United States Bankruptcy Court
Northern District of Illinois
Eastern Division

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Bankruptcy Caption: In re Headline Promotions, Inc.

Bankruptcy No. 00 B 24010

Adversary Caption: Headline Promotions, Inc. v. Marlene Trupiano, individually, and d/b/a USA Sports Network, and Stuart J. Radloff, Receiver

Adversary No. 00 A 00849

Date of Issuance: October 30, 2001

Judge: John H. Squires

Appearance of Counsel:

Attorney for Movant: Forrest L. Ingram,, Esq., Forrest L. Ingram, P.C., 79 West Monroe Street, Suite 1210, Chicago, IL 60603-4907

Attorney for Defendant: Ariel Weissberg, Esq., David C. Thollander, Esq., Weissberg and Associates, Ltd., 401 South LaSalle Street, Suite 403, Chicago, IL 60605

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

IN RE:	)	Bankruptcy No. 00 B 24010
HEADLINE PROMOTIONS, INC.,	)	Chapter 11
	)	Judge John H. Squires
Debtor.	)	
	)	
	)	
HEADLINE PROMOTIONS, INC.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Adversary No. 00 A 00849
	)	
MARLENE TRUPIANO, individually, and d/b/a USA SPORTS NETWORK and STUART J. RADLOFF, Receiver,	)	
	)	
Defendants.	)	

MEMORANDUM OPINION

These matters come before the Court on the objection of Headline Promotions, Inc. (the "Debtor") to the amended proof of claim filed by U.S.A. SportsNetwork, Inc. ("SportsNetwork"), the Debtor's counterclaim against SportsNetwork and on the complaint filed by the Debtor against Marlene Trupiano ("Marlene"), SportsNetwork and Stuart J. Radloff ("Radloff"). For the reasons set forth herein, the Court overrules the objection to the amended proof of claim and allows SportsNetwork's claim in the full amount of $12,000.00. The Court allows, in part, the counterclaim of the Debtor in the sum of $1,101.40. Further, the Court grants judgment in favor of Marlene and SportsNetwork under Count I of the complaint. The Court grants judgment in favor of the Debtor under Count III of the complaint and orders Marlene and SportsNetwork to

either turnover certain property of the estate consisting of inventory, equipment and accounts receivable held by them or the reasonable value totaling $33,875.20 pursuant to 11 U.S.C. § 542(a). The Court grants judgment in favor of the Debtor and against Marlene and SportsNetwork on Count IV of the complaint and declares that all of the property listed on the amended Schedule B is property of the Debtor's estate. However, the Court declines to enter sanctions against Marlene and SportsNetwork pursuant to 11 U.S.C. § 362(h) because the Debtor is not an "individual."

I. JURISDICTION AND PROCEDURE

The Court has jurisdiction to entertain these matters pursuant to 28 U.S.C. § 1334 and Internal Operating Procedure 15(a) of the United States District Court for the Northern District of Illinois. They are core proceedings under 28 U.S.C. § 157(b)(2)(A), (B), (C), (E), (F) and (O).

II. FACTS AND BACKGROUND

The Debtor is an Illinois corporation in the business of providing sports marketing memorabilia to businesses and individuals for their promotional activities, and operates that business from Chicago, Illinois. William C. Janicki ("William") is the sole shareholder and director of the Debtor as well as its president. Marlene operated a sports memorabilia business from her home and from office space leased in St. Louis, Missouri. Marlene does business through a corporation referred to herein as SportsNetwork. In

January 1998, the Debtor engaged Marlene to sell goods in exchange for commissions. In late 1999 and early 2000, the Debtor contemplated entering into a closer business relationship with Marlene which would involve moving the corporate office to St. Louis. The Debtor had a working business relationship with Marlene and SportsNetwork, but that relationship was never formalized as a partnership, joint venture or some other artificial entity. In early Summer 2000, office space was obtained in St. Louis, phone service was established, office supplies were purchased and certain equipment was provided to further the business relationship between the Debtor and Marlene. The Debtor transferred its books, records, inventory and other assets to the St. Louis office. This business relationship lasted only until July 17, 2000.

On July 31, 2000, Marlene filed a lawsuit against William in the Circuit Court of St. Louis, Missouri. See Defendants' Exhibit No. 1. On that date, the St. Louis court entered a consent order (the "Consent Order") whereby the court stated in relevant part that "[w]ithin 24 hours the Court will appoint a receiver to collect outstanding accounts and to hold any funds received in a special account and to pay necessary expenses of the business. . . ." See Debtor's Group Exhibit No. 1, Exhibit A and Defendants' Exhibit No. 2. A receiver was not appointed prior to the date of the filing of the bankruptcy petition.

On August 16, 2000, the Debtor filed a Chapter 11 bankruptcy petition. On August 31, 2000, the Debtor filed its Schedules, including Schedule B. Thereafter, on September 13, 2000, the Debtor filed an amended Schedule B. See Debtor's Group Exhibit No. 1, Exhibit B.

On February 22, 2001, SportsNetwork filed an amended proof of claim which

superseded the original proof of claim filed in the case, and reduced the amount claimed from $288,000.00 to $12,000.00 as a general unsecured claim without priority. See Debtor's Exhibit No. 17. On February 26, 2001, the Debtor filed a counterclaim against SportsNetwork. The Debtor's plan of reorganization was confirmed on March 20, 2001. See Debtor's Exhibit No. 26.

