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Electronically Filed January 22, 2008

IN THE UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF NEVADA

* * *

In re: N.C.P. MARKETING GROUP, INC., and TAE BO RETAIL MARKETING, INC., Debtors.	CASE NOS. BK-S-04-51071-GWZ BK-S-04-51073-GWZ (Jointly Administered) Chapter 7 Cases
N.C.P. MARKETING GROUP, INC., Plaintiff, vs. BILLY BLANKS, GAYLE BLANKS and BG STAR PRODUCTIONS, INC., Defendants.	ADV. PRO. NO. 06-05048 **OBJECTORS' SUPPLEMENTAL BRIEF IN OPPOSITION TO TRUSTEE'S MOTION FOR ORDER APPROVING SETTLEMENT AND TRANSFER OF CERTAIN ASSETS FREE AND CLEAR OF LIENS, CLAIMS AND INTERESTS** **Hearing Date: January 31, 2008** **Time of Hearing: 2:00 p.m.** **Hon. Gregg Zive**

N.C.P. Marketing Group, Inc. ("NCP") and Tae Bo Marketing Retail Marketing, Inc. ("Tae Bo") through its principal member, Paul Monea, Jr. ("Drew"), hereby submit the following Supplemental Brief in Opposition to Trustee's Motion for Order Approving Agreement for Settlement and Transfer of Certain Assets Free and Clear of Liens, Claims and Interests (the "Motion").

INTRODUCTION

The Trustee filed her Motion on November 15, 2007. NCP, Tae Bo, and Drew (collectively the "Objectors") filed their response on December 3, 2007, asserting that the proposed sale and settlement was not fair or reasonable, was not proposed in good faith and was based on faulty factual premises. At the December 12 hearing on the Motion, the Objectors advised the Court that they were prepared to pay more for the assets that were to be settled and/or compromised in the Motion. The Court requested the parties to brief two primary issues: (1) the need for an auction under section 363 in order to approve the Motion; and (2) whether the proposed buyer (identified in the Motion as the "Blanks Parties") had the right to credit bid at the auction.

The Motion seeks to dispose of three separate assets of the bankruptcy estate: (1) the estate's claim against the Blanks Parties for fraud and for avoidance of a fraudulent transfer (the "Fraudulent Transfer Action"); (2) the appeal before the Ninth Circuit seeking a reversal of this Court's ruling of November 15, 2004, as affirmed by the District Court on or about December 13, 2005 (the "Ninth Circuit Appeal"); and (3) any remaining interest of the bankruptcy estate in and to certain copyrights, masters and inventory (the "IP Assets").

There should be no "sale" of the Ninth Circuit Appeal, because the estate receives no benefit from that transaction. There is no justification whatsoever for agreeing to dismiss the Ninth Circuit Appeal. The estate incurs no cost in pursuing the Ninth Circuit Appeal. The Settlement Agreement should be disapproved insofar as it seeks authority to dismiss that appeal.

Contrary to the Trustee's Motion and the pleadings filed by the Blanks Parties, binding precedent mandates an auction of the Fraudulent Transfer Action and the IP Assets. Moreover, as the case law demonstrates, the Blanks Parties have no right to credit bid at the auction of the Fraudulent Transfer Action.

This Court will have to supervise the auction procedures to establish a level playing field. To date, the Trustee has been eager to dismiss the appeal with no benefit to the estate. The Trustee has sought to avoid an auction of the claims, and to adopt procedures that unfairly favor the Blanks Parties in that auction. This Court should deny the Trustee's Motion, and set a hearing to consider bidding procedures for the Fraudulent Transfer and the IP Assets.

I. The Ninth Circuit Appeal

The Settlement Agreement requires the Trustee to dismiss the Ninth Circuit Appeal with prejudice. To justify this unilateral concession, the Trustee points to the "complexity" presented by a successful result in that appeal. The Trustee has concluded that "Under the Settlement Agreement, the non-exclusive trademark rights could not be licensed for a period beyond December 2003, a pre-petition date, and there is no provision in chapter 11 that would permit the court to rewrite an agreement that expired pre-petition." Trustee's Motion, p.9. The Trustee then notes that it would require an infusion of "many millions of dollars" to fund a cure of the defaults. The Trustee therefore concludes that the Ninth Circuit Appeal is an "exercise in futility."

