

WESTERN DISTRICT OF TENNESSEE

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**INRE  
XL SPORTS, LTD.,  
Debtor.**

**Case No. 97-37119  
Chapter 11**

**XL SPORTS, LTD.  
Plaintiff**

v.

**Adv. Proceeding 97-1431**

**JERRY LAWLER, WARRIOR SPORTS, INC.,  
and LARRY BURTON,  
Defendants.**

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**MEMORANDUM OPINION AND ORDER**

**DENYING LARRY BURTON'S Fed. R. Crv. P.12(f) MOTION TO STRIKE  
AFFIDAVITS OF MARK SELKER AND HOMER ZION, JR., AND THE ENTIRE  
MEMORANDUM OF LAW FILED IN SUPPORT OF DEBTOR'S MOTION FOR  
SUMMARY JUDGMENT; DENYING PLAINTIFF'S MOTION TO STRIKE  
AFFIDAVIT OF VINCE McMAHON FILED DECEMBER 3,199s; OVERRULING  
LARRY BURTON'S EVIDENTIARY OBJECTIONS UNDER FEDERAL RULES OF  
EVIDENCE TO Fed. R. Crv. P. 56 SUMMARY JUDGMENT MOTION AND  
SUPPORTING PLEADINGS; DENYING LARRY BURTON'S MOTION TO DISMISS  
AMENDED ADVERSARY COMPLAINT FOR FAILURE TO STATE A CLAIM FOR  
RELIEF PURSUANT TO Fed. R. BANKR. P. 7012(b)(6); DENYING XL SPORTS LTD.%  
MOTION FOR SUMMARY JUDGMENT; AND DENYING MOTION OF JERRY  
LAWLER FOR SUMMARY JUDGMENT**

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**JUDGE WILLIAM HOUSTON BROWN**

APPEARANCES:

Dean Browning Webb, Esq.  
2500 East Fourth Plain Blvd.  
Suite 300  
Vancouver, Washington 9866 1

Larry E. Parrish, Esq.  
The Crescent Center  
6075 Poplar Avenue  
Suite 420  
Memphis, Tennessee 3 8 119

Russell Savory, Esq.  
200 Jefferson Avenue  
Suite 900  
Memphis, Tennessee 3 8 103

Madalyn S. Greenwood, Esq.  
Assistant United States Trustee  
200 Jefferson Avenue  
Suite 400  
Memphis, Tennessee 3 8 103

Franklin Childress, Jr., Esq.  
6075 Poplar Avenue  
Suite 650  
Memphis, Tennessee 3 8 119

Stephen W. Ragland, Esq.  
165 Madison Avenue  
Suite 2000  
Memphis, Tennessee 3 8 103

These contested matters are before the Court on Defendant Larry Burton's **FED. R. CIV. P.** 12(f) motion to strike the affidavits of Mark Selker and Homer Zion, Jr., and the entire memorandum of law filed in support of Debtor's motion for summary judgment; Plaintiffs motion to strike the affidavit of Vince McMahon; Defendant Larry Burton's evidentiary objections to Plaintiffs motion for summary judgment and supporting pleadings; Defendant Larry Burton's motion to dismiss the amended adversary complaint for failure to state a claim for relief pursuant to **FED. R. BANKR. P.** 7012(b)(6); Plaintiffs motion for summary judgment; and Defendant Jerry Lawler's motion for summary judgment. Based on the statements of counsel, the arguments and documentation filed in support of and in opposition to the parties' motions and objections, and the entire record in this cause, the Court concludes that there exist genuine issues of material fact sufficient to prevent the Court from granting summary judgment, and that, therefore, the parties' motions for summary judgment should be **DENIED**.

Further, the Court concludes that the parties' motions to strike and Larry Burton's evidentiary objections should be **DENIED** and **OVERRULED** for the reasons set forth below.

This order contains the Court's findings of fact and conclusions of law pursuant to **FED. R. BANKR. P. 7052**.