On September 15, 2000, the Debtor filed the instant adversary proceeding against Marlene, SportsNetwork and Radloff. Count I of the complaint seeks to avoid the Consent Order as a preferential transfer; Count II of the complaint seeks injunctive relief[1]; Count III seeks turnover of property of the estate; and Count IV seeks a declaratory judgment. The Court held an evidentiary hearing on the complaint and on the objection of the Debtor to SportsNetwork's claim. The Court barred Marlene from testifying at the trial because she violated several of the Debtor's discovery requests and the Court's order enforcing same.

III. DISCUSSION

A. Count I of the Complaint

Pursuant to Count I of the complaint, the Debtor seeks to have the Consent Order avoided as a preferential transfer pursuant to 11 U.S.C. § 547(b). The Debtor contends

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[1] On March 5, 2001, the Court entered an order resolving the issues raised in Count II of the complaint. Radloff executed an Offer of Judgment in which he attested that he has not come into possession of any monies belonging to the Debtor and does not have any property in his possession or under his control which belongs to the Debtor. On May 10, 2001, the Court entered partial summary judgment with respect to Count III of the complaint in favor of the Debtor and against Radloff. That order resolved all issues between the Debtor and Radloff.

that the Consent Order was a transfer of an interest of the Debtor in property because it affected the right of the Debtor to have possession and control of its personal property and transferred such possession and control to the St. Louis court through its appointed receiver, and thus, encumbered property of the Debtor's estate so that the Debtor could not make use of such property to effect a reorganization. Specifically, the Debtor alleges that the Consent Order encumbered the property listed on the amended Schedule B–inventory, equipment and accounts receivable.

Certain preferential transfers made from the debtor's estate before the debtor filed a bankruptcy petition may be avoided. See 11 U.S.C. § 547(b). The power to avoid preferential transfers is designed to further the Bankruptcy Code's central policy of equality of distribution: "creditors of equal priority should receive pro rata shares of the debtor's property." Begier v. IRS, 496 U.S. 53, 58 (1990). Additionally, by preventing the debtor from favoring certain creditors over others and by ensuring an equal distribution, the preference provision helps reduce "the incentive to rush to dismember a financially unstable debtor." In re Smith, 966 F.2d 1527, 1535 (7th Cir.) (citations omitted), cert. dismissed, Baker & Schultz v. Boyer, 506 U.S. 1030 (1992). "The purpose of allowing preferential transfers to be set aside is to prevent debtors who are tottering toward bankruptcy from playing favorites among their creditors, trying to keep alive a little longer by placating the most importunate ones." In re Freedom Group, Inc., 50 F.3d 408, 410 (7th Cir. 1995).

Section 547(b) of the Bankruptcy Code provides that a trustee or debtor-in-possession may avoid any transfer of an interest of the debtor in property if the transfer

meets five requirements: (1) to or for the benefit of a creditor; (2) for or on account of an antecedent debt owed by the debtor before such transfer was made; (3) made while the debtor was insolvent; (4) made on or within 90 days before the date of the filing of the petition; and (5) enables the creditor to receive more than such creditor would if the case were a case under Chapter 7, the transfer had not been made, and the creditor received payment of such debt to the extent provided by the provisions of the Code. See 11 U.S.C. § 547(b); Warsco v. Preferred Technical Group, 258 F.3d 557 (7th Cir. 2001); In re Superior Toy & Mfg. Co., 78 F.3d 1169, 1171 (7th Cir. 1996).

The trustee, and in this matter, the Debtor as debtor-in-possession, has the burden of proof to establish all elements of § 547(b) by a preponderance of the evidence. 11 U.S.C. § 547(g); In re Jones, 226 F.3d 917, 921 (7th Cir. 2000); In re Badger Lines, Inc., 140 F.3d 691, 698 (7th Cir. 1998); In re Prescott, 805 F.2d 719, 726 (7th Cir. 1986). The Bankruptcy Code presumes the debtor to be insolvent, as a matter of law, during the 90 days prior to the bankruptcy petition filing date. 11 U.S.C. § 547(f); see also Barash v. Public Fin. Corp., 658 F.2d 504, 507 (7th Cir. 1981). This presumption requires the creditor to present evidence to rebut the presumption, but it does not relieve the trustee of the ultimate burden of proof on this third element to establish a prima facie case under § 547(b). See In re Taxman Clothing Co., Inc., 905 F.2d 166, 168 (7th Cir. 1990); Schwinn Plan Comm. v. AFS Cycle & Co., Ltd. (In re Schwinn Bicycle Co.), 192 B.R. 477, 485 (Bankr. N.D. Ill. 1996).

Initially, the Court must determine whether the Consent Order constituted a transfer of an interest of the Debtor in property. The Bankruptcy Code's definition of a

transfer is "expansive," Barnhill v. Johnson, 503 U.S. 393, 400 (1992), and encompasses "every mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing of or parting with property or with an interest in property. . . ." 11 U.S.C. § 101(54). The legislative history makes it clear that even a change of custody is a "transfer." As stated in the legislative history: "[u]nder this definition, any transfer of an interest in property is a transfer, including a transfer of possession, custody or control even if there is no transfer of title, because possession, custody, and control are interests in property." H.R. Rep. No. 595, 95th Cong., 1st Sess. 314, reprinted in 1978 U.S. Code Cong. & Admin. News 5963, 6271; S.Rep. No. 598, 95th Cong., 2d Sess. 27, reprinted in 1978 U.S. Code Cong. & Admin. News 5787, 5813.

