

**UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION**

ENTERED

TAWANA D. MARSHALL, CLERK
THE DATE OF ENTRY IS
ON THE COURT'S DOCKET

IN RE:	§	
	§	
TALK PRODUCTIONS NETWORK, INC.	§	Case No. 01-33136 HDH-7
	§	
DIGITAL INFORMATION AND VIRTUAL	§	Case No. 01-33137 HDH-7
ACCESS, INC., f/k/a DIGITAL	§	
INFORMATION AND VOICE ACCESS,	§	
INC., d/b/a/ DIVA COMMUNICATIONS	§	
	§	
MONKEY BUSINESS, INC.	§	Case No. 01-33139 HDH-7
	§	
Debtors	§	Jointly Administered Under
	§	Case No. 01-33136 HDH-7

STEVEN S. TUROFF, CHAPTER 7	§	
TRUSTEE	§	
	§	
Plaintiff	§	
	§	
v.	§	Adversary No. 03-3401
	§	
BRYAN D. BULLOCH, BRYAN D.	§	
BULLOCH, P.C., BDB FINANCIAL	§	
SERVICES, INC., and BULLOCH,	§	
SEGER AND CO., LLC	§	
	§	
Defendants	§	

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Came before the Court for trial on August 20, 2004, the Complaint by the Trustee to recover preferential transfers pursuant to 11 U.S.C. §§ 547(b) & 550 ("Complaint"). The Court has jurisdiction over this adversary proceeding pursuant to 28 U.S.C. §§ 1334 and 151, and the standing

order of reference in this district. This Matter is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(A), (F) & (O). The Court makes the following findings of fact and conclusions of law pursuant to Federal Rule of Bankruptcy Procedure 7052:

FINDINGS OF FACT

A. On April 12, 2001, Digital Information and Virtual Access, Inc. ("DIVA"), Money Business, Inc., d/b/a the Underground Shopper ("MBI"), a wholly owned subsidiary of DIVA, and Talk Productions Network, Inc. ("TPN"), another wholly owned subsidiary of DIVA, filed a voluntary petition for relief under Chapter 11 of the Bankruptcy Code in this district and division.

B. On April 16, 2001, this Court ordered that the bankruptcy cases of DIVA, MBI, and TPN (collectively, the "Debtors") be jointly administered under Case No. 01-33136.

C. On June 4, 2001, the Court entered an order appointing Steven S. Turoff as Chapter 11 trustee for the jointly administered estates. On June 25, 2001, the Trustee filed a Motion to Convert Case from Chapter 11 to Chapter 7, which motion was granted by Order of this Court dated July 30, 2001.

D. Unsecured creditors in these bankruptcy cases are expected to receive substantially less than 100% payment of the amounts of their allowed claims. In fact, the undisputed evidence suggests that the unsecured creditors will likely not receive anything.

F. On April 11, 2003, the Trustee commenced this adversary proceeding against Defendants Bryan D. Bulloch, Bryan D. Bulloch, P.C. ("Bulloch P.C."), BDB Financial Services, Inc. ("BDB"), and Bulloch, Seger & Co., LLC ("BS&C").

G. Defendant Bulloch is a resident of Texas and the former Chief Financial Officer of DIVA, MBI, and TPN.

H. Defendant Bulloch P.C. is a Texas corporation with its principal place of business in Dallas, Texas. Bulloch is the sole officer, director, and shareholder of Bulloch P.C.

I. Defendant BDB is a Texas corporation with its principal place of business in Dallas, Texas. Bulloch is the sole officer, director, and shareholder of BDB.

J. Defendant BS&C is a Texas limited liability company with its principal place of business in Dallas, Texas. Bulloch is the Secretary, a manager, and shareholder of BS&C. Bulloch P.C. is a member of, and contributed its assets and liabilities to, BS&C. At the time of trial, the Trustee dismissed and announced a settlement with BS&C.

K. In May 1999, DIVA signed a letter of intent for DIVA to acquire the issued and outstanding stock of MBI from Sue Goldstein and Jerry Schraeder.

