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IN THE UNITED STATES DISTRICT COURT
DISTRICT OF UTAH, CENTRAL DIVISION

SECURITIES AND EXCHANGE COMMISSION,

PLAINTIFF,

v.

VESCOR CAPITAL CORP., a Nevada corporation,
VESCOR CAPITAL, INC., a Nevada corporation,
VESCORP CAPITAL, LLC, a Nevada limited liability
company, VESCORP CAPITAL IV-A, LLC, a Nevada
limited liability company, VESCORP CAPITAL IV-M,
LLC, a Nevada limited liability company, a Nevada
limited liability company, and VAL E. SOUTHWICK,

DEFENDANTS.

Civil No. 1:08cv00012
Judge Dee Benson

**PLAINTIFF'S
OPPOSITION TO MOTION
OF OAK VALLEY
INVESTMENTS, L.P. AND
JONATHAN H. HORNE,
M.D., AS TRUSTEE OF
THE JONATHAN H.
HORNE, M.D, P.C.
RETIREMENT PLAN
TRUST FUND FOR
RELIEF AND/OR
MODIFICATION OF STAY**

Plaintiff, Securities and Exchange Commission (the "Commission"), hereby
submits this Memorandum in Opposition to the Motion of Oak Valley Investments, L.P.
and Jonathan H. Horne, M.D., as Trustee of the Jonathan H. Horne, M.D., P.C.
Retirement Plan Trust Fund (collectively, "Oak Valley") for Relief and/or Modification
of Stay.

STATEMENT OF FACTS

1. On February 6, 2008, the Commission filed its Complaint in the above-captioned matter. Docket # 1.
2. On February 26, 2008, the Commission filed a Motion to Stay in the above-captioned matter. Docket # 9.
3. On March 5, 2008, Oak Valley filed a Motion to Intervene in the above-captioned matter. Docket # 13.
4. On April 9, 2008, the Court sent Notice of Hearing on the Motion to Intervene and the Motion to Stay. Docket # 19.
5. The Court did not rule on Oak Valley's Motion to Intervene.
6. On April 16, 2008, the Court denied the Commission's Motion to Stay. Docket # 21.
7. On May 2, 2008, the Commission filed a Motion to Appoint a Receiver in the above-captioned matter. Docket # 22.
8. On May 5, 2008, the Court appointed Robert G. Wing ("Wing" or the "Receiver") of the firm Prince Yeates & Geldzahler as Receiver for Vescor Capital Corp., Vescor Capital, Inc., Vescorp Capital, LLC, Vescorp Capital IV-A, LLC (collectively, "Vescor") together with any and all affiliated limited partnerships, corporations or other business entities. Docket # 25.

ARGUMENT

I. OAK VALLEY IS NOT A PARTY TO THIS ACTION

Oak Valley has no standing in this action to seek to modify or vacate the stay of litigation in place. Although Oak Valley sought intervention into the Commission's enforcement action, the Commission opposed that intervention. The Court has never granted Oak Valley's Motion to Intervene, and for the reasons set forth in its Memorandum in Opposition to the Motion to Intervene, the Court should not permit the intervention of Oak Valley, or any other party, without the consent of the Commission. Docket #15.

II. RELIEF OR MODIFICATION OF THE STAY IS NOT APPROPRIATE.

Oak Valley's attempt to obtain relief and/or modification of the stay is inappropriate. Oak Valley represented to this Court that it would not oppose a stay if the Court appointed a Receiver. (Mot. to Intervene at p. 4 (Docket # 13)). The Commission moved the Court to appoint a Receiver on or around May 2, 2008. (Docket # 22).¹ Consequently, the Court appointed Wing on May 5, 2008. (Docket # 25). Curiously, according to its Certificate of Service, Oak Valley did not provide notice of this motion to the Receiver in this action.

A. THE COURT HAS AUTHORITY TO ORDER A STAY OF ALL PENDING AND FUTURE LITIGATION.

As Oak Valley has admitted, this Court possesses the power to "issue a variety of ancillary relief measures," including ordering a stay of all pending and future litigation. SEC v. Wencke, 622 F.2d 1363, 1369 & 1371 (9th Cir. 1980). The Court's power to

¹ The Commission did not send notice of its motion to Oak Valley. While Oak Valley filed a Motion to Intervene on or about March 5, 2008 (Docket # 13), the Court has not made a ruling; therefore, Oak Valley remains a non-party to this case. See Fed. R. Civ. P. 5(a).

issue the requested stay is based on its well-established inherent powers. Id. at 1369, accord SEC v. Acorn Tech. Fund, L.P., 429 F.3d 438, 442-43 (3d Cir. 2005); SEC v. Merrill Scott & Assocs., Ltd., 2007 WL 26981, at *1, No. 2:02-cv-39 (D. Utah Jan. 3, 2007). This power can also be said to have derived from the All-Writs Act, which gives federal courts power to “issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law,” including the power to stay the prosecution of lawsuits. 28 U.S.C. § 1651(a). That authority facilitates the “strong federal interest in insuring effective relief in SEC actions brought to enforce the securities laws.” Wencke, 622 F.2d at 1372.

Based on the foregoing, the Commission respectfully submits that this Court has the power to issue a stay. A stay is necessary to ensure maximum recovery for all investors and not just a few.

