injunction] during the pendency of that order." See Crocker v. Tennessee Secondary School Athletic Ass'n, 908 F.2d 972 (Table), 1990 WL 104036, at *4 (6th Cir. July 25, 1990).

Based on the foregoing, the bankruptcy court erred as a matter of law in failing to give effect to the Permanent Injunction during the Injunction Period.

2. Applying The Bankruptcy Court's Own Reasoning, Spritzer Is Entitled to Allowance of an Additional $286,000 Lent to the Debtor Under the Permanent Injunction.

The bankruptcy court concluded that Spritzer was entitled to a $76,000 claim because the word "loan" written on the relevant deposit slips constituted "contemporaneous written evidence" that the amounts were loaned to the Debtor." See Machne Menachem, 2010 WL 831003, at *8. All of the $76,000 was advanced prior to the Resolution.

The bankruptcy court, however, disallowed *all* of Spritzer's claim for similar advances evidenced by deposit slips bearing the word "loan" where such advances were made after March 17, 1997. The bankruptcy court erroneously reasoned that the Resolution precluded Spritzer from advancing any loans after that date. The bankruptcy court again effectively rendered the Permanent Injunction to be meaningless. The bankruptcy court failed to appreciate that its ruling would leave the Debtor without any director authorized to borrow any funds to operate the camp operations. Specifically, Spritzer would be barred from taking any action on behalf of the Debtor, including borrowing funds, under the Resolution while all of the other directors were enjoined from managing the Debtor's camp operations under the Permanent Injunction. That makes no sense. If something must give way, it has to be the Resolution. The District Court's Permanent Injunction controls.

During the Injunction Period, Spritzer alone was authorized to administrate the Debtor's affairs. Spritzer was entitled borrow funds without the consent or participate of the enjoined

directors. Applying the bankruptcy court's pre-Resolution analysis to Spritzer's advances made within the Injunction Period, results in Spritzer having a claim for an additional $286,000. During the Injunction Period, deposit slips relating to checks in the amount of $286,000 contained the written word "loan," thereby containing the same "contemporaneous written evidence" of a loan transaction as the bankruptcy court found controlling for Spritzer's pre-Resolution advances. The additional $286,000 claim is comprised of the following transactions:

- 11/17/98 deposit slip in the amount of $10,000 – "Loan A-One"; see Spritzer Ex. 1 (Bates YS000097); Spritzer Ex. 5 (Bates YS000131)
- 11/23/98 deposit slip in the amount of $10,000 – "Loan A-One"; see Spritzer Ex. 1 (Bates YS000097); Spritzer Ex. 5 (Bates YS000132)
- 11/25/98 deposit slip in the amount of $10,000 – "Loan A-One"; see Spritzer Ex. 1 (Bates YS000098); Spritzer Ex. 5 (Bates YS000132)
- 12/21/98 deposit slip in the amount of $5,000 – "Y.S. Loan"; see Spritzer Ex. 1 (Bates YS000091); Spritzer Ex. 5 (Bates YS000134)
- 3/12/99 deposit slip in the amount of $20,000 – "Loan Y.S."; see Spritzer Ex. 1 (Bates YS000099); Spritzer Ex. 5 (Bates YS000135)
- 3/25/99 deposit slip in the amount of $2,000 – "Loan Y.S."; see Spritzer Ex. 1 (Bates YS000099); Spritzer Ex. 5 (Bates YS000136)
- 4/19/99 deposit slip in the amount of $20,000 – "Loan Y.S."; see Spritzer Ex. 1 (Bates YS000101); Spritzer Ex. 5 (Bates YS000137)
- 9/2/99 deposit slip in the amount of $5,000 – "Loan Y.S."; see Spritzer Ex. 1 (Bates YS000102); Spritzer Ex. 5 (Bates YS000138)
- 2/1/00 deposit slip in the amount of $5,000 – "Loan A-One"; see Spritzer Ex. 1 (Bates YS000106); Spritzer Ex. 5 (Bates YS000139)
- 2/28/00 deposit slip in the amount of $6,000 – "Loan A-One"; see Spritzer Ex. 1 (Bates YS000107); Spritzer Ex. 5 (Bates YS000140)
- 3/31/00 deposit slip in the amount of $3,000 – "Spritzer Loan"; see Spritzer Ex. 1 (Bates YS000108); Spritzer Ex. 5 (Bates YS000141)
- 4/19/00 deposit slip in the amount of $5,000 – "Loan Y.S."; see Spritzer Ex. 1 (Bates YS000109); Spritzer Ex. 5 (Bates YS000142)
- 4/28/00 deposit slip in the amount of $5,000 – "Loan Y.S."; see Spritzer Ex. 1 (Bates YS000109); Spritzer Ex. 5 (Bates YS000143)

