

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

SECURITIES AND EXCHANGE
COMMISSION,

Plaintiff,

Case No. 8:20-cv-00325-MSS-MRM

v.

BRIAN DAVISON, et al.,

Defendants.

_____ /

NON-PARTY ROBERT JOSEPH ARMIJO'S
OPPOSITION TO THE JOINT MOTION OF THE RECEIVER AND
INVESTOR PLAINTIFFS [DOC. NO. 760]

Non-party Robert Joseph Armijo ("Armijo") respectfully seeks to make a limited appearance in this Action to oppose the Joint Motion of Receiver and Investor Plaintiffs for (I) Preliminary and Final Approval of Proposed Settlements; (II) Approval of Form, Content and Manner of Notice of Settlements and Bar Orders; (III) Entry of Bar Orders; and (IV) Scheduling a Hearing (the "Joint Motion"). (Doc. No. 760.) In particular, Armijo opposes the joint request of the Receiver and Investor Plaintiffs ("Movants") for an order staying Armijo's lawsuit against Paul R. Wassgren ("Wassgren"), DLA Piper LLP (US) ("DLA"), and Fox Rothschild LLP ("Fox") (collectively, the "Lawyer Defendants"), which is

currently pending in the United States District Court for the Central District of California, Case No. 2:22-cv-08851 (*Armijo v. Wassgren*).

The requested stay order must be denied, because this Court does not have authority to stay or otherwise enjoin the claims Armijo has asserted against the Lawyer Defendants. Armijo's claims against the Lawyer Defendants are based on the misrepresentations and negligent legal advice the Lawyer Defendants provided to Armijo to induce him to sell investments on behalf of EquiAlt, LLC ("EquiAlt"), and on the millions in damages Armijo has suffered as a result. These claims are separate and distinct from any claims the Receiver has asserted against the Lawyer Defendants, on behalf of the Receivership Entities¹, or that the Investor Plaintiffs have asserted against the Lawyer Defendants. Further, Armijo's claims against the Lawyer Defendants are not claims against the Receiver, the Receivership Entities, or the Receivership assets. Accordingly, this Court lacks authority to stay or enjoin Armijo's claims. The caselaw that Movants cite in purported support of their request for a stay of *Armijo v. Wassgren* does not, in fact, support Movants, as explained below.

With this opposition, Armijo only addresses Movants' request for a stay of *Armijo v. Wassgren*. Armijo understands that the Court will consider, at a later

¹ See Doc. No. 760-1, listing the "Receivership Entities."

time, the issues of a) whether to finally approve the Settlements² and b) whether to enter a bar order. Armijo further understands that he will receive formal notice and an opportunity to object to the Settlements and any proposed bar order. Armijo intends to file an objection to final approval and to any proposed bar order in accordance with the schedule and procedure the Court establishes.

But the fundamental inequity of the requested bar order is obvious. Armijo has asserted pending tort claims against the Lawyer Defendants to recover millions in damages that the Lawyer Defendants' misrepresentations and negligent legal advice caused him. The Lawyer Defendants have apparently negotiated a settlement with Movants that would involve the Lawyer Defendants paying \$44 million to settle Movants' claims – but only if Armijo is barred from having his day in court. The Lawyer Defendants cannot escape their liability to Armijo merely by settling other claims asserted by other persons they have allegedly harmed. There is no legal or equitable justification to bar, stay, or otherwise prevent Armijo from proceeding on his claims against the Lawyer Defendants.

² The term "Settlements" as used herein has the same meaning as in the Joint Motion. (Doc. No. 760 at p. 1.)

For these reasons and additional reasons set forth below, Armijo respectfully requests that the Court deny Movants' request for a stay of *Armijo v. Wassgren*.

I. BACKGROUND

A. Summary of Armijo's Claims Against the Lawyer Defendants

At all times relevant to *Armijo v. Wassgren et al.*, Armijo was a California-licensed investment advisor representative. (Armijo Compl., Doc. No. 760-7, ¶ 12.) Armijo was recruited by EquiAlt, with the assistance of the Lawyer Defendants (EquiAlt's lawyers), to sell investments (the "EquiAlt Securities") in EquiAlt's various real estate investment funds. (*Id.*, ¶¶ 25, 27.) The Lawyer Defendants represented to Armijo that EquiAlt was compliant with applicable laws, that the investment opportunities EquiAlt was offering to investors were sound, that Armijo could lawfully sell the EquiAlt Securities to investors, and that the compensation Armijo received was lawful. (*Id.*, ¶¶ 6, 7, 54, 56, 62 - 85.) The Lawyer Defendants never informed Armijo of the potential risks he may face in relation to the sales of EquiAlt Securities. (*Id.*, ¶ 80.)