The Court finds that the Consent Order did not transfer any interest of the Debtor in property. Rather, that Order simply stated that a receiver would be appointed within 24 hours. The Consent Order itself did not constitute a direct, indirect, absolute or conditional, voluntary or involuntary disposing of or parting with property or with an interest in property of the Debtor's estate. Moreover, the Court holds that the Consent Order did not transfer possession, custody or control of property of the Debtor's estate. The Consent Order merely stated that a receiver would be appointed within 24 hours. In fact, however, Radloff was not appointed within that time. It was not until after the Debtor filed the bankruptcy petition that Radloff was appointed receiver.

The Debtor has not produced, and the Court was unable to find, any case authority for the proposition that a statement contained in a court order which states that a receiver shall be appointed constitutes a transfer of property. Perfunctory and undeveloped

arguments, and arguments that are unsupported by pertinent authority, are waived. See United States v. Lanzotti, 205 F.3d 951, 957 (7th Cir.), cert. denied, 530 U.S. 1277 (2000) (collecting cases). The Court does not have a duty to research and construct legal arguments available to a party. Head Start Family Educ. Program, Inc. v. Cooperative Educ. Serv. Agency 11, 46 F.3d 629, 635 (7th Cir. 1995). Because the Debtor has not met the threshold inquiry for a preference–a showing that the Consent Order itself transferred any interest of the debtor in property–the Court will not further address the essential elements required to prove the existence of a preferential transfer. Consequently, the Court grants judgment in favor of Marlene and SportsNetwork under Count I of the complaint.

B. Count III of the Complaint

Pursuant to Count III of the complaint, the Debtor seeks turnover of property of the estate pursuant to 11 U.S.C. § 542(a). In particular, the Debtor seeks turnover of all property listed on its amended Schedule B that has not been returned to it or the reasonable value of that property from Marlene and SportsNetwork.

The statutory provision for turnover contained in 11 U.S.C. § 542(a) deals with property of the estate to be turned over to the appropriate party, normally the case trustee, but in this matter the Debtor acting as debtor-in-possession, with the exceptions provided in § 542(c) and (d), and subject to set-off rights referenced in § 542(b) pursuant to 11 U.S.C. § 553. Turnover is not intended as a remedy to determine disputed rights of parties to property, rather it is intended as the remedy to obtain what is acknowledged to be property of the bankruptcy estate. Marlow v. Oakland Gin Co., Inc. (In re Julien Co.),

128 B.R. 987 (Bankr. W.D. Tenn. 1991), aff'd, 44 F.3d 426 (6th Cir. 1995). In this case, the Debtor seeks to obtain certain inventory, equipment, accounts receivable and lost profits.

Relief under § 542(a) is most frequently afforded to case trustees or debtors against creditors who are in actual or constructive possession of the subject property and who do not voluntarily surrender it. See Pileckas v. Marcucio, 156 B.R. 721 (N.D. N.Y. 1993). Hence, the burden is usually on the trustee or debtor seeking turnover, Groupe v. Hill (In re Hill), 156 B.R. 998 (Bankr. N.D. Ill. 1993), and the evidence must show that the asset in question is part of the bankruptcy estate. Mather v. Tailored Fabrics, Inc. (In re Himes), 179 B.R. 279 (Bankr. E.D. Okla. 1995). See Orix Credit Alliance, Inc. v. Wojcicki (In re Wojcicki), Bankr. No. 97 B 24008, Adv. No. 01286, 1997 WL 742513 (Bankr. N.D. Ill. Dec. 1, 1997). Only property in which the debtor has an interest that properly becomes part of the bankruptcy estate can be made the subject of an order for turnover under § 542(a). Cates-Harman v. Stage (In re Stage), 85 B.R. 880 (Bankr. M.D. Fla. 1988). It thus follows that, if the debtor does not have the right to possess or use property at the commencement of a case, a turnover action cannot be a tool to acquire such rights. Creative Data Forms, Inc. v. Pennsylvania Minority Bus. Dev. Auth. (In re Creative Data Forms, Inc.), 41 B.R. 334 (Bankr. E.D. Pa. 1984), aff'd, 72 B.R. 619 (E.D. Pa. 1985), aff'd, 800 F.2d 1132 (3d Cir. 1986). One who is in possession or control of property of the estate must turn it over to the trustee or become liable to the trustee for its value, unless he has disposed of the property without actual notice or knowledge of the bankruptcy case. In re USA Diversified Prods., Inc., 100 F.3d 53, 56-57 (7th Cir. 1996).

That he no longer has possession or control of the property when turnover is demanded is not, by itself, a defense. Id.

In the answer to the complaint, Marlene and SportsNetwork admitted that they were notified of the Debtor's bankruptcy filing on August 16, 2000. However, they denied that they were in possession of any property of the Debtor's estate. The Court finds that the evidence demonstrated that Marlene and SportsNetwork then still possessed property of the Debtor's estate.

