

UNITED STATES BANKRUPTCY COURT  
WESTERN DISTRICT OF WISCONSIN

In re:

Case Number:

TELEMARK MANAGEMENT COMPANY, INC.  
THE TELEMARK COMPANY, INC.  
TELEMARK LAND COMPANY, INC.,  
HISTORYLAND, INCORPORATED, and  
THAW, INC.,

EF7-81-00747  
EF7-81-00748  
EF7-81-00749  
EF7-81-00750  
EF7-81-00751

Wisconsin Corporations, d/b/a  
Telemark Enterprises,

FILED

Debtors.

NOV 2 - 1984

LAWRENCE KAISER, as Trustee of  
the Estate of Telemark Management  
Company, Inc.; The Telemark Com-  
pany, Inc.; Telemark Land Company,  
Inc.; Historyland, Incorporated;  
and Thaw, Inc.,

CLERK  
U.S. BANKRUPTCY COURT

Plaintiff,

Adversary No.

v.

84-0170-7

SHEILA WISE and ANTHONY WISE,  
d/b/a Anthony Wise Enterprises,  
d/b/a AWE, and AMERICAN CLASSIC  
COMPETITION,

Defendants.

FINDINGS OF FACT, CONCLUSION OF LAW  
AND  
ORDERS OF INJUNCTION

Plaintiff Lawrence J. Kaiser, Trustee, by Robins, Zelle,  
Larson & Kaplan, having requested injunctive relief; and  
Defendants Sheila Wise, Anthony Wise and American Classic  
Competition, by Smith & O'Neill, S.C., having opposed said

relief; and hearings having been held from time to time; and the Plaintiff appearing by Attorney Stephen H. Cohen; and the Defendants appearing by Attorney Russell C. Brannen, Jr.; and the matter being thoroughly briefed; the Court, being fully advised in the premises, FINDS THAT:

1. On October 9, 1984, this Court entered Judgment<sup>1</sup> in the above captioned adversary proceeding which provided, in part:

2. That the American Birkebeiner is an asset of Telemark Enterprises.

9. That the American Birkebeiner should be, and the same hereby is, declared an asset of Telemark Enterprises which has the exclusive right

- (a) to the use of the names "American Birkebeiner", "Birkebeiner" and "Birke";
- (b) to promote, operate and receive all revenues from said event,
- and
- (c) to have the Defendants turn over forthwith all funds they have received for the 1985 Birkebeiner.

2. The American Birkebeiner (the Birke) is the premier cross-country (or "nordic") ski race in the United States--well over 7,000 skiers participated in 1984. It has been granted the United States sanction of the World Loppet Association--an international organization which lends prestige to nordic ski events.

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<sup>1</sup> A "Request for Extension of Time to Appeal" and an alternative "Notice of Appeal to District Court" were filed, pro se, on October 19, 1984.

3. The Birke, although it has been operated over different trails from year to year, is generally recognized as an approximately 55 kilometer cross-country ski race in the Hayward/Cable area of northwest Wisconsin.

4. Defendant Anthony Wise, while actively involved in the management of the Debtors, selected February 23, 1985, as the date of the 1985 Birke. This date was selected to ensure that there would be no conflict with other World Loppet races.

5. In March or April of 1984, Telemark sent out a first mailing of applications for the 1985 Birke. By May 17, 1984, the date these bankruptcy proceedings were converted to Chapter 7 (liquidation) of the Bankruptcy Code, approximately 2,000 applications had been returned.

6. Defendants Sheila and Anthony Wise are the sole shareholders of the Debtors.

7. Anthony Wise was and is an officer and director of the Debtors. Anthony Wise testified that his only occupation at the present time is race promotion.

8. Since on or before May 17, 1984, the date these bankruptcy proceedings were converted to Chapter 7 (liquidation) of the Bankruptcy Code, Anthony Wise, on his own behalf or on behalf of Defendant American Classic Competitions, has been promoting and operating a February 23, 1985, nordic ski race. Said race, now called the "Norwegian-American Classic", has been held out as an approximately 55 kilometer cross-country ski race

in the Hayward/Cable area of northwest Wisconsin. See, e.g., Paragraph 13 infra.

9. On or before May 1, 1984, Anthony Wise caused Birke applications to show his personal office address (which was also the American Classic Competition address) as the mailing address for application submission.

10. Applications received prior to about May 1, 1984, were accepted and application fees deposited in Telemark's operating account.

11. Applications received by Anthony Wise in the Summer of 1984 were accepted and application fees deposited in a separate American Classic Competitions account. (Said account was the subject of this Court's September 4, 1984, Order requiring joint Trustee/Anthony Wise signatures for withdrawals.)

