

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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TMS ENTERTAINMENT, LTD., :
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 Plaintiff, : MEMORANDUM DECISION
 :
 -against- : 03 Civ. 517 (GBD)
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 MADISON GREEN ENTERTAINMENT SALES :
 INC. (f/k/a BKN ENTERTAINMENT, INC.), BKN :
 STUDIOS, INC. (f/k/a BKN ENTERTAINMENT, :
 INC.), BKN INTERNATIONAL AG, and :
 ALLEN BOHBOT, :
 :
 Defendants. :
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GEORGE B. DANIELS, District Judge:

Plaintiff TMS Entertainment, Ltd. (“TMS”) commenced this action against defendants alleging breach of contract, breach of contract for the benefit of a third party, breach of implied-in-fact contract, termination, unjust enrichment, and fraud. This Court granted summary judgment against plaintiff on all of plaintiff’s claims against defendant BKN International AG (“BKN International”) except for its unjust enrichment claim.¹

This Court conducted a bench trial on plaintiff’s unjust enrichment claim against BKN International. Plaintiff called three fact witnesses: Satoji Yoshida, managing director of TMS, Marcello Gualda, a one-time BKN Inc. board member, and Allen Bohbot, who, at various times, was a principal in the various BKN entities. Plaintiff also offered into evidence portions of the deposition of Michelle Craig, a former executive and board member of both BKN Entertainment and BKN Inc. Defendant called Allen Bohbot during its own case, as well as Robert Oppenheim, a former attorney for certain BKN entities. Defendant also offered portions of Ms. Craig’s

¹This Court entered a default judgment against defendant Madison Green Entertainment Sales, Inc.

deposition into evidence.

This Decision and Opinion constitutes the Court's findings of fact and conclusions of law. Fed. R. Civ. P. 52 (2006). Based upon the credible evidence adduced at trial, the Court finds by a preponderance of the evidence that defendant BKN International has been unjustly enriched and is liable to plaintiff TMS in the amount of \$1,014,000,² plus interest, fees, and costs.

FACTUAL DETERMINATIONS

A. The Parties

Plaintiff TMS is a public corporation organized and existing under the laws of Japan, and it is the owner and producer of the children's animated television series "Monster Rancher." Madison Green Entertainment Sales, Inc. is the current name of the entity formally known as BKN Entertainment, Inc. ("BKN Entertainment"). At all relevant times, BKN Entertainment was a wholly-owned subsidiary of BKN Inc.³ BKN Inc. and BKN Entertainment were effectively run as one entity: they had virtually identical boards of directors, except that BKN Inc. had one additional board member. They shared the same office space in New York City, their files were

²This figure represents the amount due to TMS from BKN Entertainment, Inc., under the second and third distribution agreements between the parties. The second distribution agreement had a payment schedule requiring one \$88,000 payment, and six \$132,000 payments. TMS received all but the final two payments of \$132,000 for an unpaid balance of \$264,000. Pursuant to the third distribution agreement, BKN Entertainment agreed to make an initial \$100,000 payment, followed by six \$150,000 payments. TMS only received the \$100,000 payment and one \$150,000 payment, for an unpaid balance of \$750,000. Thus, the total unpaid balance is \$1,014,000.

³BKN Inc. changed its name to Durham in March 2001. Trial Transcript ("Tr.") 292, 412.

maintained together in that office, and their employees worked for both companies interchangeably.

Defendant BKN International is a corporation organized and existing under the laws of Germany. It was created in 1999 and approved to operate as a corporation in Germany. At its inception, BKN Inc. owned 100% of BKN International's stock, but shortly thereafter, a company called Investco purchased a 20% interest in BKN International. Throughout the relationship between the parties, the various BKN entities were represented to TMS as essentially one company. In fact, most of the communications to TMS on behalf of BKN Entertainment was done via BKN International letterhead, and BKN Inc., not BKN Entertainment, made payments to TMS under the distribution agreements. Pl. Ex. 4, 5, 6; Def. Ex. D, E, F, G, H.

