purchaser). That freedom of action has now been taken away; it now reposes elsewhere. Value has been lost.

Prescient has also been harmed. Prior to the transfer to New Horizon, it could have levied upon the Assets if it obtained a judgment against the Trusts. Now, however, it can only levy upon the Trusts' beneficial interests in New Horizon, which the New Horizon trust agreement by its terms states may not be transferred, levied upon, or sold. Effectively, then, Prescient will be left without the ability to satisfy its judgment. *Interpool, supra*, 890 F. Supp. at 266 (interest in limited partnership not as valuable to creditor where creditor has only right to a charging order and cannot levy on the assets themselves).

The parties to the Fortress transactions intended to create a so-called "bankruptcy remote entity" ("BRE"). The purpose of a BRE is to receive assets from a debtor that may be or may become financially distressed so that, if a bankruptcy proceeding is filed by the transferor, the assets that were conveyed would not become part of the bankruptcy estate of the debtor and a creditor with a security interest in the assets of the BRE would not be affected by the bankruptcy proceeding. The importance of isolating the assets of New Horizon from the creditors of the Trusts are so important that it required a 59-page lawyers' opinion to satisfy Fortress. See Exhibit J to the Credit and Security Agreement, Tab 1 to Exhibit 1 of the Jackson Dep. It is not the purpose of this Report to comment upon the use of the BRE to securitize the assets, such as accounts receivable, of a transferor.[5] However, where the creation of a BRE is part and parcel of

[5] *But see In re LTV Steel Co.*, 274 B.R. 278, 285-286 (Bankr. N.D. Ohio 2001)(commenting upon some of the pernicious effects of a BRE).

a transaction that insulates assets of a defendant in pending litigation from execution by the plaintiff in that litigation, a different perspective comes into existence. *See generally,* Steven L. Schwarcz, "The Inherent Irrationality of Judgment Proofing," 52 Stan. L. Rev. 1 (1999).

To infer intent to hinder, delay or defraud creditors from the badges of fraud is particularly important in this case because of MJJ's apparent lack of specific knowledge about what was going on. His deposition is replete with statements that he had not read the documents that were used to accomplish the restructuring but instead relied upon oral discussions with his advisors and lawyers. And, while the proceeds of the Fortress loan were used to pay at least one other creditor (Mr. Branca) who had made claims against the Trusts, MJJ thought that the Prescient suit was "ridiculous." Jackson Dep., at pp. 169, 174.

OPINION NO. 2 (CONSTRUCTIVE FRAUD): THE TRANSFERS BY THE TRUSTS TO NEW HORIZON ARE CONSTRUCTIVELY FRAUDULENT UNDER SECTION 273-a OF THE NEW YORK DEBTOR AND CREDITOR LAW.

Statutory Background

Section 273-a of the New York Debtor-Creditor Law provides that:

> "Every conveyance made without fair consideration when the person making it is a defendant in an action for money damages or a judgment in which an action has been docketed against him, 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."

Section 273-a, which was not a part of the UFCA, has no counterpart in the UFTA.[6]

"Fair consideration" is defined in section 272 of the Debtor and Creditor Law as follows:

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[6] Although the presence of litigation is one of the badges of fraud discussed above.

"Fair consideration is given for property, or obligation.

"a. When in exchange for such property, or obligation, as a fair equivalent therefor, and in good faith, property is conveyed or an antecedent debt is satisfied, or

"b. When such property, or obligation is received in good faith to secure a present advance or antecedent debt in amount not disproportionately small as compared with the value of the property, or obligation obtained."

Factual Background

At all times relevant to this Report, the Trusts and MJJ were defendants in an action brought by Prescient.

