

FILED

APR 25 2016

U.S. BANKRUPTCY COURT
BY  DEPUTY

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION**

In re:	§	CASE NO. 16-50778
	§	
SANJEL (USA) Inc., et al.	§	(Chapter 15)
	§	
Debtors in a foreign proceeding.	§	JOINTLY ADMINISTERED

OBJECTION TO ENTRY OF PRELIMINARY AND PERMANENT INJUNCTIONS

Comes now, through undersigned counsel, Darell Davis and Christopher Keller, Individually and on behalf of all others similarly situated (“Objectors”), and file this Objection to Debtor’s Application for Preliminary and Permanent Injunction.

INTRODUCTION

Objectors respectfully request that this Court deny the Debtor’s request for Entry of Preliminary and Permanent Injunction, or, in the alternative, grant relief from the automatic stay, on the grounds that: (1) the claims of the Objectors and the putative collective action members they represent are severely prejudiced by the automatic stay because the statute of limitations is running on their claims for unpaid wages owed by the Debtor; and (2) Objectors object to the inclusion of the Debtor’s directors and officers in the automatic stay because the Debtor has failed to satisfy its burden of proof to issue an injunction as to claims against Debtor’s directors and officers. Therefore, Objectors pray for an Order denying Debtor’s Application for Preliminary and Permanent Injunction, or in the alternative, an Order providing the Objectors relief from the automatic stay so that they may proceed to file consents in the FLSA actions pending in the District of Colorado, disseminate a court-approved class notice apprising putative class members of their rights under the FLSA and the opportunity to toll the statute of limitations on their wasting claims, and allow Objectors and



class members to pursue their claims against the Debtor's directors and officers.

FACTUAL BACKGROUND

Objectors are the named Plaintiffs in two separate lawsuits styled *Darell Davis v. Sanjel (USA), Inc.*, Civil Action No. 1:15-cv-01980, and *Christopher Keller v. Sanjel (USA), Inc.*, Civil Action No. 1:16-cv-00271, both pending in the United States District court for the District of Colorado (the "Pending Litigation"). The Objectors allege violations of their statutory rights to receive unpaid wages from Sanjel (USA), Inc. (Hereinafter "Sanjel") as a result of Sanjel's failure to pay Plaintiffs and other similarly situated employees overtime wages as required by the Fair Labor Standards Act, 29 U.S.C. § 207 (the "FLSA"). Pursuant to 29 U.S.C. § 216 (b) of the FLSA, the Objectors have filed collective action claims seeking to represent all other similarly situated employees who have not been properly paid overtime (the "Class Members"). The Objectors and Class Members are Sanjel's current and former employees who were employed in its fracking operations in Colorado and throughout the United States.

FLSA STATUTE OF LIMITATIONS

Here, the Class Members are particularly vulnerable to the FLSA's running statute of limitations. Unlike class actions under Rule 23 of the Federal Rules of Civil Procedure, in a collective action under the FLSA, the statute of limitations does not toll from the date of the filing of a complaint. Instead, the statute of limitations continues to run until a Class Member files a written consent to participate in the litigation. For an opt-in plaintiff in a collective action, the action is not considered "commenced" until his individual written consent is filed with the court. 29 U.S.C. § 256(b). The rolling statute of limitations running against the Class Members here means that their claims are reduced by each day that passes between the filing of the action and the day on which their consent form is received by court.

Objectors seek relief from the automatic stay for the purpose of allowing additional Class Members to file their written consents to participate in the Pending Litigation in order to toll the running of the statute of limitations on their claims. Counsel for the Objectors continues to receive consents of Class Members wishing to join the Pending Litigation. Without relief from the automatic stay, these claimant's claims will be impaired by the delay in the filing of their consents. Indeed, if the relief sought is not granted, some Class Members' claims could be extinguished.

Sanjel has had knowledge that Objectors brought the Pending Litigation as a collective action, on behalf of themselves and other similarly situated employees, since the date their complaints were filed. Thus, Debtor is fully aware of the scope of its potential liability.

