

**UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF SOUTH CAROLINA**

IN RE:

Infinity Business Group, Inc.,

Debtor.

Case No. 10-06335-jw

Chapter 7

**INTERIM ORDER AND NOTICE OF  
STATUS HEARING**

This matter comes before the Court upon a Motion for Relief from the Automatic Stay (“Motion”), filed by the plaintiffs (“Movants”)<sup>1</sup> named in a complaint (“Complaint”) filed in Lexington County Court of Common Pleas.<sup>2</sup> Movants seek relief from the automatic stay in order to amend their complaint to remove Infinity Business Group, Inc. (“Debtor” or “IBG”) from the Complaint and add additional causes of action against non-debtor third parties (“Amended Complaint”). The chapter 7 trustee, Robert F. Anderson (the “Trustee”) filed an Objection to the Motion, indicating he intended to file a similar action on behalf of the bankruptcy estate (the “Estate”). This Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1334. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(A), (H) and (O). Pursuant to Fed. R. Bankr. P. 7052, the Court makes the following Findings of Fact and Conclusions of Law.<sup>3</sup>

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<sup>1</sup> Movants consist of the following twenty plaintiffs: Kevin Starkey (“Starkey”), Michael Spence (“Spence”), Jim Miles (“Miles”), Frank Pollock (“Pollock”), Donald Hanna (“Hanna”), The Estate of Katherine Hanna by Attorney in Fact Donald Hanna (“Hanna Estate”), Todd Salvagin (“Salvagin”), Jim Beasley (“Beasley”), Jim Brady (“Brady”), Leonard Day (“Day”), Glen Garrison (“Garrison”), Irene Mandrell, Louise Mandrell, Mary Mandrell, Jim Marshall (“Marshall”), Mark McClaim [sic] (“McClam”), Morris Milburn (“Milburn”), Robert Newsome, Robert Newsome, Jr. (“Newsome, Jr.”), and Joseph Stuppiello (“Stuppiello”).

<sup>2</sup> Case no. 2010-CP-32-03552

<sup>3</sup> To the extent any of the Findings of Fact constitute Conclusions of Law, they are adopted as such. To the extent any of the Conclusions of Law constitute Findings of Fact, they are so adopted.

## FINDINGS OF FACT

1. IBG, a corporation formed under the laws of Nevada with operations in South Carolina, filed the above-captioned bankruptcy case as a case under Chapter 7 of the Bankruptcy Code on September 1, 2010 (“Chapter 7 Case”).

2. On September 1, 2010, Robert F. Anderson was appointed as the Chapter 7 Trustee for IBG.

3. Prior to bankruptcy, IBG offered electronic payment processing, debt collection, risk management and fraud prevention services with a particularized focus on serving United States customers in the retail sector and the government, education and banking sectors.

4. In the Motion, Movants allege that the causes of action evidenced in their proposed verified Amended Complaint do not constitute property of the estate. The Amended Complaint and the original Complaint are written in broad, general terms.

5. In the unfiled Amended Complaint, Movants assert causes of action against (A) former board members and former officers of Infinity Business Group, Inc.—Wade Cordell, Bradshaw Cordell, John F. Blevins, and Byron Sturgill; (B) Cordell, LLC, owned by Wade Cordell, a broker-dealer and conduit for Wade Cordell and his activities concerning IBG; and (C) Morgan Keegan & Company, Inc. (“Morgan Keegan”). Movants collectively refer to all of the above named individuals and entities as “Defendants” in the Amended Complaint.

6. Movants assert the following causes of action (collectively, “Causes of Action”) in the Amended Complaint: 1) pursuant to S.C. Code Ann. §§ 35-5-502(a)(2) and 35-1-509 for Defendants’ alleged violations of § 35-1-501 (collectively “Securities Actions”); 2) fraud; 3)

negligent misrepresentation 4) civil conspiracy; 5) breach of fiduciary duty; 6) unjust enrichment; and 7) conversion.

7. The fraud, negligent misrepresentation, and civil conspiracy causes of actions (collectively, “Misrepresentation Actions”), as well as the Securities Actions, appear to be based on Movants’ allegations of Defendants’ alleged oral and written misrepresentations designed to induce Movants to invest in IBG, and Movants claim damages on account of the loss of their investments.