After the Securities and Exchange Commission (the "SEC") filed this Action against EquiAlt, separate lawsuits were filed against Armijo by the SEC, the

Receiver, and EquiAlt investors, relating to the sale of the EquiAlt Securities.³ The Lawyer Defendants' negligence and misrepresentations (including omissions) to Armijo were substantial factors in causing: (a) investors to bring individual and class actions against Armijo; (b) an investigation and pending litigation by the SEC against Armijo, including a request for civil penalties and disgorgement; (c) the Receiver to pursue claims against Armijo; (d) the destruction of Armijo's reputation among his clients in the insurance and financial advising industry; (e) Armijo incurring significant attorneys' fees and time to respond to the foregoing matters; (f) Armijo being forced to leave the financial advising industry; (g) Armijo losing investment opportunities due to financial institutions closing Armijo's investment accounts and various financial institutions refusing to do business with Armijo; and (h) Armijo suffering serious emotional distress and physical harm, including heart problems and depression. (*Id.*, ¶ 85.)

B. Status of *Armijo v. Wassgren*

Armijo filed his pending complaint against the Lawyer Defendants in Los Angeles County Superior Court on October 6, 2022. (Armijo Compl., Doc. No. 760-7.) Armijo asserts California state-law claims against the Lawyer Defendants for 1) professional negligence / gross negligence; 2) negligent misrepresentation; 3)

³ See *SEC v. Armijo, et al.*, S.D. Cal. Case No. 3:21-cv-01107; *Wiand v. Family Estate Planning, LLC et al.*, M.D. Fla. 8:21-cv-00361; *O'Neil v. Armijo, et al.*, M.D. Fla. Case No. 8:22-cv-00939.

aiding and abetting fraud; 4) equitable indemnity; 5) tort of another; and 6) violation of unfair competition law. (*Id.*) The Lawyer Defendants removed the action to the Central District of California on December 7, 2022, assertedly on the basis of federal-question jurisdiction, even though Armijo only asserts California state-law claims. (*See Armijo v. Wassgren, et al.*, C.D. Cal. Case No. 2:22-cv-08851, Doc. No. 6.) Armijo filed a motion for remand, which is set for hearing on March 3, 2023. (*Armijo v. Wassgren, et al.*, C.D. Cal. Case No. 2:22-cv-08851, Doc. Nos. 43, 51.) The Lawyer Defendants have filed a motion to transfer venue to the Middle District of Florida, as well as motions to dismiss. Armijo opposes those motions.

C. The Joint Motion

In the Joint Motion, Movants state that they have reached a settlement with the Lawyer Defendants, pursuant to which the Lawyer Defendants will pay \$44 million to settle the Receiver's and the Investor Plaintiffs' claims against the Lawyer Defendants, but only if this Court agrees to enter "a bar order protecting the Lawyer Defendants from the commencement or continuation of any actions against them brought by non-governmental plaintiffs relating to EquiAlt." (Doc. No. 760, p. 10.) Essentially, the Lawyer Defendants will pay money to some persons they harmed, if this Court allows them to escape liability to another person they harmed.

Movants ask the Court to enter a Preliminary Approval Order that would “(1) preliminarily approve the Settlements; (2) establish final approval procedures – including procedures for providing notice to parties affected by the Settlements, along with an opportunity to object and participate in the final approval hearing; and (3) stay certain actions against the Lawyer Defendants to preserve the *status quo* and reduce the unnecessary dissipation of the Receivership assets pending completion of the final approval process.” (Doc. No. 760, p. 5.)

As stated above, Armijo files *this* opposition to oppose Movants’ request for an order that would stay *Armijo v. Wassgren*. Armijo’s understanding is that, even if the Court were to grant preliminary approval of the Settlements, Armijo will still be provided formal notice and an opportunity to object to final approval of the Settlements, including any proposed bar orders. Armijo will file his opposition to final approval of the Settlement and any proposed bar orders in accordance with the schedule and procedure established by the Court. By filing this current opposition to Movants’ request for an order staying *Armijo v. Wassgren*, Armijo does **not** waive his right to object to final approval of the Settlements and/or any proposed bar order(s).