The Trustee's analysis misconstrues the facts surrounding the Ninth Circuit Appeal. The Objectors have argued in that appeal that the Settlement Agreement gave NCP the right to exploit the masters in perpetuity. As NCP has argued in its appeal, there is a fundamental difference between the right to assign that perpetual nonexclusive license, and the right to sublicense (which was limited to December 2003). That distinction lies at the heart of the appeal. The Trustee has not grasped that distinction. It is therefore not surprising that the Trustee has offered to settle the Ninth Circuit Appeal for nothing.

In reality, the Ninth Circuit Appeal has real value. As envisioned in the Second Plan of Reorganization filed with this Court on April 3, 2006, NCP intends to sell the right to exploit the masters to a third party if successful on appeal. This sale process would, NCP believes, provide the necessary resources to satisfy any necessary obligations and fund a plan.

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The Objectors are not blind to the difficulties presented by the Ninth Circuit Appeal, and to the difficulty presented in confirming a plan.[1] However, the appeal has been fully briefed. The Objectors are prepared to assume any further costs of appeal and give the resulting benefit to the estate and its creditors. It is incomprehensible that a Trustee exercising independent judgment would not choose to pursue a cost free appeal, and would ask this Court to approve a dismissal that confers no benefit on the estate.

II. The Need for an Auction

Applicable bankruptcy law requires the Trustee to conduct an auction of the Fraudulent Transfer Action. Although the Trustee and the Blanks Parties seek to foreclose competitive bidding, such a closed transaction is antithetical to bankruptcy principles, and not permissible under the governing case law. As the Trustee acknowledges, In re Lahijani,[2] 325 B.R. 282 (9th Cir. BAP 2005) is controlling law. In that case, the Bankruptcy Appellate Panel reviewed recent decisions on sales of causes and concluded that:

> When a cause of action is being sold to a present or potential defendant over the objection of creditors, a bankruptcy court must, in addition to treating it as a sale, independently evaluate the transaction as a settlement under the prevailing "fair and equitable" test, and consider the possibility of authorizing the objecting creditors to prosecute the cause of action for the benefit of the estate, as permitted by § 503(b)(3)(B).

325 B. R. at 284.

In Lahijani, the bankruptcy court approved the Trustee's motion to sell certain fraud claims to the defendant over the objections of the creditors of the estate. The objecting parties wanted to pursue the claims for the benefit of the estate. The Bankruptcy Appellate Panel reversed the order selling the claims to the defendant, noting:

> The court's obligation in § 363(b) sales is to assure that optimal value is realized by the estate under the circumstances....Ordinarily, the position

[1] The complexities of any cure, the trustee's failure to extend time to assume or reject executory contracts and related issues can be addressed at such time that the appeal is successfully completed in favor of the estate. For example, the Debtor does not believe that any cure is necessary since the Debtors have not incurred any debt owed to the Blanks Parties in connection with the non-exclusive license which was created upon the termination of the Settlement Agreement. And the Trustee may not have been required to assume or reject this non-exclusive license since the license may not be an executory contract. But these issues can be fully developed if the appeal is successful.

[2] Misspelled in the Trustee's brief as "Lahjani."

> of the trustee is afforded deference, particularly where business judgment is entailed in the analysis or where there is no objection. Nevertheless, particularly in the face of opposition by creditors, the requirement of court approval means that the responsibility ultimately is the court's.

Id. at 288-89. An auction process will ensure that the estate will receive the highest value for these claims.

The Trustee and the Blanks Parties strenuously urge this Court to accept their collectively pessimistic view of the underlying merits of the Fraudulent Transfer Actions. That view is irrelevant to an assessment of the proposed settlement, for several reasons.

