

# THE BKGG BULLETIN



## Negotiating With Creditors

During these challenging economic times, business owners are experiencing cash flow issues severe enough that some owners question the future viability of their enterprise. Many distressing cash flow situations can be managed without having to enter into formal bankruptcy proceedings to restructure or liquidate the business.

### Informal Negotiations

If a company is struggling but has relatively stable, albeit reduced income, it may be possible to accommodate creditors on a voluntary basis in a way that allows the company to survive and move forward. This typically involves the owner personally contacting some of the company's creditors and informally negotiating minor relief. Banks and mortgage companies, for example, often are willing to refinance indebtedness, especially if they can be convinced that the financial difficulties are temporary. Trade creditors may also be amenable to stretching out payments. The last thing a creditor wants is to expend resources and time to foreclose on property securing a debt or to reduce a debt to judgment when there is a good possibility of getting most, if not all, of the debt paid. Going forward, this method can help preserve relationships between a business and its creditors.



### Formal Workout

If a company is in a more dire condition and needs to renegotiate for significant reductions in its obligations across a number of creditors, a more formal option is an out-of-court restructuring or workout. In a workout, the financially distressed company and its major creditors agree to adjust the business's obligations, resulting in creditors canceling some of the debt owed them. In this process the company engages accountants to put together a reorganization plan showing how the company will sustain itself on a cash flow basis going forward and providing forecasted financial statements for three through five years into the future.

[Continued on page 2](#)

## Irvine First Korean Church Congregation Regains Control of Church

The Irvine First Korean Church has a new pastor and is moving in a fresh direction thanks to Partner Daniel Kessler and Senior Associate Michael Oberbeck. Following a court-ordered election of the Board of Directors in May, the newly elected Board named Linda Hak Nan Kendrick pastor after firing Tae Hyung Baek. Church membership had plunged from approximately 250 to 25 congregants during Baek's controversial tenure as pastor.

To regain control of their church, members of the congregation turned to BKGG. Kessler says members of any church have the ability to bring legal action against an out-of-control pastor because of the rules of corporate governance specified by California law. Most California churches are nonprofit religious corporations. "Members of churches often believe a pastor is all powerful," said Kessler. "But according to California law, if a church, synagogue, or mosque is a nonprofit corporation then a Board of Directors is required and the religious leader serves at the discretion of the Board.

[Continued on page 3](#)

## IN THIS ISSUE

- [Negotiating With Creditors](#)
- [Irvine First Korean Church Congregation Regains Control of Church](#)  
page 1

- [BKGG and International Trademarks](#)  
page 3

- [BKGG Is Sublime In Resolving Dispute Over Band Name](#)  
page 4

# Negotiating With Creditors

Continued from page 1

The financial statements should show how the company can sustain itself and generate enough cash flow to also pay off its creditors. The plan may then be presented to the creditors by the company's counsel who will negotiate the restructuring.

A workout is almost always better for a business than bankruptcy because it is faster and does not carry a bankruptcy's stigma. Potential creditors will see that the company's current creditors are betting that the company can return to profitability creating more confidence in transacting business while the company is in a workout. Unlike a restructuring in bankruptcy, a workout allows the company to select those creditors it believes are necessary to the restructuring. The company decides how to approach those creditors and has more flexibility in negotiating the plan. Finally, a workout allows the company to limit the release of its financial records to those creditors the company considers essential and the company can require that any information disclosed be kept confidential.

The biggest problem is getting the creditors to agree to the plan. Each creditor will have to decide whether a workout is more beneficial than the outcome of a bankruptcy. Critically, the company will first need to obtain the agreement of the secured creditors because if the assets of the company are lost through foreclosure, then more often than not the company will be unable to continue to operate and generate cash flow. However creditors will have significant incentive to agree to a workout since they will have less say in bankruptcy court, will experience significant delay and expense before they receive any of the debt back and will have to compete with all of the company's other creditors for available dollars, possibly resulting in a lower recovery. Thus, if a business is able to demonstrate that there is a good likelihood that it can honor the terms of the workout, the threat of bankruptcy may motivate the creditors to accept the plan.



