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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, NEW HORIZON
TRUST, and MICHAEL J. JACKSON,

Defendants.

05 Civ. 6298 (PKC)

STATEMENT OF MATERIAL FACTS

Defendant New Horizon Trust, by its attorneys, Baker & McKenzie LLP, hereby submits this Statement of Material Facts in support of its Motion for Summary Judgment, pursuant to Local Rule 56.1.

1. MJ Publishing Trust (“MJPT”) is a common law trust that was created on or about February 20, 1997, pursuant to a trust agreement under the laws of the State of Delaware. (Declaration of David Zaslowky dated January 5, 2007, submitted herewith (“Zaslowky Decl.”), ¶ 5; Ex. 2).¹

2. Michael Joseph Jackson (“MJJ”) is the 100 percent beneficial owner of MJPT. (Zaslowky Decl., ¶ 5; Ex. 2, § 1.1).

3. MJ-ATV Publishing Trust (“MJ-ATV”) is a statutory trust that was

¹ All references to “Ex. ___” refer to the exhibits annexed to the Zaslowky Decl.

created on or about February 1, 1999 pursuant to a trust agreement under the laws of the State of Delaware. (Zaslowsky Decl., ¶ 6; Ex. 3).

4. MJJ is the 100 percent beneficial owner of MJ-ATV. (Zaslowsky Decl., ¶ 6; Ex. 3, § 2.02).

5. New Horizon Trust is a Delaware statutory trust that was formed on or about February 10, 2006, pursuant to a trust agreement under the laws of the State of Delaware. (Zaslowsky Decl., ¶ 7; Ex. 4).

6. MJPT (15%) and MJ-ATV (85%) are the 100 percent beneficial owners of New Horizon Trust. (Zaslowsky Decl., ¶ 7; Ex. 4, § 3.1).

7. On or about September 29, 1999, Bank of America, N.A. (“BOA”) made an initial loan to MJPT. (Zaslowsky Decl., ¶ 8). Through a number subsequent agreements, the principal amount of the loan was increased and the due date extended. (Id.). Ultimately, under an agreement dated March 25, 2004, BOA wound up lending an aggregate principal amount of \$72.5 million to MJPT (the “MJPT Loan”). (Id.; Ex. 5, § 2(A)).

8. On or about December 23, 1998, BOA made an initial loan to MJ-ATV in the principal amount of \$140 million. (Zaslowsky Decl., ¶ 16). Through a number subsequent agreements, the principal amount of the loan was increased and the due date extended. (Id.). Ultimately, under an agreement dated as of September 30, 2002, BOA wound up lending an aggregate principal amount of \$200 million to MJ-ATV (the “MJ-ATV Loan”) (collectively, the MJPT Loan and the MJ-ATV Loan are referred to as the “BOA Loans”). (Id., ¶ 16; Ex. 10, § 2(A)).

9. The MJPT Loan bore interest at an annual rate equal to one month LIBOR + 3.00% per annum. (Zaslowsky Decl., ¶ 9; Ex. 5, § 1(B); Ex. 6).

10. The MJ-ATV Loan bore interest at 6.16% per annum for \$140 million, 7.14% per annum for \$45 million, one month LIBOR + 2% per annum for \$11.65 million, and one month LIBOR + 2% per annum for \$3.35 million. (Zaslowsky Decl., ¶ 17; Ex. 11, 12, 13, 14).

11. Both of the BOA Loans became due and payable in full, together with all accrued and unpaid interest thereon, on December 20, 2005. (Zaslowsky Decl., ¶¶ 10, 18; Ex. 5, §§ 2(G)(1), 1(UU); Ex. 10, §§ 2(C), 1(RR)).

12. To secure the MJPT Loan, MJPT assigned and pledged to BOA MJPT's right, title and interest in and to a music publishing catalog known as the MIJAC Catalog (the "MIJAC Catalog") and the right to receive payments under a number of administration agreements between MJPT and third parties for the administration of the MIJAC Catalog (the "Administration Agreements"). (Zaslowsky Decl., ¶ 12, 13; Ex. 7, §§ 2, 3; Ex. 2, §§ 1.1, 2.2, 5.1(f), 10.3; Ex. 8; Ex. 9).

