

**IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF TEXAS  
WICHITA FALLS DIVISION**

SECURITIES AND EXCHANGE COMMISSION

Plaintiff,

v.

MILLENNIUM BANK,  
UNITED TRUST OF SWITZERLAND S.A.,  
UT of S, LLC,  
MILLENNIUM FINANCIAL GROUP,  
WILLIAM J. WISE,  
d/b/a STERLING ADMINISTRATION,  
d/b/a STERLING INVESTMENT SERVICES  
d/b/a MILLENNIUM AVIATION,  
KRISTI M. HOEGEL, a/k/a KRISTI M. CHRISTOPHER  
a/k/a BESSY LU,  
JACQUELINE S. HOEGEL, a/k/a JACQUILINE S.  
HOEGEL,  
a/k/a JACKIE S. HOEGEL,  
PHILIPPE ANGELONI, and BRIJESH CHOPRA,

Defendants,

And

UNITED T OF S, LLC, STERLING I.S., LLC,  
MATRIX ADMINISTRATION, LLC,  
JASMINE ADMINISTRATION, LLC,  
LYNN P. WISE, DARYL C. HOEGEL, RYAN D.  
HOEGEL,  
and LAURIE H. WALTON,

Relief Defendants.

Case No.: 7:09-CV-050-O

**RECEIVER'S MOTION TO AMEND ORDER APPOINTING RECEIVER**

TO THE HONORABLE COURT:

COMES NOW Richard B. Roper, III ("Receiver"), who respectfully moves the Court for entry of an Order amending the Order Appointing Receiver previously entered by this Court on March 26, 2009 (Docket No. 10), and shows the following:

**I.**  
**RELIEF REQUESTED**

In order to continue carrying out the duties assigned to him by the Court, the Receiver asks the Court to modify the Order Appointing Receiver to specify that:

- (a) the Receiver has the sole and exclusive authority to petition for relief under the United States Bankruptcy Code, 11 U.S.C. §§ 101 *et seq.* (the "Bankruptcy Code") for any and all Defendants;
- (b) under the original Order Appointing Receiver, all persons and entities were enjoined, and continue to be enjoined, from filing involuntary bankruptcy petitions or petitions for recognition of foreign proceeding under the Bankruptcy Code, and will continue to be so enjoined under the Amended Order;
- (c) with respect to any non-individual Defendant on whose behalf the Receiver undertakes a bankruptcy filing, provide that the Receiver will serve as debtor in possession post-petition and will not be subject to section 543 of the Bankruptcy Code's custodial turnover provisions;
- (d) the Receiver must provide at least two days' notice to the Securities and Exchange Commission and the Defendants before filing any bankruptcy petition on behalf of any or all of the Defendants or Relief Defendants (collectively, the "Defendants");
- (e) the Northern District of Texas is the Receiver's principal place of business for all Defendants; and
- (f) all persons or entities are prohibited from seeking relief from the injunctions prohibiting bankruptcy-related filings for 180 days after entry of the Amended Order Appointing Receiver.

The proposed Amended Order Appointing Receiver is attached as Exhibit A. A redline comparing the original Order Appointing Receiver and the proposed Amended Order Appointing Receiver is attached as Exhibit B.

Providing the Receiver the sole and exclusive authority to seek bankruptcy protection for Defendants will ensure that he has the full range of options available to him while administering the Receivership Estate. Bankruptcy may ultimately be the best option for one or more Defendants, and the Receiver should be vested with the power to make that decision and effectuate it for the benefit of investors. Likewise, barring the filing of involuntary bankruptcy proceedings and permitting only the Receiver to pursue bankruptcy will allow that process to proceed in a more orderly and efficient manner and without disruption, should bankruptcy ultimately become necessary.

## **II. FACTUAL BACKGROUND**

On March 26, 2009, the Securities and Exchange Commission initiated this lawsuit against Defendants. At that time, the Court found good cause to conclude that Defendants' business operations were a Ponzi scheme and that Defendants had perpetuated a fraud involving the long-term violation of various federal securities laws. In addition to entering the Order Appointing Receiver, this Court also entered a Temporary Restraining Order and an Order Freezing Assets, Requiring Accounting, Requiring Preservation of Documents, Authorizing Expedited Discovery and Granting Equitable Relief. The Court later entered preliminary and permanent injunctions barring Defendants from, among other things, violating securities laws. Defendants have been ordered to surrender their passports and repatriate investors' funds by depositing them in the registry of the Court.