- 8/18/00 deposit slip in the amount of $25,000 – "Loan Y. Spritzer"; see Spritzer Ex. 1 (Bates YS000110); Spritzer Ex. 5 (Bates YS000144)
- 8/29/00 deposit slip in the amount of $5,000 – "Loan Y.S."; see Spritzer Ex. 1 (Bates YS000111); Spritzer Ex. 5 (Bates YS000144)
- 9/7/00 deposit slip in the amount of $10,000 – "Loan Y.S."; see Spritzer Ex. 1 (Bates YS000112); Spritzer Ex. 5 (Bates YS000145)
- 9/15/00 deposit slip in the amount of $10,000 – "Loan Y.S."; see Spritzer Ex. 1 (Bates YS000113); Spritzer Ex. 5 (Bates YS000146)
- 10/3/00 deposit slip in the amount of $10,000 – "Loan Y.S."; see Spritzer Ex. 1 (Bates YS000114); Spritzer Ex. 5 (Bates YS000147)
- 10/6/00 deposit slip in the amount of $15,000 – "Loan Y.S."; see Spritzer Ex. 1 (Bates YS000115); Spritzer Ex. 5 (Bates YS000148)
- 10/31/00 deposit slip in the amount of $15,000 – "Loan Y.S."; see Spritzer Ex. 1 (Bates YS000115); Spritzer Ex. 5 (Bates YS000149)
- 11/27/00 deposit slip in the amount of $10,000 – "Loan Y.S."; see Spritzer Ex. 1 (Bates YS000116); Spritzer Ex. 5 (Bates YS000150)
- 12/4/00 deposit slip in the amount of $10,000 – "Loan Y.S."; see Spritzer Ex. 1 (Bates YS000117); Spritzer Ex. 5 (Bates YS000151)
- 12/19/00 deposit slip in the amount of $10,000 – "Loan Y.S."; see Spritzer Ex. 1 (Bates YS000118); Spritzer Ex. 5 (Bates YS000152)
- 1/29/01 deposit slip in the amount of $10,000 – "Loan Y.S."; see Spritzer Ex. 1 (Bates YS000119); Spritzer Ex. 5 (Bates YS000153)
- 5/15/01 deposit slip in the amount of $5,000 – "Loan Y.S."; see Spritzer Ex. 1 (Bates YS000120); Spritzer Ex. 5 (Bates YS000154)
- 9/25/01 deposit slip in the amount of $15,000 – "Loan Y.S."; see Spritzer Ex. 1 (Bates YS000121); Spritzer Ex. 5 (Bates YS000155)
- 10/15/01 deposit slip in the amount of $20,000 – "Loan Y.S."; see Spritzer Ex. 1 (Bates YS000123); Spritzer Ex. 5 (Bates YS000156)
- 11/28/01 deposit slip in the amount of $10,000 – "A-One Loan"; see Spritzer Ex. 1 (Bates YS000101); Spritzer Ex. 5 (Bates YS000157)

Therefore, applying during the Injunction Period the bankruptcy court's own reliance upon contemporaneous references to the term "loan" on deposit slips would result in a total claim for Spritzer of $367,000. The $367,000 is comprised of the $76,000 in Spritzer advances made prior to

March 17, 1997 (which $76,000 was allowed by the bankruptcy court),[6] plus the $286,000 in additional Spritzer advances made during the Injunction Period. All of those advances were evidenced by a contemporaneous notation that the transaction was a "loan."

