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MANAGEMENT, LLC

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

PORTLAND DIVISION

SECURITIES AND EXCHANGE
COMMISSION,

Plaintiff,

v.

No. 3:16-cv-00438-PK

**RECEIVER'S OPPOSITION TO ENVISO
CAPITAL'S SECOND MOTION FOR
RELIEF FROM STAY**

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SECOND MOTION FOR RELIEF FROM STAY

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 ROBERT J. JESENİK, BRIAN A. OLIVER;
 and N. SCOTT GILLIS,

Defendants.

Request for Oral Argument

I. INTRODUCTION AND SUMMARY OF OPPOSITION

The Receiver respectfully submits the following opposition to the Second Motion to Lift Stay (“Second Motion”) [Dkt. 371] filed by Enviso Capital (“Enviso”). The Second Motion should be denied on both procedural and substantive grounds.

First, as with Enviso’s prior Motion to Lift Stay (“First Motion”) [Dkt. 327], the Second Motion does not contain the certification required by LR7-1(a) and, as a result, the Second Motion should be denied. LR 7-1(a)(3).¹

Substantively, Enviso wrongly claims that the stay should be lifted because no Aequitas entity owns any portion of Private Advisory Group (“PAG”). As detailed below and as previously disclosed in the Receiver’s reports to this Court, the Receivership Entity² holds a 68.23% interest in PAG; an interest that the Receiver will seek to monetize for the benefit of the Receivership Entity, and its investors and creditors.

¹ LR 7-1 generally requires that the first paragraph of every motion certify that the parties made a good faith effort to resolve the dispute and have been unable to do so. The Second Motion contains no such certification. The declaration of Karen Frostrom [Dkt. 371-2] filed in support of the Second Motion unfortunately includes inaccurate accounts of various communications with the Receiver and counsel regarding Enviso’s position on this matter. The last conversation referenced in Ms. Frostrom’s declaration was on January 18, 2017, the same day Enviso voluntarily withdrew the First Motion and over a month before it filed this Second Motion.

² Capitalized terms not otherwise defined herein have the meanings ascribed to them in the April 14, 2016 Order Appointing Receiver (the “Final Receivership Order”) [Dkt. 156].

Enviso again asks this Court to lift the stay of California-based litigation against PAG (and Chris Bean and James Maurer) so that Enviro can jump ahead of all other Aequitas investors and creditors and seek a judgment lien on Receivership Property, including PAG. Pursuant to established Ninth Circuit law, the Order Appointing Receiver [Dkt. 156] (“Final Receivership Order”) imposes a blanket litigation stay to protect the Receivership from precisely the kind of interference and dissipation of assets that Enviro proposes to resume. “A receiver must be given a chance to do the important job of marshaling and untangling a company’s assets without being forced into court by every investor or claimant.” *U.S. v. Acorn Tech. Fund L.P.*, 429 F.3d 438, 443 (3rd Cir. 2005), adopting *SEC v. Wencke*, 622 F.2d 1363, 1369 (9th Cir. 1980) (approving blanket litigation stay to protect a receivership).

Enviro is merely an unsecured pre-judgment creditor. It alleges no reason—and none exists—why it cannot wait with everyone else for an orderly administration of claims and plan of distribution under the supervision of this Court *after* the Receiver has completed the highest priority task of marshaling and managing the Receivership Entity’s assets, including PAG, for the benefit of *all* investors and creditors.

The only issue for this Court is whether to lift the litigation stay to allow one small, unsecured, pre-judgment creditor group to seek an advantage by forcing the Receiver to defend Receivership Property at trial in California, thereby “increas[ing] litigation costs . . . while diminishing the size of the receivership estate” for everyone else. *SEC v. Universal Financial*, 760 F.2d 1034, 1038 (9th Cir. 1985) (affirming denial of motion to lift litigation stay). The Receiver respectfully submits that the Second Motion should be denied.