First, it is clear that whatever the merits of the Fraudulent Transfer Action, two parties want to pay the estate for those claims. The Blanks Parties will pay $35,000 to dismiss them, and the Objectors will pay $40,000 for the right to pursue them and give any resulting benefit to the estate and its creditors, a benefit that could amount to a substantial amount of money. The Ninth Circuit admonition to "realize optimal value under the circumstances" mandates selling the Fraudulent Transfer Action to the highest bidder.

The Blanks Parties argue that an auction is not permitted because the estate does not own the Fraudulent Transfer Action, and the Trustee apparently agrees. The Blanks Parties conclude that claim preclusion bars the Fraudulent Transfer Action. This argument has been raised and overruled in the motion to dismiss the adversary complaint filed by the Blanks Parties; that order was entered on August 23, 2007.[3] The law of the case is now that the Fraudulent Transfer Action has prima facie validity. The estate has something to sell.

The Trustee/Blanks Parties position is logically inconsistent. On one hand, they argue that claim preclusion prevents the estate from conducting an auction of the Fraudulent Transfer Action. On the other hand, they admit that a sale analysis under § 363 applies to this transaction. See Trustee Motion, p. 9-11. Apparently, the Trustee can sell the Fraudulent Transfer Action, but she just can't use the most efficacious means to do so.

The Trustee cites the "complexity, expense and likely duration" of litigation as factors favoring her motion. The Trustee also adopts the Blanks Parties' claim preclusion analysis "as

[3] The Trustee's brief in support of her motion attaches the brief in support of dismissal filed by the Blanks Parties as evidence of the strength of their position, and ignores the Court's ruling denying the motion to dismiss.

support for her determination not to pursue the Fraudulent Transfer Action." Supplemental Memorandum, p. 5. This analysis completely ignores the offer made by the Objectors to pursue the Fraudulent Transfer Action at no cost to the estate. Since the estate would receive all of the benefit of the Fraudulent Transfer Action, at no risk, the Trustee cannot credibly maintain that dismissing the claim with prejudice benefits the estate in any way whatsoever. [4]

The assets to be sold should also include certain foreign license payments generated from the IP Assets since the commencement of this bankruptcy case. On October 3, 2007, counsel for the debtor advised the Trustee that there appeared to be viable trademark infringement proceedings pending in Europe in the name of N.C.P. Marketing Group. A copy of the letter from European counsel and the email from Debtors' counsel to counsel for the Trustee are appended hereto as Exhibit A and incorporated by this reference. To date, the Trustee has not advised Debtors' counsel of any actions taken regarding this potentially valuable asset.

A. No Cash Bond Should be Required.

The Trustee raises the prospect of "fees, costs and sanctions" and requests a cash bond in the amount of $150,000 to protect against such expenses. The Trustee does not offer any basis on which such sanctions might be imposed, nor any rationale for demanding a cash bond. Of course, such a bond would raise the costs to the Objectors and obviously chill the bidding. Those costs are utterly unwarranted, since the Objectors could agree to indemnify the estate and agree to subject themselves to this Court's jurisdiction for any indemnification claims. No unbiased Trustee seeking to maximize the value to the estate would demand such a bond, since it will chill bidding without any benefit to the estate.

B. The Blanks Parties Have No Right to Credit Bid.

Under § 553 of the Bankruptcy Code, the Blanks Parties do not have a valid setoff. Generally accepted bankruptcy principles, recognized in controlling Ninth Circuit precedent, hold that an unsecured claim cannot be used to offset a claim for a fraudulent transfer. *See* In re Acequia,

[4] The Trustee refers to the Golden Eye, and to the actions taken to pursue claims in the federal forfeiture proceedings. The relevance of those actions to the proposed settlement is not clear. In any event, the former principal member of N.C.P. denies that the estate has any interest in that asset.

Inc., 34 F.3d 800, 817 (9th Cir. 1994). The Acequia court recognized that allowing such setoffs would defeat the purpose of fraudulent transfer laws: to ensure that the assets of the debtor are preserved and fairly apportioned to its creditors. The Blanks Parties have already been unfairly advantaged by receiving a fraudulent transfer. Giving their unsecured claims secured status would merely exacerbate this unfairness.