B. The Bankruptcy Court Improperly Applied *SubMicron* in the Not-For-Profit Context.

The bankruptcy court stated that the "normal exercise regarding a for-profit entity would involve a determination whether a given advance is a loan or a capital investment." See Machne Menachem, 2010 WL 831003, at *3. In the non-profit context, the bankruptcy court concluded that it would alter the test to consider whether an advance is a loan or a donation. See id. That conclusion was reversible error as a matter of law.

In the for-profit context, if a purported loan is characterized as equity, the payor would be entitled to payment on account of its equity after all creditors were paid in full. Hence, if the Debtor was a for-profit entity and Spritzer's advances were characterized as equity, Spritzer would be entitled to recover from the funds remaining in the Debtor's bankruptcy estate because all other creditors have been paid in full under the Plan.

The Debtor, however, is a not-for-profit corporation. There are no equity interests in the Debtors. The characterization of Spritzer's advances as donations does not simply subordinate Spritzer's advances to the claims of creditors. Instead, it eliminates any right to repayment. In light of that important distinction, it should come as no surprise that there is no case law applying SubMicron in the non-profit context. In fact, Spritzer's counsel did not find *any* bankruptcy

---

[6] The Debtor did not appeal the bankruptcy court's allowance of Spritzer's pre-Resolution advances that were evidenced by contemporaneous deposit slip references to a "loan."

cases recharacterizing a loan as a donation in the non-profit context. Nor did the bankruptcy court cite to any such cases.

C. The Debtor Ratified Spritzer's Loans Prior to the Injunction Period

The bankruptcy court concluded that there was no evidence of subsequent ratification" of Spritzer's loans. See Machne Menachem, 2010 WL 831003, at *6. That conclusion is clearly erroneous in light of the overwhelming evidence to the contrary.

Spritzer's loans prior to the Injunction Period are well-documented. See Spritzer Ex. 2 (Proof of Claim Summary) at pp. 1-3 (Column F entitled "YS Bates Pages"); Spritzer Ex. 1 (Proof of Claim); Spritzer Exs. 3, 4, 5, 6, 7 and 8 (copies of checks, deposit slips, general ledger sheets, account statements, invoices, Lease, NYSEG Letter, Starbare Closing Documents, Forbearance Agreement, and Schreiber Foundation Checks).[7] As indicated below, the Debtor ratified those loans by reaping and retaining the benefits thereof.

For example, the current directors were involved in the Camp operations during 1995. In 1995, the Debtor owned no real estate. Instead, it leased real property from Par Cottages, Inc. pursuant to the Lease. Spritzer paid the $11,000 due upon execution of the Lease. See Spritzer Ex. 3 (Lease and copy of front of Spritzer check); Spritzer Ex. 1 (Proof of Claim) at Bates YS000021 (copy of front and back of canceled check). Goldman was with Spritzer at the Levine Glass & Miller law firm when Spritzer paid the $11,000 lease deposit. See 5/12/09 Tr. at 155:9-21. None of the other directors complained (let alone timely complained) about Spritzer's

[7] As Spritzer testified, the Schreiber Foundation Checks match to the penny the amounts loaned by Spritzer to the Schreiber Foundation for the purpose of making payments on the Debtor's obligations. See Spritzer Ex. 2 (Proof of Claim Summary) at p. 3, lines 87-89; Spritzer Ex. 1 (Proof of Claim) at Bates YS000085-87, and Spritzer Ex. 8 (Schreiber Foundation checks). As Spritzer further testified, he had to pay the Debtor's obligations through the Schreiber Foundation bank account because the current directors froze the Debtor's bank account, thereby jeopardizing the Debtor's ability to continue operations and maintain positive relationships with its vendors.