II. STATEMENT OF FACTS AND PROCEDURE

A. The California Federal Action

On March 22, 2016, Enviso sued Aequitas Holdings, LLC, Aequitas Wealth Management, LLC, Aspen Grove Equity Solutions LLC, Private Advisory Group, LLC, and certain individuals in California Superior Court, San Diego County. In its First Amended Complaint, filed in May 2016, Enviso alleged a negligence claim against all defendants, and an additional breach of contract claim against PAG. Enviso seeks to recover not less than \$1.25 million, plus other relief.³

B. Enviso's First Motion to Lift Stay

On December 21, 2016, Enviso filed the First Motion, arguing that the Court should allow it to proceed with the California action. The Receiver filed its Amended Opposition to the First Motion on January 12, 2017 [Dkt. 341], arguing that the First Motion should be dismissed for Enviso's failure to confer and based on the vast Ninth Circuit authority supporting the Receiver's position that the stay should remain. In response, Enviso voluntarily withdrew the First Motion on January 18, 2017 [Dkt. 348].

Since withdrawing the First Motion, nothing has changed and no event has occurred that would support Enviso's Second Motion. Indeed, Enviso does not even cite to the Receiver's most recent February 10, 2017 Report, nor his proposed treatment of the Enviso claim and insurance proceeds at issue. *See* [Dkt. 365]. Rather, Enviso has just recycled its First Motion

³ Enviso's original Complaint was filed after the litigation stay imposed under paragraphs 20-22 of the March 16, 2016 Stipulated Interim Order Appointing Receiver [Dkt. 30]. Likewise, Enviso's First Amended Complaint was filed more than a month after the litigation stay imposed under paragraphs 20-22 of the Final Receivership Order. The Receiver expressly reserves all of its rights and remedies with respect to Enviso's violations of the litigation stays.

and for the reasons previously set forth, and for the reasons set forth below, the present motion should be denied.

C. The Litigation Stay Imposed by the Receivership Order

This is a large, complex Receivership in which this Court's stay of litigation serves a crucially important role in giving the Receiver breathing room to carry out his extensive duties without the distraction and expense of defending a myriad of litigation claims. The SEC filed this action on March 10, 2016 against Aequitas and affiliates for alleged violation of federal securities laws in what the SEC describes as a "Ponzi-like" scheme. [Dkt. 1, at p. 3]. The SEC alleges that principals of Aequitas defrauded investors who purchased interests in trade receivables and misused investor funds to pay operating expenses and to repay earlier investors. *See id.*, at ¶¶ 1-7. The SEC alleges that "[b]y the end of 2015, [Aequitas] owed investors \$312 million and had virtually no operating income to repay them." *Id.*, at ¶ 5.

On March 16, 2016, this Court entered an Interim Receivership Order appointing Ronald F. Greenspan as Receiver, empowering the Receiver to marshal and preserve assets of the Receivership entities, and imposing a blanket stay of litigation. [Dkt. 30, at ¶¶ 20–22] ("Interim Receivership Order").

On April 14, 2016, this Court entered the Final Receivership Order. [Dkt. 156]. The Final Receivership Order is designed to further important goals of the receivership "to safeguard the assets, administer the property" and ultimately "to assist the district court in achieving a final, equitable distribution of the assets." *SEC v. Wing*, 599 F.3d 1189, 1194 (10th Cir. 2010). In furtherance of these goals, the Final Receivership Order empowers the Receiver to "take custody, control and possession" and "to sue for and collect, recover, receive and take into possession" all Receivership Property, enjoins third parties from interfering with the Receiver,

and imposes a blanket stay of litigation. (Final Receivership Order, ¶¶ 6, 20). In particular, the litigation stay applies to:

All civil legal proceedings of any nature, including but not limited to, bankruptcy proceedings, arbitration proceedings, foreclosure actions, default proceedings, or other action of any nature **involving**; (a) the Receiver, in his capacity as Receiver; (b) any **Receivership Property**, wherever located....

(Final Receivership Order, ¶ 20) (emphasis added). As detailed below, Receivership Property includes PAG.

D. A Receivership Entity is the Majority Owner of PAG.

Enviso's argument that the Receiver has no interest in PAG is conclusively disproven by the Receiver's prior reports and this Court's Final Receivership Order. Aspen Grove Equity Solutions, LLC ("Aspen Grove"), which owns 68.23% of PAG, *is part of the Receivership Entity*. That is made clear by Exhibit A to the Final Receivership Order.⁴ And the Receiver's most recent Report expressly states that Aspen Grove is a member of PAG and holds 68.23% of the membership units. [Dkt. 365, at p. 9]. Additionally, under the Final Receivership Order, Receivership Property includes "all property interests of the Receivership Entity, including, but not limited to...rights and other assets, which the Receivership Entity own, possess, have a beneficial interest in, or control directly or indirectly."⁵ By virtue of Aspen Grove's majority ownership stake in PAG, Receivership Property includes PAG and its assets.