When the Court entered the Order Appointing Receiver, Richard Roper was ordered to locate and take control of all Receivership Estate property, assets and records and was charged with overseeing and managing all of Defendants' assets, monies, securities and properties ("Receivership Assets") as well as the books, account statements, computers, servers and all other informational and data sources for all entities owned or controlled by Defendants or in the possession of their various agents and employees ("Receivership Records" and, in combination with the "Receivership Assets" collectively referred to as the "Receivership Estate").

The Order Appointing Receiver provides the Receiver with authority to engage in a wide range of activities in order to satisfy the numerous, broad duties imposed upon him by the Court including, generally, to "perform all acts necessary to conserve, hold, manage, and preserve the value of the Receivership Estate . . ." Order Appointing Receiver at ¶ 5(f). To that end, the Receiver has worked, and continues to work, diligently to prevent the wasting or dissipation of property, assets, records, and accounts.

### **III. BASIS FOR RELIEF**

In an action by the Securities and Exchange Commission to enforce federal securities laws, district courts possess "the historic power of equity to provide complete relief in the light of statutory purposes." *SEC v. H.S. Simmons & Co.*, 190 F. Supp. 432, 433 (S.D.N.Y. 1961) (quoting *Mitchell v. Robert DeMario Jewelry, Inc.*, 361 U.S. 288, 292 (1960)). The securities laws are intended "to protect the investing public from the consequences of continued violations" of those laws, and to protect "those who already have been injured by a violator's actions from further despoliation of their property or rights." *H.S. Simmons & Co.*, 190 F.Supp. at 433.

Receivers "safeguard the disputed assets, administer the property as suitable, and . . . assist the district court in achieving a final, equitable distribution of the assets if necessary"

*Liberte Capital Group, LLC v. Capwill*, 462 F.3d 543, 551 (6th Cir. 2006). A receivership is “particularly necessary in instance in which the corporate defendant, through its management, has defrauded members of the investing public; in such cases, it is likely that, in the absence of the appointment of a receiver to maintain the status quo, the corporate assets will be subject to division and waste to the detriment of those who were induced to invest in the corporate scheme and for whose benefit, in some measure, the SEC injunctive action was brought.” *SEC v. First Fin. Group of Tex.*, 645 F.2d 429, 438 (5th Cir. 1981).

Once a receiver is appointed, “a district court has broad power in fashioning relief in an equity receivership proceeding.” *Liberte Capital*, 462 F.3d at 551 (6th Cir. 2006).

**A. *The Receiver Should Be Permitted to Authorize and File Bankruptcy Petitions on Behalf of Any or All of the Defendants and Succeed as Debtor in possession of Non-Individual Defendants.***

Affording the Receiver the sole and exclusive authority to petition for relief under the Bankruptcy Code for any or all of the Defendants is a valid exercise of this Court’s equitable powers. As alleged by the Commission, the Defendants have engaged in an extensive and ongoing fraud. *See* Commission’s Complaint, Docket No. 1 at ¶¶ 1-5.

The Court selected the Receiver because of his ability to navigate the areas of SEC and securities compliance and enforcement matters, corporate governance, and fiduciary duties. Based on his initial findings, the Receiver requests that he be given the sole and exclusive authority to seek bankruptcy protection for any or all of the Defendants and to administer the non-individual Defendants’ estates as debtor in possession. *See* Proposed Order, Exhibit A, at ¶ 6.

The Receiver also requests that, in the event he authorizes and executes a bankruptcy filing under chapter 11 of the Bankruptcy Code for any Defendant, he be given the authority, pursuant to section 1505 of the Bankruptcy Code, to act in a foreign country on behalf of an

estate created under section 541 of the Bankruptcy Code, and in any way permitted by applicable foreign law. *See id.* Should the Receiver determine that it is in the best interests of creditors to commence bankruptcies, his dual role as pre-petition Receiver and post-petition debtor in possession will ensure maintenance of the status quo and a smooth transition into bankruptcy.