With respect to the inventory listed on the amended Schedule B (Debtor's Group Exhibit No. 1, Exhibit B-28), William testified that he and Tony Trupiano ("Tony"), one of Marlene's sons, took an inventory in the Debtor's St. Louis office in July 2000, and the total value of that inventory, as reported on the Debtor's amended Schedule B, was $23,893.22. Id. William testified that, except for the items marked "Chicago" on amended Schedule B-28, all the items of inventory were located at the St. Louis office on the date of the filing of the bankruptcy petition and that the total value of the inventory in St. Louis on August 16, 2000 was $20,333.22.[2] See Defendants' Exhibit No. 8.

William further testified that he did not remove, sell or have delivered to the Chicago office, any of the items of inventory that the Debtor left in St. Louis in July 2000. He testified that all of those items of inventory were in the possession of or under the control of Marlene and SportsNetwork. William also testified that he was in St. Louis

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[2] William testified that customers had returned to the Chicago office NBA basketballs worth $1,400.00, hockey pucks worth $500.00, and other items–football and hockey display cases, baseballs and other miscellaneous items–to make up the difference in the two figures.

on September 22, 2000 and was given full access to the office. At that time, William noticed that certain Super Bowl footballs were missing. Apparently, Marlene told him that those were disposed of a long time ago. William stated that he never received any compensation for this inventory sold or disposed of by Marlene and SportsNetwork. William further testified that other items of inventory which were at the St. Louis office in July 2000, were not there on September 22, 2000. He took several pictures of the inventory that remained in the St. Louis office. See Debtor's Group Exhibit No. 9.

Tony also testified that much of the inventory contained on the amended Schedule B-28 was no longer at the St. Louis office, but he could offer no satisfactory explanation as to its disposition. The thrust of this testimony was that William voluntarily left inventory and equipment in St. Louis in September, and thus same was virtually abandoned by the Debtor. The Court rejects this argument. William's testimony to the contrary was more persuasive and credible. Moreover, there has never been any motion filed seeking abandonment of any property of the estate nor any attendant requisite order of the Court under 11 U.S.C. § 554.

William further testified that all of the inventory which was at the St. Louis office in July 2000, was purchased by the Debtor. The Debtor submitted invoices for the purchase of the merchandise. See Debtor's Group Exhibit Nos. 10 and 25. Further, the Debtor submitted checks for the payment of the merchandise. See Debtor's Group Exhibit No. 11. In addition, William stated that the Debtor has not received this inventory or the value thereof from Marlene or SportsNetwork. The Court finds the testimony of William to be credible and unrebutted on this point.

Moreover, on April 4, 2001, the Debtor served on Marlene and SportsNetwork a request to admit facts. See Debtor's Exhibit No. 4. The answer thereto contains the following requests to admit and answers:

> 16. At the time the Agreed Adversary Order and the Agreed Sanctions Order were entered [March 6, 2001], you were in possession of assets listed on Debtor's Amended Schedule B, referred to in the Order.
> **ANSWER:**
> Defendants admit the facts set forth in Request number 16.
>
> 17. As of March 31, 2001, you remain in possession of assets listed on Debtor's Amended Schedule B.
> **ANSWER**:
> Defendants admit the facts set forth in Request number 17.

See Debtor's Exhibit No. 19. These answers further demonstrate that on March 31, 2001, Marlene and SportsNetwork had possession of property of the Debtor's estate.

Thus, the Court holds that Marlene and SportsNetwork violated § 542(a) when they did not return to the Debtor such inventory that was then in their possession, custody or control. The evidence was less than clear regarding the ultimate disposition of that inventory. The fact is clear from Tony's testimony, however, that Marlene and SportsNetwork no longer have possession of the inventory. As a result, the Court enters judgment in favor of the Debtor and orders Marlene and SportsNetwork to turnover all inventory in their possession or the reasonable value thereof, which William testified totaled $20,333.22.

In addition, the Debtor has requested that the Court award it the sum of $9,357.20, which represents the profits made from the sale of that inventory. The Debtor contends that the Court should draw the reasonable inference that because the inventory is no

longer located at the St. Louis office, Marlene and SportsNetwork must have marked it up and sold it at a value greater than the cost of the goods. William testified that the usual mark up was 40% over cost. The Debtor has cited no authority for the proposition that lost profits are a compensable element for recovery under § 542. The statutory text only covers, in pertinent part, "such property or the value of such property. . . ." and does not include any earnings or profits derived therefrom. See 11 U.S.C. § 542(a). Perfunctory and undeveloped arguments, and arguments that are unsupported by pertinent authority, are waived. Lanzotti, 205 F.3d at 957. Thus, based on the statutory language and the Debtor's failure to cite supporting authority, the Court declines to award the lost profits requested.

With respect to the office equipment, furnishing and supplies, William testified that when he moved the Debtor's operations from St. Louis back to Chicago on July 17, 2000, he left behind most of the office equipment, furniture and supplies. The Debtor estimated the value of those items on the date of the filing of the bankruptcy petition at $13,462.98. See Debtor's Group Exhibit No. 1, Exhibit B-26. William testified that on September 22, 2000 when he visited the St. Louis office, he retrieved items valued at $1,564.00. Therefore, the value of the remaining items from amended Schedule B-26 is $11,898.98.

