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E-Filed 11/15/07

9
10 **UNITED STATES BANKRUPTCY COURT**
11 **DISTRICT OF NEVADA**

12 IN RE:
13 N.C.P. MARKETING GROUP, INC.,
14 and TAE BO RETAIL MARKETING,
15 INC.,

CASE NOS. 04-51071-GWZ and
04-51073-GWZ
(Jointly Administered)

16 Debtors.

CHAPTER 7

17 _____/
18 N.C.P. MARKETING GROUP, INC.,
19 Plaintiff,

ADV. PRO. NO.: 06-05048

20 vs.

21 BILLY BLANKS, GAYLE BLANKS and
22 BG STAR PRODUCTIONS, INC.,

**TRUSTEE'S MOTION FOR ORDER
APPROVING AGREEMENT FOR
SETTLEMENT AND TRANSFER
OF CERTAIN ASSETS FREE AND
CLEAR OF LIENS, CLAIMS AND
INTERESTS**

23 Defendants.

**Hearing Date: December 12, 2007
Hearing Time: 2:00 p.m.
Time Required: 5 Minutes
Set By: Linda Duffy**

24 Jeri Knudson, chapter 7 trustee ("Trustee") hereby requests an order approving the
25 terms of an Agreement For Settlement And Transfer Of Certain Assets Free And Clear Of
26 Liens, Claims and Interests ("Settlement") with BG Star Productions, Inc. ("BG Star"), Billy
27 Blanks and Gayle Blanks (collectively, with BG Star, the "Blanks Parties"). This Motion is
28 made in accordance with 11 U.S.C. § 363(b) and F.R.Bankr.P. 6004, 9014 and 9019 and is
supported by the separately filed Declaration of Jeri Knudson. The Trustee also requests the
court take judicial notice of the papers and pleadings on file in these jointly administered
cases.

FACTS

The Case

1
2
3 1. N.C.P. Marketing Group, Inc. (“N.C.P.”) and Tae Bo Retail Marketing, Inc. (“Tae
4 Bo Retail”) filed their respective chapter 11 petitions on April 13, 2004.

5 2. The court entered its Order Granting Motion For Joint Administration on April
6 15, 2004. DE 11.

7 3. The Debtors filed a Disclosure Statement on September 13, 2004. DE 97.

8 4. On September 21, 2004, Billy Blanks, Gayle Blanks and BG Star Productions,
9 Inc. (collectively referred to as “BG Star”) filed a Motion To Compel Rejection Of Non
10 Exclusive Trademark License And For Relief From The Automatic Stay To Exercise
11 Applicable Non Bankruptcy Rights (“Motion To Compel”). DE 102 and 103.

12 5 On October 13, 2004, the Debtors filed their Amended Chapter 11 Plan of
13 Reorganization. DE 118.

14 6. On October 18, 2004, the Debtors filed their Disclosure Statement For Amended
15 Joint Plan of Reorganization. DE 122.

16 7. Hearing on the Motion To Compel was held on October 19, 2004 at which time
17 the court ruled from the bench in favor of BG Star. On November 15, 2004, the court
18 entered its written order granting the Motion To Compel and denying that portion of the
19 motion seeking relief from the automatic stay. DE 134.

20 8. On November 18, 2004, the Debtors filed their Notice Of Appeal of the Order
21 Granting Motion To Compel. DE 137.

22 9. On November 21, 2005, the Order Granting Motion To Compel was affirmed by
23 the District Court. In affirming, Judge Reed ruled that under applicable trademark law,
24 trademarks are personal and non-assignable without the consent of the licensor. The Debtors
25 then appealed the decision to the Ninth Circuit (“Ninth Circuit Appeal”). Briefing has been
26 completed by the parties and oral argument has been set for November 5, 2007.

27 10. A central issue in the Ninth Circuit Appeal involves whether the Debtors have a
28 continuing interest in a license to exploit certain TaeBo® trademarks, and if so, what right

1 the estate would have *vis-a-vis* the holding in *Perlman v. Catapult Entertainment, Inc. (In re*
2 *Catapult)* 165 F.3d 747 (9th Cir.1999), *cert. dismissed* 528 U.S. 924 (1999).

3 11. On February 15, 2006, BG Star filed a Motion To Convert Case To Chapter 7
4 (“Motion To Convert”). DE 258. Included among the alleged reasons for conversion was
5 Debtors’ failure to pursue avoidance and other actions against insiders. As a result of the
6 Motion To Convert, the Debtors filed more than a dozen adversary proceedings before
7 expiration of the period of limitations for doing so as set forth in 11 U.S.C. §546.

8 12. On April 3, 2006, the Debtors filed their Disclosure Statement and Second
9 Amended Joint Plan of Reorganization. DE 283 and 284.

10 13. On June 21, 2006, the court denied the Motion To Convert. DE 301.

11 14. On February 15, 2007, BG Star filed its Motion To Appoint Trustee (“Trustee
12 Motion”). DE 313.

13 15. On March 23, 2007, the court entered its Order Appointing Chapter 11 Trustee,
14 DE 325, and Jeri Knudson was appointed by the Office of the United States Trustee. DE
15 331.

16 16. On August 1, 2007, the court entered its Order Converting Cases To Chapter 7.
17 DE 363.

18 The Adversary Proceeding

19 17. Approximately five months after the Ninth Circuit Appeal, on April 4, 2006
20 Debtors filed their Complaint To Avoid And Recover Fraudulent Transfers Pursuant To 11
21 U.S.C. §§ 544(b) and 550. Adv. No. 06-05048.

