IN THE UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

IN RE:	)	
	)	
	)	
ROBERT WILLIAM MATHEWS,	)	Case No. 07-10108-TMW
	)	Chapter 7
Debtor,	)	
	)	
OKLAHOMA DEPARTMENT OF SECURITIES,	)	
Ex Rel. IRVING L. FAUGHT,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	Adversary No. 07-01140
	)	
ROBERT WILLIAM MATHEWS,	)	
	)	
Defendant.	)	

And

IN RE:	)	
	)	
MARVIN LEE WILCOX and	)	
PAMELA JEAN WILCOX,	)	Case No. 07-10610-RLB
	)	Chapter 7
Debtors,	)	
	)	
OKLAHOMA DEPARTMENT OF SECURITIES,	)	
Ex Rel. IRVING L. FAUGHT,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	Adversary No. 07-01226
	)	
MARVIN LEE WILCOX,	)	
	)	
Defendant.	)	

PLAINTIFF'S RESPONSE TO APPELLANTS' MOTION FOR STAY OF ORDER

Appellee/Plaintiff, Oklahoma Department of Securities *ex rel.* Irving L. Faught (Appellee), requests that this Court deny the Motion for Stay of Order requested by Appellants/Defendants Robert Mathews, Marvin Wilcox and Pamela Wilcox (Appellants).

1. Appellee obtained state court judgments against Appellant Mathews on December 12, 2006, and Appellants Marvin and Pamela Wilcox (Wilcoxes) on January 31, 2007. Mathews did not appeal the judgment against him. Marvin and Pamela Wilcox appealed the state court judgment against them and that appeal is currently before the Oklahoma Supreme Court. The Oklahoma Supreme Court did not stay the Department's collection efforts against the Wilcoxes.

2. On December 12, 2008, this Court entered orders holding that the debts owed by the Appellants to the Department that resulted from a securities fraud were non-dischargeable pursuant to 11 U.S.C. §523(a)(19).

3. On December 22, 2008, Appellants appealed those orders.

4. Now, Appellants seek a stay of those orders until the appeal is heard.

Arguments and Authorities

Appellants seek an extraordinary remedy and they have the burden of proving by a preponderance of the evidence that any stay should be granted. *Rossi, McCreery and Assoc, v. Abbo* (*In re Abbo),* 191 B.R. 680 (Bankr. N.D. Ohio 1996); *Henkel v. Lickman* (*In re Lickman)*, 301 B.R. 739 (Bankr. M.D. FL 2003). In determining whether to grant a stay pending appeal, courts balance four factors:

> 1) the likelihood that the party seeking the stay will prevail on the merits of the appeal; 2) the likelihood that the moving party will suffer irreparable injury unless the stay is granted; 3) whether granting the stay

> will result in substantial harm to the other parties to the appeal; and (4) the effect of granting the stay upon the public interest.

Lang v. Lang, 414 F.3d 1191,1201 (10th Cir. 2005). Failing to satisfy any one of these factors dooms Appellants' motion for a stay. *In re Bilzerian*, 264 B.R. 726 (Bankr.M.D.FL 2001). Appellants have not met their burden of persuasion as to any one of the four factors.

Appellants Have Failed To Show A Likelihood Of Success On Appeal

Appellants cite to *Ruiz v. Estelle*, 650 F.2d 555 (5th Cir. 1981), for the proposition that they do not actually have to prove a "likelihood" of success on appeal, but that they can satisfy their burden as to this factor by showing something less. In Appellants' words, they must show "merely a colorable possibility of success." The *Ruiz* court does allow for a lesser burden in proving this factor under certain facts, but even so the court requires that the movant present a "substantial case on the merits." *Id.* at 565. What Appellants fail to advise the Court is that the emphasis on this factor is only relaxed when the other three factors – the harm factors - already weigh strongly in favor of the party requesting the stay. *Ruiz* at 856-857. See also *In re First South Savings Association*, 820 F.2d 700, 709 fn10 (5th Cir. 1987); and *Ruiz v. Estelle*, 666 F.2d 854 (5th Cir. 1982) (Ruiz II) (reaffirming that the "likelihood of success" factor is still a prerequisite in most cases and this factor's weight will only be lessened where the other factors are heavily tilted to the movant).