Discussion

Section 273-a is not concerned with the transferor's state of mind or financial condition. The only questions relevant to a determination of whether a particular transfer is fraudulent under this section are (a) whether the transferor was a defendant in an action for money judgment at the time the transfer was made; (b) was fair consideration received by the transferor; and (c) would the defendant satisfy the judgment when as and if entered in favor of the plaintiff. All elements are satisfied here.

a. The Trusts Were Defendants in an Action for a Money Judgment

About this requirement there can be no dispute. When the transfers in question were made, all parties knew that the Prescient Action was pending. Indeed, Prescient had filed a motion seeking to enjoin the transfers.

b. The Trusts Did Not Receive Fair Consideration

To satisfy the requirement of fair consideration, there must be a "fair equivalent" and

"good faith." As demonstrated above, the beneficial interest in New Horizon that the Trusts received were of an inferior quality as compared to the assets that the Trusts conveyed. Thus, there was not a fair equivalent. That discussion will not be repeated here.

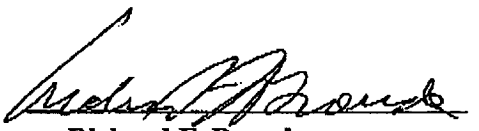
Even if there were a fair equivalent, good faith must be demonstrated. In New York, "Good faith is required of both the transferor and the transferee, and it is lacking when there is a failure to deal honestly, fairly, and openly." *CIT Group/Commercial Services, Inc. v. 160-09 Jamaica Avenue L.P.*, 25 A.D.3d 301, 303, 808 N.Y.S.2d 187, 190 (1st Dept. 2006), quoting *Bernier Trucking v. Brown*, 281 A.D.2d 924, 925, 722 N.Y.S.2d 656 (2001). In the present case, every party involved knew that the Prescient Action was pending and that the transaction's structure could impair Prescients' ability to collect on any judgment that it might obtain.

c. The Trusts Will Be Unable to Satisfy Any Monetary Judgment Entered Against Them in Favor of Prescient.

Section 273-a speaks in terms of a transfer becoming fraudulent when the creditor obtains a judgment against the transferor and the transferor is unable to satisfy the judgment. At the time this Report is written Prescient has not received a judgment and thus the transfers to New Horizon may not be fraudulent. However, the Court in the Prescient Action entered an Order on April 17, 2006, which, among other things, obligated the defendants to notify Prescient at least 30 days in advance of any transaction that might result in the transfer or encumbrance of the property transferred to New Horizon or of the Neverland Ranch owned by MJJ. The *status quo* has thus been preserved and, if Prescient obtains a money judgment that the defendants are unable to satisfy, the Court may at that time be asked to determine whether the transfers were fraudulent.

Finally, as discussed above, the transfers left the Trusts incapable of satisfying any judgment rendered against them. Again, that discussion will not be repeated here.

October 23, 2006



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AREAS OF EXPERTISE

Insolvency, reorganization and debtor-creditor relationships generally, including secured transactions. Significant experience in mass tort cases. Have represented secured creditors, plan proponents, debtors, and other parties in interest in out-of-court and in-court financial restructurings and reorganizations of business entities.

MEMBERSHIPS

American Law Institute
(Advisor, Transnational Insolvency Project)
National Bankruptcy Conference
(Chair, Committee on International Aspects, 1996-2003)
American Bar Association
(Committee on Business Bankruptcy, Subcommittee on International Bankruptcy)
International Bar Association, Section on Business Law
(Co-Chair, Insolvency & Creditors' Rights Committee, 1996-2000)
Association of the Bar of the City of New York
(Committee on Bankruptcy & Corporate Reorganization; Chair, Subcommittee on International Insolvency 1992-1995)
California, Illinois and New York Bars

OTHER ACTIVITIES

Fellow, American College of Bankruptcy
Fellow, American Bar Foundation
Member, World Bank's Insolvency Initiative Advisory Panel
Consultant, OECD (in connection with the Forum For Asian Insolvency Reform)

EXHIBIT 1

PROFESSIONAL EXPERIENCE

Partner, Mayer Brown & Platt, New York, 1990-2000

Adjunct Professor, St. John's Law School LL.M. in Bankruptcy Program, 2000- (Course: *Mass Tort Bankruptcies*)

Practice of Law, Los Angeles, California, 1971-1990

Adjunct Professor, Loyola University (Los Angeles) Law School; University of Southern California Law School, 1971-1990