From the time the relationship between TMS and the BKN entities began in June 1999 to December 2001, Allen Bohbot was the 52% owner of BKN Inc.—the entity that owned BKN Entertainment and BKN International—as well as Chairman and Chief Executive Officer of BKN Inc.⁴ He was also, until May 2001, the Chairman and CEO of BKN Entertainment, and Chairman of BKN International's supervisory board.⁵ Bohbot then became Chairman of BKN International's management board. Tr. 161-67, 180-81, 209-10, 309-31, 398-99, 412-13, 437-39, 594; Plaintiff's Exhibit ("Pl. Ex.") 4, 5, 6, 7, 9, 10, 11, 16, 27 & 28; Defendant's Exhibit ("Def. Ex.") D, E, F, G, H & S.

⁴BKN stands for Bohbot Kids Network. See Tr. 167.

⁵In Germany, corporations have a supervisory board and a management board. The supervisory board represents the shareholders in an oversight, supervisory role. The management board has the authority to, and does, conduct the business of the corporation. (Tr. 327-28).

B. The Distribution Agreements Between TMS and BKN Entertainment

In August 1999, plaintiff TMS licensed the distribution rights in the first twenty-six (26) episodes of “Monster Rancher” to BKN Entertainment. The distribution agreement executed by the parties expressly prohibited BKN Entertainment from assigning the rights to a third party without requiring that third party to assume all obligations. Specifically, the clause stated: “BKN shall cause the assignee to assume any and all obligations of BKN under the Agreement as if it were a party to the Agreement.” These “obligations” included the obligation “to pay to [TMS] as full and final consideration for the rights being licensed hereunder the sum of \$1,040,000” During the negotiations, Mr. Yoshida specifically insisted that this provision be inserted into the agreement because BKN Entertainment demanded the right of assignment. Tr. 32-33, 658; Pl. Ex. 1.

The parties eventually entered into two more distribution agreements, on April 10, 2000, and November 21, 2000, respectively, giving BKN Entertainment the distribution rights for the remaining episodes of “Monster Rancher.” These subsequent distribution agreements contained the same conditions on assigning the rights and obligations as did the first agreement. All three distribution agreements were signed on behalf of BKN Entertainment by Allen Bohbot. He read each agreement before he signed it; he also initialed each page of each agreement, signifying that he read that page. Tr. 34-38, 169-71, 198-99, 211-12; Pl. Ex. 1, 2 & 3.

C. The Transfer of the “Monster Rancher” Licenses to BKN International

Around the time TMS and BKN Entertainment entered into the first distribution agreement, in the fall of 1999, a plan was developed to strip the non-U.S. rights in BKN

Entertainment's assets—which included the distribution rights to “Monster Rancher”—put them into a European entity, then take that entity public creating value for the shareholders. It was also an intended part of the plan that this European entity would not assume any of BKN Entertainment's liabilities. BKN International was thus created specifically for this purpose. At the time, BKN Inc. was an 80% shareholder of BKN International, and Bohbot was the majority owner of BKN Inc. Tr. 177-85, 445-46, 606-07.

To this end, in December 1999, BKN Inc., BKN Entertainment, and BKN International entered into a License and Development Agreement (the “L & D Agreement”) by which BKN Entertainment transferred the non-U.S. rights in its assets, including the “Monster Rancher” distribution rights, to BKN International. There is no provision in the L & D Agreement, however, that BKN International assume the obligation to pay TMS or BKN Entertainment for those rights, in direct violation of the distribution agreement. BKN Entertainment received no specific monetary consideration in return. Indeed, the agreement states that the rights were “granted in exchange for shares in [BKN International]” that were “issued to BKN Inc” pursuant to a separate agreement. Nowhere in the L & D Agreement does BKN Inc. agree to assume the payment obligations to TMS. Indeed, those obligations contractually remained with BKN Entertainment. The only other mention of payment obligations in the L & D Agreement was one section requiring BKN International to pay its share of the production costs for any series that might be transferred to it from BKN Entertainment or BKN Inc. in the future. Tr. 189-93, 191, 195-96, 203-04, 248-49, 252-54, 326-27, 376, 385-86, 416-17; Pl. Ex. 18; Def. Ex. M.