$11,000 loan to insure the availability of leased property for the Debtor's Camp operations. The Debtor used the leased property for its Camp operations thereby ratifying Spritzer's $11,000 loan.

The Debtor, however, could not open its Camp because NYSEG denied its application for utility services. See Spritzer Ex. 4 (NYSEG Letter). NYSEG demanded a $3,305 deposit as a condition to providing the Debtor with utility services. See Spritzer Ex. 4 (NYSEG Letter). Due to the Debtor's lack of funds, Spritzer loaned $3,305 to the Debtor to pay the deposit. See Spritzer Ex. 1 (Proof of Claim) at Bates YS000022.

In 1996, the Debtor purchased the Property from Starbare II Partners, L.P. ("Starbare"). See Spritzer Ex. 6 (Summary of Closing) at Tab 2 (Agreement of Sale). Spritzer loaned the Debtor $35,000 (by endorsing a certified check to Settlers Abstract Co., the title/closing agent. See Spritzer Ex. 6 (Summary of Closing) at Tab 1 (Closing Statement) and Tab 14 (copy of check #4419); Spritzer Ex. 1 (Proof of Claim) at Bates YS000048 (copy of check endorsed by Spritzer to Settlers Abstract Co.). The Debtor used the Property for its Camp operations from 1996 through 2006. The Debtor (including the current directors) steadfastly asserted ownership of the Property. The Debtor's estate also received the proceeds, in excess of $1.0 million, from the sale of the Property to SRFC, a New York not-for-profit corporation, pursuant to the Plan.

It is inconsistent with the benefits derived from the Debtor's ownership of the Property for the Debtor to refute its obligation to Spritzer for the $35,000 loan that was necessary to purchase the Property. The Debtor's use and enjoyment of the Property, and its receipt of the proceeds of the sale of the Property (which were used to pay its other creditors), ratified the Spritzer loan used to acquire that Property.

In January 1997, Spritzer also paid $36,162.11 pursuant to the Forbearance Agreement to avoid Starbare's acceleration of its mortgage loan. See Spritzer Ex. 7 (Forbearance Agreement) at § 6(b)-(d), pp. 4-5; Spritzer Ex. 1 (Proof of Claim) at Bates YS000084. The Debtor's continued use and enjoyment of the Property, and its receipt of the proceeds of the sale of the Property, ratified the Spritzer loan necessary to obtain Starbare's forbearance.[8]

As indicated above, the Property was sold to SRFC in this bankruptcy case. Absent Spritzer's funding of all the Debtor's other unpaid pre-Injunction Period expenses (as well as the Injunction Period expenses), the Debtor either would have lost the Property to foreclosure or would have an additional $1.0 million in unpaid vendor claims. Accordingly, the Debtor's continued use and enjoyment of the Camp property for over a decade ratified all of Spritzer's pre-Injunction Period loans. Compare Bank of North America v Shapiro, 298 N.Y.S.2d 399, 402 (App. Div. 1st Dept. 1969) (having made use of loan proceeds, corporation could not assert that loans were unauthorized) with 56 East 87th Units Corp. v. Kingsland Group, Inc., 30 A.D.3d 1134, 815 N.Y.S.2d 576, 2006 N.Y. Slip Op. 04357 (N.Y.A.D. 1st Dept. June 6, 2006) ("Given that plaintiff promptly objected once it learned of the transaction, *and never received the loan proceeds*, which were diverted by the president to his wife's corporation, plaintiff cannot be held to have ratified the transaction.") (emphasis added). Here, the Debtor ratified Spritzer's loans by accepting and using the loan proceeds to defray camp expenses for goods and services received by the Debtor. It would have been absurd not to ratify those loans as they were made without interest. See 5/12/09 Tr. at 106:3-8.

---

[8] Levi Heber (a relative of one of the Debtor's current directors) maintained the ledger for "Gan" Machne (the portion of the Camp devoted to younger children). As Spritzer testified, that ledger acknowledges (and ratifies) advances of petty cash funds by Spritzer. See Spritzer Ex. 1 (Proof of Claim) at Bates YS000026-31 and YS000033.