13. To secure the MJ-ATV Loan, MJ-ATV assigned and pledged to BOA MJ-ATV's right, title and interest in and to MJ-ATV's 50% interest in Sony/ATV Music Publishing LLC ("Sony/ATV"), a 50-50 joint venture between MJJ on the one hand and Sony Entertainment Inc., and various Sony affiliates on the other. Sony/ATV holds a music publishing catalog colloquially known as the Beatles Catalog (the "Beatles Catalog"). (Zaslowsky Decl., ¶¶ 20, 21; Ex. 3, §§ 1.1, 2.04(a); Ex. 15, §§ 2, 3; Ex. 16).

14. As a result of the assignment and pledge of their assets to BOA under the BOA Loans, MJPT and MJ-ATV were restricted in their ability to convey, dispose of, or transfer all or any portion of the MIJAC Catalog, the Administration Agreements, or MJ-ATV's 50% interest in Sony/ATV, respectively. (Zaslowsky Decl., ¶¶ 13, 21; Ex. 5, § 6(A); Ex. 7, §§ 11(I),

12; Ex. 10, § 6(A); Ex. 15, §§ 11(H), 12).

15. MJPT and MJ-ATV were further restricted in their ability to convey, dispose of, or transfer all or any portion of the MIJAC Catalog, the Administration Agreements, or MJ-ATV's 50% interest in Sony/ATV under the relevant Administration Agreements and joint venture agreement between MJ-ATV and Sony, respectively. (Zaslowsky Decl., Ex. 8, § 17; Ex. 9, § 16; Ex. 16, § 7.3).

16. Under the MJPT Loan, an Event of Default occurred where MJPT failed to pay when due and payable any principal or where MJPT failed to pay within three business days of when due and payable any interest under the MJPT Loan. (Zaslowsky Decl., ¶ 14; Ex. 5, § 7(A)).

17. Under the MJ-ATV Loan, an Event of Default occurred where MJ-ATV failed to pay when due any principal or interest when the same became due and payable. (Zaslowsky Decl., ¶ 22; Ex. 10, § 7(A)).

18. Under the MJPT Loan, BOA's remedies upon an Event of Default included, among other things, BOA's right to resort to any or all of the MIJAC Catalog or the Administration Agreements and to exercise any or all of the rights of a secured party thereto. (Zaslowsky Decl., ¶ 15; Ex. 5, § 8(B)).

19. Under the MJPT Loan, upon an Event of Default, MJPT would be obligated to pay to BOA a default fee of \$10 million. (Zaslowsky Decl., ¶ 15; Ex. 5, § 8(B)).

20. Under the MJPT Loan, upon an Event of Default, BOA could, at its discretion, publicly or privately sell the MIJAC Catalog and the Administration Agreements upon such terms as BOA deemed commercially reasonable. (Zaslowsky Decl., ¶ 15; Ex. 7, § 13(A)).

21. Under the MJPT Loan, upon an Event of Default, the MJPT Loan bore a default interest rate of prime + 4% per annum. (Zaslowsky, ¶ 9; Ex. 6).

22. Under the MJ-ATV Loan, BOA's remedies upon an Event of Default included, among other things, BOA's right to resort to any or all of MJ-ATV's 50% interest in Sony/ATV and to exercise any or all of the rights of a secured party thereto. (Zaslowsky Decl., ¶ 23; Ex. 10, § 8(C)).

23. Under the MJ-ATV Loan, upon an Event of Default, BOA could, at its discretion, sell MJ-ATV's interest in Sony/ATV upon such terms as BOA deemed commercially reasonable. (Zaslowsky Decl., ¶ 23; Ex. 15, § 13(A)).

24. Under the MJ-ATV Loan, upon an Event of Default, the interest rates under the MJ-ATV Loan increased by 2% per annum. (Zaslowsky Decl., ¶ 17; Ex. 11, 12, 13, 14).

25. On May 3, 2005, BOA assigned the MJPT Loan to Fortress Music Trust III. (Zaslowsky Decl., ¶ 24; Ex. 17).

26. On May 3, 2005, BOA assigned the MJ-ATV Loan to Fortress Music Trust I and Fortress Music Trust II. (Zaslowsky Decl., ¶ 25; Ex. 18, 19). (The Fortress entities are hereinafter collectively referred to as "Fortress").

27. On September 27, 2005, John Branca filed UCC Financing Statements against MJ-ATV. (Zaslowsky Decl., ¶¶ 26-27; Ex. 20).