L. On September 24, 1999, Bulloch signed a letter of intent to become DIVA's Chief Financial Officer. That letter included, *inter alia*, the following terms:

- i. Effective October 1, 1999, Bulloch would become DIVA's Chief Financial Officer;
- ii. Bulloch would receive a monthly salary of \$10,000.00;
- iii. Bulloch would receive quarterly bonuses of \$12,500.00, with the first two quarterly bonuses guaranteed and the remainder on incentive;
- iv. BDB would receive a monthly consulting fee of \$2,500.00; and
- v. Bulloch would receive an initial allotment of options to purchase 360,000 shares of DIVA stock at an exercise price of \$.50 per share.

M. In October 1999, Bulloch began serving as the CFO for both DIVA and MBI.

N. In December 1999, DIVA acquired all of the issued and outstanding stock of MBI, pursuant to a Stock Purchase Agreement dated December 16, 1999 (the "Stock Purchase Agreement").

O. In January 2000, Bulloch formed TPN, as a wholly owned subsidiary of DIVA. Bulloch served as an initial director and as the CFO for TPN.

P. As CFO, Bulloch had access to and control of the financial records and affairs of the Debtors, including check-writing authority. Bulloch also negotiated contracts, forecasted revenues, prepared financial statements, and managed accounts receivable and accounts payable for the Debtors. He sat in management meetings regularly and participated in decisions regarding the payment of certain creditors.

Q. In exchange for his services as CFO, the Debtors paid Bulloch an annual salary of \$120,000. In addition, the Debtors paid monthly consulting fees of \$2,500 and quarterly bonuses of \$12,500 to Bulloch through his company, BDB.

R. In early 2000, DIVA started planning a public stock offering and retained Arthur Andersen & Co. to conduct an audit of the DIVA, MBI, and TPN financial statements for calendar year 1999.

S. Arthur Andersen never issued an audit opinion on the DIVA, MBI, and TPN financial statements, in part, because DIVA had more than \$16 million in convertible debt that threatened its ability to continue as a going concern.

T. Throughout early 2000, the Debtors relied on convertible debt raised by Paul Ptak ("Ptak"), a Dallas-based financial planner who had been introduced to the Debtors by Bulloch.

U. Ptak raised approximately \$16 million in convertible debt for the Debtors through several companies owned and/or controlled by Ptak, including (a) Ptak Financial Planning Group, (b) Net.Return Fund 1, Ltd., and (c) Net.Return, Inc.

V. By the Summer of 2000, Ptak and his companies had become the subject of an investigation by the Securities and Exchange Commission. Consequently, Ptak ceased financing DIVA, MBI, and TPN in mid-2000.

W. After the loss of the Ptak funding, Glover created Media Star Productions, Inc. ("Media Star") in order to temporarily fund DIVA and to eventually acquire DIVA's operating assets.

X. Media Star raised funds by selling equity in itself to foreign investors — primarily to an entity known as Diversified Investment Strategies. Media Star then used most of those funds to provide unsecured loans, totaling approximately \$4.6 million, to the Debtors. By July 2000, the Debtors relied on Media Star for essentially all of their funding.

Y. Bulloch was appointed as Media Star's CFO. Bulloch claims he resigned as the Debtors' CFO at the end of May 2000. However, no written evidence of the purported resignation was offered.

Z. Despite the purported resignation, Bulloch nonetheless continued to have a close and controlling relationship with the Debtors. For example, Bulloch served as the primary liaison for DIVA in connection with its audit by Arthur Andersen until the abandonment of that audit in August 2000. Bulloch continued to be active in the affairs of DIVA. He attended a number of management meetings, and participated in decisions regarding the repayment of creditors. Bulloch also continued to collect the same substantial salary and quarterly bonuses from the Debtors until August 2000.

Bulloch, moreover, continued to negotiate with creditors on behalf of the Debtors throughout late 2000. Bulloch wrote checks to himself and his entities after his purported resignation.

AA. Most importantly, as Media Star's CFO, Bulloch controlled essentially all funding for the Debtors. Bulloch caused Media Star to advance more than \$4.6 million to the Debtors, so they were able to pay their bills. Sometimes, Bulloch simply caused Media Star to pay bills directly to the Debtors' creditors.