22 18. On August 25, 2006, the Debtors filed an Amended Complaint For (I) Fraud
23 And Deceit; (II) Avoidance Of And Recovery Of Fraudulent Transfers Pursuant To 11
24 U.S.C. §§ 544(b) and 550 (“Adversary Proceeding”). A copy of the Amended Complaint is
25 attached as Exhibit A.

26 19. On September 20, 2006, the Blanks Parties filed their Answer to the Amended
27 Complaint.

28 20. On October 5, 2006, the Blanks Parties filed their Amended Answer to the

1 Amended Complaint ("Amended Answer"). A copy of the Amended Answer is attached as
2 Exhibit B.

3 21. On May 5, 2006, the Blanks Parties filed their Motion To Dismiss Complaint
4 Under Rule 12(b)(6) ("Motion To Dismiss"). A copy of the Motion To Dismiss is attached
5 as Exhibit C.

6 22. The Blanks Parties have offered the Trustee \$35,000 in exchange for a dismissal
7 of the Adversary Proceeding, dismissal of the Ninth Circuit Appeal and transfer of the
8 Copyrights, the Masters, the Inventory and any and all rights thereto. The Trustee on behalf
9 of the estate and the Blanks Parties will execute mutual releases. A copy of the proposed
10 Agreement For Settlement And Transfer Of Certain Assets Free And Clear Of Liens, Claims
11 and Interests is attached hereto as Exhibit D.

12 23. Having reviewed the Motion To Compel and this court's ruling on the same, the
13 transcript of the bankruptcy hearing on the Motion To Compel, the Motion To Dismiss, the
14 ruling by the Honorable Judge Reed and the appellate briefs, the Trustee has determined that
15 the Settlement is in the best interest of the estate. Accordingly, the Trustee requests an order
16 approving its terms.

17 DISCUSSION

18 The bankruptcy court may approve a compromise or settlement agreement between
19 an estate and another party pursuant to F.R.Bankr.P. 9019(a) which provides:

20 On motion by the trustee and after notice and a hearing, the court may
21 approve a compromise or settlement. Notice shall be given to creditors, the
22 United States trustee, the debtor, and indenture trustees as provided in Rule
2002 and to any other entity as the court may direct.

23 In the Ninth Circuit, motions to approve a compromise are governed by application
24 of the standards set forth in the case of *In re A & C Properties*, 784 F.2d 1377 (9th Cir.
25 1986). Those standards require a review of four factors: 1) likelihood of success on the
26 merits of the underlying litigation with due consideration for uncertainty in the facts and law;
27 2) the complexity of the litigation involved and the expense, inconvenience and delay
28 necessarily attending it; 3) difficulties if any to be encountered in collection; and 4)

1 paramount interest of creditors and proper deference to their reasonable views in the
2 premises. 784 F.2d at 1381.

3 The bankruptcy court is afforded wide latitude in approving compromise agreements
4 which it determines to be fair, reasonable and adequate. *In re Woodson*, 839 F.2d 610 (9th
5 Cir. 1988). The Court need not conduct an exhaustive investigation into the claim sought to
6 be compromised. *In re Walsh Construction, Inc.*, 669 F.2d 1325, 1328 (9th Cir. 1982). In
7 undertaking an examination of the settlement, the responsibility of the bankruptcy judge is
8 not to decide the numerous questions of law and fact raised by appellants but rather to
9 canvass the issues and see whether the settlement “fall[s] below the lowest point in the range
10 of reasonableness”. *In re W.T. Grant Company*, 699 F.2d 599, 608 (2nd Cir. 1983), citing,
11 *Newman v. Stein*, 464 F.2d 689, 693 (2nd Cir. 1972), *cert. denied sub nom. Benson v.*
12 *Newman*, 409 U.S. 1039 (1972). The court must reach “an intelligent and objective opinion
13 of the probabilities of ultimate success should the claim be litigated” and “form an educated
14 estimate of the complexity, expense, and likely duration of such litigation and all other
15 factors relevant to a full and fair assessment of the wisdom of the proposed compromise.”
16 *Protective Committee For Independent Stockholders of TMT Trailer Ferry, Inc. v. Anderson*,
17 390 U.S. 414, 424-425 (1968). Though the Court should give deference to the reasonable
18 views of creditors, “objections do not rule. It is well established that compromises are
19 favored in bankruptcy.” *In re Lee Way Holding Co.*, 120 B.R. 881, 891 (Bankr. S.D. Ohio
20 1990).

21 The law favors compromise and not litigation for its own sake, and so long as the
22 bankruptcy court has amply considered the various factors, the decision to approve a
23 compromise must be affirmed. The Trustee as the party proposing the compromise has the
24 burden of persuading the bankruptcy court that the compromise is fair and equitable and
25 should be approved. *A & C Properties*, 784 F.2d at 1381. The Trustee believes that the
26 Settlement meets the test of *A & C Properties* and should be approved as fair and equitable.

27 ///

28 ///

1 **I. The Proposed Settlement Satisfies The A & C Properties Test**

2 **a. Likelihood of success on the merits with due consideration for**
3 **uncertainty in the facts and law.**

4 The Adversary Proceeding includes three claims for relief: avoidance of fraudulent
5 transfer, disallowance of claims and fraud. The Blanks Parties Amended Answer denies the
6 claims for relief and interposes twenty affirmative defenses. The gravamen of the Adversary
7 Proceeding is found at paragraphs 12 and 13 which read as follows:

8 12. In 1999, Plaintiff purchased the entire interest in the Tae Bo trademark rights
9 from Mr. Blanks for over \$40 million. Defendants have argued and this Court has
10 agreed, that under the Agreements, the Plaintiff transferred his interest back to the
11 Defendants in return for the ability to sub-license its right to sell the Tapes for a
12 period covering approximately three months. In addition, Mr. Blanks was required to
13 assist NCP in creating new Tae Bo videos and provide personal services to NCP in
14 connection with the operation of NCP's business. In return, NCP was to pay Mr.
15 Blanks approximately \$4 million in royalties and service fees. In August 2002, Mr.
16 Blanks breached the Settlement Agreement by refusing to make a promotional
17 appearance that was required under the terms of the Settlement Agreement. As a
18 result, NCP refused to make a scheduled royalty payment to Mr. Blanks.