Appellants also suggest that their chance of success on appeal must only be "better than negligible." The court in *Matter of Forty-Eight Insulations, Incorporated*, 115 F.3d 1294, 1301 (7th Cir. 1997), held that a person seeking a preliminary injunction need only demonstrate a "better than negligible" chance of success. However, the court

went on to state expressly that "in the context of a stay pending appeal, where the applicant's arguments have already been evaluated on the success scale, the applicant must make a stronger threshold showing of likelihood of success to meet his burden." *Id.*

As will be described more fully below, Appellants have failed to prove that the other three factors weigh at all in their favor, let alone that they are "heavily tilted" in their favor. In order to justify a stay of the orders, Appellants therefore must persuade this Court by a preponderance of the evidence that they have a likelihood of success on appeal.

Appellants have not established that there is a likelihood of success on appeal. Appellants merely restate the arguments they made before this Court, but provide no explanation for why the court on appeal would rule differently.

Appellants Have Failed To Show They Will Be Irreparably Harmed

Appellants complain that they will be irreparably harmed by having to bear the cost and burden of the Appellee's efforts to collect on the state judgments. Monetary injury, no matter how substantial, is not irreparable such that it necessitates an order of stay. *In re Abbo* at 684; *In re Lickman* at 748. Specifically, collection activity during an appeal does not constitute irreparable harm. *In re Abbo* at 684; *In re Lickman* at 748; *LaRocco v. Smithers* 2005 WL 4030095 (Bankr.S.D.Ohio 2005). Appellants have presented no other argument as to this factor, therefore failing utterly to demonstrate that they will suffer irreparable harm.

Appellee Will Suffer Substantial Harm By Further Delay In Enforcing Judgments

The Appellee has held its state court judgments against Appellant Mathews since December 2006 and against Appellants Marvin and Pamela Wilcox since January 2007.

The judgments sought from Appellants represent money by which they were unjustly enriched in a Ponzi Scheme conducted by Marsha Schubert. In connection with Appellants' unjust enrichment, other participants in the Schubert Ponzi Scheme lost money (Short Investors). Some of the Short Investors lost significant amounts of money, and in some cases, their life savings and retirement funds. These Short Investors have been waiting since October of 2004 to recover funds lost to them – funds that Appellants have benefitted from all of these years.

Appellants claimed in their Motion that they had no non-exempt assets with which to satisfy the judgments thus they say there would be no harm to Appellee in delaying Appellee's collection efforts a little longer. Appellee recently conducted asset hearings with Appellants and believes that they have or will shortly have assets upon which the judgments could be satisfied. For instance, the fathers of both Appellant Mathews and Appellant Marvin Wilcox recently died and both Appellants are the beneficiaries of significant trust assets[1]. Once the trust assets are distributed, Appellants are likely to consume these assets or convert them to exempt assets. Impeding the Appellee's collection efforts at this stage may very well cost Appellee the only assets it can ever hope to collect from Appellants.

Public Interest Would Be Harmed By A Stay

Appellants state that there would be no effect on the public interest in granting a stay. Appellee, however, is a state agency that sought the judgments against Appellants in the public interest pursuant to its statutory mandate under the Oklahoma securities

[1] Interestingly, both of the trusts of which Appellants will benefit are claimants in the receivership that was authorized by the Logan County Court to gather the assets of the Schubert Ponzi Scheme for the benefit of the Short Investors. Both trusts have received significant distributions from the receivership and will receive the benefit of Appellee's collection efforts against Appellants.

laws. The moneys by which Appellants were unjustly enriched were the fruits of a securities fraud and rightfully belong to other people who have been substantially injured. Appellants combined received more than One Million Dollars ($1,000,000) at the expense of the Short Investors. Because of the anticipated distributions from the trusts formed by Appellants' fathers, there is now some chance of recovery for the benefit of the Short Investors. That chance of recovery may be greatly diminished if Appellants are given the opportunity to consume or convert those assets.

Conclusion

Appellants have not met their burden of persuasion to support the issuance of a stay. Their failure to show any irreparable harm to themselves is fatal to their motion. The harm to Appellee and to the public interest clearly outweighs the monetary harm that may come to Appellants. The Appellee requests the Court to deny any stay of the Appellee's collection efforts. Should the orders be stayed, Appellees request that Appellants be required to post a bond in an amount sufficient to cover the judgments plus interest and costs. Such a bond would be necessary to protect Appellee's rights especially here where the Appellee's ultimate recovery is likely to be greatly diminished if the stay is issued.

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CERTIFICATE OF SERVICE

I hereby certify that on this 13th day of February, 2009, I electronically transmitted the attached document to the Clerk of Court using the ECF System for filing. Based on the records currently on file, the Clerk of Court will transmit a Notice of Electronic Filing to the following ECF registrants:

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