Notwithstanding the fact that PAG and its assets constitute Receivership Property, Enviso now contends that the stay should be lifted because none of the *named* defendants own a direct interest in PAG. Enviso provides no authority for this novel theory, and for good reason,

⁴ Final Receivership Order, p. 18.

⁵ Final Receivership Order, ¶ 6.A.

because none exists. The undisputed facts are that the Receiver has disclosed his intent to assert his rights to continue as the majority owner of PAG and to monetize this asset for the benefit of the Receivership Entity, and its creditors and investors. (September 14, 2016 Report of Ronald F. Greenspan, Receiver, p. 64).⁶ The litigation stay should stay in place to allow the Receiver to do so.

III. ARGUMENT AND ANALYSIS

A. The California Litigation Should Remain Stayed.

The Ninth Circuit in *SEC v. Wencke*, 622 F.2d 1363 (9th Cir. 1980), established a foundational principle of federal receivership law, later adopted by many other Circuits, that a district court is empowered to issue a blanket stay of litigation, effective against all persons, in order to protect and preserve receivership assets and the orderly administration of receiverships. *Id.* at 1368-72. “The purposes of a receivership are varied, but the purpose of imposing a stay of litigation is clear. **A receiver must be given a chance to do the important job of marshaling and untangling a company’s assets without being forced into court by every investor or claimant.**” *Acorn Tech Fund*, 429 F.3d at 443, 449 (emphasis added) (adopting *Wencke* in refusing to lift a stay of litigation in a receivership); *see also Wing*, 599 F.3d at 1196.

The Ninth Circuit also established the following set of considerations relevant to a district court’s exercise of discretion in determining whether to grant relief from a blanket litigation stay:

(1) whether refusing to lift the stay genuinely **preserves the status quo or whether the moving party will suffer substantial injury** if not permitted to proceed; (2) the **time** in the course of the receivership at which the motion for relief from the stay is made; and (3) the **merit** of the moving party’s underlying claim.

⁶ Dkt. 246, pp. 67-68.

SEC v. Universal Fin., 760 F.2d 1034, 1037-38 (9th Cir. 1985) (emphasis added) (quoting *SEC v. Wencke*, 742 F.2d 1230, 1231 (9th Cir. 1984) (*Wencke II*), citing *Wencke*, 622 F.2d 1363).

“The *Wencke* test ... requires the district court to balance the interests of the Receiver and the moving party.” *Universal*, 760 at 1038. In that balance, “the interests of the Receiver are very broad and include not only protection of the receivership *res*, but also protection of defrauded investors and considerations of judicial economy.” *Id.* See also *SEC v. TLC Invs. & Trade Co.*, 147 F. Supp. 2d 1031, 1039 (C.D. Cal. 2001) (denying motion to lift stay where movant’s interests were outweighed by the “need to protect and marshal the assets of the Receivership estate, protect defrauded and innocent investors, and judicial economy”).

As detailed below, the *Wencke* factors favor the Receiver. Accordingly, the Second Motion should be denied.

1. Continuing the Litigation Stay Protects the Receivership *Status Quo* and Does Not Impose Any “Substantial Injury” on Enviso.

The first *Wencke* considerations are whether the litigation stay preserves a *status quo* beneficial to the Receivership, and whether the movant “will suffer substantial injury if not permitted to proceed.” *Wing*, 599 F.3d at 1196; see *Wencke*, 622 F.2d at 1373. There is no question that the litigation stay provides crucial protection against dissipation of Receivership assets. The Court should give “substantial weight to the receiver’s need to proceed unhindered by litigation, and the very real danger of litigation expenses diminishing the receivership estate.” *Acorn Tech. Fund, L.P.*, 429 F.3d at 443. Judge King of this Oregon District Court expressly recognized the importance of maintaining a litigation stay against the demands of one creditor, as here, where other creditors naturally would seek to pile on and consume receivership assets “in the defense of an onslaught of lawsuits.” *SEC v. Capital Consultants, LLC*, 2002 U.S. Dist.