Bohbot was the ultimate decision maker with respect to this agreement, and he knew that by structuring the deal in this manner, BKN Entertainment would be breaching the distribution

agreement with TMS. Robert Oppenheim, the attorney who negotiated and drafted the distribution agreements with TMS for BKN Entertainment, advised Bohbot, and the other attorneys involved in the L & D Agreement, that by assigning the rights without the obligations, BKN Entertainment would be in breach of the distribution agreement. He also advised them that TMS's only contractual remedy would be to pursue money damages against BKN Entertainment, and that neither BKN Inc. nor BKN International would be contractually liable. Tr. 445-46, 658-59; Pl. Ex. 18.

The L & D Agreement also obligated BKN Entertainment to offer any future rights it acquired to BKN International on the same terms as the L & D Agreement. After BKN Entertainment entered into the second and third distribution agreements, it did in fact offer to assign, and BKN International did in fact accept the assignment, of the distribution rights to the remaining episodes of "Monster Rancher." Also, as before, BKN International did not contractually assume BKN Entertainment's payment obligations to TMS. Thus, when Bohbot signed the second and third distribution agreements with TMS, he did so knowing BKN Entertainment would breach the assignment provisions of their agreements. BKN Entertainment again was paid no specific fee from BKN International in return. Bohbot did not tell anyone at TMS that BKN Entertainment had transferred the distribution rights to all of the "Monster Rancher" episodes to BKN International. TMS was never informed that the assignment of rights was not accompanied by an assignment of obligations. Tr. 39-41, 90-97, 193-95, 205, 214-15, 219-20, 446, 577.

Eventually, on January 5, 2001, BKN International acquired from BKN Entertainment the domestic distribution rights in "Monster Rancher" pursuant to a Film Asset Purchase Agreement

(the “FAP Agreement”). BKN International paid BKN Entertainment only \$100 for these rights. Again, in violation of the distribution agreements, the FAP Agreement does not require that BKN International assumed the obligation to pay TMS. On that same date, January 5th, in a separate agreement called the Studio Asset Purchase Agreement, BKN Entertainment transferred the last of its assets to an entity called BKN Studios, Inc., a wholly-owned subsidiary of BKN International, Inc., which was itself a wholly-owned subsidiary of BKN International. Following these two transactions, BKN Entertainment had been stripped of all assets, property, income, and business operations. It solely retained the payment obligations to TMS under the distribution agreements. At this time, Bohbot was still Chairman, Chief Executive, and controlling shareholder of BKN Inc., Chairman and Chief Executive of BKN Entertainment, and Chairman of BKN International’s supervisory board. He never told TMS about these additional transactions. Tr. 222-28, 233-35, 254, 263-65, 445-56; 592-94; Pl. Ex. 20, 23.

D. BKN Entertainment’s Default and TMS’s Attempts to Obtain Payment

Soon after the parties entered into the first distribution agreement, TMS began receiving payments due under that agreement. TMS eventually received all the payments due under the first agreement, and some payments due under the second and third distribution agreements. These payments, save for one,⁶ were made by BKN Inc. But by February 2001, payments were in arrears, and, in May, TMS sent BKN Entertainment a letter confirming that BKN Entertainment had an unpaid balance of \$1,296,000. The letter requested that BKN Entertainment confirm the

⁶The one payment not made by BKN Inc. came from an entity call Bohbot Entertainment & Media, Inc. Tr. 114; Def. Ex. I.

amount by signing the letter and returning it to TMS. Michelle Craig and Grace Collins, who was a V.P. of BKN Entertainment, each signed the confirmation on behalf of BKN Entertainment and sent it back to TMS. At about the same time, in May 2001, Bohbot resigned in all capacities from BKN Inc. and BKN Entertainment. Yet he still maintained his 52% ownership interest in BKN Inc. and, according to Marcello Gualda, he still “ran the show.” Bohbot decided what, if any, creditors would get paid. Bohbot also resigned from the supervisory board of BKN International and became Chairman of its management board. Tr. 39-41, 55-58, 90-97, 464-65, 594-95; Pl. Ex. 4,5,6, 9, 10; Def. Ex. D, E, F, G, H.