Objectors are entitled to the relief sought because such relief will not impair Debtor's plan of reorganization and does not seek monetary relief against the Debtor at this particular time. The relief sought herein is analogous to relief sought pursuant to 11 U.S.C. §§ 362(d)(1). In litigation concerning the automatic stay, the Code generally seeks to leave matters in a status quo posture, especially in business cases, to provide a reasonable opportunity for a financially distressed debtor, its creditors, and the Court to determine whether there are reasonable prospects for the debtor's survival. *In Re American Mariner*, 27 B.R. 1004, 1014; rev'd on other grounds, 734 F.2d 426 (9th Cir.1984). This underlying policy evokes a balancing of the equities which entails supporting a debtor's rehabilitation versus the protection of a creditor's interest in assets of the estate. *In re New Am. Food Concepts, Inc.*, 70 B.R. 254, 257-58 (Bankr. N.D. Ohio 1987). In this case, Debtor has already secured a purchaser for the company, so its survival is presumed, albeit with a different owner. Additionally, the equities of the situation militate in favor of the Objectors and the tolling of the statute of limitations of any potential claimants.

CLASS NOTICE

Objectors also respectfully request the Court to grant them relief from the automatic stay for the limited purpose of moving for and disseminating a court-approved class notice to the putative Class Members in the Pending Litigation. The putative Class Members have the right to learn of the Pending Litigation and participate in order to toll the statute of limitations on their wasting claims.

District courts have the authority to issue court-approved class notice to putative class members in an FLSA collective action. *Hoffmann-La Roche v. Sperling*, 493 U.S. 165, 170 (1989). FLSA collective actions “depend upon employees receiving accurate and timely notice concerning the pendency of the collective action, so that they can make informed decisions about whether to participate.” *Id.* The district court oversees the dissemination of the class notice and joinder of additional parties to assure the task is accomplished in an efficient and proper way. *Id.* at 170-71. This decision is made after the plaintiff has moved the district court for court-approved notification of putative class members. *See Mooney v. Aramco Servs. Co.*, 54 F.3d 1207, 1213 (5th Cir. 1995). If the district court certifies the class, putative class members are given notice and the opportunity to “opt-in.” *See Mooney*, 54 F.3d at 1214. Unlike class actions under Federal Rule of Civil Procedure 23, putative class members under the FLSA must opt into the class rather than opt out.

Currently, the vast majority of the Class Members are unaware of the Pending Litigation, which affects their federal statutory rights to make a claim for unpaid overtime wages under the FLSA. Nevertheless, the statute of limitations is running on their claims. Therefore, Objectors request leave to move the District Court of Colorado to disseminate notice to the putative Class Members whose claims are wasting due to the statute of limitations. Objectors do not request a

ruling on the merits of the Pending Litigation, rather, their request is for the limited purpose of providing notice of the Pending Litigation to the putative Class Members.¹ Providing notice therefore works no harm or prejudice to the Debtor, because the relief sought will not impair Debtor's plan of reorganization and does not seek monetary relief against the Debtor at this particular time.

DIRECTORS AND OFFICERS

The standard for injunctive relief is "where relief is urgently needed to protect the assets of the debtor or the interests of the creditors." 11 U.S.C. § 1519(a). The Debtor must show "a substantial threat of irreparable injury" that "the threatened injury to the movant outweighs any damage the injunction might cause the opponent, and that the injunction would not be adverse to the public interest." *Dallas Cowboys Cheerleaders, Inc. v. Scoreboard Posters, Inc.*, 600 F.2d 1184, 1187 (5th Cir. 1979). If the Debtor fails to meet any of the requirements, the Court cannot grant the preliminary injunction. *Id.*

Sanjel wholly fails to address the prerequisites to include the directors and officers in its request for preliminary injunction, and therefore has failed to satisfy its burden of proof. The April 4, 2016 Emergency Application fails to argue that claims against Debtor's directors and officers should be included in the automatic stay. *See* Dkt. 6 at 41-49. Likewise, it fails to argue facts necessary for this Court to make a finding that excluding directors and officers in the stay would cause irreparable harm to the Debtor.² *Id.* In sum, Sanjel fails to provide the necessary

¹ Typically, FLSA class notice is a neutral communication from the court providing notice of the pendency of the action and of the opportunity to opt in. It makes no comment on the merits of the case. The potential class members are advised of the running statute of limitations, how to opt in to the litigation, and that they are not required to participate.