A receiver may act as both a custodian of an entity's assets and the entity's decision-making authority. "Federal courts may grant a receiver powers that include the day-to-day management of the business entity, including the authority to liquidate assets, the authority to pursue claims, and the authority to file for bankruptcy." *In re Bayou Group, Z.L.C.*, 363 B.R. 674, 683 (S.D.N.Y. 2007).<sup>1</sup> Additionally, a pre-petition receiver who makes corporate governance decisions may act as debtor in possession upon the filing of a bankruptcy case. In fact, "[t]he management of a bankrupt entity that files . . . is automatically authorized to act as the debtor in possession" under section 1101(1) of the Bankruptcy Code, which provides that the term "debtor in possession means debtor." *Id.* at 686.

The Receiver also asks that the amended Order provide that, if any of the non-individual Defendants undertake a bankruptcy filing, the Receiver will not be subject to section 543 of the Bankruptcy Code's custodial turnover provisions. *See* Proposed Order at ¶ 6. Because the Receiver's proposed corporate governance appointment will survive any bankruptcy filing, he should not be subject to section 543's turnover provision. Thus, with respect to section 543, the

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<sup>1</sup> The *Bayou* court examined in detail a receivership order similar to that proposed here. In *Bayou*, the district court for the Southern District of New York issued an order appointing an individual, Mr. Jeff J. Marwil, as receiver and exclusive managing member of entities that operated as a fraudulent Ponzi scheme in violation of federal securities laws, with full authority to file petitions for relief under the Bankruptcy Code for the entities subject to his receivership. Following such appointment, Marwil sought protection for such entities under chapter 11 of the Bankruptcy Code. Upon the entities' bankruptcy filings, the United States Trustee sought the appointment of a trustee in bankruptcy. The court enforced the language of the receivership order and denied the Trustee's motion. The court held that because the receivership order afforded Marwil broad corporate governance powers, upon causing the entity to file its bankruptcy petition, Marwil's receivership ended and he immediately became the managing member of the debtor in possession. As in *Bayou*, bestowing the Receiver with broad powers is equitable and will ensure a seamless transition to bankruptcy if and when the Receiver determines such relief is appropriate.

Receiver only asks the Court to clarify that the Receiver is, indeed, authorized to exercise the full powers of a debtor in possession afforded by statute. See *In re Bayou Group, L.L.C.*, 363 B.R. at 687 (as managing member of a debtor in possession, receiver who was also given pre-petition corporate governance powers was under no obligation to turn over estate property).

***B. The Amended Order Should Provide that the Northern District of Texas is the Principal Place of Business for All Defendants and that the Receiver Must Give Appropriate Notice of any Bankruptcy Filing.***

In the proposed Order, the Receiver further asks the Court to: (1) require the Receiver to provide at least two business days' written notice to the Commission and the Defendants before undertaking a bankruptcy filing on the Defendants' behalf and (2) specify that the Northern District of Texas is the Receiver's place of business for all the Defendants. See Proposed Order at ¶ 7. Equity requires the addition of such provisions, which will ensure that parties in interest receive due and adequate notice of any bankruptcy filing and will preserve the judicial system's limited resources in the event of any bankruptcy filing.

***C. The Amended Order Should Enjoin All Litigation Against the Defendants, Including Bankruptcy Filings, For 180 Days.***

The Order Appointing Receiver imposes a blanket temporary injunction restraining and enjoining creditors and all other persons, from, among other things, taking "[a]ny act to collect, assess, or recover a claim against the Receiver or that would attach to or encumber the Receivership Estate." Order Appointing Receiver ¶ 8(c). Such injunction is necessary so that the Receiver may carry out the Court's order to "[p]reserve the Receivership Estate and minimize expenses in furtherance of maximum and timely disbursement thereof to claimants." *Id.* ¶ 5(j).