In October 2001, TMS sent another account confirmation letter to BKN Entertainment stating that, as of that August, BKN Entertainment owed TMS \$1,014,000. Grace Collins signed and returned it to TMS, confirming the balance. No payments were received by TMS after August 2001. Mr. Yoshida subsequently sent three letters to Bohbot—in October, November, and December—requesting that BKN Entertainment make the past-due payments to TMS. In the December letter, Yoshida expressly threatened legal action should the payments not be made. Bohbot never responded to any of Yoshida’s letters, even though he knew that TMS—and other creditors—were calling and writing BKN Entertainment seeking payment on debts. Instead, Bohbot told Michelle Craig and other employees to ignore and/or reject mail addressed to BKN Inc. and BKN Entertainment. Tr. 58-65, 269-70, 371-72, 447-48; Pl. Ex. 11, 12, 16.

Bohbot also directed Craig to tell TMS that BKN Entertainment’s management board would be meeting to discuss making the payments owed to TMS. He also told Craig to tell TMS that the board had approved a payment to TMS for \$564,000. Craig did so in an email exchange with Mitsumoto Suzuki at TMS, telling him that BKN Entertainment’s board met and agreed to

make a \$564,000 payment to TMS on January 15th. But there was no board meeting and there was no approved payment. In fact, at this time, BKN Entertainment essentially did not exist; it had no assets, income, or business operations. Finally, on January 23, 2002, Craig sent an email to Suzuki stating that BKN Entertainment was not in a financial position to make the outstanding payments and that TMS would not be paid. Tr. 65-68, 273-76, 448-49; Pl. Ex. 13, 14.

Consequently, on January 31st, TMS's Japanese counsel sent Bohbot a letter threatening legal action if payment was not received within 30 days. Bohbot responded by sending a letter, on BKN International letterhead, stating that BKN International had acquired the rights to the "Monster Rancher" licenses, that BKN International had no connection with BKN Entertainment, and that TMS should address its concerns to BKN Entertainment and/or its counsel. Bohbot knew, however, that at that time, BKN Entertainment no longer had any assets, employees, income, or business operations. This was the first time anyone told TMS that BKN International had acquired the distribution rights to "Monster Rancher" from BKN Entertainment. It was also less than two months after Bohbot took the final step in completely disassociating himself from BKN Entertainment and BKN Inc. That past December, Bohbot gave back to BKN Inc. his 52% ownership interest and forgave a \$5 million loan he made to the company, all in exchange for 425,000 shares of BKN International stock. Tr. 69-75, 291, 295-97, 420-21; Pl. Ex. 15, 16; Def. Ex. S.

At the time of trial, TMS was still owed \$1,014,000, and BKN International was still using the rights to "Monster Rancher." Tr. 76, 222.

E. BKN International's Defense

BKN International argues that it paid full and fair value to BKN Inc. for the rights to the “Monster Rancher” licenses and that it would be inequitable to require it to pay again. Specifically, it maintains that it paid BKN Inc. with shares of BKN International stock that was worth more than the rights to the “Monster Rancher” licenses, that BKN Inc. assumed the obligation to pay TMS, and that the plan was for BKN Inc. to sell that stock and pay TMS with the proceeds. In support of this argument, BKN International notes that in September 2000, BKN Inc. did an offering of BKN International stock and did in fact use the proceeds to pay many creditors. BKN International also points out that TMS was paid in full under the first distribution agreement, received some payments under the second and third agreements, and that those payments were made by BKN Inc. BKN Inc. was unable to continue making the payments to TMS, defendant argues, because (1) the remaining stock it owned in BKN International was restricted and couldn't be sold until July 2001, and (2) after July 2001, the worldwide markets crashed and BKN International's stock price plummeted. Finally, BKN International argues that it made two cash payments to BKN Inc. as consideration for the rights to the “Monster Rancher” licenses it received from BKN Entertainment. It should be emphasized, however, that it was BKN Entertainment, not BKN Inc., that contracted with the TMS for the licencing rights to “Monster Rancher.” Def. Post-Trial Memo. at 2-6, 8, 19-22; Tr. 336-37, 371-74, 40-09, 411-12, 433-34; Def. Ex. O, P, Q.