### **ANALYSIS**

The Court first considers Defendant Larry Burton's motion to strike the affidavits of Mark Selker and Homer Zion, Jr., and the entire memorandum of law filed in support of the debtor's motion for summary judgment, pursuant to **FED. R. CIV. P. 12(f)**, and concludes that the motion should be denied. By their very nature, affidavits are ex parte statements, and the affiants are

generally not subject to cross-examination, yet ED. R. Civ. P. 56 clearly contemplates the use of affidavits in support of summary judgment motions. It is not uncommon for an affiant to be a party to the litigation or to have some interest in the outcome of the lawsuit. If Mr. Burton was concerned about the truthfulness or credibility of these witnesses, there was nothing to prevent him from requesting an evidentiary hearing to cross-examine the affiants. The Court is well aware of the interests of Mr. Selker and Mr. Zion in this adversary proceeding, and of the evidentiary issues as to admissibility of the statements contained within their affidavits, but the Court should not exclude their affidavits and statements at this summary judgment stage.

Mr. Burton's primary objections to the Court's consideration of the Plaintiffs memorandum of law in support of its motion for summary judgment appear to focus on the allegations that the debtor failed to comply with several local rules regarding summary judgment motions and memoranda. Whether to grant or to deny a motion to strike based on violations of a local rule is within the discretion of the trial court. *Johnson v. Wilkinson*, 1994 WL 669857, \*10-11 (6<sup>th</sup> Cir. 1994). As a general rule, the Sixth Circuit has determined that "a claim (or motion) should only be dismissed for failure to follow a local rule in extreme circumstances." *Salehpour v. Univ. of Tennessee*, 159 F.3d 199, 205 (6<sup>th</sup> Cir. 1998) (citing *Stough v. Adayville Community Schools*, 138 F.3d 612, 614-615 (6<sup>th</sup> Cir. 1998)). Based on the facts and circumstances existing in this case, and the directive of the Sixth Circuit case law cited above, the Court determines that Mr. Burton's motion to strike the Plaintiffs memorandum should be denied.

The Plaintiff has also filed a motion to strike the affidavit of Mr. Vince McMahon, premised on the timeliness and relevancy of the affidavit. Contrary to what the Plaintiff suggests, however, the Court did not set forth a rigid scheduling order pertaining to the parties' motions for summary

judgment, but merely confirmed and noted the parties' representations regarding when responsive pleadings would be filed. The Court thereafter, upon the Plaintiffs request, granted an extension of Plaintiffs represented date to Plaintiffs counsel. Under these circumstances and in the Court's discretion, the Court concludes that Mr. McMahon's affidavit filed in support of Jerry Lawler's motion for summary judgment was filed in a sufficiently timely manner.

The Court further concludes that, although as Plaintiff alleges, Mr. McMahon's affidavit does not pertain to the "strict voidability" issue raised in Plaintiffs motion for summary judgment, the affidavit is certainly relevant to other issues raised by the parties, including the issue of whether the debtor received reasonably equivalent value in exchange for its transfers of funds to the defendants. The affidavit is properly considered by the Court in its determination of the motions before it and the Plaintiffs motion to strike the affidavit should be denied.

The Court has also considered Mr. Burton's evidentiary objections to the affidavits of Mark Selker and Dominick Comella, and concludes that the objections should be overruled. Mr. Burton's objections are primarily based on hearsay, alleging that the statements are predicated upon alleged false information provided to Mr. Selker and Mr. Comella by Mr. Burton and Mr. Lawler. Under these circumstances, however, the Court concludes that the allegedly false statements made to these witnesses by Mr. Burton and Mr. Lawler are not hearsay, as the statements allegedly made by the Defendants are included in the affidavits for the purpose of establishing that Mr. Comella's report and recommendations were based on false information received from Mr. Burton and Mr. Lawler, and the statements are therefore not offered into evidence for their truth.

As Mr. Burton points out, the parties' motions for summary judgment' are primarily directed at the evidence, or lack of evidence, regarding the statutory components of § 548(a)(2)(A) and (B)\*, with a focus on the "reasonably equivalent value" factor of § 548(a)(2)(A). After consideration of the parties' motions for summary judgment and the testimony and documentation filed in support of and in opposition to the motions, the Court concludes that there exist genuine issues of material fact regarding the reasonably equivalent value of the business purchased by the Plaintiff sufficient to prevent the Court from granting summary judgment in this case. For example, Mr. Douglas Smorag, a certified public accountant and investor in XL Sports, Ltd., testified to the profitability and value of the U.S. W.A. business in his deposition as follows:

Q. Mr. Smorag, even today, are you convinced that the income potential from your investment was great?

A. Absolutely. No question in my mind, even today....

Q. Do you have any recollections today as to what you considered to be reasonable potentials for income from the ad revenue and operation of the business?