LEXIS 6775, at *5 (D. Ore. 2002); *see also Universal*, 760 F.2d at 1038 (litigation stay is appropriate to avoid “a multiplicity of actions in different forums [that] would increase litigation costs . . . while diminishing the size of the receivership estate.”).

The Receiver’s task is enormous—especially given the SEC’s allegations of a Ponzi-type scheme involving hundreds of millions of dollars. *See Wing*, 599 F.3d at 1197 (“[I]n a case involving a Ponzi scheme, ‘the interests of the Receiver are very broad and include not only protection of the receivership *res*, but also protection of defrauded investors and considerations of judicial economy.’”) (citation omitted). Forcing the Receiver to litigate in California also would interfere with the Receiver’s top priorities of marshaling, preserving and managing the assets of more than forty Aequis affiliates, untangling their financial affairs, and investigating potential claims “the prosecution of which would benefit investors[.]” *Wencke*, 622 F.2d at 1372. Lifting the litigation stay at this point merely to accommodate one creditor group would upset the *status quo* to the detriment of the Receivership.

Additionally, under *Wencke*, the Court is to consider whether the movant “will suffer substantial injury if not permitted to proceed.” *Wing*, 599 F.3d at 1196; *see Wencke*, 622 F.2d at 1373. In this case, not only will Enviso suffer no “substantial injury” if the stay is maintained, it does not assert that it will suffer any injury at all. Rather, Enviso argues that (a) because it is seeking insurance proceeds that benefit PAG, and (b) because “the estate has uncovered a significant amount of assets,” it should be allowed to proceed now ahead of other creditors. Neither argument is supported by the facts or law. *See Second Motion*, p. 5.

Enviso’s only interest is to get ahead of other unsecured creditors by seeking a judgment lien against Receivership Property, including PAG. Enviso’s desire to pursue a lien on Aequis’ assets ahead of other creditors—and before the Receiver is ready to propose an *equitable*

distribution to *all* allowed stakeholders—is simply “not the kind of substantial injury” that district courts “recognize under the first prong of *Wencke*.” *Acorn Tech. Fund*, 429 F.3d at 449.

As matters now stand, there is no reason that Enviso cannot comply with an orderly claims administration process and plan of distribution in due course, to address any claims it may have against Aspen Grove and upon Receivership Property including the Receivership Entity’s majority ownership interest in PAG. *See* Final Receivership Order, ¶ 38; *Capital Consultants*, 2002 U.S. Dist. LEXIS 6775, at *6 (denying motion to lift stay where the creditor may pursue a claim in a receivership process); *TLC Invs. & Trade Co.*, 147 F. Supp. 2d at 1039 (denying motion to lift stay where creditors showed no substantial injury).

2. The Timing is Premature for Any Relief from the Litigation Stay.

The second *Wencke* consideration in determining whether to lift a litigation stay is the stage of the receivership proceedings given the passage of time. *Wencke*, 622 F.2d at 1373-74. Enviso’s self-serving declaration that “the receivership is very advanced” is rejected by the Receiver’s most recent February 10, 2017 Report [Dkt. 365, p. 10]. In that report the Receiver makes clear that “this Receivership is still in the first stage – the stabilization and monetization of assets.” *Id.* The Receiver goes on to explain why he needs additional time to monetize assets, and why allowing Ancillary Proceedings against registered investment advisers such as PAG would impair the goal of maximizing recovery to investors, and potentially impair insurance proceeds that are available to PAG. *Id.* at pp. 7-10. Enviso does not cite, let alone challenge, the Receiver’s conclusions.

Case law strongly favors retaining the litigation stay. Motions to lift a litigation stay made, as here, relatively soon after a receiver has taken control are generally denied given the “receiver’s need to organize and understand the entities under his control[.]” *Wencke*, 622 F.2d

at 1373-74; *see Acorn Tech. Fund*, 429 F.3d at 443-44 (“[V]ery early in a receivership even the most meritorious claims might fail to justify lifting a stay given the possible disruption of the receiver’s duties.”).