28. On September 27, 2005, John Branca filed UCC Financing Statements against MJPT. (Zaslowsky Decl., ¶¶ 26, 28; Ex. 21).

29. On December 20, 2005, MJPT and MJ-ATV did not repay the BOA Loans when they matured, putting the loans in default. (Zaslowsky Decl., ¶ 29; Ex. 22, p. 164:6; Ex.

24, ¶ 5; Ex. 25, §§ 2(b), (c)).

30. On the same date, MJPT and MJ-ATV acknowledged that the BOA Loans were fully due and payable, that they had failed to pay amounts due under the BOA Loans, and that they were unable to pay amounts due under the BOA Loans. (Zaslowsky Decl., ¶ 30-31; Ex. 25, §§ 2(b), (c); Ex. 23, p. 15:8-12, 16:1-2; Ex. 24, ¶ 5; Ex. 22, p. 164:9-10).

31. Under the MJPT Loan, the default rate of interest was prime + 4%. (Zaslowsky Decl., ¶ 9; Ex. 6). At the time of MJPT's default, the prime rate was approximately 7.25%. (Zaslowsky Decl., ¶ 52; Ex. 42). Consequently, following MJPT's default under the MJPT Loan, the MJPT bore a default interest rate of approximately 11.25%.

32. Under the MJ-ATV Loan, the default interest rate was 2% more than the original rates under the MJ-ATV Loan. (Zaslowsky Decl., ¶ 17; Ex. 11, 12, 13, 14). At the time of MJ-ATV's default, the 30-day LIBOR rate was approximately 4.34%. (Zaslowsky Decl., ¶ 52; Ex. 43). Thus, the default interest rate under the MJ-ATV Loan following MJ-ATV's default was 8.16% for \$140 million, 9.14% for \$45 million, 8.34% for \$11.65 million, and 8.34% for \$3.35 million.

33. Following MJPT and MJ-ATV's default under the BOA Loans, there was a substantial risk that Fortress and Branca would foreclose on the assets securing the BOA Loans – *i.e.*, the MIJAC Catalog, the Administration Agreements, and MJ-ATV's 50% interest in Sony/ATV. (Zaslowsky Decl., ¶ 37; Ex. 24, ¶¶ 6, 25).

34. MJPT, MJ-ATV and Fortress, among others, executed a Forbearance Agreement under which (1) Fortress agreed to forbear from any enforcement action based on the defaults by MJPT and MJ-ATV under their respective BOA Loans up to January 19, 2006 (Zaslowsky Decl., ¶ 32; Ex. 25, § 3); (2) MJPT and MJ-ATV agreed to pay Fortress an amount

equal to 1% of the outstanding balance of the BOA Loans (Zaslowsky Decl., ¶ 32; Ex. 25, § 4); (3) MJPT and MJ-ATV granted to Fortress a right of last offer to match any bona fide written offer to refinance the BOA Loans (Zaslowsky Decl., ¶ 33; Ex. 25, § 5); and (4) the parties agreed that Fortress was not obligated to accept payment from any individual or entity of any amounts due under either of the BOA Loans unless such individual or entity acquired both of the BOA Loans or paid both of the BOA Loans in full. (Zaslowsky Decl., ¶ 34; Ex. 25, § 7).

35. On January 13, 2006, MJPT, MJ-ATV and Fortress, among others, executed an Amended and Restated Put Extension Agreement by which the parties agreed to extend the forbearance period to February 18, 2006. (Zaslowsky Decl., ¶ 35; Ex. 26, Recital F).

36. Due to the risk of foreclosure on their assets by Fortress and Branca, MJPT and MJ-ATV, in early January 2006, invited bids from various financial institutions to refinance the BOA Loans. (Zaslowsky Decl., ¶ 37; Ex. 24, ¶¶ 6-7).

37. Five financial institutions conveyed expressions of interest. (Zaslowsky Decl., ¶ 37; Ex. 24, ¶ 7).

38. On January 31, 2006, Citigroup Global Markets Inc. (“Citigroup”) extended a commitment to refinance the BOA Loans (the “Citigroup Proposal”). (Zaslowsky Decl., ¶ 37; Ex. 24, ¶ 12; Ex. 22, pp. 174:22-175:13).