² The Initial Order entered by the Canadian Court includes a provision staying proceedings against directors and officers. *See* Exhibit A at 12 ("Proceedings against Directors and Officers"). Although this Court's April 5, 2016 Order granting the Emergency Application for Temporary Restraining Order does not specifically include directors and officers, it gives full force and effect to the terms of the Initial Order. *See* Dkt. 43 ("Except with respect to the

evidence and legal authority to demonstrate that its directors and officers are entitled to the protections of the automatic stay. To the extent Sanjel attempts to seek relief that it did not properly raise in the motion, the motion should be denied.

Further, a preliminary and permanent injunction will disserve the public interest and damage the Objectors and Class Members. A Debtor's directors and officers are not presumptively extended the protections of the automatic stay. "Extending the automatic stay or issuing an injunction for non-debtors contravenes a basic and compelling principle of federal bankruptcy law." *In re Vitro, S.A.B. de C.V.*, 455 B.R. 571, 581 (Bankr. N.D. Tex. 2011). If the injunction is granted as to the directors and officers, Objectors and Class Members will be unable to pursue their claims against the directors and officers in their individual capacity. The FLSA defines the term "employer" to include "any *person* acting directly or indirectly in the interest of an employer in relation to an employee[.]" 29 U.S.C. § 203(d) (emphasis added). *See also Dole v. Elliott Travel & Tours, Inc.*, 942 F.2d 962, 965 (6th Cir.1991) (the "overwhelming weight of authority is that a corporate officer with operational control of a corporation's covered enterprise is an employer along with the corporation, jointly and severally liable under the FLSA for unpaid wages."). As such, Objectors and Class Members have valid claims against the directors and officers for their unpaid wages, which they will be barred from pursuing if these individuals are included in the automatic stay.

If the injunction is granted, the Objectors and Class Members will be required to delay collection efforts while reorganization proceedings are pending in Canada. This will result in the Objectors and Class Members being substantially harmed by the subordination of their claims as

provisions regarding the Interim Financing and the Interim Financing Charge, the terms of the Initial Order are hereby given full force and effect on an interim basis until otherwise ordered by this Court."). There is no provision in the Court's Order limiting the enforceability of the "Proceedings against Directors and Officers" section of the Initial Order, so the stay against directors and officers would appear to be applicable in the United States as well.

a result of the reorganization proceedings. Moreover, as outlined above, the statute of limitations will continue to run on the Class Members' unasserted claims against Sanjel's directors and officers, thereby severely diminishing or even extinguishing the claims. As Sanjel has not met all the prerequisites for injunctive relief on behalf of its directors and officers, the Court should deny the Application for Preliminary and Permanent Injunction as to directors and officers.

RELIEF REQUESTED


Objectors pray for an Order denying Debtor's Application for Preliminary and Permanent Injunction, or in the alternative, denying the Application for Preliminary and Permanent Injunction as to directors and officers so that Debtor's directors and officers are not included in the automatic stay. In addition, Objectors request an Order permitting relief from the automatic stay for the limited purposes of: (1) allowing additional claimants to file consents to participate in the FLSA actions pending in the District of Colorado in order to toll the running of the statute of limitations for their claims; and (2) moving for and disseminating a court-approved class notice in order to provide putative Class Members the opportunity to file consents to join the FLSA actions pending in the District of Colorado and toll the statute of limitations running on their claims.

CONCLUSION

For the foregoing reasons, Objectors respectfully request the Court grant the relief requested herein.

Dated: April 22, 2016

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CERTIFICATE OF SERVICE

I certify that a copy of this document will be served upon the persons in the Master Service List by overnight delivery, U.S. First Class Mail, postage pre-paid, and/or by electronic notification by the Electronic Case Filing system for the United Bankruptcy Court for the Western District of Texas on or before April 22, 2016.


Galvin B. Kennedy