19 13. Consequently, under the Uniform Fraudulent Transfer Act as adopted in the State
20 of California, the Agreements, taken together, constitute a fraudulent transfer of
21 Plaintiff's interest in the Tae Bo trademarks, because Plaintiff failed to receive
22 reasonably equivalent value for transferring its interest in the Tae Bo trademarks back
23 to the Defendants.

24 When broken down into their component parts, these allegations are not supported by the
25 history contained in the record.¹

26 Although less than clear, the allegation is that NCP paid the Blanks Parties over \$40
27 million and then transferred the rights it had purchased back to the Blank Parties for less than
28 a reasonably equivalent value in exchange. What is missing is a disclosure of the remainder
of the obligation under the original 1999 Letter Agreement. Specifically, under Section 5 of
the Letter Agreement, N.C.P. was required to pay BG Star payments of \$20,000,000 "for
each calendar year during the period between August 1, 1998 through December 15, 2005.
Under the terms of Section 3 of the Letter Agreement, the Blanks Parties' transfer of the Tae
Bo trademarks was expressly conditioned upon N.C.P. paying BG Star at least \$90,000,000

¹ To the extent that the allegations turn on paragraph 7 of the Adversary Proceeding, the Trustee contends those allegations are inappropriate because they violate the rule that settlement discussions are inadmissible.

1 during the term of the Letter Agreement:

2 Company and Blanks hereby assign to NCP all of their right, title and interest
3 in and to the Tae-Bo name and logo and other copyrights or trademarks
4 (whether or not registered) owned by Company or Blanks (except for those
5 provided below) and all good will associated therewith (collectively, the
6 “Intellectual Property”), subject to . . . (b) a reversion of such rights if NCP
7 has not paid to Company \$90,000,000 of the payment Amounts.” Letter
8 Agreement, §3(a) (emphasis added).

9 See, Exhibit C, Motion To Dismiss, pps. 12-14. There are at least two other problems with
10 this premise. The Trustee is informed and believes that during the period between August
11 1999 and October 3, 2001, NCP generated significant revenue as a result of marketing the
12 rights that it did have.² Second, the Settlement Agreement included a release of all claims
13 which NCP may have had against the Blanks Parties up until the date of that agreement.

14 If the allegation is related to the prospective consideration contemplated under the
15 Settlement Agreement, then that premise, too, must fail. The Settlement Agreement
16 confirmed that the Blanks Parties owned the trademarks in question and set forth the relative
17 rights and obligations of the parties, each to the other. In June 2002, the Blanks Parties and
18 NCP entered into a License Agreement which set forth the terms under which NCP could
19 utilize the trademarks. Thereafter, NCP materially breached both the Settlement Agreement
20 and the License Agreement. The Blanks Parties then initiated arbitration proceedings in
21 accordance with the terms of paragraph 12 of the Settlement Agreement. On December 29,
22 2003, the arbitrator found that NCP had materially breached the License Agreement by
23 failing to pay \$2.1 million in royalties and that the Blanks Parties had rightfully terminated
24 the Licenses. This took place approximately four months prior to the chapter 11 petitions
25 being filed by NCP and Tae Bo.

26 The allegations in paragraphs 12 and 13 simply ignore the award by the arbitrator
27 who found that NCP had materially breached the Agreements by failing to pay the \$2.1
28 million in royalties required by Settlement Agreement. In turn, this failure of consideration
29 gave the Blanks Parties the right to terminate the License Agreement. It defies logic for NCP

30 ² The Trustee does not have the business records from the Debtor. However, the Statement of Financial
31 Affairs filed by NCP discloses that gross income in 2002 from the sales of Tae Bo Brand Video Sales was in excess
32 of \$10,000,000.

1 to contend that the confirmation of the trademark ownership rights to the Blanks Parties in
2 the Settlement Agreement constitutes a fraudulent transfer notwithstanding its failure to pay
3 the consideration which formed the basis for the Settlement Agreement in the first instance.³

4 In the Trustee's analysis, the likelihood of success on the merits of the Adversary
5 Proceeding is subject to serious doubt.

6 **b. The complexity of the litigation involved and the expense, inconvenience**
7 **and delay necessarily attending it.**

8 With respect to the Adversary Proceeding, one of the key elements to be proven in a
9 fraudulent transfer context is the solvency or insolvency of the transferor. This element is
10 always problematic in that reconstruction of financial information will require significant
11 expenditures for accounting professionals and for expert witnesses. As noted elsewhere, in
12 2002, the year after the alleged fraudulent transfer took place (in the October 2001
13 Settlement Agreement), NCP generated more than \$10 million in sales of the Tae Bo videos.
14 Although this fact alone does not equate to a conclusion of solvency at the time the alleged
15 transfer occurred, it is indicative of the level of difficulty to be encountered in a trial on the
16 issue of solvency.

17 In light of the history of the dispute between NCP and the Blanks Parties, it is
18 apparent that the claims in the Adversary Proceeding would be vigorously contested and
19 would result in significant additional expense and delay in ultimately gaining resolution.