BB. When Media Star's own funding was delayed, Bulloch loaned his personal and corporate funds to the Debtors. Between May 2000 and September 2000, Bulloch, Bulloch P.C., and BDB made 39 loans to the Debtors, totaling \$1,145,993.00 (the "Bulloch Loans"). Bulloch made the Bulloch Loans in order for the Debtors to pay vendors, payroll, and general operating expenses.

CC. The Bulloch Loans were not documented in the form of any promissory notes.

DD. The Bulloch Loans were made on an interest-free and unsecured basis.

EE. The Bulloch Loans were made with no specified date for repayment.

FF. The Bulloch Loans were not conducted at arm's length between the parties.

GG. The Bulloch Loans were not commercially motivated. A reasonably prudent lender would not have loaned between \$100,000 to \$400,000 to DIVA at the time that the Bulloch Loans were made.

HH. At the time of the Bulloch Loans, the Debtors were not paying their debts as they became due. The Debtors were also insolvent. The Bulloch Loans were made at a time when Bulloch knew of the Debtors' financial condition, and that the Debtors could not pay their bills as they came due. He also knew that Arthur Andersen had expressed skepticism about the ability of the Debtors to continue as going concerns.

II. When other funds became available to the Debtors, Bulloch caused DIVA to transfer funds to himself and his affiliated companies in order to repay the Bulloch Loans.

JJ. When other funds became available to the Debtors, Bulloch caused DIVA to transfer the following amounts to himself and his affiliated companies in order to repay the Bulloch Loans: (a) \$83,000 to Bulloch (the "Bulloch Transfers"); (b) \$855,080 to Bulloch P.C. (the "Bulloch P.C. Transfers"); and (c) \$25,750 to BDB (the "BDB Transfers").

KK. Bulloch effectuated every single one of these transfers (collectively, the "Transfers"), signing 20 checks and five wire transfer requests on behalf of DIVA.

LL. Bulloch, Bulloch P.C., and BDB were persons in control of DIVA at the time of the Transfers.

MM. The sum of DIVA's debts was greater than all of DIVA's property, at a fair valuation, at the time of the Transfers.

NN. The Bulloch P.C. Transfers and the BDB Transfers were made for the benefit of Bulloch.

OO. Any finding of fact which is more properly deemed to be a conclusion of law is to be considered a conclusion of law.

CONCLUSIONS OF LAW

1. The Court has jurisdiction over this adversary proceeding pursuant to 28 U.S.C. §§ 157 and 1334. This is a core proceeding under 28 U.S.C. § 157(b)(2)(F).

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

3. The Trustee has standing to pursue the claims in this adversary proceeding on behalf of DIVA's bankruptcy estate.

Defendant Bulloch

4. Each Bulloch Transfer constituted a transfer, as defined in 11 U.S.C. § 101(54).
5. Each Bulloch Transfer constituted a transfer of an interest in property of DIVA.
6. Each Bulloch Transfer was made to or for the benefit of Bulloch.
7. Each Bulloch Transfer was made while DIVA was insolvent, as defined in 11 U.S.C. § 101(32).
8. The Bulloch Transfers were all made within one year before the petition date in these bankruptcy cases.
9. Bulloch was a creditor of DIVA at the time of each of the Bulloch Transfers.
10. Bulloch did not apply the checks and wire transfers made to him individually to any of his outstanding indebtedness. Instead, such funds were routed to Bulloch P.C. Therefore, the Trustee has not shown that Bulloch Transfers were made for or on account of an antecedent debt that DIVA owed to Bulloch, rather the Bulloch Transfers were made for or on account of an antecedent debt that DIVA owed to Bulloch P.C.
11. Bulloch was an insider of DIVA, as defined under 11 U.S.C. § 101(31), at the time of the Bulloch Transfers.

Defendant Bulloch P.C.