The broad language of the Order Appointing Receiver's injunction already prevents the filing of any petition or complaint under the Bankruptcy Code. Nonetheless, the Receiver asks

the Court to clarify the language so as to specifically state that creditors and all other persons, without prior approval of the Court, are enjoined from filing any proceeding under the Bankruptcy Code . . .". Order ¶ 10.

The proposed amended injunction is a valid exercise of this Court's equitable powers. The addition of such language will permit the Receiver to carry out the duties already assigned to him by this Court, without any challenges to the language of the Order Appointing Receiver, which could delay the Receiver's progress toward uncovering fraud and gathering assets and other information that is necessary to pay creditors and stakeholders.

Moreover, because "the receivership court has a valid interest in both the value of the claims themselves and the costs of defending any suit as a drain on receivership assets," the court "may issue a blanket injunction, staying litigation against the named receiver and the entities under his control unless leave of that court is first obtained." *Liberte Capital*, 462 F.3d at 551. The injunction will bind all non-parties with notice, exceeding normal limits on the scope of injunctions. *See SEC v. Wencke*, 622 F.2d 1363, 1369 (9th Cir. 1980) ("The federal courts have inherent equitable authority to issue a variety of ancillary relief measures in actions brought by the SEC to enforce the federal securities laws."). Furthermore, the power "extends to the institution of any suit, and not just a proceeding for execution of a judgment against the receivership in the receivership court." *Liberte Capital*, 462 F.3d at 551. Blanket stays directed toward non-parties "may be entered when necessary to protect the federal receivership." *Wencke*, 622 F.2d at 1370. A district court's equitable powers include the ability to prohibit creditors from filing involuntary bankruptcy petitions against the defendants. *SEC v. Byers*, No. 08 Civ. 7104, 2008 WL 5236644, at \*2 (S.D.N.Y. Dec. 17, 2008) (in issuing a receivership



order, the court has “the authority to prevent non-parties from filing involuntary bankruptcy petitions against the [defendants]”).

The Receiver further requests that the Order extend such injunction for a period of 180 days from the entry of the Order. *See* Proposed Order at ¶ 11. Equity justifies imposing a six month injunction in this case. If the Receiver determines that bankruptcy is the proper direction for any or all of the Defendants, the existence of a 180-day injunction will ensure that such Defendants will transition into bankruptcy in an orderly and non-disruptive manner.

The *Byers* case provides guidance and precedent for this case. In *Byers*, the Commission brought a civil fraud enforcement action in the Southern District of New York against companies and individuals arising out of an alleged Ponzi scheme. The Commission sought the appointment of a receiver, and in the order appointing the receiver, the court enjoined any person from taking actions that could impact the receivership assets. *SEC v. Byers*, 2008 WL 5236644, at \* 1. Some of the defendants’ creditors filed a motion to modify the receivership order, arguing that the court did not have the power to enjoin them from filing involuntary bankruptcy petitions against the defendants. In the alternative, the creditors argued that, to the extent the court had power to issue the injunction, the court should lift it and allow the creditors to file the involuntary bankruptcy petitions.

The court rejected both arguments, holding that it had “the authority to prevent non-parties from filing involuntary bankruptcy petitions against the [defendants]”). *Id.* at \*2. In so holding, the court noted that it was “persuaded ... by the sound reasoning of cases” such as *Wencke*, *Liberte Capital*, and others. *Id.* Addressing the question of whether the injunction should be lifted, the court adopted the three-part test articulated by the Ninth Circuit in *Wencke*

(and adopted by numerous other courts, including the Third Circuit in *United States v. Acorn Tech. Fund, L.P.*, 429 F.3d 438, 442 (3d Cir. 2005)). *Id.* at \*3.

The *Wencke* factors include (1) whether maintaining the stay will result in substantial injury to the moving party; (2) how long the receivership has been operating when the motion for relief is made; and (3) the merit of the moving party's underlying claim. *See SEC v. Wencke (Wencke II)*, 742 F.2d 1230, 1231 (9th Cir. 1984). The parties seeking relief from the stay have the burden of proving that the *Wencke* factors weigh in their favor. *See United States v. Petters*, No. 08-5348 ADM/JSM, 2008 WL 5234527, at \*3 (D. Minn. Dec. 12, 2008).