Even if the Blanks Parties did have a valid setoff, they would still not be entitled to credit bid their claim, because setoffs cannot be credit bid under § 363(k). The Bankruptcy Code explicitly provides that the only creditors who are entitled to credit bid their claims are those who hold *liens* on the assets being auctioned. Though setoffs may be secured claims, they are not liens. "To be sure, a right of setoff is not quite the same thing as a mortgage or security interest." 4 Collier on Bankruptcy ¶506.03[1][b] at 506-17. Indeed, § 506 clearly distinguishes between two kinds of secured claims: "An allowed claim of a creditor secured by a lien on property in which the estate has an interest, or that is subject to setoff under section 553 of this title, is a secured claim . . ." 11 U.S.C. § 506(a) (emphasis added). Section 363(k) limits the right to credit bid to holders of a claim secured by a lien. Section 363(k) does not permit setoff creditors to credit bid.

Since the Blanks Parties do not hold a lien on any of the assets being auctioned, they cannot credit bid their claims. The Blanks Parties claim they are entitled to a lien under California law, but that claim improperly conflates the fraudulently transferred assets (the IP Assets) with the claim to recover those assets (the Fraudulent Transfer Action). Under the California fraudulent transfer law, the transferee is only entitled to retain a lien in the fraudulently transferred goods - in this case, the IP Assets - in the event the transfer is deemed to be fraudulent. The Trustee proposes to sell both the IP Assets and the Fraudulent Transfer Action. If the Fraudulent Transfer Action succeeds, the Blanks Parties would only have a lien on the IP Assets themselves, to the extent of the value paid in good faith. The California fraudulent transfer statute does not grant the Blanks Parties a lien on the Fraudulent Transfer Action. Cal. Civ. Code § 3439.08(d) is intended to protect good-faith transferees who lose an asset for which they gave value. Since the Blanks Parties still possess the fraudulently acquired IP Assets, they neither need nor deserve the protection of the California statute with respect to the Fraudulent Transfer Action.

Allowing the Blanks Parties to credit bid their claims would produce an unfair and irrational result. The Blanks Parties' claim to any kind of setoff right is conditional on the fraudulent transfer being avoided. If the Blanks Parties retain the IP Assets, *they have no lien or setoff claim against the estate*. Yet allowing them to credit bid their hypothetical claim will substantially impair a fair auction and potentially prevent the transfer from being avoided. The net result is a depletion of the assets of the estate.

As the Supplemental Brief admits, the proper remedy for a good-faith fraudulent transferee is to claim a reduction in the judgment amount for any value given. This is the rule followed in In re Brun, 360 B.R. 669, 675 (Bankr. C.D. Cal. 2007), and other decisions on the subject.. *See also* In re JTS Corp., 2006 U.S. Dist. LEXIS 75122 (N.D. Cal. 2006). If the rule proposed by the Blanks Parties were followed, the transferees would be compensated once when they are allowed to credit bid their claims and then again when they are allowed to offset their claims against the fraudulent transfer recovery.

The Blanks Parties have filed a claim for approximately $2.1 million. That claim is filed as an unsecured claim. Nowhere in that proof of claim do the Blanks Parties assert a right to secured status. Nowhere do they claim the $50 million they now assert in their Supplemental Brief. There is no justification for allowing the Blanks Parties to change their previous position and now claim a secured claim for any amount. There is certainly no basis to hold that their claim is over $50 million. Nor is there any statutory basis to permit them to credit bid their setoff claim.

C. The Appeal Rights Should Not be Sold.

Even if this Court grants the Trustee's Motion, the Ninth Circuit Appeal should not be sold to the Blanks Parties. The Blanks Parties assert that the appeal is moot, since the time to assume the license rights has expired. Of course, the Trustee had the obligation to extend those rights, assuming the Blanks Parties have accurately characterized those rights as executory. In any event, there is no cost to the estate and no risk to the estate in pursuing the Ninth Circuit Appeal. Insofar as the Trustee now seeks to abandon that appeal for no consideration, this Court should deny the Motion.