II. There is No Basis, in Law or Equity, for this Court to Stay or Otherwise Enjoin Armijo’s Pending Lawsuit Against the Lawyer Defendants

A. Receivership Courts Cannot Stay Claims That Are Not Brought Against the Receiver, Receivership Entities, or Receivership Assets

There is no basis, in law or equity, for this Court to enter an order that would stay *Armijo v. Wassgren* or otherwise enjoin Armijo from pursuing his claims against the Lawyer Defendants. A receivership court has authority to stay claims asserted against receivership assets, against the receiver, or against receivership entities. See *Liberte Capital Group, LLC v. Capwill*, 462 F.3d 543, 551 (6th Cir. 2006) (“Once assets are placed in receivership, a district court’s equitable purpose demands that the court be able to exercise control over claims brought against those assets. The receivership court has a valid interest in both the value of the claims themselves and the costs of defending any suit as a drain on receivership assets. [Citation.] To this extent, the receivership court may issue a blanket injunction, staying litigation against the named receiver and the entities under his control unless leave of that court is first obtained.”) But receivership courts do not have authority to stay claims that are not brought against the receiver, the receivership entities, or receivership property.

Movants cite two out-of-circuit cases – *SEC v. Wencke*, 622 F.2d 1363 (9th Cir. 1980) (“*Wencke*”) and *SEC v. Vescor Capital Corp.*, 599 F.3d 1189 (10th Cir. 2010) (“*Vescor*”) – that simply do not support Movants’ position. As discussed below, in *Wencke*, the receivership court stayed an action brought *against receivership entities*. And in *Vescor*, the receivership court stayed an action brought *against*

receivership property. Armijo does not assert claims against the Receivership Entities or against receivership property.

1. *Wencke*

In *Wencke*, the issue before the Ninth Circuit was whether a receiver appointed in a securities fraud action could “issue a stay, effective against nonparties and without prior notice to them, prohibiting ‘all investors, creditors, and other persons’ from ‘(c)ommencing, prosecuting, continuing or enforcing any suit’ *against the receivership entities*, except by leave of court.” *Wencke*, 622 F.2d at 1366 (emphasis added). The Ninth Circuit concluded that the receivership court did have authority to stay actions brought by nonparties against the receivership entities. *Id.* at 1369-1372. *Wencke* does not provide any support to Movants here, because the Lawyer Defendants are not Receivership Entities. (See Doc. No. 760-1, pp. 12-13.)

2. *Vescor*

Nor does *Vescor* provide support to Movants. In *Vescor*, the SEC filed a civil action against an individual (“Southwick”) and the various entities he controlled (collectively, “Vescor”), alleging that “Southwick operated a massive Ponzi scheme that defrauded several hundred investors of approximately \$180 million.” *Vescor*, 599 F.3d at 1191. The district court appointed a receiver to “manage and control all Vescor-related assets as well as any other entity directly or indirectly

controlled by Mr. Southwick.” *Id.* In addition, the district court granted a stay of all actions related to property in the receivership estate. *Id.*

The property in the receivership estate included real property in Nevada (the “Nevada Properties”). *Id.* at 1192 (noting the “inclusion of the Nevada Properties in the receivership”). A subset of investors in Vescor, the “Covenant Group,” moved the district court to lift the stay so that they could pursue nonjudicial foreclosure actions against the Nevada Properties. *Id.* The district court denied the request, and the Tenth Circuit affirmed. *Id.*

Unlike in *Vescor*, Armijo does not assert any claims in *Armijo v. Wassgren* to foreclose on property that belongs to, or that even is asserted to belong to, the receivership estate. *Vescor* simply does not authorize what Movants requests here: an order that would enjoin a non-party (Armijo) from pursuing claims that 1) do not concern receivership property and 2) are not asserted against Receivership Entities.

B. The Claims Armijo Asserts Against the Lawyer Defendants in *Armijo v. Wassgren* are Separate and Distinct from the Claims the Receiver and the Investor Plaintiffs Assert Against the Lawyer Defendants

In the Joint Motion, Movants vaguely assert that “the claims asserted by Armijo are interrelated to those asserted against the Lawyer Defendants by the Investor Plaintiffs and the Receiver.” (Doc. No. 760, at p. 20.) But the Receiver and the Investor Plaintiffs have not asserted, and cannot assert, the claims that Armijo

has asserted against the Lawyer Defendants in *Armijo v. Wassgren*. Armijo's claims against the Lawyer Defendants arise out of misrepresentations and negligent legal advice the Lawyer Defendants provided to Armijo in order to induce Armijo to sell the EquiAlt Securities. These claims belong to Armijo alone.

The Receiver has not asserted, and cannot assert, claims on behalf of Armijo against the Lawyer Defendants. Rather, the Receiver asserts claims against the Lawyer Defendants *only on behalf of the Receivership Entities*. The Eleventh Circuit is clear on this point:

It is axiomatic that a receiver obtains only the rights of action and remedies that were possessed by the person or corporation in receivership. [Citation.]. Although a receivership is typically created to protect the rights of creditors, the receiver is not the class representative for the creditors and cannot pursue claims owned directly by the creditors. [Citation.] Rather, he is limited to bringing only those actions previously owned by the party in receivership.

