

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
LOUISVILLE DIVISION**

THE HUNTINGTON NATIONAL)	
BANK, AS TRUSTEE,)	
)	
PLAINTIFF,)	CIVIL ACTION NO.
)	3:16-cv-00465-DJH
v.)	
)	<i>Electronically Filed</i>
SAINT CATHARINE COLLEGE, INC.)	
)	
DEFENDANT.)	
)	

**MEMORANDUM IN SUPPORT OF NON-PARTIES’ MOTION TO LIFT
RECEIVERSHIP STAY TO PROCEED WITH FILING OF CIVIL ACTION
AGAINST DEFENDANT ST. CATHARINE COLLEGE, INC.**

Come Interested Non-Parties to the above-referenced action, Becky Lee Meadows, Scott Scheerhorn, Robert Akin, and Robert Hutchins, on behalf of themselves and a class of Plaintiffs similarly situated, and in support of their motion to lift the receivership stay currently in place by virtue of an Order entered in the above-captioned action so that they may proceed with the institution and prosecution of a civil action against Defendant, St. Catharine College, Inc., and others non-party Defendants provide as follows:

STATEMENT OF PERTINENT FACTS

By Order of the Honorable David J. Hale, Judge, United States District Court, Western District of Kentucky, St. Catharine College, Inc. was placed into Receivership effective July 26, 2016. See Order Appointing Receiver [Document 12]. Pursuant to paragraph 13 of that Order, “[n]o individual or entity may sue the Receiver or Saint Catharine without first obtaining permission of this Court....” The Non-Parties to this motion hereby move this Court to lift the

receivership stay presently in place so that they may file and thereafter prosecute an action on behalf of themselves and a Class of individuals similarly situated against Defendant St. Catharine College and other non-party Defendants. This action is summarily described in paragraph 9 of the proposed Complaint as follows:

9. Plaintiffs assert on behalf of themselves and a Class of individuals similarly situated claims pursuant to Rule 23(a) and 23(b) of the Federal Rules of Civil Procedure against Defendant St. Catharine College for its violations of the provisions of the Worker Adjustment and Retraining Notification Act of 1988, 29 U.S.C. Sections 2101-2109 *et seq.*, KRS 337.055 (failure to pay wages upon dismissal), and KRS 337.385 (failure to pay wages). Moreover, the Plaintiffs assert on behalf of themselves and a class of individuals similarly situated claims pursuant to Rule 23(a) and 23(b) of the Federal Rules of Civil Procedure against the other named Defendants in this action in their official and individual capacities for their respective violations of KRS 273.229 (breach of statutory duties of St. Catharine College officers), KRS 273.215 (breach of statutory duties of St. Catharine College Board of Trustees members), and breach of common law fiduciary duties.

See, Exhibit 1 to Memorandum in Support, Proposed Complaint, and paragraph 9.

The Non-Parties to this motion assert that it is their present intent to seek judgment against or a settlement with Defendant St. Catharine College, Inc. only to the extent that insurance coverage is available to indemnify St. Catharine College for the claims asserted in the attached Proposed Complaint. In a previous filing in this action another non-party, Jessie Lynn Broderick, moved this Court to lift the receivership stay so that she could proceed with a pending civil action in state court against Defendant St. Catharine College only to the extent that St. Catharine College had insurance that would indemnify it against any judgment or settlement of her claims against St. Catharine College. See Document 18, Motion for Leave to Proceed with Pending Litigation. The non-party attached as an exhibit to that motion documentation of insurance coverage indemnifying St. Catharine College from the claims asserted by the non-party movant. See Document 18, Exhibit B, Declarations Page from Philadelphia Insurance

Companies re: St. Catharine College, policy period 12/01/13 through 12/01/14. Upon learning of this coverage, undersigned Counsel contacted Philadelphia Insurance Companies to report the claims against St. Catharine College that flow from the Proposed Complaint. Upon information and belief, undersigned counsel believes that there is substantial insurance coverage available indemnifying St. Catharine College and the non-party Defendants [in the Proposed Complaint] from 2012 to the present for some of the claims set forth in the Proposed Complaint. Based upon these factors, among others, and applicable case law, this Court should lift the receivership stay so that the non-party movants may proceed with their claims against Defendant St. Catharine College and other non-party Defendants.