Professor of Law, Nebraska University Law School, 1966-69, and Georgetown University Law Center, 1969-71

Practice of Law, Chicago, Illinois, 1962-1966

Law Clerk, Hon. Walter V. Shaefer, Illinois Supreme Court, 1961-1962

EDUCATION

J.D., with honors, University of Chicago,
Order of the Coif

Member, Board of Editors, University of Chicago Law Review

B.S., Washington University (St. Louis)

PUBLICATIONS:

A. **Books**

Editor and Co-Author, *Collier International Business Insolvency Guide* (Matthew Bender & Co., 2000; periodic updates)

Reorganizations Under Chapter 11 of the Bankruptcy Code (Law Journal Press, originally published in1986; semi-annual updates).

Editor, *Insolvency and Finance in the Transportation Industry* (Lloyd's of London Press, 1993).

(with N. Penny) *Cases and Materials on Land Financing* (Foundation Press, 1970) (Second Edition, 1977) (Third Edition, 1985).

B. **Articles Published in the Last Ten Years**

"Commencement of a Business Bankruptcy Case" and "Executory Contracts and Unexpired Leases in Bankruptcy," prepared for use in a continuing legal education course entitled "Real Estate Defaults" sponsored by American Law Institute-American Bar Association Continuing Professional Education, 1997, 1998, 1999, 2001, 2002, 2004m 2005 and 2006 (updated for each presentation)

"The Priority Provisions of the UNCITRAL Convention on the Assignment of Receivables in International Trade," 11 International Insolvency Review 121 (2002) (with B. Markell)

"Secured Transactions in Personal Property in the United States," a chapter in *Cross-Border Security and Insolvency* (Michael Bridge and Robert Stevens, editors, Oxford University Press, 2001)

"How the rescue culture came to the United States and the myths that surround Chapter 11", 16 Insolvency Law & Practice 169 (2000).

C. **Other Selected Articles**

"Some Comments on Harmonization of Jurisdictional and Reorganizational Rules" and "Some Comments on the Challenges of Commercial Reorganization in Insolvency: Why Chapter 11?," chapters in *Current Developments in International and Comparative Corporate Insolvency Law* (Jacob S. Ziegel, editor, Clarendon Press, Oxford, 1994).

"The U.S. Bankruptcy Act of 1994: How Does It Effect Real Estate Secured Transactions", 10 J. of Int'l Banking Law 103 (1995).

"Some Observations Regarding Corporate Governance, Claims Trading, and the Chapter 11 Process", prepared for the Fifth Annual General Meeting and Conference of The Insolvency Institute of Canada, November, 1994.

"The Effect of Insolvency Procedures on Arbitration: The United States Experience", prepared for a seminar entitled "The Effect of Insolvency Procedures on Arbitration", presented under the auspices of the International Bar Association and the International Chamber of Commerce, Paris, France, September, 1994.

"The Treatment of Executory Contracts in the United States", a chapter in *Insolvency and Finance in the Transportation Industry*, (Broude, ed.) (Lloyd's of London Press Ltd. 1993).

"Drafting and Enforcement of Insolvency Provisions in International Business Contracts: The United States Experience", prepared for the IBA Annual Meeting, September 1992.

D. Other Publications

Board of Editors and Author, *Collier on Bankruptcy* (15th ed. Revised).

Contributing Editor, *Collier Bankruptcy Practice Guide.*

Board of Editors, *Insolventie Recht* (published by Kluwer)

A SAMPLING OF LECTURES AND SPEAKING ENGAGEMENTS :

Moderator, "The Judge's Role in Insolvency Proceedings," a panel presented at the May, 2002, meeting of Committee J of the International Bar Association held in Dublin, Ireland

Lecture, "The Role of the Court in Prepackaged and Prenegotiated Plans in the United States," Forum for Asian Insolvency Reform, Bali, Indonesia, February 2001, and "The Bankruptcy Law of Thailand," Forum for Asian Insolvency Reform, Bangkok, Thailand, December 2002

Panelist in seminars dealing with bankruptcy and reorganization presented by: ALI-ABA, 1981-present; Prentice Hall Law & Business, 1988-1995; Practicing Law Institute, 1993-2000; UCLA School of Law, Business Bankruptcy Institute; Georgetown University Advanced Bankruptcy Institute *(Co-Chair).*

Lecture, "Origins and Myths of Company Rescue", at a program entitled "International Corporate Recovery: Past, Present & Future", London England, June 2000, sponsored by R3 (formerly, Association of Business Recovery Professionals).