12. Each Bulloch P.C. Transfer constituted a transfer, as defined in 11 U.S.C. § 101(54).
13. Each Bulloch P.C. Transfer constituted a transfer of an interest in property of DIVA.
14. Each Bulloch P.C. Transfer was made to or for the benefit of Bulloch P.C.
15. Each Bulloch P.C. Transfer was made while DIVA was insolvent, as defined in 11 U.S.C. § 101(32).

16. Bulloch P.C. received each of the Bulloch P.C. Transfers within one year before the petition date in these bankruptcy cases.
17. Bulloch P.C. was a creditor of DIVA at the time of each of the Bulloch P.C. Transfers.
18. Each Bulloch P.C. Transfer was made for or on account of an antecedent debt that DIVA owed to Bulloch P.C.
19. Bulloch P.C. was an insider of DIVA, as defined under 11 U.S.C. § 101(31), at the time of the Bulloch P.C. Transfers.
20. The Bulloch P.C. Transfers enabled Bulloch P.C. to receive more than it would receive if (a) this case were under Chapter 7 of the Bankruptcy Code; (b) the Bulloch P.C. Transfers had not been made; and (c) Bulloch P.C. received payment of the Bulloch Loans to the extent provided by the Bankruptcy Code.
21. Bulloch P.C. presented sufficient evidence to establish the affirmative defense of “subsequent new value” in this adversary proceeding.
22. Net of the subsequent new value defense, the Bulloch P.C. Transfers shall be and hereby are avoided in the amount of \$270,907.00, pursuant to 11 U.S.C. § 547(b).
23. Bulloch P.C. was the initial transferee of the Bulloch P.C. Transfers.
24. Bulloch P.C. did not take the Bulloch P.C. Transfers for value, in good faith, and without knowledge of their voidability.
25. Pursuant to 11 U.S.C. § 550, the Trustee shall recover the value of the Bulloch P.C. Transfers from Defendant Bulloch P.C., less the subsequent new value advanced to Debtors during the applicable purchase period, or \$270,907.00.

26. The Trustee argues that each of the Bulloch P.C. Transfers were made for the benefit of Bulloch and therefore, pursuant to 11 U.S.C. § 550, the Trustee should be able to recover the value of the Bulloch P.C. Transfers from Defendant Bulloch. However, the evidence on this point was not persuasive at trial. Bulloch P.C. received the transfers, which went into operations. The funds were used for many purposes, including paying the expenses of Bulloch, P.C. It may be that the Trustee will show through post-judgment activity that Bulloch and Bulloch P.C. have an identity of interests under state law. However, liability under § 550 was not proved at trial.

Defendant BDB

27. Each BDB Transfer constituted a transfer, as defined in 11 U.S.C. § 101(54).

28. Each BDB Transfer constituted a transfer of an interest in property of DIVA.

29. Each BDB Transfer was made to or for the benefit of BDB.

30. Each BDB Transfer was made while DIVA was insolvent, as defined in 11 U.S.C. § 101(32).

31. BDB received each of the BDB Transfers within one year before the petition date in these bankruptcy cases.

32. BDB was a creditor of DIVA at the time of each of the BDB Transfers.

33. Each BDB Transfer was made for or on account of an antecedent debt that DIVA owed to BDB.

34. BDB was an insider of DIVA, as defined under 11 U.S.C. § 101(31), at the time of the BDB Transfers.

35. The BDB Transfers enabled BDB to receive more than it would receive if (a) this case were a case under Chapter 7 of the Bankruptcy Code; (b) the BDB Transfers had not been made; and

(c) BDB received payment of the Bulloch Loans to the extent provided by the Bankruptcy Code.

36. BDB presented sufficient evidence to establish the affirmative defense of "subsequent new value" in the adversary proceeding.

37. Net of the subsequent new value defense, no preferential transfers were made to BDB.

Defendant BS&C

38. The Trustee has settled with and dismissed BS&C from this adversary proceeding.

39. Any conclusion of law which is more properly deemed to be a finding of fact is to be considered a finding of fact.

40. The Court reserves the right to make additional conclusions of law.

Signed this 6th day of October, 2004.



Harlin D. Hale
United States Bankruptcy Judge