To substantiate the cost of the items, William identified several sales tickets from vendors indicating items purchased by the Debtor for the St. Louis office. See Debtor's Group Exhibit No. 12. He testified that none of the office equipment, furnishings or supplies in the St. Louis office had been purchased by Marlene or SportsNetwork. No

other evidence was offered on behalf of Marlene or SportsNetwork to show that they had purchased any of the office equipment, furnishings or supplies or to contradict the values placed on those items by the Debtor.

William testified that the items listed on amended Schedule B-26 were in the possession of or under the control of Marlene and SportsNetwork on August 16, 2000, and have not been returned to the Debtor. Marlene and SportsNetwork acknowledged that the property in St. Louis was property of the Debtor's estate. See Debtor's Exhibit Nos. 2 and 3. Moreover, on April 4, 2001, the Debtor served on Marlene and SportsNetwork a request to admit facts. See Debtor's Exhibit No. 4. The answer thereto contains the following requests to admit and answers:

> 16. At the time the Agreed Adversary Order and the Agreed Sanctions Order were entered [March 6, 2001], you were in possession of assets listed on Debtor's Amended Schedule B, referred to in the Order.
> **ANSWER:**
> Defendants admit the facts set forth in Request number 16.
>
> 17. As of March 31, 2001, you remain in possession of assets listed on Debtor's Amended Schedule B.
> **ANSWER**:
> Defendants admit the facts set forth in Request number 17.

See Debtor's Exhibit No. 19. These answers further demonstrate that at that time Marlene and SportsNetwork had possession of such equipment of the Debtor's estate.

Damages must be proven with reasonable certainty. See Doe v. United States, 976 F.2d 1071, 1085 (7th Cir. 1992). A party seeking damages must prove them using methodologies that need not be intellectually sophisticated. Schiller & Schmidt, Inc. v. Nordisco Corp., 969 F.2d 410, 415 (7th Cir. 1992). Still, a damage award cannot be based

on mere speculation, guess or conjecture. Adams Apple Distr. Co. v. Papeleras Reunidas, S.A., 773 F.2d 925, 930 (7th Cir. 1985). The Court will utilize the "cost" value of the unreturned inventory and equipment to the Debtor as supported by the evidence adduced at trial. The Seventh Circuit has not prescribed any particular required measurement of "value" for § 542 purposes. See USA Diversified Prods., 100 F.3d at 56.

The Court finds that William's testimony regarding the values placed on the Debtor's office equipment, furnishings and supplies, as listed on the amended Schedule B-26, although disputed by Tony, was the only evidence proffered. The Court finds William's testimony more credible. Hence, the Court finds the value of such items to be $11,898.98. The Court holds that Marlene and SportsNetwork violated § 542(a) when they did not return to the Debtor the remaining office equipment, furnishings and supplies in their possession, custody or control. The Court orders Marlene and SportsNetwork to turnover to the Debtor that office equipment or its reasonable value of $11,898.98.

With respect to the accounts receivable, on its amended Schedule B, the Debtor listed their value at $46,741.00. See Debtor's Group Exhibit No. 1, Exhibit B-15. In a handwritten note thereon, the Debtor indicates additional receivables in the sum of approximately $9,000.00 for which no invoices could be retrieved. Thus, the total accounts receivable listed on the Debtor's amended Schedule B-15 is $55,741.00.

William testified that he collected most of those receivables. He further testified that during the pendency of the case, he came to learn that certain customers had sent checks to Marlene in St. Louis to pay the Debtor's invoices, rather than to the Debtor in Chicago. He testified that he spoke to two customers about this–KN Integer Group and

Peaks Performance.

William further testified that he believed that between $5,000.00-$10,000.00 of the Debtor's receivables have been diverted, post-petition, to Marlene and SportsNetwork. The Debtor seeks turnover of only $5,000.00. The Court declines to over turnover of $5,000.00 for the receivables based solely upon William's "guestimate." That sum has not been established with a reasonable degree of certainty. The only evidence introduced by the Debtor in this regard was with respect to the receivables from School Calendar. In the Debtor's request to admit facts, Marlene and SportsNetwork admitted that they made a communication to Bambi Maers from School Calendar requesting that the check in the sum of $993.00, which was issued to the Debtor, be reissued in the same amount to SportsNetwork. See Debtor's Exhibit Nos. 4 and 19. Consequently, the Court will order turnover of only $993.00 from Marlene and SportsNetwork to the Debtor.

Next, the Debtor seeks turnover of the asset retrieval items listed on amended Schedule B-33. See Debtor's Group Exhibit No. 1, Exhibit No. B-33. William testified that the value of the hockey pucks and the holders listed on amended Schedule B-33, which Marlene and SportsNetwork failed to turnover to the Debtor, is $650.00. The Court holds that Marlene and SportsNetwork violated § 542(a) when they did not return to the Debtor those hockey pucks and holders in their possession, custody or control. The Court orders Marlene and SportsNetwork to turnover to the Debtor the sum of $650.00 which represent the reasonable value of those items.

The Debtor also seeks the sum of $20,000.00 for the failure of Marlene and

SportsNetwork to turnover photocopies of the Debtor's customer records and other business documents. The Debtor alleges that Marlene and SportsNetwork made use of those documents to divert receivables from the Debtor to SportsNetwork. The Debtor also seeks turnover of those documents.