Further, numerous decisions denying motions to lift the litigation stay in federal receiverships illustrate that Enviso’s Second Motion is entirely premature. *See, e.g., Acorn Tech Fund*, 429 F.3d at 449-450 (denying motion to lift stay after three years); *Wencke*, 622 F. 2d at 1374 (affirming refusal to lift stay after two years); *Universal*, 760 F.2d at 1039 (affirming refusal to lift stay after four years); *Wencke II*, 742 F.2d at 1231-32 (finding an abuse of discretion in refusal to lift the litigation stay only after seven years when the receiver was about to make the distribution); *Capital Consultants, LLC*, 2002 U.S. Dist. LEXIS 6775, at *4-6 (denying motion to lift stay early in a receivership process).

In due course, the Receiver will implement a claims procedure under the supervision of this Court as contemplated by the Final Receivership Order.⁷ Enviso will be free to submit a proof of any claim it may have against Aspen Grove and to any Receivership Property, including the Receivership Entity’s majority ownership interest in PAG, in order to participate in any Liquidation Plan approved by the Court. With regard to claims against PAG and related individuals, all interested parties recognize that with a limited amount of insurance proceeds potentially available to defend and settle claims significantly larger than the policy limits, it is incumbent on the parties and their counsel to seek to prevent or delay unnecessary litigation until such time as a comprehensive, global settlement might be achieved. With the support and encouragement of the Receiver, many interested parties including investor claimants

⁷ Paragraph 38 of the Final Receivership Order provides as follows: “The Receiver is authorized, empowered and directed to develop a plan for the fair, reasonable, and efficient recovery and liquidation of all remaining, recovered, and recoverable Receivership Property (the ‘Liquidation Plan’).”

and PAG are in the midst of an expedited alternative dispute resolution process, which included a first mediation session on March 1-2. Enviso was invited to and participated in the first mediation session. The alternative dispute resolution process should continue without a small, unsecured, pre-judgment creditor group such as Enviso being allowed to dissipate Receivership Property through litigation costs and corresponding reductions in available insurance coverage. *See Wing*, 599 F.3d at 1194; *Capital Consultants, LLC*, 2002 U.S. Dist. LEXIS 6775, at *4-6 (denying motion to lift stay where creditor “has the ability to pursue a claim in the summary claims process...set up as part of the receivership”). In short, the timing of Enviso’s Second Motion is premature.

3. Enviso Fails to Address the Merits of its Claims.

The third *Wencke* consideration in determining whether to lift a litigation stay is the strength of the movant’s claim on the merits. *Wencke*, 622 F.2d at 1373-74. “Where the claim is unlikely to succeed . . . there may be less reason to require the receiver to defend the action now rather than defer its resolution . . . [and] where the likelihood that the receiver will prevail is small . . . there is less reason to permit the receiver to avoid resolving the claim[.]” *Id.*

Here, Enviso states only that its claims “have substantial merit.” (Second Motion, p. 6). Its support for that statement is its unilateral conclusions that PAG breached the purchase agreement and that Enviso intended to perform under that agreement. *Id.* However, none of the defendants in the California litigation have filed a responsive pleading. The Receiver has not completed his investigation as to the merits of Enviso’s claims and any defenses that might be asserted. In fact, it is possible that the Receivership Entity will ultimately seek to recover funds previously paid to Enviso. At best, the final *Wencke* factor does not favor one party more than the other.

Even assuming, however, that Enviso's claims against PAG and the individuals are meritorious, that fact alone does not support lifting the stay. Undoubtedly a great number of Aequitas creditors have meritorious claims. The question for this Court is whether to allow one creditor to proceed ahead of others. The Receivership Entity's assets will be diminished if the stay is lifted as to Enviso, or any other creditor at this time. Doing so will require the Receivership Entity to spend estate assets defending such claims, and tap into wasting insurance policy proceeds for defense costs and fees that would otherwise be available to claimants and creditors on an equitable basis. Accordingly, for the benefit of all creditors and investors, Enviso's claims against PAG and the individuals should remain stayed. Enviso is encouraged to continue to participate in the ADR process mentioned above together with investor claimants, PAG and its insurance carrier.

IV. CONCLUSION

The *Wencke* factors weigh decisively against lifting the litigation stay imposed by this Court to protect the Receivership Entity, and its creditors and investors. The Receiver respectfully requests that the Court deny Enviso's motion to lift the stay and its alternative request that the Receiver post a bond.

Dated this 8th day of March, 2017.

Respectfully submitted,

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