Moreover, Spritzer's loans kept the Debtor alive and operating for many years. If Spritzer did not pay the Debtor's obligations to its landlord, mortgagee, camp employees, and vendors, the Debtor would have been required to pay those obligations – or shut down – a long time ago. As Spritzer's loans simply substituted Spritzer, a much more willing and patient creditor, for other creditors, Spritzer's loans did not prejudice the Debtor in any way. Spritzer also did not earn interest on his loans to the Debtor because earning such interest is prohibited by Jewish law. See 5/12/09 Tr. at 106:3-8; Leviticus 25:37 ("Do not give him your money for interest"); Deuteronomy 23:20-21 (prohibiting charging of interest between Jews).

D. Even if Spritzer's Loans Are Avoided Under N-PCL § 715, Spritzer Is Entitled to Restoration of His Funds.

Where an interested director (unlike Spritzer) is *profiting* at the expense of the corporation, the transaction may be voidable. See Vonnoh v. Sixty-Seventh St. Atelier Bldg., 105 N.Y.S. 155, 156 (1907); see also Barr v. N.Y. L. E. & W. R.R. Co., 125 N.Y. 263, 279 (1891). As the New York Court of Appeals has declared, a transaction with a director "in the absence of bad faith on his part, cannot be avoided without a restoration to him of what the corporation received." Duncomb v. New York, H & N.R. Co., 84 N.Y. 190, 191 (1881); see Globe Woolen Co. v. Utica Gas & Elec. Co., 136 N.Y.S. 24, 32 (App. Div. 4th Dept. 1912) (citing Duncomb). Therefore, even assuming, *arguendo*, that Spritzer's loans were not ratified by the Debtor and were avoidable, Spritzer's claim still should be allowed in its entirety. Specifically, to the extent that Spritzer's loans are avoided, the Debtor is required to restore Spritzer to the position that he was in before the loans were made – *i.e.*, the Debtor is required to give Spritzer his money back. See New York Trust Co. v. American Realty Co., 244 N.Y. 209, 217, 155 N.E. 102, 104-05 (N.Y. 1926) ("A corporation may not repudiate the obligations of a contract made with a director and at the same time retain its benefits.").

The bankruptcy court acknowledged Spritzer's "quite logical" argument that he is entitled to restoration of his funds upon avoidance of his loans. See Machne Menachem, 2010 WL 831003, at *7. In fact, the bankruptcy court declared that Spritzer's point was "well taken.". Id. Nevertheless, the bankruptcy court stated that, "having said that," it would be "inconceivable to foist a loan on an unwilling Debtor." Id.[9] Once again, the bankruptcy court cited absolutely no authority in support of its conclusion. That conclusion was reversible error as a matter of law.

As indicated above, under New York law, Spritzer is entitled to restoration of his funds absent "bad faith." The Objections did not assert any bad faith on Spritzer's part. Nor did the bankruptcy court find any bad faith on Spritzer's part. In fact, the bankruptcy court had previously noted that the Debtor was receiving value of $1.9 million for $1.375 million in assets under Spritzer's Plan. See Opinion (Bankr. D.I. 594) at p. 9.

Therefore, even if Spritzer's loans were avoidable, Spritzer is entitled to restoration of the $1,003,000 he advanced to the Debtor regardless of whether the Debtor is "unwilling." If the Debtor is unwilling to accept a loan, then it should return the funds. The Debtor is not prejudiced by having to return Spritzer's funds. If the Debtor did not have to pay the $1,003,000 to Spritzer, the doing so as it would have had to pay $1,003,000 to the creditors had it not received Spritzer's funds.[10]

---

9 The bankruptcy court does not explain why it is any more conceivable to foist a donation on an unwilling party.

10 There are many reported decisions considering the avoidability of loans *to* directors or officers. Cf. NY N-PCL § 716 ("No loans . . . shall be made **by** a corporation **to** its directors or officers . . . .") (emphasis added). Counsel for Spritzer, however, did not uncover any cases avoiding an interest-free loan **by** a director or officer **to** a corporation. Presumably, there is a dearth of such case law because such loans, by definition, are beneficial to the corporation.