B. A STAY IS APPROPRIATE IN THIS MATTER

A stay is appropriate in cases where “the expense involved in defending the many lawsuits which often are filed against an entity in the wake of a securities fraud scheme may be overwhelming unless some are temporarily deferred.” Wencke, 622 F.2d at 1373. Likewise, a stay is appropriate when an investor has obtained a judgment in their favor prior to the filing of an SEC enforcement action, because “preservation of the receivership estate is paramount.”² SEC v. Pittsford Capital Income Partners, LLC, 2007 U.S. Dist. LEXIS 62338, at *5 (W.D.N.Y. Aug. 23, 2007) (holding that a stay is appropriate where investors had obtained a judgment prior to an SEC enforcement action.) Like the stay in Pittsford, a stay is also appropriate in this matter. Despite Oak

² Oak Valley obtained a judgment in a separate action against Southwick. Oak Valley Investments L.P. v. Southwick. 2:06cv00737, US D. Utah, 9/01/2006.

Valley's having obtained a judgment, relief from the stay would benefit Oak Valley at the expense of the other investors. Here, a stay is necessary to ensure that there is a more equitable distribution of assets among all the investors.

Other courts have addressed the question of when modifying or lifting a stay is appropriate. The Acorn Tech. Court applied the three-pronged Wencke test in making its decision as to whether to lift a stay.³ 429 F.3d at 442. Significantly, the Acorn Tech. Court noted that even the "most meritorious claims might fail to justify lifting a stay given the possible disruption of the Receiver's duties" when a case is in the early stages of receivership. Acorn Tech., 429 F.3d at 443-44. Here, the receivership is only two months old, and the Receiver is still uncovering new information regarding the assets and liabilities of the entities of which he is in control. See SEC v. Universal Fin., 760 F.2d 1034, 1039 (9th Cir. 1985) (denying a motion to lift a four-year-old stay where "material facts continue[d] to come to light.").

Granting Oak Valley's motion "would make it extremely burdensome or impossible for the Receiver to perform his mandated duties." Wencke, 622 F.2d at 1373. In addition, allowing Oak Valley to pursue individual recovery against Val Southwick ("Southwick"), would put Oak Valley at an advantage over other investors who may not have the means to litigate, essentially undermining the very reason that the Receiver was appointed. A receiver is needed to ensure that the marshalling and distribution of assets is accomplished equitably, orderly, and promptly. However, "[a] receiver must be given the chance to do [its] important job . . . without being forced into court by every investor or claimant." Acorn Tech., 429 F.3d at 443. Indeed, Oak Valley consented to a stay

³ The three prongs are: (1) if refusal to lift the stay genuinely preserves the status quo or the moving party will suffer substantial injury; (2) how long the receiver has been performing his duties; and (3) the merit of the moving party's claim.

earlier. In its original Motion to Intervene, Oak Valley said “[it] [did] not oppose the imposition of a stay, were it to be accompanied by the appointment of a receiver.” (Mot. to Intervene at p. 4 (Docket # 13)). A receiver has been appointed. (Order dated 5/5/2008, Docket # 25). The stay should remain in place.

The Commission, together with the Receiver, reviewed Oak Valley’s investment balances with Vescor, and Oak Valley appears to have received about \$800,000 more than it invested with Vescor. See Exhibit “A” attached hereto. Further unilateral collection efforts by Oak Valley will disproportionately hurt the other Vescor investors, some of which have not received any of the money that they invested with Vescor

In its Motion for Relief and/or Modification of Stay, Oak Valley attempts to distinguish the cases on which the Commission has relied: Wencke, 622 F.2d 1363; Acorn Tech., 429 F.3d 438; Merrill Scott, 2007 WL 26981. (Mem. of Points and Auth. in Support of Mot. for Relief and/or Modification of Stay at p. 2 (Docket # 30)). Oak Valley asserts that in each of these cases “the stay was imposed in conjunction with the appointment of a receiver that took control of the defendants’ assets.” Id. That is precisely what has taken place here; the receiver is in the process of marshalling assets held by Southwick; none of which were held in his individual name. Oak Valley also asserts that Southwick is free to dispose of his personal assets. There is no evidence of this dissipation or of Southwick holding any assets outside of the receivership entities. In addition, Southwick is currently incarcerated in the Utah State Prison, which makes it very difficult for him to conceal, sell or transfer any remaining assets.⁴

⁴ Southwick plead guilty to nine felony counts of securities fraud on March 31, 2008, and is serving nine consecutive sentences of one to fifteen years. State of Utah v. Southwick, Criminal Action No: 081900971, Third District Court Salt Lake County Utah, 2/6/2008. He was taken into custody and remanded to prison on June 10, 2008.

Therefore, because a stay ensures a more equitable distribution of assets among all investors, and because the Receiver is still uncovering new information, lifting the stay to permit individual investors to reduce the entirety of the estate at this early stage in the receivership is inappropriate.

CONCLUSION

For the reasons set forth above, the Commission respectfully requests this Court to deny Oak Valley's Motion for Relief and/or Modification of Stay.

DATED this 8th day of July 2008.

/s/ Thomas M. Melton

Thomas M. Melton
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Commission