

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

SECURITIES AND EXCHANGE	§	
COMMISSION,	§	
Plaintiff,	§	
	§	
v.	§	CIVIL ACTION NO. H-09-3674
	§	
ALBERT FASE KALETA and	§	
KALETA CAPITAL MANAGMENT,	§	
<i>et al.</i> ,	§	
Defendants.	§	

MEMORANDUM AND ORDER

Movant Barbara Doreen House has filed an Emergency Motion for Order Declaring Movant’s Claims Exempt from Receivership or, in the Alternative, For an Order Lifting the Stay [Doc. # 45] (“Motion”). The Receiver has filed a response [Doc. # 53] (“Response”) and the motion now is ripe for decision. Having considered the parties’ briefing, the applicable legal authorities, and all matters of record, the Court concludes that the Motion should be **denied**.

Movant is the plaintiff in a suit pending in the 234th Judicial District Court of Harris County, Texas, alleging breach of fiduciary duty, fraud, misrepresentation, and other claims in the handling of Movant’s financial affairs. Daniel S. Frishberg and Elisea T. Frishberg are defendants in the state court suit. Movant seeks recovery from

insurance proceeds available to the Frishbergs. On October 6, 2010, counsel for Movant received a letter from the Receiver in this action citing two orders from this Court and stating that the orders prohibit further litigation of the state court case.¹ The Receiver referred Movant to this Court's order appointing the Receiver, dated December 2, 2009, which restrains and enjoins all persons from:

The commencement or continuation . . . of any judicial, administrative, or other proceeding against the Receiver, the Defendant, the Receivership Estate, or any agent, officer, or employee related to the Receivership Estate, arising from the subject matter of this civil action.²

The Receiver also cited a second order dated June 17, 2010, which modified the first order by expressly including the assets and records of Daniel Frishberg Financial Services, Inc., d/b/a DFFS Capital Management, Inc. ("DFFS"), and Business Radio Network L.P., d/b/a BizRadio, in the Receivership Estate.³

Movant first requests that this Court declare her claims against the Frishbergs exempt from the stay. Movant argues that the Frishbergs' individual assets and legal rights are not covered by the Court's order appointing the Receiver. However, Movant also admits in her Motion that Daniel Frishberg is a "partner, director, and/or

¹ Exhibit C to Motion.

² Agreed Order Appointing Receiver [Doc. # 7], at 6, ¶ 7(a).

³ Order Modifying Order Appointing Receiver [Doc. # 34], at 1-2.

officer of [DFFS],” and that Elisea Frishberg was “an employee of [DFFS].”⁴ As stated above, the order appointing the Receiver explicitly restrained a judicial action against any “officer[] or employee related to the Receivership Estate.”⁵ Moreover, as set forth in the Response, the allegations made by Movant in her state court action involve the same fraudulent scheme that led to the Receivership, and therefore arise from the same subject matter as this civil action. Movant’s request that her claims be declared exempt from the stay therefore is denied.

In the alternative, Movant requests that this Court issue an order lifting the stay to allow her to continue pursuit of her claims against proceeds of DFFS’ insurance policy. The parties agree on the three-part test to determine whether to lift a receivership injunction: (1) whether refusing to lift the injunction preserves the status quo or whether the moving party will suffer substantial injury if it is 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 merits of the movant’s claim.⁶ The Movant bears the burden to show that the stay should be lifted.⁷

⁴ Motion, at 8.

⁵ Agreed Order Appointing Receiver, at 6, ¶7(a).

⁶ *SEC v. Wencke*, 622 F.2d 1363, 1373-74 (9th Cir. 1980).

⁷ *U.S. v. Acorn Technology Fund, L.P.*, 429 F.3d 438, 450 (3d Cir. 2005).

The Court holds that the equities weigh in favor of maintaining the stay. If Movant's suit were permitted to proceed, she in effect would be granted priority over other investors who were victimized by the same fraudulent scheme. The Receiver states that other victimized investors have made claims against DFFS' insurance policy in connection with Frishbergs' actions, and that these claims have been submitted to the insurance carrier.⁸ Movant's suit would disrupt the status quo by depleting insurance proceeds, which are subject to claims from other fraud victims. The Frishbergs' defense costs from Movant's suit also would diminish the assets of the Receivership Estate.

In addition, although Movant has alleged that she would suffer substantial harm, she has presented no evidence in support of her allegation, and therefore has not met her burden to show that the stay should be lifted.

The second *Wencke* factor, the timing of the request, also weighs in favor of the Receiver. The Receiver was appointed approximately one year ago, in December 2009, and is actively investigating the fraudulent scheme at issue and is marshaling resources for the Receivership Estate.⁹

⁸ Response, at 11-12.

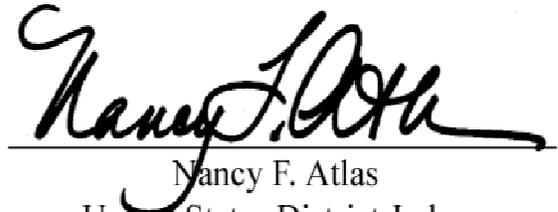
⁹ Response, at 15-16.

As for the third *Wencke* factor, the Court expresses no opinion as to the merits of Movant's claims in her state court suit. However, even assuming the claims are meritorious, this factor does not outweigh the equities set forth above, which weigh heavily in favor of the stay.

For all of the foregoing reasons, it is hereby

ORDERED that Movant's Emergency Motion for Order Declaring Movant's Claims Exempt from Receivership or, in the Alternative, For an Order Lifting the Stay [Doc. # 45] is **DENIED**.

SIGNED at Houston, Texas, this 14th day of **January, 2011**.


Nancy F. Atlas
United States District Judge