Isaiah v. JPMorgan Chase Bank, 960 F.3d 1296, 1306 (11th Cir. 2020); *see also Scholes v. Lehmann*, 56 F.3d 750, 753 (7th Cir. 1995) (“an equity receiver may sue only to redress injuries to the entity in receivership”).

Nor is there any overlap between the Investor Plaintiffs' claims against the Lawyer Defendants and Armijo's claims against the Lawyer Defendants. Armijo's claims against the Lawyer Defendants in *Armijo v. Wassgren* are based on misrepresentations and negligent legal advice the Lawyer Defendants made to

induce Armijo to sell the EquiAlt Securities. The Investor Plaintiffs have not asserted, and cannot assert, these claims on behalf of Armijo.

C. The Requested Stay Will Not Preserve the Status Quo, Nor Is It Needed to Prevent Dissipation of Receivership Assets

In the Joint Motion, Movants contend that a stay of *Armijo v. Wassgren* is necessary “to preserve the *status quo* and reduce the unnecessary dissipation of Receivership assets pending completion of the final approval process.” (Doc. No. 760, at p. 5.) Movants are mistaken. First, even if the requested stay would have this effect (and it wouldn’t), this Court lacks authority to stay *Armijo v. Wassgren*, for the reasons set forth above. Second, Movants fail to explain how staying *Armijo v. Wassgren* would “preserve the *status quo*.” The status quo is that Armijo has a pending lawsuit against the Lawyer Defendants that he is entitled to litigate. Staying *Armijo v. Wassgren* would therefore *disrupt* the status quo, not preserve it. Third, Movants fail to explain how Armijo’s pursuit of his claims against the Lawyer Defendants will dissipate Receivership assets. Again, the torts that the Lawyer Defendants committed against Armijo, and the harm caused him, are separate and distinct from the torts committed against or harm suffered by the Investor Plaintiffs or the Receivership Entities.

Finally, the Receiver and Investor Plaintiffs’ argument that the Court should preclude Armijo from pursuing his claims against the Lawyer Defendants in order to prevent “dissipation of Receivership assets” (Doc. No. 760, at p. 5) is directly

contrary to the position the Investor Plaintiffs took earlier in this Action, when they argued that this Court should permit them to proceed on *their* claims against the Lawyer Defendants. (Investor Plaintiffs’ Notice of Special Appearance and Motion for Confirmation of Unimpeded Right to Prosecute Investor Claims, Doc. No. 145.) In that earlier motion, the Investor Plaintiffs asserted that the “Investor Plaintiffs’ claims against the Lawyer Defendants, who have no financial entanglement with the [Receivership Entities], will have no effect on the property or assets of the Receivership and thus are not barred by either the TRO or the Receivership Order.” (*Id.*, p. 11.) The Investor Plaintiffs argued, persuasively, that their claims against the Lawyer Defendants are “independent [and] non-derivative” of the Receiver’s claims against the Lawyer Defendants (*id.*, p. 5) and do not affect assets of the Receivership (*id.*, pp. 8-11).⁴ The Investor Plaintiffs emphasized that the Lawyer Defendants “do not have a limited fund from which damages can be recovered,” as the “Lawyer Defendants are well-established law firms with significant resources,” and that, “should the Receiver ultimately decide to pursue separate claims against the Lawyer Defendants on behalf of the Receivership entities, there undoubtedly will be ample resources from which to

⁴ See *Zacarias v. Stanford Int’l Bank, Ltd.*, 945 F.3d 883, 897 (5th Cir. 2019) (“the receivership court cannot reach claims that are independent and non-derivative and that do not involve assets claimed by the receivership”).

compensate the Receivership estate.” (*Id.*, p. 10.) In short, the Investor Plaintiffs’ earlier arguments as to why *they* should be permitted to pursue their claims against the Lawyer Defendants rebut any arguments they and the Receiver now make in asking this Court to preclude Armijo from pursuing *his* claims against the Lawyer Defendants.

III. CONCLUSION

For the reasons set forth above, Armijo respectfully requests that this Court deny the Movants’ request for entry of an order that would stay *Armijo v. Wassgren* or otherwise interfere with Armijo’s right to pursue his claims against the Lawyer Defendants. If the Court is at all inclined to grant the stay order, then Armijo respectfully requests that the Court schedule a hearing on the issue and that Armijo be afforded leave to appear.

Dated: January 19, 2023

Respectfully submitted,

/s/ C. David Durkee

C. David Durkee (FL Bar No. 998435)

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CERTIFICATE OF SERVICE

I hereby certify that, on January 19, 2023, I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system.

/s/C. David Durkee
C. David Durkee