E. The Debtor Would Be Unjustly Enriched if Spritzer's Claim Were Not Allowed.

As Spritzer testified, and as corroborated by the documents that Spritzer admitted into evidence at the May 12 hearing, *all* of the Spritzer loan proceeds were used by the Debtor for its own benefit. In fact, the proceeds of Spritzer's loans were used to (i) acquire the Property (see Spritzer Ex. 1 (Proof of Claim) at Bates YS0000048 and Spritzer Ex. 6 (Starbare Closing Documents)), (ii) retain the Property (see Spritzer Ex. 1 (Proof of Claim) at Bates YS0000084 and Spritzer Ex. 7 (Forbearance Agreement)), or (iii) fund Camp expenses, including payment for goods or services (see Spritzer Exs. 1-15). By way of illustration (and without limitation), Spritzer loaned the Debtor $103,624 to pay Camp expenses for employees' wages (see Spritzer Ex. 2 (Proof of Claim Summary) at 3 (row 80)) and Spritzer Ex. 1 (Proof of Claim) at Bates YS0000054-75 and Bates YS0000002-8). There is no element of "self-dealing" in making loans to fund those payments. Absent Spritzer's loans, the Debtor would have been required to pay the employees' claims (without the 10% reduction that Spritzer negotiated for the *Debtor's* benefit) and all of the vendors' claims that were paid with the proceeds of Spritzer's loans. See Machne Menachem, 2010 WL 831003, at *2 ("A review of [Spritzer's] claim, together with Spritzer's testimony, leaves little doubt that a significant amount of Spritzer or Spritzer controlled funds went into Machne" and were "meticulously itemized.").

If Spritzer's loans are not repaid, the Debtor will be grossly and unjustly enriched. Specifically, the Debtor would be able to avoid (a) paying the Camp expenses that were previously paid with the proceeds of Spritzer's loans and (b) repaying Spritzer's loans. Such a windfall would constitute unjust enrichment. See Federal Nat'l Mortg. Co. (In re Stendardo), 991 F.2d 1089, 1099 (3d Cir. 1993) (party asserting claim under Pennsylvania law for unjust enrichment must show "enrichment to the Debtors and an injustice to it if recovery for that

enrichment is denied") (quoting Visor Builders, Inc. v. Devon E. Tranter, Inc., 470 F.Supp. 911, 924 (M.D.Pa. 1978); Giordano v. Thompson, 564 F.3d 163, 170 (2d Cir. 2009) ("Under New York law, a plaintiff asserting a claim of unjust enrichment must show that the defendant was enriched at the plaintiff's expense and that equity and good conscience require the plaintiff to recover the enrichment from the defendant.").

The bankruptcy court failed to appreciate that Spritzer's funds were necessary to provide an opportunity for the children of Crown Heights to attend a summer camp and benefited the not-for-profit Debtor and the public for which it was organized to serve. Considering the benefits conferred by Spritzer's loans on the Debtor and the children served by the Camp, the bankruptcy court's conclusion unjustly enriched the Debtor and should be reversed.

VI. CONCLUSION

For all of the foregoing reasons, Yaakov Spritzer respectfully requests that this Court enter judgment (i) reversing the Order, (ii) allowing Spritzer's claim in full in the amount of $1,003,000, and (iii) granting such further relief to Spritzer as is appropriate.

Dated: April 26, 2010

REED SMITH LLP

By: s/ Kurt F. Gwynne

Kurt F Gwynne, Esquire (#66390)
1201 N. Market Street
Suite 1500
Wilmington, DE 19801
Phone: (302) 778-7550
Fax: (302) 778-7575
Email: kgwynne@reedsmith.com

Counsel for Yaakov Spritzer,
Appellant