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Conclusion

The Trustee and this Court must pursue a sale process that will realize the optimal value for the estate. That process is clear – rejection of the Trustee's proposed settlement, and an auction process with no unfair advantage given to any party. This Court should therefore deny the Trustee's Motion as supported by the Blanks Parties' Supplemental Brief and the Trustee's Supplemental Brief, and grant such other relief as will lead to a fair and open sale.

DATED this 22nd day of January, 2008.

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1900 East Ninth Street
Cleveland, OH 44114

AND

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Attorneys for Debtors
N.C.P. MARKETING GROUP, INC. &
TAE BO RETAIL MARKETING, INC.

EXHIBIT A

Bash, Brian

From: Bash, Brian
Sent: Wednesday, October 03, 2007 3:01 PM
To: 'Jeff Hartman'
Subject: FW: Attached Image

Dear Mr. Hartman:

Attached please find a letter dated today regarding trademark claims in Europe being handled by the firm, Arnold Siedsma. As you will note, October 12, 2007 is a serious deadline for reply. I have sent European counsel a letter explaining that I am not the receiver and that I have sent you a copy of the letter to review with your client and respond.

Regards,
Brian Bash

-----Original Message-----
From: CannonMFP@bakerlaw.com [mailto:CannonMFP@bakerlaw.com]
Sent: Wednesday, October 03, 2007 2:55 PM
To: Bash, Brian
Subject: Attached Image

1122_001.pdf (272 KB)

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October 3, 2007

Peter P.J.M. Verhaag
Arnold Siedsma
The Hague
Sweelinckplain 1
2517 GK Den Haag
P.O. Box 18558
2502 EN The Hague
The Netherlands

Re: *NCP/Tae Bo*

Dear Mr. Verhaag:

Thank you for your letter of even date. Please be advised that I am not the receiver in the NCP Marketing Group, Inc. case. I represent the companies. However, the case has been converted to a case under chapter 7 of title 11 of the United States Code (the Bankruptcy Code) and a trustee has been appointed in the case. I enclose a copy of the notice of the chapter 7 case.

The trustee, Jeri Coppa-Knudson, is represented by Jeffrey L. Hartman whose contact information is as follows:

Jeffrey L. Hartman
510 West Plumb Lane, Suite B
Reno, Nevada 89509
Telephone 775.324.2800
Email: JLH@bankruptcy reno.com

Please contact him regarding your course of action. I have taken the liberty of sending a copy of your letter to him, but think that it would be prudent if you called him and not wait for him to reply to my correspondence.

Very truly yours,

/s/Brian A. Bash

Brian A. Bash

cc: Jeffrey Hartman

FORM B9D (Chapter 7 Corporation/Partnership Asset Case) (10/05) Case Number 04-51071-gwz

UNITED STATES BANKRUPTCY COURT
District of Nevada

Notice of Chapter 7 Bankruptcy Case, Meeting of Creditors, & Deadlines

A bankruptcy case concerning the debtor Corporation listed below was originally filed under chapter 11 on 4/13/04 and was converted to a case under chapter 7 on 7/31/07.

You may be a creditor of the debtor. **This notice lists important deadlines.** You may want to consult an attorney to protect your rights. All documents filed in the case may be inspected at the bankruptcy clerk's office at the address listed below. NOTE: The staff of the bankruptcy clerk's office cannot give legal advice. Case documents may be viewed at www.nvb.uscourts.gov.

Important Notice to Debtors: Debtors who are individuals must provide government-issued photo identification and proof of social security number at the meeting of creditors. Failure to do so may result in dismissal of their case.

See Reverse Side For Important Explanations

Debtor(s) (name(s) used by the debtor(s) in the last 8 years, including married, maiden, trade, and address):
N.C.P. MARKETING GROUP, INC.
4735 BELPAR STREET
N.W. CANTON, OH 44718

Case Number: 04-51071-gwz Judge: GREGG W ZIVE	Taxpayer ID/Employer ID/Other Nos.: 34-1825112
Attorney for Debtor(s) (name and address): THOMAS A. WEARSCH 3200 NATIONAL CITY CENTER 1900 E. NINTH STREET CLEVELAND, OH 44114 Telephone number:	Bankruptcy Trustee (name and address): JERI COPPA-KNUDSON 3495 LAKESIDE DRIVE PMB #62 RENO, NV 89509-4841 Telephone number: (775) 329-1528

