IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 4:12-cv-00080-CEJ

SECURITIES AND EXCHANGE COMMISSION	)
	)
Plaintiff	)
	)
vs.	)
	)
BURTON DOUGLAS MORRISS, et al.	)
	)
Defendants, and	)
	)
MORRISS HOLDINGS, LLC	)
	)
Relief Defendant	)

CORRECTED MOTION OF RELIEF DEFENDANT MORRIS HOLDINGS FOR A NEW TRIAL OR TO ALTER, OR AMEND JUDGMENT AND MEMORANDUM OF LAW IN SUPPORT

I. Motion

Relief defendant Morriss Holdings LLC moves the Court pursuant to Fed. R. Civ. P. 59(a) and (e) to enter its order setting aside the judgment entered in this case on March 22, 2012, and granting a new trial, or altering and amending that judgment. The following is stated in support of this motion:

This is an action commenced by the Securities and Exchange Commission against several defendants including Acartha Group LLC, MIC VII LLC, Acartha Technology Partners LP, and Gryphon Investments III LLC. Each of those four entity defendants had filed a petition for protection under federal bankruptcy law prior to the commencement of this action, and those bankruptcy proceedings were

pending when this case was initiated. The automatic stay provision of 11 U.S.C. § 362(a) applied to the government's suit, the exception to the stay provided by § 362(b)(4) did not, and the SEC's commencement of this action thus was void *ab initio*. *In re Vierkant,* 240 B.R. 317, 321-25 (B.A.P. 8th Cir. 1999). The Court should reconsider its decision to grant the precise judgment sought by the SEC in a complaint that was not cognizable as a matter of law.

A primary purpose of the SEC in commencing and prosecuting this action was to obtain the money and other assets of the entity defendants for the payment of civil penalties, costs of litigation including the substantial cost of receivership and liquidation, and the purported redistribution of funds to private investors in the entity defendants. Because this was an action to obtain money from entities that had invoked the jurisdiction and protection of a federal bankruptcy court, the automatic stay provision of 11 U.S.C. § 362(a) was applicable and operated to preclude the seeking or recovery assets in the estates of the entity defendants. The action of the SEC in seeking that relief and prosecuting this action, and of the Court in granting the precise relief demanded by the Commission, thus have been void from the inception of this case. *Vierkant,* 240 B.R. at 321-25.

The exception to the automatic stay provided in 11 U.S.C. § 362(b)(4) was not applicable to this case, despite the fact that it purports to be the action of a governmental unit enforcing its police or regulatory power, because (a) this always was an action to recover a money judgment, which is excluded from the automatic stay exception of § 362(b)(4), and (b) the government's action was not a necessary

governmental function to protect the public health and safety, but rather it was a proprietary government action aimed at the protection of pecuniary interests.

For these reasons, the movant requests that the Court set aside its judgment of March 22, 2012, or alter and amend that judgment, and enter in its stead either (a) a judgment finding that the government's action was barred by the automatic stay provision of § 362(a) to the extent that it sought to obtain money or other assets of defendants Acartha Group LLC, MIC VII LLC, Acartha Technology Partners LP, and Gryphon Investments III LLC, or (b) such alternative judgment or relief as the Court may find just.

II. Memorandum In Support of Motion

The commencement of bankruptcy proceedings by defendants Acartha Group LLC, MIC VII LLC, Acartha Technology Partners LP, and Gryphon Investments III LLC invoked the automatic stay provision of 11 U.S.C. § 362. That statute provides that the filing of a petition pursuant to 11 U.S.C. § 301, 302, or 303 "operates as a stay, applicable to all entities, of . . . [any] action or proceeding against the debtor . . . to recover a claim against the debtor." 11 U.S.C. § 362(a)(1). The statute also stays "any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate." 11 U.S.C. §362(a)(3). Congress has made clear the importance of the automatic stay, identifying it as a "fundamental" protection provided by the bankruptcy laws. H.R. Rep. 95-595, at § 362 (Sept. 8, 1977). And the Eighth

Circuit's Bankruptcy Appellate Panel has recognized that an action taken in violation of the automatic stay is void *ab initio*. *Vierkant,* 240 B.R. at 321-25.[1]

The relief requested by the Securities and Exchange Commission in this action has included the appointment of a receiver, whom the SEC anticipated would dismiss the bankruptcy petitions filed by the entity defendants, the acquisition of and control over the assets of those defendants, and the imposition of fines. Doc. 1, p. 20. The SEC has characterized the relief requested in its complaint and subsequent motions as "equitable" and the action itself as an enforcement proceeding excepted from the automatic stay by virtue of § 362(b)(4). Doc. 3, pp. 9-10.

The Court previously made *ex parte* findings at the request of the SEC that "the automatic stay provisions of 11 U.S.C. § 362(a) do not apply to this matter and the asset freeze requested by the Commission." Doc. 17, p. 3. The Court has appointed the receiver requested by the SEC and authorized the receiver to make any filing she deemed appropriate in the pending bankruptcy proceedings on behalf of the entity defendants. Doc. 16, p. 6. The injunctive judgment entered by the Court on March 22, 2012, provisionally awards the SEC possession and control of the assets of the entities and promises the imposition of civil penalties requested by the SEC. Doc. 101, pp. 4-5.

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[1] The judgment of March 22, 2012, thus exceeded this Court's jurisdiction. *See Constitution Bank v. Tubbs,* 68 F.3d 685, 691 (3rd Cir. 1995) (stating that "[o]nce triggered by a debtor's bankruptcy petition, the automatic stay suspends any non-bankruptcy court's authority to continue judicial proceedings then pending against the debtor") (quoted in *Vierkant,* 240 B.R. at 320).