Addressing the first factor, the court in *Byers* noted that while the receiver was "charged with protecting the investments of *all* the [defendants] investors," the moving creditors were "only concerned with recouping their own investments, presumably even at the expense of other investors." *Byers*, 2008 WL 5236644 at \*3. While the court was sympathetic to the movants, the court explained that "the best way to maintain the status quo [was] to permit [the receiver] to carry on with his investigation," *Id.*

Regarding the second factor, the *Byers* court observed that the receiver had "only just begun to investigate the full extent of the fraudulent scheme, and permitting some investors to file involuntary bankruptcy petitions would hinder the Receiver's investigation." *Id.* at \*4. The court found that this factor weighed against modifying the order. The court quoted a Third Circuit case in which that court explained that "very early in a receivership even the most meritorious claims might fail to justify lifting a stay given the possible disruption to the receiver's duties." *Acorn Tech. Fund, L.P.*, 429 F.3d at 443-44. *See also Wencke II*, 742 F.2d at 1231 (holding that "where the motion for relief from the stay is made soon after the receiver has

assumed control over the estate, the receiver's need to organize and understand the entities under his control may weigh more heavily than the merits of the party's claim").

Regarding the third factor, the court did not have enough information on the merits of the movants' claims. Because the other two factors weighed so heavily against lifting the stay, the court kept the injunction in place and prohibited "parties and non-parties alike from filing an involuntary bankruptcy petition against [the defendants]." *Byers*, 2008 WL 5236644, at \*4.

As in the *Byers* case, the *Wencke* factors here weigh heavily in favor of maintaining the stay against all litigation, including the filing of involuntary bankruptcy petitions, at least for the first few months of the Receiver's appointment. The Receiver has been operating only since late March and is charged with protecting the interests of all who have a stake in the Defendants' assets, not just a few creditors. The filing of involuntary bankruptcy petitions would cause confusion and thwart the Receiver's efforts to ascertain the full extent of the assets under the Receiver's control. Creditors and other interested parties will not be harmed by the injunction. The Receiver has worked quickly and diligently to secure the Receivership Estate.

The second factor also weighs heavily in favor of keeping the stay in place. The tasks facing the Receiver, and the fact that he has been on the job only since late March, far outweigh any other consideration. Significantly, a bankruptcy filing by a third party now would disrupt the Receiver's efforts to track down and gather assets before they disappear. Any delays in securing assets could be devastating to creditor recoveries.

#### **IV.** **CONCLUSION AND PRAYER**

WHEREFORE, PREMISES CONSIDERED, the Receiver prays that, upon final hearing and consideration of this Motion, the Court enter the Amended Order Appointing Receiver such that (1) the Receiver has the sole and exclusive authority to petition for relief under the United

States Bankruptcy Code, 11 U.S.C. §§ 101 *et seq.* (the "Bankruptcy Code") for any and all Defendants; (2) all persons are enjoined from filing involuntary bankruptcy petitions or petitions for recognition of foreign proceeding under the Bankruptcy Code (3) with respect to any non-individual Defendant on whose behalf the Receiver undertakes a bankruptcy filing, the Receiver shall serve as debtor in possession post-petition and will not be subject to section 543 of the Bankruptcy Code's custodial turnover provisions; (4) the Receiver, before filing any bankruptcy petition on behalf of any or all of the Defendants, shall provide at least two days' notice to the Commission and the Defendants; (5) the Northern District of Texas shall be the Receiver's principal place of business for all the Defendants; and (6) all persons shall be enjoined from seeking relief from the injunctions prohibiting bankruptcy-related filings for 180 days after entry of the Order.

The Receiver additionally requests an order granting him such other and further relief, general or special, at law or in equity, to which the Receiver may show himself justly entitled.

Respectfully submitted,

THOMPSON & KNIGHT LLP

/s/ Jessica B. Magee

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**CERTIFICATE OF SERVICE**

On May 22, 2009, I electronically submitted the foregoing document to the Clerk of the Court for the United States District Court for the Northern District of Texas using the electronic case filing system of the Court.

/s/ Jessica B. Magee  
Jessica B. Magee