20 **The Appeal Presents A Separate Element of Complexity**

21 Although anybody's guess, there are realistically three possible outcomes for the
22 appeal. First, the Court can affirm the bankruptcy court and the district court rulings. In
23 such a ruling, the Court may determine that all contractual rights terminated pre-petition and
24 that there was nothing to be considered under §365. Second, the Court can agree that the
25 trademark rights fall under the *Catapult* rubric, cannot be assigned without consent, and
26 therefore, may not be assumed. Third, the Court could reverse which then would lead to the
27

28 ³ NCP's position calls to mind the story of the son who murders his parents and then asks for mercy because he has been orphaned.

1 following possibilities. The case could be converted back to chapter 11 and NCP could then
2 file a plan in which it would attempt to assume and assign the non-exclusive trademark
3 rights. In turn, this presents at least two problems. Under the Settlement Agreement, the
4 non-exclusive trademark rights could not be licensed for a period beyond December 2003, a
5 pre-petition date, and there is no provision in chapter 11 that would permit the court to re-
6 write an agreement that expired pre-petition. Moreover, even if the Code somehow
7 permitted such a re-write, NCP would have to be able to fund a cure of the defaults under the
8 Settlement Agreement. The estates are administratively insolvent and without an infusion of
9 significant resources, in the many millions of dollars, conversion would be an exercise in
10 futility. And, given the litigation track record to date, there is every indication that the
11 Blanks Parties would continue to aggressively oppose NCP's efforts.

12 **c. Difficulties if any to be encountered in collection.**

13 This criteria is highlighted by the analysis of the two previous criteria. Only after
14 very substantial additional litigation both in the adversary and in a plan context would there
15 likely be the possibility of an affirmative net benefit (meaning dollars) to creditors. It is
16 entirely unknown whether the Blanks Parties would be in a position to respond as might be
17 required.

18 **d. Paramount interest of creditors and proper deference to their reasonable**
19 **views in the premises.**

20 The impact on creditors can only be gauged after notice is provided. Nevertheless, it
21 is the Trustee's belief that, because this is an administratively insolvent case, it is only under
22 the most unlikely scenario that there ever could be a return to unsecured creditors. The
23 chapter 7 expenses would have to be satisfied. The trustee would have to prevail in the
24 Adversary Proceeding and collect on any judgment obtained. The judgment also would have
25 to be in an amount necessary to satisfy the unpaid chapter 11 administrative expenses.

26 **II. The Transfer of the Estate's Interest In The Masters, The Copyright, The**
27 **Inventory and the Rights, and the Dismissal of the Appeal, Should Be Approved**
28 **As A Sale Under Section 363**

As a threshold matter, the Ninth Circuit Bankruptcy Appellate Panel has stated that

1 the disposition of a "claim" by way of a compromise that is an asset of the estate is the
2 equivalent of a sale of the intangible property represented by the claim which transaction
3 implicates the sale provisions under §363 as implemented by F.R.Bankr.P. 6004 and the
4 compromise procedure under F.R.Bankr.P. 9019. *Goodwin v. Mickey Thompson*
5 *Entertainment (In re Mickey Thompson Entertainment)*, 292 B.R. 415 (9th Cir. B.A.P. 2003).
6 Section 363(b)(1) provides that a debtor in possession, after notice and a hearing may use,
7 sell or lease other than in ordinary course of business, property of the estate. The court
8 should consider various factors in determining whether the disposition is appropriate:

- 9 1. Whether a sound business purpose justifies the sale;
- 10 2. Whether accurate and reasonable notice of the sale was provided;
- 11 3. Whether the price to be paid is adequate, i.e., fair and reasonable; and
- 12 4. Whether the sale is in good faith, i.e., whether there is an absence of any dealings
13 with insiders. *In re Wilde Horse Enterprises, Inc.*, 136 B.R. 830, 841-2 (Bankr. C.D. Cal.
14 1991). The proposed Settlement between the Trustee and the Blanks Parties meets each of
15 these requirements.

16 **a. Sound Business Purpose**

17 The Ninth Circuit Bankruptcy Appellate Panel has adopted a flexible case-by-case
18 test to determine whether the business purpose for a propose sale justifies disposition of the
19 property under §363(b). *In re Walter*, 83 B.R. 14, 19 (9th Cir. B.A.P. 1988).

20 Whether the proffered business justification is sufficient depends on the case. As the
21 Second Circuit held in *Lionel*, the bankruptcy judge should consider all salient
22 factors pertaining to the proceeding and, accordingly, act t further the diverse
interests of the Debtor, creditors and the equity holders alike.

23 *In re Walter*, 83 B.R. at 19-20, citing *In re Continental Air Lines, Inc.* 780 F.2d 1223, 1226
24 (5th Cir. 1986).

25 For all of the reasons described above, the Trustee submits that the disposition of the
26 estate's claim represented by the dismissal of the adversary proceeding and the transfer of
27 the estate's interest in the Masters, the Copyright, the Inventory and the Rights, and the
28 dismissal of the appeal are clearly in the best interest of the estate. The estate's claim

1 represented by the adversary proceeding involves a very substantial litigation risk and an
2 additional expense that the estate cannot afford, with the risk including the possibility that
3 the estate may recover nothing. The Trustee believes that a sound business purpose exists
4 for approving and consummating the proposed Settlement.

5 **b. Accurate and Reasonable Notice**

6 The notice must comply with the provisions of F.R.Bankr.P. 2002 and 6004.

7 **c. Fair and Reasonable Price**

8 This is perhaps the most difficult factor to assess. In the large context, it first appears
9 that there are substantial values at issue. As the first example, NCP states that it paid more
10 than \$40 million for the rights it acquired in 1999. However, as stated by the Trustee, it is
11 unclear just how much money NCP made in the intervening period between 1999 and the
12 Settlement Agreement in 2001. In the following year it had gross sales in excess of \$10
13 million from the sale of the Tae Bo videos. But then, there followed a series of breaches of
14 the various agreements, as determined by the arbitration, and the eventual bankruptcy filings.
15 In turn, the bankruptcy court found that the agreements had terminated prepetition and, even
16 had they not terminated prepetition, the trademark license could not be assigned and
17 therefore they could not be assumed under the dictates of *In re Catapult Entertainment*, 165
18 F.3d 747 (9th Cir. 1999). The bankruptcy court's position was then confirmed by the
19 appellate court.