8. As of the date of this Order, 14 of the 20 Movants have filed proofs of claims pursuant to § 501 in IBG’s chapter 7 bankruptcy case.<sup>4</sup>

9. At the hearing, the Trustee informed the Court that he intended to file a complaint in this Court against the same Defendants named in the Amended Complaint but as of the date of this Order, he has yet to file such a complaint.<sup>5</sup>

### **CONCLUSIONS OF LAW**

In the event of bankruptcy, the existing right of shareholders to pursue a derivative action in the name of the corporation becomes part of the bankruptcy estate under § 541. In re Greenwood Supply, Co., 295 B.R. 787, 794 (Bankr. D.S.C. 2002) (citations omitted). The effect of a derivative suit becoming part of the bankruptcy estate is that the trustee, not the shareholders, decides how, when, and if the suit will proceed. Id. The trustee in a chapter 7 case is given these tasks in order to avoid a myriad of lawsuits by individual creditors racing to the courthouse to deplete the available resources of the estate and thwart the equitable goals of the

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<sup>4</sup> McClam (POC #288-1); Milburn (POC #276-1 and #277-1); Louise Mandrell (POC #302-1); the Hanna Estate (POC #304-1); Brady (POC #305-1); Beasley (POC #307-1); Irene and Louise Mandrell (POC #309-1); Mary Mandrell (POC #316-1); Starkey (POC #318-1); Pollock (POC #394-1); Spence (POC #402-1); Day (POC #409-1); Stupiello (POC #418-1); and Miles (POC #510-1).

<sup>5</sup> The Trustee asserted at the hearing that the delay in filing his complaint is a result of having to coordinate with the Attorney General’s offices in multiple states.

bankruptcy laws. Am. Nat'l Bank v. Mortgage Am. Corp. (In re Mortgage America Corp.), 714 F.2d 1266, 1274 (5th Cir. 1983); see also Caplin v. Marine Midland Grace Trust Co. of N.Y., 406 U.S. 416, 92 S. Ct. 1678 (1972) (indicating that trustees in bankruptcy are not authorized to sue third parties on behalf or for the benefit of specific creditors but instead must assert claims for the benefit of all creditors).

The trustee also has creditor status under § 544 to bring suits for the benefit of the estate and ultimately the creditors collectively. Koch Refining v. Farmers Union Cent. Exchange, Inc. (Koch Refining), 831 F.2d 1339, 1348 (7th Cir. 1987). However, the trustee has no standing to bring personal claims of creditors. A cause of action is “personal” if the claimant himself is harmed and no other claimant or creditor has an interest in the cause. Id. at 1349. To determine whether an action accrues individually to a claimant or generally to the corporation, a court must look to the injury for which relief is sought and consider whether it is peculiar and personal to the claimant or general and common to the corporation and creditors. Id.

Movants first contend that all the Causes of Actions asserted in the Amended Complaint are personal or direct, but even if some are derivative, Movants rely on In re Glo-Tex Int'l, Inc. and ask the Court to bifurcate the direct and derivative actions and allow Movants' direct causes of action to go forward. C/A No. 07-06449-jw; 2010 WL 4916574 (Bankr. D.S.C. Nov. 30, 2010). While the approach used in Glo-Tex is helpful in determining whether each claim is direct or derivative, there is a significant distinction. In Glo-Tex, the Chapter 7 trustee had already settled the derivative claims held by the estate at the time the plaintiff sought relief from stay. The issue was whether that settlement included, and therefore precluded, causes of action that the plaintiff asserted were direct. In Glo-Tex, the trustee was not simultaneously pursuing

causes of actions for the benefit of creditors nor competing for sources of recovery. In the instant case, the Trustee has not settled any claims the Estate may have against the Defendants.