William and Tony both testified that numerous customer records and business records of the Debtor were copied and that Marlene and SportsNetwork maintained possession of the photocopies. The original documents, however, were turned over to the Debtor. The Court holds that Marlene and SportsNetwork violated § 542(a) when they did not return to the Debtor the copies of the Debtor's customer records and other business documents in their possession, custody or control. The Court orders Marlene and SportsNetwork to turnover to the Debtor those documents forthwith.

The Court declines to award the Debtor the sum of $20,000.00 for the lost use of those documents. The record before the Court is devoid of any corroborating evidence to support the Debtor's allegation that Marlene and SportsNetwork used those documents to divert collection of receivables from the Debtor to SportsNetwork. Further, no evidence was adduced to support the award of the $20,000.00 lost use figure.

C. Count IV of the Complaint

Pursuant to Count IV of the complaint, the Debtor seeks a declaratory judgment that the property listed on the Debtor's amended Schedule B constitutes property of the Debtor's estate. The Debtor contends that this fact has been admitted by Marlene and SportsNetwork in orders entered by the Court on March 6, 2001. See Debtor's Exhibit Nos. 2 and 3. In addition, the Debtor further requests that because Marlene and

SportsNetwork maintained and exercised exclusive control over property of the Debtor's estate, they should be required to pay to the Debtor, as sanctions for their further willful and contemptuous violation of the automatic stay, and their continuing violation of the order confirming the Debtor's plan, the Debtor's costs and reasonable attorney's fees.

On March 6, 2001, the Court entered two orders which provided in relevant part: "[r]espondents acknowledge that all assets noted in Debtor's Schedule B, as amended, are property of Debtor's estate, including accounts receivable, but excluding a certain 800-number (the "Telephone Number"). Debtor acknowledges that the Telephone Number is not property of Debtor's estate." Id. at ¶s 2.

Pursuant to Federal Rule of Bankruptcy Procedure 7001(9), the Court may enter a declaratory judgment relating to any of the matters set forth in Bankruptcy Rule 7001. Pursuant to Bankruptcy Rule 7001(1), and under Count III of the complaint, the Debtor seeks turnover of property of the estate. Bankruptcy courts may issue declaratory judgments in adversary proceedings which are properly within their jurisdiction. See In re Korhumel Indus., Inc., 103 B.R. 917, 921 (N.D. Ill. 1989). The Court clearly has core jurisdiction over this adversary proceeding which involves a claimed avoidable preferential transfer under 11 U.S.C. § 547 and turnover of property of the Debtor's estate under 11 U.S.C. § 542(a). See 28 U.S.C. § 157(b)(2)(E) and (F).

Based on the prior orders entered by the Court on March 6, 2001, the Court finds that Marlene and SportsNetwork made admissions that all of the items listed on amended Schedule B were property of the Debtor's estate. See Debtor's Exhibit Nos. 2 and 3. Therefore, the Court enters judgment in favor of the Debtor and against Marlene and

SportsNetwork on Count IV of the complaint and declares that all of the property listed on the amended Schedule B is property of the Debtor's estate.

The Debtor additionally requests that the Court sanction Marlene and SportsNetwork for their alleged further willful and contemptuous violation of the automatic stay and their continuing violation of the order confirming the Debtor's plan. The Debtor seeks an unspecified amount of its costs and attorney's fees. The Debtor seeks damages for this alleged violation of the automatic stay pursuant to 11 U.S.C. § 362(h) which provides:

> (h) *An individual* injured by any willful violation of a stay provided by this section shall recover actual damages, including costs and attorneys' fees, and, in appropriate circumstances, may recover punitive damages.

11 U.S.C. § 362(h)(emphasis supplied).

There is a split of authority among the circuit courts, still unresolved by the Seventh Circuit, as to whether parties who are not individuals, such as corporations, can recover under § 362(h). Compare In re Chateaugay Corp., 920 F.2d 183, 184-87 (2d Cir. 1990); In re Goodman, 991 F.2d 613, 619 (9th Cir. 1993); In re Just Brakes Corp. Sys., Inc., 108 F.3d 881, 884-85 (8th Cir. 1997); Jove Eng'g, Inc. v. IRS, 92 F.3d 1539, 1549-50 (11th Cir. 1996) (the term "individual" does not include corporations) with In re Atlantic Bus. and Cmty. Corp., 901 F.2d 325, 329 (3d Cir. 1990); Budget Serv. Co. v. Better Homes of Virginia, Inc., 804 F.2d 289, 292 (4th Cir. 1986) (the term "individual" does encompass corporations). This Court has previous held that a corporate entity is not an "individual" for purposes of § 362(h), and therefore, does not have standing to invoke a

claim for its costs and attorney's fees. In re Prairie Trunk Ry., 125 B.R. 217, 220-22 (Bankr. N.D. Ill. 1991), aff'd, Consolidated Rail Corp. v. Gallatin State Bank, 173 B.R. 146 (N.D. Ill. 1992). The parties do not dispute that the Debtor is an Illinois corporation. Accordingly, based on the Court's prior decision in Prairie Trunk and the majority decision of the circuit courts, the Court denies the Debtor's request for sanctions against Marlene and SportsNetwork pursuant to § 362(h) because the Debtor is not an "individual."