UNJUST ENRICHMENT

The evidence in this case established by a preponderance of the evidence that BKN

International was unjustly enriched and is therefore liable to TMS. To succeed on its claim of unjust enrichment, TMS must establish by a preponderance of the evidence that “(1) defendant was enriched; (2) the enrichment was at plaintiff’s expense; and (3) the circumstances were such that equity and good conscience require defendants to make restitution.” CBS Broadcasting, Inc. v. Jones, 460 F.Supp.2d 500, 505 (S.D.N.Y. 2006) (citations omitted); Clifford R. Gray, Inc. v. LeChase Const. Services, LLC, 819 N.Y.S.2d 182, 187 (N.Y. App. Div. 3d Dep’t 2006). “The essence of such a claim is that one party has received money or a benefit at the expense of another.” Carofino v. Forester, 450 F.Supp.2d 257, 266 (S.D.N.Y. 2006) (citations and internal quotation marks omitted).

There is no questions that BKN International has been enriched. It used, and is still using, the distribution rights in the “Monster Rancher” licenses. Also, the acquisition of these rights and other BKN Entertainment assets gave BKN International value as an entity, which in turn allowed it to sell its stock for profit. Moreover, it is beyond dispute that BKN International’s enrichment was at TMS’s expense, as TMS has still not been completely compensated for licensing the rights to BKN Entertainment. The issue then is whether, under the circumstances of this case, equity and good conscience require BKN International to make restitution to TMS. The Court determines that it does.

The record demonstrates that as Chairman and CEO of both BKN Entertainment and BKN Inc., Chairman of BKN International’s supervisory board, and controlling shareholder of BKN Inc., Bohbot had the power to, and did, effectively direct the relevant financial affairs of all three companies. The record also demonstrates that Bohbot was the architect of, and ultimate decision maker with respect to, the agreement by which BKN Entertainment transferred the

rights to the “Monster Rancher” licenses to BKN International. Furthermore, the evidence shows that Bohbot knew that BKN Entertainment was breaching the distribution agreements, that he personally executed on its behalf, when those rights were transferred without the liabilities. The evidence also demonstrates that the contractual payment obligations to TMS remained with BKN Entertainment; and that BKN International never paid BKN Entertainment, or TMS, for the rights it accepted from its sister company. It was clear that the transfer was violating the agreements when BKN International never assumed the obligation to make those payments. Knowing this, the record reflects that Bohbot caused BKN Entertainment to transfer all of its assets to other BKN entities and to stop all business operations. It was Bohbot’s conscious and deliberate design. Thus, Bohbot knew that should TMS not get paid, it would be unable to recover in contract because BKN Entertainment had no assets or income, and neither BKN Inc. nor BKN International could be contractually liable to TMS for BKN Entertainment’s breach and failure to pay. Moreover, the record reflects that Bohbot never told anyone at TMS about the transfers to BKN International until after he managed to completely disassociate himself, and his ownership interests, from BKN Entertainment and BKN Inc., the entities BKN International now claims failed to pay TMS. Finally, the evidence demonstrates that TMS was never informed that the assignment of the distribution rights were deliberately structured so that BKN International would not assume any obligation to pay TMS. These facts prove that BKN International was unjustly enriched.

Moreover, BKN International’s argument that it already paid fair consideration for the rights to “Monster Rancher” is unpersuasive. The evidence belies a conclusion that the two cash payments made to BKN Inc. were payments for the rights to the “Monster Rancher” licenses

acquired by BKN Entertainment in the second and third distribution agreements. First, Bohbot's testimony that they were for this purpose, like of much his testimony, is not credible. Also, the one memo evidencing the first payment indicates that the payments listed therein were for production costs. This is entirely consistent with the L & D Agreement, which required BKN International to pay its share of production costs for any rights to any series it subsequently acquired from BKN Entertainment. The rights to "Monster Rancher" under the second and third distribution agreements fit into that category. As for the second payment, the only document offered as proof of that payment was a bank statement showing that a deposit for that amount was made. There is no other evidence, other than Bohbot's incredible testimony, that this payment to BKN Inc. was for the "Monster Rancher" distribution rights. In any event, it was BKN Entertainment that transferred the rights to "Monster Rancher" and was contractually obligated to pay TMS for those rights, not BKN Inc. Thus, any payments made in exchange the "Monster Rancher" licenses should have been made to BKN Entertainment. The spuriousness of defendant's entire argument lies in the fact that BKN Inc. had even less of an obligation to pay TMS than BKN International, since, unlike BKN International, BKN Inc. never contracted to acquire nor was ever assigned the rights to "Monster Rancher."