Meeting of Creditors

Date: **September 5, 2007** Time: **10:00 AM**
Location: **300 Booth Street, Room 2110, Reno, NV 89509**

Deadlines to File a Proof of Claim

Proof of Claim must be *received* by the bankruptcy clerk's office by the following deadlines:

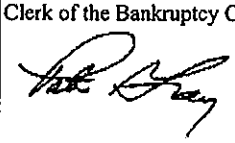
For all creditors (except a governmental unit): **12/4/07**

For a governmental unit: **180 days after relief entered.**

Foreign Creditors
A creditor to whom this notice is sent at a foreign address should read the information under "Claims" on the reverse side.

Creditors May Not Take Certain Actions:

In most instances, the filing of the bankruptcy case automatically stays certain collection and other actions against the debtor and the debtor's property. Under certain circumstances, the stay may be limited to 30 days or not exist at all, although the debtor can request the court to extend or impose a stay. If you attempt to collect a debt or take other action in violation of the Bankruptcy Code, you may be penalized. Consult a lawyer to determine your rights in this case.

Address of the Bankruptcy Clerk's Office: 300 Booth Street Reno, NV 89509 Telephone number: (775)784-5559	**For the Court:** Clerk of the Bankruptcy Court:  Patricia Gray
Hours Open: Monday – Friday 9:00 AM – 4:00 PM	Date: 8/1/07

EXPLANATIONS

FORM B9D (10/05)

Filing of Chapter 7 Bankruptcy Case	A bankruptcy case under Chapter 7 of the Bankruptcy Code (title 11, United States Code) has been filed in this court by or against the debtor(s) listed on the front side, and an order for relief has been entered.
Legal Advice	The staff of the bankruptcy clerk's office cannot give legal advice. Consult a lawyer to determine your rights in this case.
Creditors Generally May Not Take Certain Actions	Prohibited collection actions are listed in Bankruptcy Code § 362. Common examples of prohibited actions include contacting the debtor by telephone, mail or otherwise to demand repayment; taking actions to collect money or obtain property from the debtor; repossessing the debtor's property; starting or continuing lawsuits or foreclosures. Under certain circumstances, the stay may be limited to 30 days or not exist at all, although the debtor can request the court to extend or impose a stay.
Meeting of Creditors	A meeting of creditors is scheduled for the date, time and location listed on the front side. *The debtor's representative must be present at the meeting to be questioned under oath by the trustee and by creditors.* Creditors are welcome to attend, but are not required to do so. The meeting may be continued and concluded at a later date without further notice.
Claims	A Proof of Claim is a signed statement describing a creditor's claim. If a Proof of Claim form is not included with this notice, you can obtain one at any bankruptcy clerk's office. A secured creditor retains rights in its collateral regardless of whether that creditor files a Proof of Claim. If you do not file a Proof of Claim by the "Deadline to file a Proof of Claim" listed on the front side, you might not be paid any money on your claim from other assets in the bankruptcy case. To be paid, you must file a Proof of Claim even if your claim is listed in the schedules filed by the debtor. Filing a Proof of Claim submits the creditor to the jurisdiction of the bankruptcy court, with consequences a lawyer can explain. For example, a secured creditor who files a Proof of Claim may surrender important nonmonetary rights, including the right to a jury trial. **Filing Deadline for a Foreign Creditor:** The deadlines for filing claims set forth on the front of this notice apply to all creditors. If this notice has been mailed to a creditor at a foreign address, the creditor may file a motion requesting the court to extend the deadline.
Liquidation of the Debtor's Property and Payment of Creditors' Claims	The bankruptcy trustee listed on the front of this notice will collect and sell the debtor's property that is not exempt. If the trustee can collect enough money, creditors may be paid some or all of the debts owed to them, in the order specified by the Bankruptcy Code. To make sure you receive any share of that money, you must file a Proof of Claim, as described above.
Bankruptcy Clerk's Office	Any paper that you file in this bankruptcy case should be filed at the bankruptcy clerk's office at the address listed on the front side. You may inspect all papers filed, including the list of the debtor's property and debts and the list of the property claimed as exempt, at the bankruptcy clerk's office or at www.nvb.uscourts.gov.
Foreign Creditors	Consult a lawyer familiar with United States bankruptcy law if you have any questions regarding your rights in this case.