D. The Debtor's Objection to the Amended Claim of SportsNetwork

The Debtor objects to the amended claim of SportsNetwork in the sum of $12,000.00. See Debtor's Exhibit No. 17. That claim is based on the assertion that in July 2000, the Debtor wrongfully withdrew that sum from SportsNetwork's merchant account at the First Star Bank N.A. (Account No. 1810301141). The Debtor's president, William and Marlene were joint signatories on this account. See Debtor's Exhibit No. 14. The Debtor and Marlene made use of the account to deposit credit card payments on invoices to customers of the Debtor, Marlene and SportsNetwork.

Pursuant to Federal Rule of Bankruptcy Procedure 3001(f), "[a] proof of claim executed and filed in accordance with these rules shall constitute prima facie evidence of the validity and amount of the claim." Fed. R. Bankr. P. 3001(f); see also 11 U.S.C. §§ 501 and 502(a). Claim objectors carry the initial burden to produce some evidence to overcome this rebuttable presumption. In re O'Malley, 252 B.R. 451, 456 (Bankr. N.D. Ill. 1999). Once the objector has produced some basis for calling into question allowability of a claim, the burden then shifts back to the claimant to produce evidence to

meet the objection and establish that the claim is in fact allowable. Id. (citation omitted). However, the ultimate burden of persuasion always remains with the claimant to prove entitlement to the claim. In re Octagon Roofing, 156 B.R. 214, 218 (Bankr. N.D. Ill. 1993).

The properly filed claim of SportsNetwork constitutes prima facie evidence of the validity and amount of the claim. The objector to that claim, the Debtor, has the burden of presenting evidence to rebut the prima facie validity. If that burden is satisfied, then the claimant bears the ultimate burden of proving its claim.

The Court finds and holds that the Debtor has not presented evidence to rebut the prima facie validity of SportsNetwork's claim. William testified that during the months that the Debtor had hoped to establish a joint business venture with Marlene, the Debtor, Marlene and SportsNetwork began using an account at Mercantile Bank (a/ka Firstar Bank N.A.), Account No. 1810301141 for deposits for customers. The account was entitled "USA SportsNetwork d/b/a Headline Sports." See Debtor's Exhibit No. 14. Both William and Marlene were signatories on the account. Id. As of June 12, 2000, that account had a negative balance of -$37.87. See Debtor's Exhibit No. 13 and Defendants' Exhibit No. 7. William testified that on July 11, 2000, he withdrew funds from the Mercantile Bank account and obtained a cashier's check in the sum of $12,000.00 made payable to the Debtor. See Debtor's Exhibit No. 16. William further testified that he deposited that check into the Debtor's account in Chicago to pay suppliers who had invoiced the Debtor for products sold to it. He further testified that thereafter, on July 13, 2000, after demands for repayment were made by Marlene and other members of her

family, he agreed to refund the proceeds and thus issued a check from the Debtor's Citibank account made payable to Headline Sports in the sum of $12,000.00. See Debtor's Exhibit No. 15 and Defendants' Exhibit No. 5. After further consultation with an attorney, William placed a stop payment on the check. Id.

However, William now contends that he agreed to repay the funds under duress and threats from Marlene's family. Tony testified that neither he nor his family exerted any duress or made threats to William. Rather, they merely demanded that William reimburse the account with the $12,000.00 he had unilaterally withdrawn without Marlene's knowledge or consent. The Court declines to find that the agreement to repay the $12,000.00 was the product of improper duress or threats. No corroborative evidence was adduced at trial to support such contention.

The Court finds that as an additional signatory on the account, William had the authority to withdraw the $12,000.00. That unilateral withdrawal, without Marlene's knowledge, was not wrongful. However, when William, on behalf of the Debtor, agreed to replace that sum and issued a check payable to Headline Sports, and then put a stop payment on that check, he breached his promise, on behalf of the Debtor, to repay the $12,000.00 he had withdrawn from the account. The Debtor misses the point with the argument that the funds in the account existed as a result of deposits made by the Debtor's customers. While this assertion may be correct, the account was not solely owned by the Debtor, but was subject to the withdrawals of Marlene as an additional signatory. The deposited proceeds represented the collected funds from the efforts of the Debtor, Marlene and SportsNetwork. The stop payment placed on the check by William,

on behalf of the Debtor, constituted a breach of his promise and agreement to repay the $12,000.00. The stop payment order placed by William does not rescind the Debtor's promise to pay SportsNetwork the $12,000.00 and does not impair SportsNetwork's suit on that promise. See 2 J. White and R. Summers, Uniform Commercial Code § 21-5 at p. 383 (4th ed. 1995). Pursuant to William's breach of promise, on behalf of the Debtor, the Court finds SportsNetwork is entitled to recover the $12,000.00. Accordingly, the Court overrules the Debtor's objection to the amended proof of claim.

E. The Debtor's Counterclaim Against Marlene and SportsNetwork

On February 26, 2001, the Debtor filed a counterclaim against Marlene and SportsNetwork requesting that the Court enter an order requiring them to return to the Debtor the sum of $4,000.00, which remained in the SportsNetwork account, or was later deposited into that account after the Debtor withdrew the $12,000.00 on July 11, 2000. The Debtor contends that this money was deposited into that account pursuant to its promotion and sale of goods purchased by it, not Marlene or SportsNetwork.