20 Moreover, at the time of the Trustee's appointment the estate had no funds on hand.
21 The Debtor left the Trustee with multiple filed but unprosecuted adversary proceedings and
22 an appeal to the Ninth Circuit. The issue on appeal to the Ninth Circuit, as noted above, has
23 various possible outcomes but does not generate a benefit to the estate: reversal would lead
24 to only the potential prospect of a benefit after (1) conversion back to chapter 11, (2) cure of
25 all defaults and (3) a requirement to persuade the court that it could approve a construct in
26 which the non-exclusive license could be 'sub' licensed for a period long after the end period
27 contained in the Settlement Agreement and the License Agreement both of which were
28 terminated prepetition. This circular analysis demonstrates why, in the larger context of the

1 case, the proposed settlement of \$35,000 is fair and reasonable.

2 **d. The Sale Is In Good Faith**

3 The court must consider whether there is any evidence of fraud or collusion or an
4 attempt to take unfair advantage of any potential bidder. *In re Filtercorp, Inc.* 163 F.3d 57,
5 577 (9th Cir. 1998). The Trustee does not believe there is any evidence of bad faith in the
6 proposed settlement.

7 **CONCLUSION**

8 For the foregoing reasons, the Trustee requests an Order approving the Agreement
9 For Settlement And Transfer Of Certain Assets Free And Clear Of Liens, Claims and
10 Interests with the Blanks Parties and for such other relief as is appropriate.

11 DATED this 15th day of November, 2007

12

HARTMAN & HARTMAN

13

/S/ Jeffrey L. Hartman
Jeffrey L. Hartman, Esq. for Trustee
Jeri Knudson

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EXHIBIT A

Electronically Filed August 25, 2006

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IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEVADA

In re

N.C.P. Marketing Group, Inc., et al.,

Debtors.

Case No. BK- 04-51071-GWZ

In Chapter 11 Joint Administration
With: Case No. BK- 04-51073-GWZ

N.C.P. Marketing Group, Inc.

Plaintiff,

vs.

Billy Blanks, Gayle Blanks and BG Star
Productions, Inc.

Defendants.

Adv. Pro. No: BK-N-06-05048-GWZ

**AMENDED COMPLAINT FOR (I) FRAUD
AND DECEIT; (II) AVOIDANCE AND
RECOVERY OF FRAUDULENT
TRANSFERS PURSUANT TO 11 U.S.C. §§
544(b), 550**

1 N.C.P. Marketing Group, Inc, a debtor and debtor-in-possession in the above captioned
2 bankruptcy cases ("Plaintiff"), by and through the undersigned counsel, for its Amended Complaint
3 against Billy Blanks, Gayle Blanks and BG Star Productions, Inc. (collectively, "Defendants")
4 respectfully represents and alleges as follows:

5
6 **INTRODUCTION**

7 As detailed more fully herein, Plaintiff brings this action pursuant to the Uniform
8 Fraudulent Transfer Act, as adopted in the State of California at Cal. Civil Code §§ 3439.01-
9 3439.12. Since 1997, Plaintiff has operated as a seller of Tae Bo brand exercise tapes and DVDs
10 (the "Tapes") after it formed a relationship with Defendant Billy Blanks, the creator of the Tae Bo
11 brand of exercise. Pursuant to a Letter Agreement dated August 31, 1999, Plaintiff purchased,
12 amongst other things, certain Tae Bo trademark rights from Mr. Blanks. Plaintiff paid Mr. Blanks
13 \$40 million in exchange for these rights. Subsequently, in late 2001 and early 2002, Plaintiff and
14 Defendants entered into two interrelated agreements: the Settlement Agreement, dated October 3,
15 2001 (the "Settlement Agreement," attached hereto as Exhibit A and incorporated herein by
16 reference) and a later-executed License Agreement, dated June 20, 2002 (the "License Agreement,"
17 attached hereto as Exhibit B and incorporated herein by reference). The Settlement Agreement and
18 the License Agreement (collectively, the "Agreements") governed, amongst other things, Plaintiff's
19 rights in the Tae Bo trademarks.
20

21 Pursuant to the Settlement Agreement, Plaintiff assigned its interest in the Tae Bo
22 trademarks back to the Defendants (the "Transfer"). In consideration for the Transfer, Defendants
23 granted Plaintiff certain rights in the Tae Bo trademarks. Pursuant to the Agreements, Defendants
24 granted Plaintiff: (i) the exclusive right to produce and sell the Tapes; (ii) the exclusive right to use
25 the Tae Bo trademarks to market the Tapes; and (iii) the ability to assign its rights in the Tae Bo
26

1 trademarks under the License Agreement to a third party. Defendants have argued, and this Court
2 has agreed, that under the Agreements the Plaintiff transferred its interest in the Tae Bo trademarks,
3 for which Plaintiff previously paid \$40 million, for the mere ability to sub-license its rights for a
4 period covering approximately three months. In doing so, Defendants have acted to deny Plaintiff
5 the benefits Plaintiff specifically believed it had bargained for in the Agreements. Consequently,
6 under the Uniform Fraudulent Transfer Act as adopted in the State of California, the Transfer
7 constitutes a fraudulent transfer of Plaintiff's interest in the Tae Bo trademarks, because Plaintiff
8 failed to receive reasonably equivalent value for transferring its interest in the Tae Bo trademarks
9 back to the Defendants.
10

11 JURISDICTION AND VENUE

12 1. This Court has jurisdiction over this adversary proceeding pursuant to 28 U.S.C. §
13 1334, because it arises in and is related to the above-captioned Chapter 11 cases, pending in the
14 United States Bankruptcy Court for the District of Nevada.