## Why So Much Effort to Avoid Bankruptcy?

On the surface a bankruptcy can sound appealing, but it has significant negative aspects that should be carefully considered. For one thing, filing a corporate bankruptcy won't eliminate personal guarantees of corporate debt or other obligations (e.g., a corporate lease or the company's various tax obligations). Corporations and other business entities are not typically entitled to a "discharge," in bankruptcy, and, if they plan to continue in business, have to file for a "Chapter 11 Reorganization." The corporate bankruptcy rules are very complicated and the attorneys' fees involved can be very costly. Usually a bankruptcy lawyer is going to insist on being paid up front. If a debtor

fails to comply with the rules or makes misrepresentations to the bankruptcy court, the court may simply dismiss a bankruptcy, meaning that the debtor would no longer be entitled to protection of the bankruptcy laws. A debtor could even be prosecuted criminally. Bankruptcy proceedings are public record, and the owner's name and certain details about the owner will be recorded in the court documents. Anyone who wants to find out information on the owner and the bankruptcy can easily do so. Bankruptcies do create stigma and filing bankruptcy for your company will expose a lot of private information to public scrutiny.

Finally, most business owners do not want to close their doors. Instead, they are looking for temporary relief from financial pressure and want to preserve their relationships with vendors, landlords and others with whom they need to do business. Sometimes in the period leading up to a bankruptcy an owner will be making payments to a valued customer. However, in a formal bankruptcy all payments made to creditors during the 90 days preceding the filing will be closely reviewed by the court, and in some cases creditors will be required to repay those payments to the court as "preferences" for the benefit of all of the creditors. Such repayments could destroy the very relationships the owner is trying to preserve.

*BKGG would be happy to explore with you whether a non-court workout is a viable option in your particular situation, and, if so, possible workout strategies. Please contact Gregory M. Clement at 949.975.7500 or [gclément@bkgglaw.com](mailto:gclément@bkgglaw.com).*

## Congregation Regains Control of Church

Continued from page 1

The corporation rules apply only to the governing process and have nothing to do with the content of services or issues of religious freedom.

In January 2009, BKG and church members filed a complaint with the Superior Court of Orange County alleging that Baek had "failed and refused to appoint, elect or otherwise permit the Church to have a duly appointed and authorized Board of Directors to manage the affairs of the Church. Because Baek, in his capacity as President and pastor of the Church, refused to allow the formation of a Board of Directors, no corporate officers were ever appointed or selected in compliance with California law."

The lawsuit, which is awaiting resolution in court, alleges that defendant Baek "breached his fiduciary duty" by, among other things, failing to hold regular elections of corporate officers and the Board of Directors, refusing to allow Church members to inspect corporate and financial records, and using church funds to purchase two homes.

Since January, Judge Gregory Munoz of the Orange County Superior Court has issued three injunctions against Baek and his allies. The first restrained the former pastor and his cohorts from selling or disposing of any church property or using church funds or assets for anything other than the ordinary and customary operating expenses of the Church. The second injunction in March forbade Baek and his allies from disrupting or interfering with worship services by changing the locks or blocking the entrance to the church property on Wald street in Irvine. Evidence filed in the case showed that Baek and his co-defendants previously changed the locks, thereby causing church members to conduct services in the parking lot for two weeks. In addition, the court forbade the former pastor from trying to interfere with church members' choice of legal counsel.

The third injunction on May 4th ordered an election of the Board of Directors to be conducted on Sunday, May 17th and specified that those voting in the election be real members of the church (as identified on specified membership lists) that sign an affidavit stating such. On May 17th, a quorum of eligible church members elected five members to the Board of Directors: Hak Nan Kendrick, Kyoo J. Lee, Thomas Palmer, Steven R. Kendrick and Russell Tamura. The results of the Board election were filed with the court.