GOVERNING LAW

A district court may impose a litigation stay on a non-party to a receivership as part of its inherent power as a court of equity to fashion effective relief. *S.E.C. v. Byers*, 609 F.3d 87, 91 (2d Cir.2010) (citing *S.E.C. v. Wencke*, 622 F.2d 1363, 1369 (9th Cir.1980) (“*Wencke I*”). 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. *U.S. v. Acorn Tech. Fund, L.P.*, 429 F.3d 438, 443 (3d Cir.2005). “Nevertheless, an appropriate escape valve, which allows potential litigants to petition the court for permission to sue, is necessary so that litigants are not denied a day in court during a lengthy stay.” *Id.*

Although the United States Court of Appeals for the Sixth Circuit has not articulated a test for determining whether a receivership stay should be lifted, the factors set forth by the United States Court of Appeals for the Ninth Circuit in *SEC v. Wencke*, 622 F.2d 1363 (9th Cir.1980)(“*Wencke I*”) and *SEC v. Wencke*, 742 F.2d 1230 (9th Cir.1984)(“*Wencke II*”)

(collectively “*Wencke*”), which has been subsequently adopted by many federal courts¹, appears to be the applicable standard. The *Wencke* test involves a three-pronged analysis:

(1) [w]hether 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.

Wencke II, 742 F.2d at 1231.

ARGUMENT

1. Maintenance of Status Quo Versus Injury to the Movant.

As noted above, the first *Wencke II* factor requires a court to consider “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.” 742 F.2d at 1231. This factor “essentially balances the interests in preserving the receivership estate with the interests” of the movant. *S.E.C. v. Stanford Int'l Bank Ltd.*, 424 F. App'x 338, 341 (5th Cir.2011); *Illarramendi*, 2012 WL 234016 (same); *Schwartzman v. Rogue Int'l Talent Grp., Inc.*, CIV.A. 12–5255, 2013 WL 460218 (E.D.Pa. Feb. 7, 2013) (first factor requires court “to balance the Receiver's interest in maintaining the status quo with any injury the moving party may suffer if the stay remains in place”); *U.S. v. ESIC Capital, Inc.*, 675 F.Supp. 1462, 1463 (D.Md.1987) (court must assess “the competing interests of the injury to the moving party versus preserving the status quo”).

¹ The *Wencke* test has been applied by numerous Courts to determine when a receivership stay should be lifted to allow a non-party to proceed with litigation against a party in receivership. See *S.E.C. v. Byers*, 592 F.Supp.2d 532, 536 (S.D.N.Y.2008) *aff'd*, 609 F.3d 87 (2d Cir.2010); *S.E.C. v. Illarramendi*, 3:11CV78 JBA, 2012 WL 5832330 (D.Conn. Nov. 16, 2012); *S.E.C. v. Byers*, 08 CIV. 7104 DC, 2012 WL 954254 (S.D.N.Y. Feb. 28, 2012); *S.E.C. v. Illarramendi*, 3:11CV78 JBA, 2012 WL 234016 (D.Conn. Jan. 25, 2012).

The moving non-parties contend that this factor weighs in their favor because maintaining the stay would cause them to suffer substantial harm while lifting the stay would not adversely affect the status quo. First, the non-moving parties note that the Receiver has previously allowed another non-party to proceed with litigation against Defendant St. Catharine College to the extent that such a claim would be covered by insurance. See Order granting motion to proceed with litigation by agreement [Doc. 72]. For the Receiver to allow litigation to proceed against Defendant St. Catharine College by agreed Order in this action is an admission by the Receiver that lifting the stay under such circumstances did not interfere with the *status quo* of the receivership estate to such a degree that it unduly interfered with the Receiver's duties and responsibilities in this action. The moving parties are seeking the same relief by virtue of this motion.

Next, the non-moving parties assert that the Receiver's filing of six reports with the Court updating its progress in securing the assets of Defendant St. Catharine College and identifying its potential creditors demonstrates that the Receiver has substantially completed its primary job of "marshaling and untangling" Defendant St. Catharine College's assets and identifying its potential creditors. See Sixth Report to Court by Receiver LS Associates LLC [Doc. 77-1]. This report establishes the following facts:

- The report identifies the only remaining inventoriable assets of St. Catharine College including all property, uncollected receivables and cash in Section III of the report. Accordingly, the Receiver has determine with a high degree of probability all of the assets of St. Catharine College as of the date of filing the sixth report on or about March 3, 2017;
- The report identifies in Section VI all secured lenders and unsecured creditors to St. Catharine College estimating total debts and claims against St. Catharine College to total \$29,764,854.00 with no indication that any other potential creditors with substantial claims against St. Catharine College exist. Accordingly, the Receiver has determine with a high degree of probability the vast majority of the debts and

liabilities of St. Catharine College as of the date of filing the sixth report on or about March 3, 2017; and

- The report also summarizes the liquidation of certain assets of St. Catharine College including the sale of real and personal property which was approved by this Court prior to liquidation. Thus, the liquidation process of the receivership estate is now in progress.

