

SIGNED.



Dated: January 28, 2011

*James M. Marlara*  
JAMES M. MARLAR  
Chief Bankruptcy Judge

**IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF ARIZONA**

10	In re:	)	Chapter 11
11	BASHAS' INC.,	)	Nos. 2:09-bk-16050-JMM
12	BASHAS' LEASECO INC.,	)	2:09-bk-16051-JMM
13	SPORTSMAN'S, LLC,	)	2:09-bk-16052-JMM
14		)	(Jointly Administered)
	Debtors.	)	<b>MEMORANDUM DECISION</b>

Before the court is the Debtors' challenge to Claim No. 1756, filed by David A. Duncan (ECF No. 2658). The court heard argument on the procedural issues on January 11, 2011, after which it took the matter under advisement in order to more fully review the facts and the law. If allowed, the claim would receive 100% under the plan.<sup>1</sup>

**JURISDICTION**

This is a core matter over which the court has jurisdiction. 28 U.S.C. § 157(b)(2)(B).

<sup>1</sup> The creditor also alludes to a cause of action under 11 U.S.C. §§ 523 (a)(2) or (6) (fraud; misrepresentation; conversion). But, since the plan provides 100% to approved unsecured claims, the § 523 action is moot. The only question is whether the claim is allowable. In any event, a common law action for fraud or conversion is subject to a state statute of limitations. That period ran prior to the bankruptcy case. ARIZ. REV. STAT. § 12-542 (conversion--two years); § 12-543 (fraud--three years). So, claims made under these theories are time-barred.

1 **FACTS**

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3 The Claimant, David A. Duncan, filed Proof of Claim No. 1756 for \$1,000,000 in  
4 principal and \$285,124 in interest. He maintains that he was the rightful winner of a ticketed  
5 gaming event promoted by Bashas' in approximately September, 2003.

6 When Mr. Duncan presented his ticket, it was declared not to be entitled to any prize  
7 money. That notification occurred on or about September 30, 2003.

8 Since that date, Mr. Duncan has not filed suit in any court to have his rights declared  
9 (until filing his claim in this bankruptcy case).

10 Bashas' filed a voluntary Chapter 11 case in the U.S. Bankruptcy Court for the District  
11 of Arizona on July 12, 2009.

12 Thereafter, creditors were advised to file their claims on or before October 12, 2009.  
13 Mr. Duncan filed his claim on October 9, 2009. It was therefore timely filed.

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15 **PROCEDURE**

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17 The Debtor challenges Mr. Duncan's proof of claim on substantive and procedural  
18 grounds. FED. R. BANKR. P. 3007(a). The procedural grounds are that applicable statutes of  
19 limitations had passed by the time the Bashas' entities filed bankruptcy petitions.

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21 **DISCUSSION--STATUTES OF LIMITATION**

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23 Before the court can reach the merits of the controversy before it, it must determine  
24 whether the applicable statutes of limitations have passed. If so, any claim under applicable state  
25 or federal law would be time-barred.

26 As the court understands Mr. Duncan's claim and pleadings, he has asserted rights  
27 under:

- 1 1. The Lanham Act, 15 U.S.C. § 1114 and/or § 1125. The Lanham Act
- 2 relates, in general, to copyrights and trademarks.
- 3 2. The Arizona Consumer Fraud Act, ARIZ. REV. STAT. ("ARS") §§ 44-
- 4 1522 and 1533.
- 5 3. The Arizona Criminal Code, ARS § 13-3311.
- 6 4. Breach of contract.

7 Each type of action, and the applicable statute of limitations, will be discussed in turn.

### 8

### 9 **1. The Lanham Act**

### 10

11 The court is baffled by how this federal statute applies to the claim for failure to pay

12 out on a gaming ticket. Or, for that matter, how the claimant contends that he holds rights to a

13 patent, trademark or copyright violation. To assert a claim under this federal statute, a claimant

14 would have to prove legal standing. Here, the claimant does not appear to claim an ownership

15 interest in a patent, copyright or trademark that has been infringed.

16 Nonetheless, it would appear that any applicable statute of limitation under this theory

17 had long passed, under the Lanham Act, by the time that Bashas' filed its Chapter 11 bankruptcy

18 case on July 12, 2009.

19 The Lanham Act does not have its own statute of limitations, so the court must borrow

20 the most analogous statute of limitations from state law. Arizona's three-year statute of limitations

21 for fraud applies to Lanham Act claims. Au-Tomotive Gold Inc. v. Volkswagen of America, Inc.,

22 603 F.3d 1133, 1140 (9th Cir. 2010). If the claim is filed after the limitations period has expired,

23 any suit is barred by the passage of time. Id.