15 2. Venue is proper in this Court pursuant to 28 U.S.C. § 1409(a).

16 3. This adversary proceeding is a core proceeding pursuant to 28 U.S.C. §§
17 157(b)(2)(B), (F) and (H). Plaintiff has standing as debtor-in-possession in a Chapter 11 case
18 pursuant to Bankruptcy Code § 1107(a).
19

20 PARTIES

21 4. Plaintiff is a Nevada corporation with its principal place of business in Canton,
22 Ohio. Plaintiff has operated as a seller of exercise tapes and DVDs, primarily through distribution
23 agreements with Century Incorporated and Northern Response International.
24

25 5. Defendant Billy Blanks and Defendant Gayle Blanks are citizens and residents of
26 Los Angeles County, California. Defendant BG Star Productions, Inc. is a California corporation
27

1 with its principal place of business in Sherman Oaks, California. Defendants are parties to the
2 Settlement Agreement, wherein Plaintiff transferred certain trademark rights related to the Tapes to
3 the Defendants in return for the right to produce and sell the Tapes, the right to use the Tae Bo
4 trademarks to market the Tapes and the ability to assign its rights in the Tae Bo trademarks to a
5 third party.

6
7 **FACTUAL ALLEGATIONS**

8 6. Plaintiff previously owned trademark rights in the Tapes under the brand name "Tae
9 Bo." Plaintiff also owned copyrights in the masters of the Tapes. Plaintiff began selling the Tapes
10 in 1997 after it formed a relationship with Billy Blanks, the creator of the Tae Bo brand of exercise.
11 On August 31, 1999, Plaintiff paid Mr. Blanks \$40 million for the right to produce and sell Tae Bo
12 exercise tapes and to purchase certain Tae Bo trademark rights from Mr. Blanks (the "Original
13 Agreement").

14 7. In 2001, a dispute arose between the parties concerning their respective obligations
15 under the terms of the Original Agreement. Plaintiff and Mr. Blanks ultimately resolved such
16 dispute by entering into the Agreements. However, prior to entering into the Agreements, the
17 parties attempted to resolve the dispute through mediation and engaged David Rotman, then
18 affiliated with Gregorio Haldeman Piazza in San Francisco, to act as mediator. During this period,
19 Plaintiff was represented by Jeffrey L. Laytin of Salans, Hertzfeld, Heilbronn, Christy & Viener
20 ("Plaintiff's Counsel"). Mr. Blanks was represented by William R. Sobel of Edelstein, Laird &
21 Sobel, LLP ("Defendants' Counsel"). During the mediation, Mr. Rotman oversaw settlement
22 discussions and conveyed proposals between the respective parties. During these discussions, Mr.
23 Blanks, through Defendants' Counsel, repeatedly represented that he would convey an exclusive
24 license to produce and sell the Tapes to Plaintiff as part of any settlement agreement. Moreover,
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1 Mr. Blanks represented, on multiple occasions, that this license would be freely assignable. These
2 representations were made during the mediation in and around July and August of 2001. The
3 parties continued to engage, through counsel, in settlement discussions leading up to the entering of
4 the Settlement Agreement on October 3, 2001. During this period, Mr. Blanks again repeatedly
5 represented, through Defendants' counsel, that any settlement agreement would include the
6 conveyance to Plaintiff of an exclusive license to produce and sell the Tapes. Again, during these
7 discussions, Mr. Blanks repeatedly represented that the license would be freely assignable.
8 Consequently, Mr. Blanks repeatedly represented that, as part of the Agreements, he intended to
9 convey an exclusive, freely assignable license to Plaintiff. As discussed more fully below,
10 Defendants later argued that the Agreements did not convey an exclusive, freely assignable license
11 to Plaintiff, but instead only the ability to sub-license its right to sell the Tapes for a period
12 covering approximately three months. Therefore, despite his repeated statements to the contrary
13 during months of July, August and September of 2001, Mr. Blanks never intended to convey an
14 exclusive, freely assignable license to Plaintiff as part of the Agreements.
15

16 8. Plaintiff entered into the Settlement Agreement with Defendants on October 3,
17 2001. Through the Settlement Agreement, Plaintiff continued to have the exclusive right to
18 produce and sell Tae Bo brand exercise tapes, but was obligated to make periodic payments to Mr.
19 Blanks. In addition, Plaintiff agreed to assign its interest in the Tae Bo trademarks back to Mr.
20 Blanks. In return, Plaintiff received the exclusive right to use the trademarks to market the Tapes,
21 the right to exploit the masters through the License Agreement and the right to assign its interest in
22 the trademarks to a third party.
23

24 9. Upon termination of the Settlement Agreement, Mr. Blanks could exercise an option
25 to purchase the Tapes from Plaintiff. If he failed to exercise the option, then Plaintiff's license to
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1 use the trademarks to sell the Tapes converted from an exclusive license into a perpetual
2 nonexclusive license to sell the Tapes and otherwise exploit the masters of the Tapes. In exchange,
3 Plaintiff had to pay Mr. Blanks royalties. Finally, under paragraph 9 of the License Agreement,
4 Plaintiff believed it was given the right to freely assign the trademark license in the License
5 Agreement.