*Daniel J. Kessler can be reached at [dkessler@bkglaw.com](mailto:dkessler@bkglaw.com) and 949.975.7500.*

"...according to California law, if a church or synagogue or mosque is a nonprofit corporation then a Board of Directors is required and the religious leader serves at the discretion of the Board."



## BKGG and International Trademarks

BKGG recently participated in the International Trademark Association's (INTA) 131st Annual Meeting in Seattle. The five-day event drew attorneys and other trademark specialists from around the world. BKGG represents clients in trademark filings in more than 50 countries.

Continued on page 4

# BKGG and International Trademarks

Continued from page 3

Nations we have filed trademark applications include: Argentina, Austria, Belgium, Brazil, Bulgaria, Canada, Chile, China, Costa Rica, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hong Kong, Hungary, Indonesia, India, Ireland, Italy, Japan, Korea, Latvia, Lithuania, Luxembourg, Malaysia, Malta, Mexico, Netherlands, New Zealand, Pakistan, Peru, Philippines, Poland, Portugal, Romania, Singapore, Slovakia, Slovenia, South Africa, Spain, Sweden, Thailand, Taiwan, United Kingdom and United States.



## BKGG Is Sublime In Resolving Dispute Over Band Name

Intellectual Property Partner Eric J. Goodman announced that a settlement has been reached in a lawsuit involving the members of legendary alternative rock band Sublime and the family of deceased lead singer Brad Nowell.

Sublime, the alternative punk band from Long Beach, whose songs soared into the Billboard's Top 20, achieved cult status among rock fans and sold millions of albums after founder and frontman Brad Nowell died of a drug overdose in May 1996. In 1997, the band's single, "What I Got," went to No. 1 on the Modern Rock chart and the album "Sublime" produced hit after hit, going on to sell more than 2 million copies.



The case had been in litigation for five years with BKGG representing Nowell's father, Jim, and widow, Troy Nowell. In 1994, the members of Sublime signed an agreement giving Brad Nowell the sole ownership of and right to use the name Sublime. Nowell also applied for federal trademark protection with the United States Patent and Trademark Office. A registration was issued after his death. "Nowell's foresight in protecting his intellectual property was crucial in preserving rights for his estate," said Goodman.

The case is an illustration of the critical importance of intellectual property law to the entertainment world. The dispute arose shortly after Brad Nowell's death when Troy Nowell purported to license certain merchandising rights to the brother of the band's drummer. This ultimately resulted in a federal lawsuit, which has been resolved to the satisfaction of all parties, said Goodman.

*Eric J. Goodman can be reached at [egoodman@bkgglaw.com](mailto:egoodman@bkgglaw.com) and 949.975.7500.*



The BKGG Bulletin is Published By:

Burkhalter Kessler Goodman & George LLP  
2020 Main Street  
Suite 600  
Irvine, CA 92614  
Attn: Alton G. Burkhalter  
949.975.7500  
949.975.7501 fax

340 North Westlake Blvd.  
Suite 110  
Westlake Village, CA 91362  
Attn: William C. George  
805.373.1500  
805.373.1503 fax

[www.bkgglaw.com](http://www.bkgglaw.com)

Burkhalter Kessler Goodman & George LLP (BKGG) is a Southern California law firm with a reputation for aggressively protecting its clients' interests. The firm specializes in providing legal services to businesses and high net worth individuals. BKGG litigators have a proven record of winning in court and the Intellectual Property practice group has years of experience assisting firms and artists in protecting their brands. Core practice areas include: Business Litigation, Trademarks and Copyright, Corporate and Transactional, Employment and Estate Planning. BKGG provides comprehensive estate planning services through their State Bar certified Estate Planning specialist.

2009 © BKGG; Content reproduced with permission of the copyright owner. Further reproduction is prohibited without permission; This newsletter is for informational purposes only and is not legal advice; BKGG is a service mark of Burkhalter Kessler Goodman & George LLP; All rights reserved.