— Refer to Other Side for Important Deadlines and Notices —

Sent to Hastman 10/3/07 @ 255 pm

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Attn: Mr. Brian Bash
Faxno. 001 216 696 0740
Email: bbash@bakerlaw.com

DATE
October 3, 2007

YOUR REFERENCE

OUR REFERENCE
ZA PV/lh

RE
NCP "TAE BO"

Dear Mr. Bash,

David Wright, who has recently been in contact with you on our firm's behalf, told me that you, in your capacity as receiver in bankruptcy of NCP Marketing Group, Inc., would be interested to learn more about the history and advantages of the "TAE BO" trademark enforcement and court proceedings that I have initiated in the name of NCP Marketing Group, Inc, since 1999 and the prospects that these enforcement acts and proceedings and cases would have in the Netherlands. I advice you as follow:

Activities of the parties BG Star and NCP in 1998/1999/2000.

Mr Billy Blanks, an American from California, "invented"a fitness workout somewhere in the nineties, that he called "TAE BO"; he started giving workouts under this name and marketing all kinds of products (clothing, boxing equipment, video's, dvd's, etc);

In 1998, he filed the name TAE BO as a trademark in the United States Patent and Trademark Office (USPTO); with priority therefrom he filed a community trademark in the European Union;

After that filing his company, BG Star, began marketing activities with the help of NCP in Europe and the Netherlands in 1999 and 2000;

Soon, TAE BO became a hype in Europe, even soon followed by massive infringements by fitness schools all over Europe that began offering workouts and lessons as well as merchandising bearing the name;

ARNOLD SIEDSMA

Trademark enforcement and court actions.

At the end of 1999 I was contacted by the US attorneys for NCP in order to enforce BG's and NCP's rights and to start court proceedings aimed at infringement where necessary; in 2000 we wrote more than 700 cease and desist letters to parties that we found were infringing (we have evidence of the infringing acts in our files by way of clippings from news papers with advertisements);

The common rebuttal by the defendants, canalized because of huge media attention in those days was, that TAE BO is not a trademark, but merely a type of sport, like athletics, baseball or soccer;

Some of the infringers filed observations in the European trademark office stating so, but the office (OHIM) denied their objections and allowed the application for registration;

To set an example, we filed court actions in summary proceedings against seven fitness-clubs and sportschools (Lens c.s.);

We also filed court actions in proceedings on the merits against sport schools Corio Sports and Silhouette;

Until now, the judges denied our claims, stating that it was doubtful whether Tae Bo is indeed a trademark and further , that a preliminary injunction was not justified against such a trademark if the owner never used it in this country and seems not to be willing to do so in the near future (Plaintiffs refused to give licenses in those days to parties in this country); in a way the judge ordered the cases to be handled by normal proceedings on the merits.

Cancellation actions filed in the Office of Harmonization in the Internal Market (OHIM) in 2001.

Meanwhile, while these proceedings in the Netherlands were pending, two German parties filed cancellation actions in the OHIM, stating that TAE BO is not a trademark; the Regulations on Community Trademark stipulates in that situation, that national court proceedings must be put on hold until a decision by the cancellation department of the community office is given;

Indeed, the Dutch proceedings were stayed thereupon and are stayed until today;

In 2004, the Cancellation division decided that the requests for cancellation were unfounded, and thus the European trademark registration TAE BO remained valid;

That decision was confirmed by the Board of Appeal in 2005;

ARNOLD SIEDSMA

Meanwhile, the parties, NCP and BG, got into internal troubles; as a result of that, the trademark-rights were assigned several times;

Meanwhile also, NCP and BG stopped paying my attorney declarations; only after many letters and reminders, BG has payed a part of these fees in 2007; at this moment, at least € 30.000,- (Euro's) are still unpaid;