39. Citigroup proposed (1) a “bankruptcy remote” structure to refinance the BOA Loans in an amount of \$300 million (Zaslowsky Decl., ¶ 38; Ex. 24, ¶¶ 7-10); (2) that a new trust be established to which the assets of MJPT and MJ-ATV would be conveyed in return for the beneficial ownership of the new trust (Zaslowsky Decl., ¶ 38; Ex. 24, ¶¶ 9, 12); (3) Citibank, N.A. would then loan the new trust \$300 million, secured by the assets conveyed to the new trust by MJPT and MJ-ATV (Zaslowsky Decl., ¶ 38; Ex. 24; ¶ 13); and (4) the proceeds of

the Citigroup \$300 million loan would then be distributed to repay the existing indebtedness of MJPT and MJ-ATV under the BOA Loans. (Zaslowsky Decl., ¶ 38; Ex. 24, ¶ 13).

40. The new trust proposed by Citigroup took the form of New Horizon Trust. (Zaslowsky Decl., ¶ 39; Ex. 27).

41. On February 14, 2006, Fortress exercised its right of last offer and matched the terms of the Citigroup Proposal (the “Fortress Refinancing”). (Zaslowsky Decl., ¶ 40; Ex. 22, pp. 55:4-59:22, 175:9-13; Ex. 24, ¶ 14; Ex. 28).

42. Fortress’ matching of the Citigroup Proposal required it to undertake a substantially identical bankruptcy remote transaction structure to that proposed by Citigroup. (Zaslowsky Decl., ¶ 41; Ex. 22, p. 57:3-6; Ex. 24, ¶ 14).

43. Under the Fortress Refinancing, MJPT and MJ-ATV transferred their assets to New Horizon Trust in exchange for 100 percent beneficial interest in New Horizon Trust. (Zaslowsky Decl., ¶ 44; Ex. 31, §§ 1, 2; Ex. 32, §§ 1, 2; Ex. 4, § 3.1; Ex. 35, p. 24).

44. MJPT received 15 percent beneficial ownership of New Horizon Trust, and MJ-ATV received 85 percent beneficial ownership of New Horizon Trust. (Zaslowsky Decl., ¶ 44; Ex. 4, § 3.1).

45. Fortress loaned \$300 million to New Horizon Trust (the “\$300 Million Loan”). (Zaslowsky Decl., ¶ 45; Ex. 33, §§ 1.01, 2.01).

46. The \$300 million loan bore an interest rate of one month LIBOR + 1.50%, and is to mature on March 2, 2008. (Zaslowsky Decl., ¶ 46; Ex. 33, §§ 1.01, 2.05(a)). The initial interest rate was set as of March 31, 2006, at which time the 30-day LIBOR rate was 4.83%, making the interest rate under the \$300 Million Loan 6.33%. (Zaslowsky Decl., ¶ 52; Ex. 44; Ex. 33, 1.01, 2.05(a)).

47. To secure the loan, New Horizon Trust pledged the assets conveyed to it by MJPT and MJ-ATV. (Zaslowsky Decl., ¶ 45; Ex. 33, § 7.01).

48. The proceeds of the \$300 million loan were used in such a way as to repay all of MJPT and MJ-ATV's outstanding obligations under the BOA Loans. (Zaslowsky Decl., ¶ 47; Ex. 33, § 2.11).

49. Fortress acknowledged that it received payment and satisfaction in full of all of MJPT and MJ-ATV's obligations under the BOA Loans. (Zaslowsky Decl., ¶ 48; Ex. 34, §§ 1, 2).

50. On April 3, 2006, Plaintiff filed its Second Amended Complaint in this action (Ex. 1) and moved to enjoin MJPT and MJ-ATV from completing the Fortress Refinancing. (Zaslowsky Decl., ¶ 49; Ex. 36, 37, 38).

51. The motion was resolved by stipulation and consent between the parties at a hearing before the Court on April 11, 2006. (Zaslowsky Decl., ¶ 50; Ex. 39, 40).

52. At that hearing, counsel for the Defendants made clear on the record that the stipulation provided that Plaintiff would not later seek to undo the Fortress Refinancing. (Ex. 39, pp. 3:18-4:9). During a colloquy among the lawyers at a subsequent deposition, there was further confirmation that the parties had stipulated that Plaintiff would not seek to unwind the transaction. (Ex. 22, pp. 140:21-143:18).

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