Furthermore, defendant offered no good reason why BKN Inc. failed to pay TMS, or BKN Entertainment, if the payments to BKN Inc. were truly intended to cover the payments owed to TMS by BKN Entertainment under the second and third distribution agreements, or why BKN Entertainment was not simply paid directly by BKN International. Finally, and most importantly, Bohbot's testimony that these payments were for the rights to the "Monster Rancher" licenses is in direct contradiction to BKN International's principle argument from the

beginning: that it paid BKN Inc. with shares of BKN International stock, and that but for the shares being locked-up until July 2001, and a crash in world financial markets and BKN International's stock price, TMS would have been paid in full. (See Pre-Trial Memo of Law 4-5; Tr. 24-28 (opening statement); Post-Trial Memo of Law 6-8, 20). If BKN International did actually pay BKN Inc., in cash, the money needed to pay TMS under the second and third distribution agreements, then the collapse of the stock market and BKN International's stock price would be irrelevant. It was the deliberate stripping and transfer of all BKN assets to BKN International that left BKN Inc. and BKN Entertainment without any real financial ability to meet any obligation to TMS.

Nor does the fact that BKN International might have given BKN Inc. shares of BKN International stock as "payment" for the rights to the "Monster Rancher" licenses relieve it from any equitable obligation to pay TMS. BKN Inc. owned BKN Entertainment and it owned BKN International. It caused BKN Entertainment to give its assets to BKN International so that BKN International could have value and its shares could be sold on a public market for a profit. Then it gave itself 80% of the shares of BKN International so that it could sell those shares to the public, making money for Bohbot and the rest of BKN Inc.'s shareholders, even though BKN Inc. itself gave nothing to BKN International for that stock. As argued, BKN Inc. might have also intended to pay its and BKN Entertainment's creditors if the price of BKN International stock remained high and there was enough money to go around. But if the price dropped and the stock became worthless, it was creditors like TMS that bore the risk and would lose, not BKN Inc. After all, money and assets were only being transferred among BKN entities, so it was a win or break even proposition for BKN Inc.'s shareholders. Unfortunately for Bohbot and the BKN

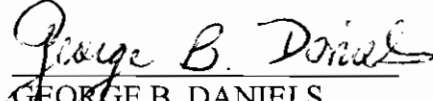
entities, the plan backfired and the stock price fell dramatically, leaving no excess cash to pay the monies owed to TMS. Equity and good conscience, however, would not require TMS to suffer the loss for the BKN entities' losing wager.

Therefore, considering the circumstances surrounding the transfer of the distribution rights in "Monster Rancher" to BKN International, the relationship between the entities involved in that transfer, and Bohbot as the common element on every side of each BKN business transaction, it would be unjust to allow BKN International to benefit from the "Monster Rancher" licenses at TMS's expense. See, e.g., Cinquemani v. Lazio, 829 N.Y.S.2d 265, 268 (N.Y. App. Div., 3d Dep't 2007) (stating that "a person is unjustly enriched when retention of the benefit received would be unjust considering the circumstances of the transfer and the relationship of the parties") (citation omitted). It cannot be allowed to continue to exercise those rights without assuming any obligation to pay TMS what is owed and remains unpaid. Accordingly, the Court finds in favor of the plaintiff in the amount of \$1,014,000, the sum TMS is owed under the distribution agreements, plus interest, fees, and costs.

Plaintiff shall prepare an appropriate judgment and court order to be issued consistent with this memorandum decision.

Dated: New York, New York
April 9, 2007

SO ORDERED:


GEORGE B. DANIELS
United States District Judge