6 10. In August 2002, a dispute between the parties went to arbitration. On December 29,
7 2003, the arbitrator held the Settlement Agreement terminated on August 18, 2002. As a result,
8 Plaintiff owned the masters and Tapes as well as a nonexclusive license, in perpetuity, to use the
9 trademarks to exploit the master and sell the Tapes. The arbitrator awarded monetary damages to
10 Mr. Blanks. Unable to immediately meet its financial obligations, Plaintiff (and its wholly owned
11 subsidiary, Tae Bo Retail Marketing, Inc.) filed a voluntary petition for relief under chapter 11 of
12 title 11 of the United States Code (as amended, the "Bankruptcy Code") with this Court on April
13 13, 2004 (the "Petition Date").
14

15 11. During the reorganization process, Plaintiff determined that two methods of
16 satisfying its creditors existed: either assume the Agreements and continue to sell the Tapes, or
17 auction its rights in the trademarks under the Agreements. Plaintiff determined that it could auction
18 its rights because, under paragraph 9 of the License Agreement, Plaintiff had the unlimited right to
19 assign its trademark license in the License Agreement. On September 21, 2004, Defendants filed a
20 Motion to Reject seeking to compel this Court to block Plaintiff's assignment of the license and to
21 terminate it. Defendants argued that paragraph 9 of the License Agreement did not grant Plaintiff
22 the right to freely assign its trademark license. Defendants noted that paragraph 9 is "subject to the
23 terms and conditions of the Settlement Agreement." In turn, paragraph 3(k) of the Settlement
24 Agreement provides that Plaintiff would have the right to enter fifteen (15) new license agreements
25 with respect to the trademarks provided that the new license agreements were effective no later
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1 than September 30, 2002. Therefore, Defendants concluded that Plaintiff's only assignment right
2 consisted of entering a maximum of fifteen sub-license agreements prior to September 30, 2002.
3 This Court agreed, finding that "the deadline for the assignment of the License Agreement was
4 September 20, 2002 and, therefore, has passed." On November 15, 2004, this Court granted the
5 Defendants' motion and entered a Rejection Order directing the Debtors to reject the License
6 Agreement.

7
8 12. In 1999, Plaintiff purchased the entire interest in the Tae Bo trademark rights from
9 Mr. Blanks for \$40 million. Defendants have argued, and this Court has agreed, that under the
10 Agreements the Plaintiff transferred this interest back to the Defendants in return for the ability to
11 sub-license its right to sell the Tapes for a period covering approximately three months. In
12 addition, Mr. Blanks was required to assist NCP in creating new Tae Bo videos and provide
13 personal services to NCP in connection with the operation of NCP's business. In return, NCP was
14 to pay Mr. Blanks approximately \$4 million in royalties and service fees. In August 2002, Mr.
15 Blanks breached the Settlement Agreement by refusing to make a promotional appearance that was
16 required under the terms of the Settlement Agreement. As a result, NCP refused to make a
17 scheduled royalty payment to Mr. Blanks.

18 13. Consequently, under the Uniform Fraudulent Transfer Act as adopted in the State of
19 California, the Agreements, taken together, constitute a fraudulent transfer of Plaintiff's interest in
20 the Tae Bo trademarks, because Plaintiff failed to receive reasonably equivalent value for
21 transferring its interest in the Tae Bo trademarks back to the Defendants.

22
23 **COUNT ONE – AVOIDANCE OF FRAUDULENT TRANSFER**

24 14. Plaintiff hereby incorporates by reference each of the allegations, averments and
25 statements contained in paragraphs 1 through 13 above.
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1 15. Pursuant to 11 U.S.C. § 544(b)(1), a trustee may avoid any transfer of an interest of
2 the debtor in property that is voidable under applicable law by a creditor holding an unsecured
3 claim that is allowable under 11 U.S.C. § 502.

4 16. Pursuant to 11 U.S.C. § 550, where a transfer is avoided pursuant to 11 U.S.C. §
5 544, a trustee may recover, for the benefit of the estate, the property transferred or the value of such
6 property from the transferee.

7 17. Pursuant to 11 U.S.C. § 1107, as debtor-in-possession, Plaintiff has all the rights and
8 powers of a trustee serving in a case under chapter 11 of title 11 of the United States Code.

9 18. Upon information and belief, a creditor with an unsecured claim allowable under 11
10 U.S.C. § 502 could avoid the Transfer under applicable non-bankruptcy law, specifically the
11 Uniform Fraudulent Transfer Act, as adopted in the State of California at Cal. Civil Code §§
12 3439.01–3439.12.

13 19. The Transfer was a transfer of Plaintiff's interest in property to the Defendants.

14 20. At the time of the Transfer, Plaintiff was "insolvent," within the meaning of
15 California Civil Code § 3439.02, at the time of the Transfer, or Plaintiff became insolvent as a
16 result of the Transfer.

17 21. At the time of the Transfer, Plaintiff was engaged or was about to engage in a
18 business or a transaction for which the Plaintiff's remaining assets were unreasonably small in
19 relation to the business or transaction.

20 22. At the time of the Transfer, Plaintiff intended to incur, or reasonably should have
21 believed that it would incur, debts beyond its ability to pay as they became due.

22 23. Plaintiff received less than reasonably equivalent value in exchange for the Transfer.

23 24. The Transfer was made within seven years prior to the filing of this action.
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1 25. Pursuant to 11 U.S.C. §§ 544(b)(1), 550 and the Uniform Fraudulent Transfer Act,
2 as adopted in the State of California at Cal. Civil Code §§ 3439.01–3439.12, Plaintiff is entitled to
3 set aside the Transfer and recover the subject property in its entirety or recover its equivalent value.