24 Here, to the extent Mr. Duncan's claim is considered a complaint, it was filed more

25 than six years after the cause of action occurred in September, 2003. Therefore, it is clearly barred.

26 Mr. Duncan has no available remedy under the portion of the claim which he

27 maintains is violative of the Lanham Act.

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**2. The Arizona Consumer Fraud Act**

Mr. Duncan cites the Arizona Consumer Fraud Act, ARS §§ 44-1522 and 1533, as his theory for another cause of action. There is a one year statute of limitations applicable to actions on liabilities created by this statute, rather than the general three year period for actions arising out of fraud. Murry v. Western Am. Mortg. Co., 124 Ariz. 387, 604 P.2d 651 (App. 1979) (Citing ARS § 12-541(5) (formerly subsection 3) (action upon a liability created by statute); see also ARS § 12-543(e) (fraud).

Therefore, under either the general fraud limitations period or the Consumer Fraud Act limitations statute, Mr. Duncan's present complaint, on this theory, is time-barred.

**3. The Arizona Criminal Code**

Mr. Duncan cites a violation of the Criminal Code, ARS § 13-3311, which requires that any person who conducts an amusement, gambling, intellectual contest or event to register with the attorney general's office. He then accuses the Debtors of failing to register, which he asserts was an act of "willful neglect." The bankruptcy court lacks jurisdiction over criminal actions.

Moreover, the parties have not provided legal authority for the proposition that the Criminal Code has rules relating to liability under a civil claim, such as that asserted by Mr. Duncan.

Thus, the theory or theories asserted under the Criminal Code are inapplicable to what this court must decide. Mr. Duncan's claim, on this theory, is not capable of relief.

**4. Breach of Contract**

A gaming event, such as the one at issue here, is most analogous to a written contract. Rules of the contest govern the issues of legal entitlement. See, e.g., Gray v. Montgomery, 23 Ariz. 461, 204 P. 1029 (1922); Kerr v. Time Inc. 188 F.3d 513 (9th Cir. 1999); Henry v. Chandler Education Foundation, Inc. 2008 WL 5384289 (Ariz. App 2008) (unpublished decision).

1 In Arizona, suit on a written contract carries a six-year statute of limitations.  
2 ARS § 12-548. Here, the cause of action accrued on September 30, 2003 (Proof of Claim).

3 Before the six-year limitations period expired, Bashas' filed Chapter 11 on July 12,  
4 2009. Upon that filing, the automatic stay of 11 U.S.C. § 362(a) prevented Mr. Duncan from  
5 commencing suit on the claim. A kind of tolling period occurred thereafter. See 11 U.S.C. § 108(c).  
6 Although Mr. Duncan could have sought stay relief to commence his action in state court, he instead  
7 took advantage of the claim provisions of the Bankruptcy Code to file a timely proof of claim.  
8 Thus, he has elected to have the merits of the controversy decided by this court.

9 The court finds and concludes that the applicable statute of limitations, for bringing  
10 an action upon a written contract, had not expired when the bankruptcy case was filed. The  
11 substantive issues of Mr. Duncan's proof of claim require a trial on the merits.

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13 **CONCLUSION**  
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15 Bashas' objections to Claim No. 1756, filed by David A. Duncan, are SUSTAINED  
16 on his theories under the Lanham Act, the Arizona Consumer Fraud Act and the Criminal Code.  
17 Bashas' objection to Mr. Duncan's Claim No. 1756, on statute of limitations grounds, based upon  
18 contract principles, is OVERRULED.

19 The Clerk shall convert this matter to an adversary proceeding, and issue the  
20 appropriate trial scheduling order.

21  
22 DATED AND SIGNED ABOVE.  
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24 COPIES to be sent by the Bankruptcy Notification  
25 Center ("BNC") to the following:

26 Michael McGrath, Attorney for Debtors  
27 Michael Carmel, Attorney for Debtors  
28 David A. Duncan, Claimant  
Office of U.S. Trustee

## Notice Recipients

District/Off: 0970-2  
Case: 2:09-bk-16050-JMM

User: rohmand  
Form ID: pdf008

Date Created: 1/31/2011  
Total: 1

**Recipients submitted to the BNC (Bankruptcy Noticing Center):**

cr      DAVID A. DUNCAN      204 W. MARLBORO DR.      CHANDLER, AZ 85225-7194

TOTAL: 1