A. My recollection, Mr. Parrish, is I think that the minimum gross was between -- and when I say, gross, that is gross for a year -- ad revenues of between four and eight million at the bottom but I can't recollect where it went from there.

(Smorag deposition, pp. 106-107).

Q. And you needed capital to actually run the business in the hopes that it would prove itself to be

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<sup>1</sup> Mr. Burton's pleading styled "Motion to Dismiss Amended Adversary Complaint for Failure to State a Claim for Relief Pursuant to Bankruptcy Rule 7012(b)(6) of the Federal Rules of Bankruptcy Procedure" is treated by the Court as a motion for summary judgment pursuant to FED.R.CIV.P. 12(b), as Mr. Burton presented, and the Court considered, matters outside the pleadings in support of the motion.

<sup>2</sup> The parties, in their pleadings, referred to this section of the Bankruptcy Code as §548(a)(2). Pursuant to the most recent amendments to the Code, however, the pertinent sections are now designated as §§ 548(a)(1)(A) and (B).

a good buy for Vince McMahon, or in the alternative, that it, itself, would be a good business, and make money, a profit?

A. We didn't think we needed capital to run the business, because it was already making a profit.

Q. So it just kinds of runs itself?

A. It was making money. Jerry Lawler was running it, remember, for sixteen years, or something like that.

(Smorag deposition, p. 146).

In addition, Mr. Vince McMahon, Chairman of Titan Sports, Inc., d/b/a the World Wrestling Federation, testified that, in late 1996, it was his opinion that the U.S. W. **A.** could be worth between five million and eight million dollars, depending on further investigation. He expressed his belief that the U.S.W.A. could be a valuable asset to the World Wrestling Federation as a "minor league" franchise and a place to cultivate and develop new talent. (McMahon Affidavit, ¶ 4).

The deposition of Mr. Patrick Montrone provides further evidence of reasonably equivalent value:

Q. Okay. Was there income to be made by the operation of USWA?

A. Absolutely, yes, there was plenty of income to be made.

Q. Okay. And could you see a business plan that would produce income?

A. Just in the advertising opportunities alone. If we was to pursue the advertising opportunities that were in place, in existence the day that I came to **USWA**, which is the 25<sup>th</sup> of July, there was plenty of opportunity to make money.

Q. You have made the statement \$40 million to \$50 million. Was that just a number you pulled out of the air or was that based on some calculations by you?

A. No, that was a number that I pulled out of the air. It was the wish list, what can you bring this company to, the wish list. But in reality, if you was to take a look at the numbers **of what** existed as far as advertising opportunities, a conservative number would be somewhere between a four to \$5 million opportunity that existed there.

Q. Was that an immediate opportunity?

A. It was immediate. All you needed to do was have staff to do it and a plan.

Q. Okay. From what you could see of the opportunity that existed there, could there have been achieved a four or \$5 million platform from which to grow fairly simply?

A. Simply and quickly and easily, yes.

(Deposition of Patrick Montrone, pp. 87-88).

The affidavit of Mr. Homer Zion, Jr. and the sworn statement of Mr. Jerry Jarrett, however, present contradictory statements regarding the value and profitability of the business purchased. Mr.

Zion makes the following statements:

Based on the above-stated assumptions, **affiant** concludes that, (a) that on December 26, 1996, XL Sports paid cash \$250,000 to Mr. Lawler directly and \$25,000 to Mr. Burton but delivered to Mr. Lawler, consisting of \$218,750 cash from capital on hand and \$56,350 cash from loan proceeds, and, (b) in return received 13.75% of the USWA Business which had a value of \$45,023. (Affidavit of Homer Zion, Jr., ¶ 15).

Based on the above-stated assumptions, **affiant** concludes that, on January 29, 1997, XL Sports paid cash \$50,000 to Mr. Burton, consisting of \$40,000 cash from capital on hand and \$10,000 cash from loan proceeds, and, in return, received 1.25% of the USWA Business which had a value of \$4,093. (Affidavit of Homer Zion, Jr., ¶ 17).