See Sixth Report to Court by Receiver LS Associates LLC [Doc. 77-1]. These facts support the conclusion that the Receiver has progressed sufficiently in the effort to organize and understand the entities under his control, as evidenced by regular status reports to the court, so that the Receiver would not be harmed by a lifting of the stay to allow the moving parties to proceed with their claims against Defendant St. Catharine College. *See SEC v. Private Equity Mgmt. Grp., LLC*, CV 09–2901 PSG EX, 2010 WL 4794701 (C.D.Cal. Nov. 18, 2010) (lifting of stay was warranted where receivership was well over one year old and receiver had progressed sufficiently in the effort to organize and understand the entities under his control, as evidenced by regular status reports to the court).

More importantly, the non-party movants will suffer irreparable harm if this Court prevents them from immediately proceeding with their claims against Defendant St. Catharine College and the non-party Defendants as set forth in the proposed Complaint attached hereto as “Exhibit 1.” Unlike the statutory provision that provides for a tolling of the statute of limitations on non-bankruptcy related claims impacted by the automatic stay in a Bankruptcy proceeding²,

² That statute, 11 U.S.C. Section 108(c), is a tolling provision; it extends state statute of limitations for potential creditors who are barred by the automatic stay from taking timely action against the debtor. It provides in pertinent part as follows:

If applicable non-bankruptcy law...fixes a period for commencing or continuing a civil action in a court other than a bankruptcy court on a claim against the debtor...and such period has not expired before the date of filing the petition, then such petition does not expire until the later of--

the equitable nature of the powers afforded to a Court during the pendency of a receivership created pursuant to Federal Rule of Civil Procedure 66 make it highly unlikely that this Court could fashion any remedy to toll the statute of limitation periods for the various claims that the moving parties seek to assert against Defendant St. Catharine College in the attached Proposed Complaint. Ultimately, such a delay would result in the loss of all or portions of the rights that the moving parties had pursuant to federal and state law against Defendant St. Catharine College. Moreover, any more delay in the institution of the action against Defendant St. Catharine College would make it more difficult to locate potential Class Members to inform those individuals of their legal rights against St. Catharine College. It would also create difficulties with locating and serving those individual Defendants named in the Proposed Complaint who previously served as officers and/or trustees for St. Catharine College.

The equities in favor of lifting the stay are further supported by the Sixth Circuit Court of Appeals' decision in *Geig v. The March Company*, 59 F.3d 170 (6th Cir. 1995) which observed that the United States Supreme Court has “distinguished between liquidating a claim, which does not interfere with the receivership court's authority, and distributing assets, which is the essence of the receivership court's authority.” *Geig*, 59 F.3d at 170 (citing *Riehle v. Margolies*, 279 U.S. 218, 224, 49 S.Ct. 310, 73 L.Ed. 669 (1929)). This distinction means that “ [t]he establishment of the existence and amount of a claim against the debtor in no way disturbs the possession of the liquidation court, in no way affects title to the property, and does not necessarily involve a

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- (1) the end of such period, including any suspension of such period occurring on or after the commencement of the of the case; or
 - (2) 30 days after such notice of the termination or expiration of the stay under section 362...of this title...with respect to such claim.

Id.

determination of what priority the claim should have.’ ” *Id.* (quoting *Morris v. Jones*, 329 U.S. 545, 549, 67 S.Ct. 451, 91 L.Ed. 488 (1947) and citing *Coit v. Independence Joint Venture v. F.S.L.C.*, 489 U.S. 561, 575, 109 S.Ct. 1361, 103 L.Ed.2d 602 (1989)).

For the foregoing reasons, the moving parties assert that they have met their burden of demonstrating substantial harm to their rights and to those rights of members of a Class of individuals who are similarly situated to them. This harm outweighs the Receiver's interest in maintaining the status quo. Therefore, the first *Wencke II* factor favors the non-party movants.

2. Timing.

The second *Wencke II* factor requires courts to analyze the time in a receivership in which a motion to lift a litigation stay is made. There is no “clear cut-off date after which a stay should be presumptively lifted.” *Acorn Tech. Fund, L.P.*, 429 F.3d at 450. The timing factor is fact-specific and “based on the number of entities, the complexity of the scheme, and any number of other factors.” *Stanford Int'l Bank Ltd.*, 424 F. App'x at 341; *see also S.E.C. v. Vescor Capital Corp.*, 599 F.3d 1189, 1197 (10th Cir .2010) (“the timing factor is case-specific”). The Ninth Circuit explained in *Wencke I* that,

[w]here 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. As the receivership progresses, however, it may become less plausible for the receiver to contend that he needs more time to explore the affairs of the entities. The merits of the moving party's claim may then loom larger in the balance.

Wencke I, 622 F.2d at 1373–74.