In analyzing the Motion, the Court will examine each allegation as pled without deciding the validity of the claims and determine whether the Movants' Causes of Action represent derivative or direct actions.<sup>6</sup>

#### **A. Securities Actions and Misrepresentation Actions**

Movants claim that their Securities Actions and Misrepresentation Actions are direct causes of action. These actions appear to arise out of an allegation of a similar set of operative facts: each Plaintiff was induced to invest in Debtor by improper representations of the Debtor's past financial condition and was shown fraudulent future projections. However, the Trustee argues that even if these allegations amount to direct claims, Movants' Securities Actions and Misrepresentation Actions should be stayed to allow the Estate's causes of action to proceed first, relying on the Fourth Circuit decision of National Am. Ins. Co. v. Ruppert Landscaping Co., 187 F.3d 439, 440 (4th Cir. 1999). In Ruppert, the Fourth Circuit concluded that the plaintiff's claims were so similar in object and purpose to the claims the trustee could bring that the plaintiff lacked standing to independently pursue these claims because "[i]f a cause of action is part of the bankrupt estate then the trustee alone has standing to bring that claim." Id. (citing Steyr-Daimler-Puch of Am. Corp. v. Pappas, 852 F.2d 132, 136 (4th Cir. 1988)).

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<sup>6</sup> Movants contend that South Carolina law governs whether their Causes of Action constitute direct actions or derivative action, while the Trustee argues that Nevada law governs this determination based upon the internal affairs doctrine. Pursuant to the "internal affairs doctrine," "the law of the state of incorporation normally determines issues relating to the *internal* affairs of a corporation." First National Bank v. Banco Para El Comercio Exterior de Cuba, 462 U.S. 611, 621, 103 S. Ct. 2591, 2598 (1983). While the internal affairs doctrine may govern whether a claim is direct or derivative, South Carolina's choice of law rules govern the substantive causes of actions themselves. See Georgia Bank & Trust Co. of Augusta v. Trenergy, C/A No. 3:03-2371-JFA, 2010 WL 3271732 (D.S.C. Aug. 18, 2010); Hovis v. Gen. Dynamics Corp. (In re Marine Energy Sys. Corp.), 362 B.R. 247 (Bankr. D.S.C. 2006); Lister v. NationsBank of Delaware, 494 S.E.2d 449 (S.C. Ct. App. 1998).

The Fourth Circuit explained that the trustee should have the first crack at bringing its fraudulent conveyance action since it is the trustee's role to bring these types of suits on behalf of all creditors. Id. (citing Steyr-Daimler-Puch, 852 F.2d at 135). Further, the Fourth Circuit determined that “[t]o allow selected creditors to artfully plead their way out of bankruptcy court would unravel the bankruptcy process and undermine an ordered distribution of the bankruptcy estate.” Id. (quoting Litchfield Co. v. Anchor Bank (In re Litchfield Co.), 135 B.R. 797, 804 (W.D.N.C. 1992)). The Fourth Circuit went on to explain that the purpose of bankruptcy is to avoid piecemeal litigation and eliminate “many wasteful and competitive suits of individual creditors.” Id. (quoting Koch Refining., 831 F.2d at 1342-43).

In the instant case, the Trustee does not appear to argue that the Movants lack standing to bring their Securities Actions and Misrepresentation Actions. Rather, the Trustee argues that these claims are “similar in object and purpose” to the Estate’s claims and allowing both to proceed would be wasteful and require duplicative discovery.

The Securities Actions are based on alleged violations of §§ 35-1-501 and 502(a), pursuant to a cause of action under § 35-1-509, of the South Carolina Securities Act of 2005.<sup>7</sup>

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<sup>7</sup> S.C. Code Ann. § 35-1-501 provides as follows:

It is unlawful for a person, in connection with the offer, sale, or purchase of a security, directly or indirectly:

- (1) to employ a device, scheme, or artifice to defraud;
- (2) to make an untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading; or
- (3) to engage in an act, practice, or course of business that operates or would operate as a fraud or deceit upon another person.

S.C. Code Ann. § 35-1-502(a) provides:

It is unlawful for a person that advises others for compensation, either directly or indirectly or through publications or writings, as to the value of securities or the advisability of investing in, purchasing, or selling securities or that, for compensation and as part of a regular business, issues or promulgates analyses or reports relating to securities:

- (1) to employ a device, scheme, or artifice to defraud another person; or
- (2) to engage in an act, practice, or course of business that operates or would operate as a fraud or deceit upon another person.