Based on the above-stated assumptions, **affiant** concludes that, on February 27, 1997, XL Sports paid cash \$335,000 to Mr. Lawler, consisting of \$23,250 cash from capital on hand and \$311,750 cash from loan proceeds, and, in return, received 16.75% of the USWA Business which had a value of \$54,846. (Affidavit of Homer Zion, Jr., ¶ 19).

Based on the above-stated assumptions, **affiant** concludes that, on June 20, 1997, XL Sports paid \$450,000 cash to Mr. Lawler, consisting of \$120,813 cash from capital on hand and \$329,187 cash from loan proceeds, and, in return received 22.50% of the USWA Business which had a value of \$73,674. (Affidavit of Homer Zion, Jr., ¶ 21).

In summary, by June 28, 1997, XL Sports had paid \$1,110,000 in cash, made up of \$707,187 in loan proceeds and \$402,813 in cash capital on hand, and had received, in return 54.25 % of the USWA Business which had a value of \$177,636; XL Sports had zero working capital. (Affidavit of Homer Zion, Jr., ¶ 23).

In addition, Jerry Jarrett testified to the following:

Q. Now, I presume that it was your opinion that if someone had paid two million dollars for those assets, that would have been an overprice?

A. Unless they knew a whole lot more about the wrestling business and its possibilities than I did, yes.

(Sworn Statement of Jerry Jarrett, p. 36)

A. Well, if I had -- if **Vince McMahon** was going to pay two million dollars, I would assume that he was smarter than me. If I had known that Mark Selker was going to pay two million dollars, I would have sat down with Mark, as I have a number of times, and I would have said unless you know something that I don't know, its going to be real hard for you to justify this kind of deal.. . .

(Sworn Statement of Jerry Jarrett, p. 37).

Q. When you determined to sell half of the interest in the partnership to Jerry Lawler for \$250,000, was that based on your conclusion that that was more or less half of the value of that partnership?  
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A. . . .Yes. I can -- I could substantiate to anybody that \$187,000 was a fair and equitable price for what they were getting, with or without any background or knowledge. I mean, you could -- you know, you could make that much money. I could have made that much in a year if I hadn't of -- if I had just stayed **and** ran the business; but you know, I have greater expectations.

(Sworn Statement of Jerry Jarrett, pp. 40-41)

The testimony set forth above establishes that there are genuine issues of material fact regarding the reasonably equivalent value prong of § 548(a)(2)(A), thus preventing the Court from granting summary judgment in this case.

The parties have also referred to the “insolvency” and “inadequate capital” requirements of § 548(a)(2)(B) in support of and in opposition to the motions. In order to prevail on a motion for summary judgment based on § 548(a)(2)(A) and (B), however, the movant must establish that no genuine issue of material fact exists as to “reasonably equivalent value,” **and** either “insolvency” or “inadequate capitalization.” As set forth above, the Court has concluded that a material factual

dispute exists regarding the “reasonably equivalent value” of the assets acquired by the Plaintiff, which, by the terms of the statute, renders the issues of “insolvency” and “inadequate capitalization” incapable of a summary judgment determination.

The Court concludes, nevertheless, that genuine issues of material fact exist regarding the Plaintiffs solvency at the time of the transfers, therefore mandating a denial of the motions on this basis as well. For example, the affidavit of Homer Zion, Jr. states as follows:

Based on the above-stated assumptions, immediately after the December 26, 1996 purchase by XL Sports, XL Sports had paid \$229,977 more in cash than the value of the 13.75% of the USWA Business purchased and, thereby, had depleted all of the XL Sports capital with \$11,227 less in asset value than the value of the \$218,750 cumulative total cash capital on hand before its use to purchase portions of the USWA Business. (Affidavit of Homer Zion, Jr., ¶ 16).

Immediately after the January 29, 1997 purchase by XL Sports, XL Sports had paid \$275,884 more in cash than the value of the 15.00% of the USWA Business purchased and, thereby, had depleted all of the XL Sports capital with \$17,134 less in asset value than the value of the \$258,750 cumulative cash total capital on hand before its use to purchase portions of the USWA Business. (Affidavit of Homer Zion, Jr., ¶ 18).