Presently, the courts want to know whether parties are willing to proceed further or not and are threatening to stop the cases because of non-proceeding; **more specifically, we are requested to notice one of the courts on or before October 12, 2007** whether the proceedings are to be maintained;

Please be advised that there is a good chance that, if that happens, the defendants will request a court decision that NCP and BG are to be judged to pay for the costs of the courts and of the defendants;

Meanwhile also, BG's US attorney has requested my firm A&S to cease our representation and transfer the files to another attorney : for the time being, I have refused to do so until we received full payment, which is within Dutch Bar rules. Also, I cannot completely cease our representation as we still represent NCP as well.

Present situation:

The trademark "Tae Bo" is now practically incontestable as a result of the decisions of Cancellation Division and Board of Appeal in 2004/2005 of the European Trademark Office.

Most fitness-schools have ignored the cease and desist orders from the year 2000 and continued to offer Tae Bo lessons; after the hype in 2000 this has been continuing but on a lower level

The pending court cases, as well as all other infringement actions are practically without defense argument of, as the evidence of infringement is almost non- rebutable;

Remuneration of profits made by the third parties over the years by continued use of TAE BO and damages suffered by the owners can be collected either in court or through amicable settlements.

Specific proposal:

What could be done now is that we continue the enforcement actions against the approx 700 defendants that have been continuously using the TAE BO trademark since 2000. I would be in a position to send those parties letters, explaining the situation and the defenseless position they are now in, and offering them a possibility to amicably settle the dispute by

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them informing us about the total amount of TAE BO courses and lessons they have given since they first received our order to stop using the trademark, the amounts of money that they have received therewith and the margin that they have gained, asking the remuneration of a reasonable part thereof (in a way instead of license) and possibly also the remuneration of (or part of the) lawyers costs that we find necessary to collect these sums.
Given the length of infringement, the huge number of infringers and the enormous amount of lessons and courses that must have been given, such would result in a total remuneration of profits of many million of US dollars.

The amount of work that my office would have to conduct to settle these matters would be substantial, but mostly of organizational, administrative nature and would, as I expect, not be more than a few hundred dollars per case, to be negotiated with you.

Possibly, it would be better, in order to boost the willingness of the seven hundred defendants, that we bring the pending court proceedings to an end.

Possibly also, we could try to reach multi party arrangements by contacting fitness-organizations, although I must say that it is my remembrance that their reaction in 2000 was rather arrogant; this attitude however, could have changed after the decisions of OHIM or after that these associations have been made aware of them (I do not know whether they have knowledge of them already)

Pitfalls:

I do not know exactly, but fear that the parties NCP and/or BG have not used the trademark TAE BO over recent years for services such as aerobic workouts; the mark should become vulnerable to cancellation in april 2004 because of non-use. This would mean, that any party could now request cancellation of the mark based on non-use. Contrarily of course, the claims based on infringement until the date of filing a request for cancellation still remain 100% valid. Also I know that at least until 2001, NCP and BG have been selling goods under the mark in the EU, so the bigger part of the foregoing calculation remains secure.

We might however avoid that such a claim, by starting use of the trademark as from now, for instance by appointing one or more licensees who must use the mark in the EU, preferably for services of fitness-schools.

In order to secure this possibility, we should be careful when starting further actions, even when sending the necessary response to the court (which has to be done before October 12, 2007) as the defendants must be copied on all correspondence!!

Necessary action before October 12, 2007:

1) Informing the court whether the plaintiffs want to continue proceedings.

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2) Receiving your instructions thereon a.s.a.p., but ultimately on October 10, 2007.

If, after considering this proposal, you would like to further pursue the matter, I would be happy to further discuss it with you; in that regard, please be advised that I will travel to Orlando, Florida, from November 7 to 11, 2007, where we could meet and discuss all ins and outs.

Yours sincerely,

Peter P.J.M. Verhaag

Ps: In this letter I have refrained from regarding the situation of infringements in other, sometimes much bigger countries of the European Union, which might well be comparable mutatis mutandis.

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