12. About 800 applications were received in the early Fall of 1984 by Anthony Wise and were not processed.

13. On October 2, 1984, Anthony Wise, on behalf of American Classic Competition, returned the unprocessed application fees to the 800 applicants and enclosed a letter (dated September 2, 1984) to "Effectuated [sic] Birkebeiners" which provided, in part:

1. Enclosed you will find the check you sent us along with your entry blank. We do not want to misrepresent the race circumstances to you in any way. After reading this letter, if you still want to send this check to the American Birkebeiner Race, you can do so my [sic] mailing it to Telemark, Cable, WI 54821. That is your privilege.

2. We are returning your check but keeping your entry data in case you agree with our procedures in this matter.

3. Why are we doing this? We are doing it because the Federal Bankruptcy Judge for the Western District of Wisconsin located in Eau Claire, Wisconsin, ruled in September that the American Birkebeiner Race might belong to the court-appointed trustee of Telemark Enterprises and not to American Classic Competitions, Inc. (ACC). I am president of ACC, a corporation formed on May 1, 1984, . . .

5. ACC definately [sic] intends to hold a 55-kilometer cross country ski race on Saturday, February 23, 1985, on the existing Birkebeiner Trail from Hayward to Cable. The race will be organized with the same ambience and the same attention to details and the same manner that North America's largest ski race has always been conducted.

8. All racers who have sent us entries and checks and which we have previously cashed will of course have their entries honored, in case we have to conduct a head-to-head battle against those that might want to hold another race. I can assure you that the trustee does not have the expertise, nor the resources to conduct a world class race. We hope the trustee will understand this and not compete with us. If he agrees to our position, we will agree to end the race at Telemark Lodge.

14. The Defendants have promoted their ski race with certain Telemark lists and documents relating to skiers who participated in the Birke in prior years and with the information from 1985 applications (in addition, non-Telemark mailing lists were used). Said lists, documents and applications contain applicants' names, addresses, number of years of participation, lodging requirements, age, sex and race times. The number of years of participation information is used to grant continuity awards (which, in turn, encourage future participation). The race times are used for seeding (the Birke is conducted in waves--faster skiers begin in earlier waves).

15. Except for certain 1985 applications, Anthony Wise obtained the Telemark lists, documents and applications by removing them from Telemark on or about May 17, 1984.<sup>2</sup>

16. The operation of the Birke involves 50-100 paid workers plus 4-500 volunteers from the Hayward/Cable area. In addition to personnel, a significant amount of equipment is required--for example: trailers, snow cats and food pavilions.

17. The Birke is managed in "sections" such as start line, trail grooming and awards. The Birke management team consists of some 20-30 section chiefs--some of whom, called "the cadre" by Mr. Wise, were in charge of more than one section. In the past, section chiefs reported to Anthony Wise.

18. Two major long distance cross-country ski races could not be operated in the Hayward/Cable area on the same weekend nor could they be adequately operated in said area in the same month.

19. The Birke itself costs about \$350-400,000 to produce and has never generated a profit for the Debtors. Last year, the event lost about \$25,000. (It is not surprising, in light of the negative cash flow of the Birke, that the Wises have not stressed the argument that an injunction would prevent them from earning a living.)

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<sup>2</sup> Conflicting evidence was presented regarding the current whereabouts of the lists, documents and applications--as well as the "Birke books" (looseleaf notebooks with summaries regarding the operation of each Birke section). However, the Court need not reach this issue to determine the issues raised by the Trustee's request for injunctive relief.

20. The Defendants have obtained the exclusive right to use portions of the recent Birke trail on February 23, 1985.

21. Both the Trustee and the Wises presented evidence that they and they alone had the financial, managerial and tangible resources to mount a successful race.

22. The Trustee requests an injunction to prevent the Defendants from interfering with the 1985 Birke--including the promotion and operation of a similar ski race on or before February 23, 1985.

#### Discussion

23. Jurisdiction. Were this a typical unfair competition law case, this Court would have serious reservations regarding its authority to act. However, two aspects of the Wises' past and present relationship with the Debtors brings this matter within the jurisdiction of this Court:

24. First, the Wises are currently subject to a Judgment of this Court declaring the Birke to be property of the estate of the above captioned bankruptcy proceeding. Paragraph 1 supra, see 11 U.S.C. sec. 542 (turnover of property to the estate).

25. Second, even if the Wises' fiduciary duties to the Debtors have terminated as a matter of corporate law, see C. Van Swearingen, Fletcher Cyclopedia of the Law of Private Corporations secs. 860 & 5725 (1980) (fiduciary relationship of corporate officer and shareholder ceases upon insolvency), but see Parson's Mobile Products, Inc. v. Remmert, 216 Kan. 256, 531 P.2d 428 (Sup. 1975) (former officers and directors may not

compete in bad faith or in such a way as to interfere with corporate business), the Wises' duties as representatives, sole shareholders and former alter egos of Debtors continue as a matter of bankruptcy law, see, e.g., 11 U.S.C. sec. 521(2) ("The debtor shall . . . cooperate with the trustee as necessary to enable the trustee to perform the trustee's duties . . .").