Immediately after the February 27, 1997 purchase by XL Sports, XL Sports had paid \$556,038 more cash than the value of the 31.75% of the USWA Business purchased and, thereby, had depleted all of the XL Sports capital with \$276,046 less asset value than the value of the \$282,000 cumulative total cash capital on hand before its use to purchase portions of the USWA Business. (Affidavit of Homer Zion, Jr., ¶ 20).

Immediately after the June 20, 1997 purchase by XL Sports, XL Sports had paid \$932,364 more in cash than the value of the 54.25% of the USWA Business purchased and, thereby, had depleted all of the XL Sports capital with \$533,911 less asset value than the value of the \$402,813 cumulative total cash capital on hand before its use to purchase portions of the USWA Business. (Affidavit of Homer Zion, Jr., ¶ 22).

It is undisputed, however, that, in exchange for the transfers referenced in Mr. Zion’s affidavit, the Plaintiff acquired assets of the U.S.W.A. business, and, as set forth above, the reasonably equivalent value of the assets acquired is in dispute. Therefore, there is no way for the Court to determine as a matter of law, based on the contradictory proof of asset value presented, that

the Plaintiffs debts incurred as a result of the transfers were greater than the value of the assets acquired. The Court therefore concludes that a genuine issue of material fact exists as to the solvency of the Plaintiff at the time of the cash transfers to Mr. Lawler and Mr. Burton, and that summary judgment on the basis of insolvency of the debtor must be denied.

Further, the Plaintiff has also raised an argument of “strict voidability” in support of its motion for summary judgment, alleging that, under common law principles, the transfers at issue should be declared **void ab initio** in light of the alleged breach of fiduciary duties on the part of Larry Burton. As the Plaintiff points out in its memorandum in support of its motion, the Court must first find that a fiduciary relationship existed between Mr. Burton and the Plaintiff, and that Mr. Burton breached his duty of loyalty to the Plaintiff, which leads the Court to the “remedy” of “strict voidability.” Whether such a fiduciary relationship existed, and whether Mr. Burton breached his fiduciary duties, however, are mixed questions of law and of fact, and the allegations of such a relationship and breach are so intertwined with the disputes concerning reasonably equivalent value, insolvency, and capitalization that the Court has determined that they are not ripe for summary judgment determination. Therefore, the Plaintiffs motion for summary judgment based on principles of fiduciary duty and “strict voidability” will be denied.

### **CONCLUSION AND ORDER**

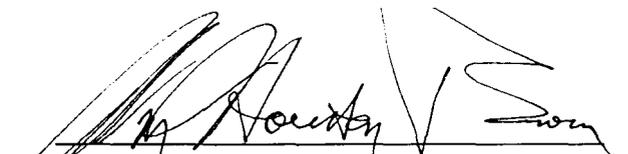
Based on the evidence presented in support of and in opposition to the parties’ motions before the Court, the Court concludes in its discretion that Larry Burton’s FED.R.CIV.P. 12(f) motion to strike the affidavits of Mark Selker and Homer Zion, Jr., and the entire memorandum of law filed in support of Debtor’s motion for summary judgment is **DENIED**. The Court also concludes that Plaintiffs motion to strike the affidavit of Vince McMahon is **DENIED**, and that Larry Burton’s

evidentiary objections to the Plaintiffs summary judgment motion and supporting pleadings are OVERRULED.

Further, because the evidence in this case presents genuine issues of material fact regarding the reasonably equivalent value of the assets acquired by the debtor, the debtor's insolvency, and the alleged breach of fiduciary duties of Larry Burton, the parties respective motions for summary judgment are DENIED.

The Court has scheduled a status conference to be held on January 25, 1999, at 10:00 a.m. in Courtroom 680,200 Jefferson Avenue, Memphis, Tennessee, to discuss with counsel whether this adversary proceeding should be suspended pending resolution of the litigation between the parties in the United States District Court for the Northern District of Ohio, Eastern Division, in the interest of the parties' and judicial economy. See 11 U.S.C. § 305. Counsel may participate in this conference telephonically by contacting the Courtroom Deputy Clerk.

SO ORDERED this 29<sup>th</sup> day of December, 1998.



JUDGE WILLIAM HOUSTON BROWN  
UNITED STATES BANKRUPTCY JUDGE