The relief granted in the Court's judgment of March 22, 2012, violates the automatic stay provisions of § 362(a). The Court should set aside or modify its judgment for that reason.[2] Section 362(b)(4) excepts from the automatic stay actions by a government agency "to enforce . . . [its] police and regulatory power." But that provision excludes from the exception—and thus leaves the automatic stay applicable to—the enforcement of a "money judgment" obtained by the agency "in an action . . . to enforce [its] police or regulatory power." *See City of New York v. Exxon Corp.,* 932 F.2d 1020, 1024 (2nd Cir. 1991) (recognizing that "collection of a money judgment obtained in . . . a regulatory proceeding would be barred by the stay").

From its inception this was an action to obtain a judgment taking money from the entity defendants, each of which had sought relief in bankruptcy, and giving the SEC possession and control of those assets. The judgment now granted in favor of the SEC is an end run around the automatic stay and should not be allowed to stand. The § 362(b)(4) exception to the automatic stay, properly construed, cannot abide what the government has accomplished.

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[2] Morriss Holdings' interest in this issue is clear. The judgment of March 22 precludes any of the named defendants from arguing in disgorgement proceedings that their actions—including their payments to Morriss Holdings—were lawful and did not violate federal securities laws. By enjoining these defendants, the Court substantially limits the availability of evidence relevant to the only question that has a direct bearing on Morriss Holdings' interest in this case—the question as to whether Morriss Holdings received funds as a result of these defendants' unlawful conduct and is, therefore, required to disgorge those funds, from its own assets, in these proceedings.

"The automatic stay is a crucial provision of bankruptcy law." *In re Parr Meadows Racing Association, Inc.,* 880 F.2d 1540, 1545 (2nd Cir. 1989). "Congress clearly intended the automatic stay to be quite broad. Exemptions to the stay, on the other hand, should be read narrowly to secure the broad grant of relief to the debtor." *In re Stringer,* 847 F.2d 549, 551-52 (9th Cir. 1988); *see also In re Grede Foundries, Inc.,* 651 F.3d 786, 790 (7th Cir. 2011) (quoting *Stringer); Matter of Edwards Mobile Home Sales, Inc.,* 119 B.R. 857, 860 (M.D. Fla. 1990) (holding that the § 362(b)(4) exception to the automatic stay "is . . . to be construed narrowly"); H.R.Rep. No. 95-595, *supra.* Courts should "examine the substance of an action, and not its form," to determine whether it is stayed under § 362(a) or excepted from the stay by § 362(b)(4). In re Goodwin, 163 B.R. 825, 827 (D. Idaho 1993). The SEC's complaint and its subsequent motions have made it clear from the beginning that the substance of this action was to obtain money from companies that had invoked the protections of federal bankruptcy law.

The government has cited *City of New York v. Exxon Corp., supra,* for the proposition that § 362(b)(4) does except government actions premised on allegations of fraud from the automatic stay provision. Doc. 3, p. 9. In that case the City of New York sought to recover costs incurred in an environmental cleanup attributable to a debtor that had sought bankruptcy protection. 932 F.2d at 1022. The Second Circuit relied on the following excerpt from the legislative history of § 362(b) in concluding that the action was excepted from the automatic stay:

> Paragraph (4) excepts commencement or continuation of actions and proceedings by governmental unites to enforce police or regulatory powers. Thus, where a government unit is suing a debtor to prevent or stop violation of fraud, *environmental protection,* consumer protection, safety, or similar police or regulatory laws, or *attempting to fix damages for violation of such a law,* the action or proceeding is not stayed under the automatic stay.

Id. at 1024 (quoting S.Rep. No. 989, 95th Cong.2d Sess. at 52 (1978) (emphasis added by court).

The Second Circuit concluded that allowing the city's action to recover cleanup costs furthered the purpose of the § 362(b)(4) exception by preventing the "'frustration [of] necessary governmental function'" through the commencement of bankruptcy proceedings. *Id.* (quoting *United States v. Seitles,* 106 B.R. 36, 38-40 (S.D.N.Y. 1989)). It explained:

> The availability of a reimbursement action encourages a quick response to environment crises by a government, secure in the knowledge that reimbursement will follow. Such a quick response is a direct exercise of a government's police power to protect the health and safety of its citizens.

932 F.2d at 1024. The appropriation of several debtors' assets and the imposition of civil penalties—supported by the wholesale admission of wrongdoing made on behalf of the debtor by a receiver hand-picked by the government agency seeking to obtain those assets and collect those penalties—does not speak of such a "necessary government function" required "to protect the health and safety of its citizens."

In *Seitles,* the opinion quoted by the Second Circuit to explain ts application of the § 362(b)(4) automatic stay exception in a "crisis" environmental cleanup case, the bankruptcy court framed the issue as follows:

> The question . . . is whether the present governmental action . . . is a "necessary governmental function" geared towards the "protect[ion] of the public health and safety," or instead, whether this claim is a proprietary governmental function aimed at the protection of pecuniary interests.

106 B.R. at 38. That is indeed the question, and in the present case it could hardly be more clear that the governmental action has everything to do with "the protection of pecuniary interests" and naught with the "protection of the public health and safety."

III. Conclusion

Relief defendant Morriss Holdings LLC requests that the Court vacate its judgment of March 22, 2012, or alter and amend that judgment, and enter either (a) a judgment finding that the government's action was barred by the automatic stay provision of § 362(a) to the extent that it sought to obtain money or other assets of defendants Acartha Group LLC, MIC VII LLC, Acartha Technology Partners LP, and Gryphon Investments III LLC, or (b) such alternative judgment as the Court may find just and necessary.

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CERTIFICATE OF SERVICE

I certify that I electronically filed the foregoing on April 19, 2012, with the Clerk of the Court using the CM/ECF system, which will send notification to the following:

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