Once again, the facts of record in this case support the conclusion that the Receiver has progressed sufficiently in the effort to organize and understand the entities under his control, as evidenced by regular status reports to the Court, so that the Receiver would not be harmed by a

lifting of the stay to allow the moving parties to proceed with their claims against Defendant St. Catharine College³. Courts have concluded that this fact is significant when considering the equities of the second prong. *See SEC v. Private Equity Mgmt. Grp., LLC*, CV 09–2901 PSG EX, 2010 WL 4794701 (C.D.Cal. Nov. 18, 2010) (second factor cut against receiver where receivership was well over one year old and receiver had progressed sufficiently in the effort to organize and understand the entities under his control, as evidenced by regular status reports to the court).

While the Receiver has not liquidated all of the assets of Defendant St. Catharine College, it is a fair statement that that the Receiver has substantially completed its primary job of “marshaling and untangling” Defendant St. Catharine College’s assets and identifying its potential creditors. The moving parties, however, have demonstrated that harm will result from not being able to immediately pursue its claims against St. Catharine College, and the Receiver has progressed far enough in its duties that this Court should conclude that the timing factor weighs in favor of the non-party movants.

3. Merit of the Movants’ Underlying Claims.

Under the third prong of the *Wencke II* test, the party requesting a lift of stay is not required to show that it is likely to prevail on the merits. Rather, the inquiry is whether “the [moving] party has colorable claims to assert which justify lifting the receivership stay.” *United States v. Acorn Tech. Fund, L.P.*, 429 F.3d 438, 443 (3d Cir.2005) (citing *Wencke II*, 742 F.2d at 1232). The more meritorious a movant's underlying claim, the more heavily this factor will

³ As noted previously, the Receiver’s decision to allow non-party litigation to proceed against Defendant St. Catharine College by agreed Order entered by this Court on **February 8, 2017** is an admission by the Receiver that lifting the stay under such circumstances did not interfere with the *status quo* of the estate to such a degree **at that point in the receivership** that it unduly interfered with the Receiver’s duties and responsibilities in this action. *See* Order granting motion to proceed with litigation by agreement [Doc. 72].

weigh in the movant's favor. *See, e.g., Wencke I*, 622 F.2d at 1373 (“Where the claim is unlikely to succeed (and the receiver therefore likely to prevail), there may be less reason to require the receiver to defend the action now rather than defer its resolution”).

Here, as set forth in detail in paragraph 9 of the proposed Complaint, the moving parties seek to assert the following claims against Defendant St. Catharine College and others:

9. Plaintiffs assert on behalf of themselves and a Class of individuals similarly situated claims pursuant to Rule 23(a) and 23(b) of the Federal Rules of Civil Procedure against Defendant St. Catharine College for its violations of the provisions of the Worker Adjustment and Retraining Notification Act of 1988, 29 U.S.C. Sections 2101-2109 *et seq.*, KRS 337.055 (failure to pay wages upon dismissal), and KRS 337.385 (failure to pay wages). Moreover, the Plaintiffs assert on behalf of themselves and a class of individuals similarly situated claims pursuant to Rule 23(a) and 23(b) of the Federal Rules of Civil Procedure against the other named Defendants in this action in their official and individual capacities for their respective violations of KRS 273.229 (breach of statutory duties of St. Catharine College officers), KRS 273.215 (breach of statutory duties of St. Catharine College Board of Trustees members), and breach of common law fiduciary duties.

See, Exhibit 1 to Memorandum in Support, Proposed Complaint, paragraph 9. On its face, Defendant St. Catharine College undeniably terminated 100 or more employees as part of a plant shutdown or mass layoff at Defendant St. Catharine College’s facilities located at 2735 Bardstown Road, St. Catharine, Kentucky within a thirty-three day period ending July 31, 2016. There is also no proof that Defendant St. Catharine College gave proper notice to those employees as required by the WARN Act. Moreover, it is also not in dispute that the non-party movants to this motion, who were professors and employees of St. Catharine College that labored to make the college a successful educational institution, were not paid in full for the services they rendered to St. Catharine College prior to termination. Finally, the ultimate decision to close St. Catharine College’s facilities located at 2735 Bardstown Road, St. Catharine, Kentucky was due to avoidable financial problems that from a review of financial reports, audits and other information likely resulted from certain Defendants’, acting in their

official capacity as officers, directors and/or members of the Board of Trustees of Defendant St. Catharine College and in their individual capacities, willful, wanton, and/or reckless violations of KRS 273.229, KRS 273.215, and/or violations of common law fiduciary duties causing the named Plaintiffs and Class Members to suffer damages/injuries. See Exhibit 1, Proposed Complaint. The non-party movants clearly have met their final burden under the *Wencke II* test of establishing that they have “colorable” claims to assert against Defendant St. Catharine College which justify lifting the receivership stay.

CONCLUSION

For the reasons set forth herein, this Court should lift the receivership stay currently in place by virtue of an Order entered in this action so that the non-party movants may proceed with the filing/prosecution of the attached Complaint against Defendant, St. Catharine College, Inc., and other non-party Defendants.

Respectfully submitted,

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