26. Unfair Competition. "One damaged by unfair competition has been held entitled to injunctive relief. . ." 55 Am.Jur.2d Monopolies, Etc. sec. 711 (1971).

27. -deceptive imitation. It has been long established that imitation of another's product is unfair competition when that imitation is likely to deceive purchasers into the belief that the competing product is the same as the original product. Opperman v. Waterman, 94 Wis. 583, 69 N.W. 569 (Sup. 1896).

28. Arguably, this is not such a case. The Wises have, since this Court's October 9, 1984, Judgment, promoted their race under the name "Norwegian-American Classic" and have made it clear that Telemark is promoting a separate "American Birkebeiner".

29. -appropriation. Even if not deceptive, competition is unfair when it consists of the appropriation of a business' expenditures, labor or good will. E.g., Fish Bros. Wagon Co. v. LaBelle Wagon Works, 82 Wis. 546, 52 N.W. 595 (1982) (former operators of competitor business advertised new business as the successor to the competitor business' expertise), Electrolux Corp. v. Val-Worth, Inc., 6 N.Y.2d 556, 161 N.E.2d 197 (App.



1959) ("bait and switch" based upon denigration of competitor's product).

30. This Court need go no further than Mr. Wise's October 2nd letter, Paragraph 13 supra, to find unfair competition: Mr. Wise wrote to people who had sent American Birkebeiner applications to his office, indicated that his race would "be organized with the same ambience and the same attention to details and the same manner that North America's largest ski race has always been conducted", made disparaging remarks regarding the Trustee's ability to run the race and encouraged the applicants to re-apply for his race.

31. Both corporate and bankruptcy law prohibit the officers and directors of a debtor corporation from interfering with corporate businesses. E.g., Remmert, Paragraph 25 supra (corporate law), 11 U.S.C. sec. 521 (bankruptcy law).

32. The Defendants' plan to run a cross-country ski race in the Hayward/Cable area on the same day as the 1985 Birke<sup>3</sup>, if successful, would cripple the American Birkebeiner. See Paragraph 18 supra.

33. -use of trade secrets. "It is the general rule that even in the absence of a contractual restriction, a former employee is precluded from using for his own advantage, and to

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<sup>3</sup> Because February 23, 1985, is the only practical day available for World Loppet sanction, there is a legitimate business purpose for the selection of that day. But query whether the Wises' attempts to have the World Loppet sanction their race instead of the Birke is also interference.

the detriment of his former employer, confidential information or trade secrets acquired by him in the course of his employment . . . ." Annot. 28 A.L.R. 3d 7, 31 (1969).

34. Each of the following six factors should indicate a trade secret exists before legal protection is extended to business information:

(1) the extent to which the information is known outside of his business;

(2) the extent to which it is known by employees and others involved in his business;

(3) the extent of measures taken by him to guard the secrecy of the information;

(4) the value of the information to him and to his competitors;

(5) the amount of effort or money expended by him in developing the information;

(6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

Corroon & Black-Rutters & Roberts v. Hosch, 109 Wis.2d 290, 325 N.W.2d 883 (Sup. 1982).

35. The Trustee has not shown that each of the six factors indicate that the lists, documents, applications or "Birke books" are Debtor trade secrets.

36. Duty to Turnover. Under 11 U.S.C. sec. 542(a), any entity in possession, custody or control of property of the bankruptcy estate must turnover such property to the trustee of that estate. On October 9, 1984, this Court ruled that the Birke is property of the above captioned bankruptcy estate.

37. To the extent that any of the Defendants retain actual or constructive possession of tangible personal property of the Debtors, see Paragraph 15, footnote 2, supra, there is no doubt that they are under an affirmative duty to turnover such items.

38. That the Birke itself is an intangible property interest can not be used to avoid the operation of section 542.

39. To the extent that the Defendants' race is an attempt to duplicate the Birke concept or "ambience" in the Hayward/Cable area on or near the date set and advertised for the 1985 Birke, it is the Birke and must be relinquished to the Trustee.

40. Conclusion. This Court is aware of the positive economic impact of a major nordic skiing event on the Hayward/Cable area and of the concerns of Hayward/Cable residents that the ultimate result of the continuing dispute and hard feelings between the parties to this adversary proceeding might be that no such event will take place in 1985. While this Court prefers that litigants come to some mutually acceptable working arrangement without judicial intervention, it must act when they do not: "[T]he duty of the Court is to determine the facts and apply the law to those facts." Kaiser v. Wise (In re Telemark), Adv. No. 84-0170-7 (Bankr.W.D.Wis. October 3, 1984).