The Court denies, in part, this component of the Debtor's counterclaim. Both Marlene and William were signatories on the account, which entitled either or both to withdraw the monies in that account. Based upon the limited evidence, the Court is unable to find that the money solely belonged to the Debtor. While the Debtor introduced evidence that the proceeds in the account were the result of credit charge deposits made from sales promoted by the Debtor (Debtor's Exhibit No. 23), Tony testified that some of the monies deposited were generated from sales made by Marlene.

In addition, the Debtor asks the Court to award it the sum of $1,101.40, which represents the total of several checks that were made payable to the Debtor, but were held by Marlene and SportsNetwork for over six months and then turned over to the Debtor.

See Debtor's Exhibit Nos. 5 and 27. On April 5, 2001, the Debtor served on Marlene and SportsNetwork a request to admit genuineness of documents. See Debtor's Exhibit No. 5. They responded thereto and admitted that during June, July and August 2000, they came into possession of certain checks. See Debtor's Exhibit No. 18.

Further, in their answers to the requests to admit, Marlene and SportsNetwork admitted that they held checks payable to the Debtor for months after the Debtor filed its bankruptcy petition. See Debtor's Exhibit No. 19. Specifically, Marlene and SportsNetwork answered:

> 27. After [the Debtor] filed for relief under chapter 11 of the Bankruptcy Code, you obtained and held, or gave to your attorney to hold, for over six months, checks made payable to [the Debtor].
>
> **ANSWER:**
> Defendants admit the facts set forth in Request number 27.

Id. at p. 7-8. Additionally, on March 6, 2001, the Court entered an order which resolved all issues relating to Count II of the complaint. That order states in relevant part that: "[i]n the event that [Marlene and SportsNetwork] shall receive checks payable to [the Debtor], they shall immediately tender these checks to the Debtor." See Debtor's Exhibit No. 2 at ¶ 4. William testified that he has been unable to collect a total of $1,101.40 because the checks were stale and the drawee banks would not honor the checks.

The Court holds that the Debtor shall be awarded the sum of $1,101.40 because Marlene and SportsNetwork wrongfully withheld checks that were made payable to the Debtor. These checks were wrongfully withheld for over six months before being turned over to the Debtor. By that time, the checks were stale and the Debtor was unable to collect the proceeds of them. Thus, the Court grants, in part, the Debtor's counterclaim against Marlene and SportsNetwork in the sum of $1,101.40.

IV. CONCLUSION

For the foregoing reasons, the Court overrules the objection to SportsNetwork's amended proof of claim and allows the claim in the full amount of $12,000.00. The Court allows, in part, the counterclaim of the Debtor in the sum of $1,101.40. Further, the Court grants judgment in favor of Marlene and SportsNetwork under Count I of the complaint. The Court grants judgment in favor of the Debtor under Count III of the complaint and orders Marlene and SportsNetwork to either turnover certain property of the estate consisting of inventory, equipment and accounts receivable, or the reasonable value totaling $33,875.20. The Court grants judgment in favor of the Debtor and against Marlene and SportsNetwork on Count IV of the complaint and declares that all of the property listed on the amended Schedule B is property of the Debtor's estate. However, the Court declines to enter sanctions against Marlene and SportsNetwork pursuant § 362(h) because the Debtor is not an "individual."

This Opinion constitutes the Court's findings of fact and conclusions of law in accordance with Federal Rule of Bankruptcy Procedure 7052. A separate order shall be entered pursuant to Federal Rule of Bankruptcy Procedure 9021.

ENTERED:

DATE: _____

_____
John H. Squires
United States Bankruptcy Judge

cc: See attached Service List

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

IN RE:	)	Bankruptcy No. 00 B 24010
HEADLINE PROMOTIONS, INC.,	)	Chapter 11
	)	Judge John H. Squires
Debtor.	)	
	)	
	)	
HEADLINE PROMOTIONS, INC.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Adversary No. 00 A 00849
	)	
MARLENE TRUPIANO, individually, and d/b/a USA SPORTS NETWORK and STUART J. RADLOFF, Receiver,	)	
	)	
Defendants.	)	

O R D E R

For the reasons set forth in a Memorandum Opinion dated the 30th day of October, 2001, the Court overrules the objection of Headline Promotions, Inc. to the amended proof of claim of U.S.A. SportsNetwork and allows the claim in the full amount of $12,000.00. The Court allows, in part, the counterclaim of Headline Promotions, Inc. in the sum of $1,101.40. Further, the Court grants judgment in favor of Marlene Trupiano and U.S.A. SportsNetwork under Count I of the complaint. The Court grants judgment in favor of Headline Promotions, Inc. under Count III of the complaint and orders Marlene Trupiano and U.S.A. SportsNetwork to either turnover certain property of the estate consisting of inventory, equipment and accounts receivable held by them or its reasonable value totaling $33,875.20 pursuant to 11 U.S.C. § 542(a). The Court grants judgment in favor of Headline Promotions, Inc. and against Marlene Trupiano and U.S.A. SportsNetwork on Count IV of the complaint and declares that all of the property listed

on the amended Schedule B is property of the estate of Headline Promotions, Inc. However, the Court declines to enter sanctions against Marlene Trupiano and U.S.A. SportsNetwork pursuant to 11 U.S.C. § 362(h) because Headline Promotions, Inc. is not an "individual."

ENTERED:

DATE: _____ _____

John H. Squires
United States Bankruptcy Judge

cc: See attached Service List