Lecture, "Secured Transactions in Personal Property in the United States", at a Colloquium entitled "Cross-Border Security and Insolvency", Oxford, England, April 2000, organized by The Faculty of Law, University of Oxford and Norton Rose.

Moderator, "The Role and Impact of Multinational Organizations in Insolvency Reform", at a program entitled "Insolvency 2000", Milan, Italy, June 2000, sponsored by Committee J of the International Bar Association

Moderator, "Managing and Financing a Transnational Insolvency," part of INSOL Bermuda, April, 1999.

Guest Lecturer, "Comparative Law of the Liability of Directors and Officers of Insolvent Companies", February 1999, University of Essex, England; Catholic University, Nijmegen, Holland

Moderator, "Liquidation, Workouts and Restructurings in the Asia-Pacific Region", part of the 2nd Asian Financial Law Seminar sponsored by the International Bar Association, the All China Lawyers' Association and the Shanghai Bar Association, Shanghai, China, November, 1998.

Lecturer on "Liability of Directors of Insolvent Companies", at a seminar entitled "Groups of Companies and Corporate Governance", sponsored by the Center for International Legal Studies, Salzburg, Austria, October, 1997.

Expert Witness Engagements Within the Preceding Four Years

Testified as an expert witness at the hearing held in an arbitration conducted by the London Court of International Arbitration, June 2005. The issue was concerned with the "insured vs. insured" exclusion contained in a directors' and officers' insurance policy. I am precluded by rules of confidentiality from disclosing the names of the parties to the arbitration.

Testified in 2005 as a deponent and as an expert witness on behalf of Congoleum Corp., in a proceeding pending in the Superior Court of New Jersey Law Division: Middlesex County, Docket No. MID-L-8908-01, entitled Congoleum Corporation, Plaintiff v. Ace American Insurance Company et al., Defendants.

MATERIALS REVIEWED IN PREPARING OPINION

A. Depositions

Deposition of Constantine Dakolias taken March 30, 2006

Deposition of Daniel Gropper, taken April 13 and May 8, 2006

Deposition of Michael Sydow, taken June 8, 2006

Deposition of Ann Roberts, taken October 17, 2006

Deposition of Michael J. Jackson, taken June 12 and 13, 2006

Deposition of Katherine Jackson, taken October 16, 2006

B. Pleadings in Case No. 05 Civ. 6298 (PKC)

Plaintiff's Memorandum of Law in Support of Motion to Amend the Complaint and for TRO and Preliminary Injunction Against Fraudulent Transfers (April 3, 2006)

Memorandum of Law in Opposition to Plaintiff's Motion to Amend the Complaint and for a Preliminary Injunction (April 7, 2006)

Declaration of Villiers Terblanche (April 7, 2006)

Plaintiff's Reply Memorandum of Law in Further Support of Motion to Amend the Complaint and for TRO and Preliminary Injunction Against Fraudulent Transfers (April 10, 2006)

Transcript of hearings held on April 11, 2006 before District Judge Castel

Order filed April 17, 2006

Second Amended Complaint (April 19, 2006)

Memorandum and Order filed July 31, 2006

Defendant New Horizon Trust's Answer With Affirmative Defenses (September 18, 2006)

Memorandum and Order on Motion to Reconsider (October 6, 2006)

EXHIBIT 2

C. Documents

I have reviewed and considered virtually all of the exhibits that were marked as exhibits at the depositions listed above, including the documents that constituted the April 13, 2006 closing of the transaction discussed in my Report. Documents believed to be pertinent were perused. Others were reviewed less closely. Several of the former category of documents are expressly referenced in my Report.