41. Because of some question of delay in the proceedings that has come to the attention of the Court, the Court wishes to make it clear that it did not receive the brief of the Trustee until Friday, October 26, 1984, and the brief of the Defendants

until the morning of October 29, 1984, and that this decision has been made as expeditiously as possible under the circumstances.

42. From the foregoing Findings and all of the actions of the Defendants, it is clear that the said Defendants, and especially Mr. Wise, do not recognize that you can not have one position in a Chapter 11 reorganization proceeding (claiming everything belongs to the Telemark Enterprises) and then have a different position when the Chapter 7 liquidation takes over (that assets don't belong to the Telemark proceedings). They are unable to recognize the necessary carryover of the fruits of their conduct and representations in the Chapter 11 proceeding or to obey the bankruptcy laws under the Chapter 7 proceeding. They have become so entwined in the attempted reorganization and now the attempted takeover of part of the Telemark assets that it almost appears that their position is: "If we can not have Telemark, nobody else is going to." Because of their actions during these bankruptcy proceedings--arranging the race, other activities and business operations, and now trying to destroy them--the Court has no choice but to grant the injunction as prayed for by the Trustee.

43. The general laws as hereinabove stated in the court decisions of both the United States and the State of Wisconsin must be respected and upheld. "No man is above the law and no man is below it; nor do we ask any man's permission when we require him to obey it. Obedience to the law is demanded as a

right; not asked as a favor." T. Roosevelt, Third Annual Message (December 7, 1903).

CONCLUSION OF LAW

An injunction should issue forthwith to protect the Debtors from Defendant appropriation of, interference with or unfair competition with the 1985 American Birkebeiner.

ORDERS

IT IS ORDERED THAT the Defendants and each of them, their agents and employees, and all persons claiming under them or acting under the direction or authority of them, or any of them, be and they are hereby perpetually enjoined and restrained from:

(1) promoting, organizing or operating, or assisting, advising or consulting with--for compensation or gratuitously--others to promote, organize or operate any cross-country ski race, other than the 1985 American Birkebeiner, to take place, all or in part, in the Hayward/Cable area in the month of February, 1985. For the purpose of this Injunction, "the Hayward/Cable area" shall mean any point within a 100 mile radius of Hayward, Wisconsin, or Cable, Wisconsin;

(2) using any alleged expertise with others or other race consultants to promote, organize, operate, assist or advise a February, 1985, nordic ski event in the Hayward/Cable area;

(3) interfering with, obstructing or denigrating or assisting others to interfere with, obstruct or denigrate the 1985 American Birkebeiner;

(4) communicating with past, present or potential applicants, participants, sponsors, endorsers, or other individuals or entities associated with the American Birkebeiner, except as may be ordered by the court;

(5) applying for or seeking approval of any further right to use cross-country ski trails and public access to conduct a race on or about February 23, 1985, in Sawyer or Bayfield Counties;

(6) disposing of, transferring, or using any and all property associated with or relating to the American Birkebeiner;

(7) copying, duplicating or in any way using the applications, participant lists, sponsor lists, or any other records or papers generated by or from the American Birkebeiner ski race in 1985 and preceding years; and

(8) taking any acts to return American Birkebeiner fees in their possession or subject to their control now or in the future.

IT IS FURTHER ORDERED THAT the Defendants and each of them, their agents and employees, and all persons claiming under them or acting under the direction or authority of them, or either of them, are required to:

(9) supply to the Plaintiff the names of all individuals to whom registration fees were returned or to whom the Defendants sent any letters or other correspondence regarding any ski race;

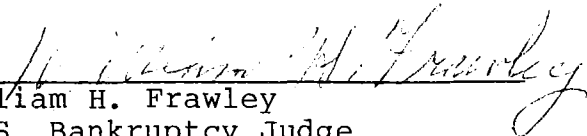
(10) place in the hands of the Trustee all funds in any form and from any source received by the Defendants in regard to any cross-country ski race and related activities to be run in Sawyer or Bayfield Counties on or about February 23, 1985;

(11) forthwith and without delay comply with all previous orders of this Court entered in this adversary proceeding.

IT IS FURTHER ORDERED THAT the Trustee's request that Anthony Wise and American Classics Competition be found in contempt of court and that sanctions be imposed be, and the same hereby is, reserved to further order of this Court.

Dated: November 2, 1984.

BY THE COURT:

  
William H. Frawley  
U. S. Bankruptcy Judge

cc: Attorney Lawrence J. Kaiser  
Attorney Stephen H. Cohen (Robins, Zelle, Larson & Kaplan)  
Anthony Wise  
Sheila Wise  
American Classics Competition  
Attorney Russell C. Brannen, Jr. (Smith & O'Neill, S.C.)