4 26. The Transfer should be declared void and the Plaintiff should recover either the
5 property subject to the Transfer or its equivalent value for the benefit of Plaintiff's creditors.
6

7 **COUNT TWO – DISALLOWANCE OF CLAIMS**

8 27. Plaintiff hereby incorporates by reference each of the allegations, averments and
9 statements contained in paragraphs 1 through 26 above.

10 28. Pursuant to § 502(d) of the Bankruptcy Code, the Court shall disallow any claim of
11 any entity from which property is recoverable under §§ 542, 543, 550 or 553 of the Bankruptcy
12 Code or that is a transferee of a transfer avoidable under §§ 522(f), 522(h), 544, 545, 547, 548, 549,
13 or 724(a) of the Bankruptcy Code, unless such entity or transferee has paid the amount, or turned
14 over any such property, for which such entity or transferee is liable under §§ 522(i), 542, 543, 550,
15 or 553 of the Bankruptcy Code.

16 29. Because the Defendants have not turned the property subject to the Transfer over to
17 Plaintiff, the Court must disallow under § 502(d) of the Bankruptcy Code any claims of the
18 Defendants against Plaintiff until the Defendants turn over the property subject to the Transfer or
19 pay to Plaintiff its equivalent value.
20

21 **COUNT THREE – FRAUD**

22 30. Plaintiff hereby incorporates by reference each of the allegations, averments and
23 statements contained in paragraphs 1 through 29 above.
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1 31. During the months of July, August and September of 2001, Defendants repeatedly
2 represented that they intended to convey an exclusive, freely assignable license to Plaintiff as part
3 of the Agreements.

4 32. In fact, Defendants made these representations without any intention of actually
5 conveying an exclusive, freely assignable license to Plaintiff as part of the Agreements.

6 33. During the months of July, August and September of 2001, Defendants repeatedly
7 represented that, under the Agreements, an exclusive, freely assignable license was conveyed to
8 Plaintiff.

9 34. In fact, Defendants represented that an exclusive, freely assignable license was
10 being conveyed to Plaintiff despite believing that this representation was not true.

11 35. Defendants' representations regarding the conveyance of an exclusive, freely
12 assignable license constitute material misrepresentations.

13 36. Defendants knew that Plaintiff would rely upon Defendants' material
14 misrepresentations to enter into the Agreements.

15 37. Defendants' material misrepresentations were made with the intent to induce
16 Plaintiff to enter into the Agreements.

17 38. Plaintiff justifiably relied upon Defendants' material misrepresentations when
18 Plaintiff entered into the Agreements.

19 39. As a result of Defendants' misrepresentations, Plaintiff has incurred damages
20 including, but not limited to, the rejection of the License Agreement by this Court.
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23 WHEREFORE, Plaintiff respectfully requests pursuant to 11 U.S.C. §§ 544(b)(1), 550 that
24 the Court:

25 A. Enter judgment in favor of Plaintiff and against the Defendants ordering that the
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1 Transfer be set aside, avoided, annulled and declared fraudulent, void and a nullity as to Plaintiff as
2 debtor-in-possession;

3 B. Enter judgment in favor of Plaintiff and against the Defendant either ordering
4 Defendant to turn over the property subject to the Transfer or awarding Plaintiff its equivalent
5 value for the benefit of Plaintiff's creditors; and

6 C. Grant Plaintiff such further and other relief as the Court may deem equitable and
7 just.

8 WHEREFORE, Plaintiff respectfully requests pursuant to 11 U.S.C. § 502(d) that the Court:

9 A. Disallow any claims of the Defendants against Plaintiff pursuant to § 502(d)
10 of the Bankruptcy Code; and

11 B. Grant Plaintiff such further and other relief as the Court may deem equitable
12 and just.

13 WHEREFORE, Plaintiff respectfully requests judgment against Defendants for fraud and
14 that the Court grant relief to Plaintiff as follows:

15 A. Damages resulting from Defendants' conduct in an amount to be determined
16 at trial;

17 B. Punitive damages in an amount to be determined at trial;

- 1 C. The costs of this action including attorneys' fees;
- 2 D. Such further and other relief as the Court may deem equitable and just.

3
4 Date: Reno, Nevada
August 25, 2006

/s/ Jennifer Smith
Jennifer Smith (State Bar No. 610)
LIONEL SAWYER & COLLINS

6 And

7 Brian A. Bash (Ohio Bar No. 0000134)
8 Jeffrey Baddeley (Ohio Bar No. 0013900)
9 Thomas M. Wearsch (NY Bar No. 4082533)
BAKER & HOSTETLER LLP

10 *Attorneys for the Debtors*

11 And

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16 *Special Litigation Counsel*

Certificate of Service

1. On August 25, 2006, I served the following document(s):

AMENDED COMPLAINT FOR (I) FRAUD AND DECEIT; (II) AVOIDANCE AND RECOVERY OF FRAUDULENT TRANSFERS PURSUANT TO 11 U.S.C. §§ 544(b), 550

2. I served the above-named document(s) by the following means to the persons as listed below:

a. **By direct email (as opposed to through the ECF System)**

Michael S. Greger, Esq. - mgreger@allenmatkins.com

Michael A. T. Pagni - mpagni@mcdonaldcarano.com

U.S. Trustee - RN -11 - USTPRegion17.RE.ECF@usdoj.gov

Based upon the written agreement of the parties to accept service by email or a court order, I caused the document(s) to be sent to the persons at the email addresses listed below. I did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission was unsuccessful.

I declare under penalty of perjury that the foregoing is true and correct.

Dated this 25th day of August, 2006.

/s/ Audrey A. Kay
An Employee of
Lionel Sawyer & Collins