Official Comment 1 to S.C. Code § 35-1-501 provides that “Section 501 . . . was modeled on Rule 10b-5 adopted under the Securities and Exchange Act of 1934 and on Section 17(a) of the Securities Act of 1933.” In Brown v. Charles Schwab & Co., Inc., the District Court clarified that § 35-1-501 is identical to Rule 10b-5 except a plaintiff does not have to prove causation and reliance. 2009 WL 4809426, at \*6 (D.S.C. Dec. 9, 2009).<sup>8</sup> Section 35-1-509 creates a civil cause of action against one who sells a security *either* (1) in violation of the Act's registration requirements *or* (2) “by means of an untrue statement of a material fact or omission to state a material fact necessary in order to make the statement made, in light of the circumstances under which it is made, not misleading.” Beechwood Dev. Corp. v. Konersman, 517 F. Supp. 2d 770, 774 (D.S.C. 2007) (quoting S.C. Code § 35-1-509).

According to the Trustee, the Estate will be pursuing causes of action based upon the same South Carolina Securities Act and also pursuant to Rule 10b-5 for damages to IBG as a result of Defendants’ misrepresentations in connection with the sale of IBG’s securities.<sup>9</sup> The standards for proving a violation of Rule 10b-5 are closely intertwined with those required for a cause of action under S.C. Code Ann. § 35-1-509 for a violation of S.C. Code Ann. §§ 35-1-501 and 502(a)(2).

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<sup>8</sup> To establish liability under Section 10(b) and Rule 10b-5, a plaintiff must prove that in connection with the purchase or sale of a security:

- (1) the defendants made a false statement or omission of material fact
- (2) with scienter
- (3) upon which the Movants justifiably relied
- (4) that proximately caused plaintiff's damages.

May v. Penninger, 2008 WL 509470 (D.S.C. Feb. 22, 2008) (citing Register v. Cameron & Barkley Co., 467 F.Supp.2d 519, 532 (D.S.C.2006) (quoting Longman v. Food Lion, Inc., 197 F.3d 675, 682 (4th Cir.1999)).

<sup>9</sup> The Trustee also asserts a cause of action on behalf of the Estate pursuant to S.C. Code Ann. § 35-1-501 pursuant to S.C. Code § 35-1-509 and pursuant to § 35-1-502(a)(2) against Defendants.

The Trustee also argues that allowing Movants to proceed with their Securities Actions would violate the purpose of the automatic stay. See Fidelity Mortg. Investors v. Camelia Builders, Inc., 550 F.2d 47, 55 (2nd Cir. 1976), *cert. denied*, 429 U.S. 1093, 97 S.Ct. 1107 (1977) (reasoning “the stay insures that the debtor’s affairs will be centralized, initially, in a single forum in order to prevent conflicting judgments from different courts and in order to harmonize all of the creditors’ interests with one another”). Therefore, the Trustee argues that Movants should be stayed from proceeding with their Securities Actions in order to effectuate the policy goals of the automatic stay and because the Securities Actions are so similar in object and purpose to claims that the Trustee could bring in bankruptcy court.

The Trustee also contends that the Misrepresentation Actions, which arise from the same operative facts as the Securities Actions, interfere with the Estate’s potential malpractice claims, securities law claims, preference causes of action, and fraudulent conveyance causes of action, while also containing similar elements to the Estate’s Rule 10b-5 cause of action against Defendants and should be stayed to avoid interfering with property of the estate. See Litchfield Co. v. Anchor Bank (In re Litchfield Co.), 135 B.R. 797, 804 (W.D.N.C. 1992) (“even though claims of the debtor and an individual creditor are ‘not identical’ the court can stay proceedings initiated by the creditor in order to avoid interfering with or diminishing property of the estate); Ruppert, 187 F.3d at 441.

In the case at bar, the Trustee does not request that the Complaint be dismissed but merely stayed to allow the Estate to proceed in order to eliminate the wasteful and competitive litigation that shall ensue if the stay is lifted. The Court agrees that the Estate should be allowed to proceed with its claims that appear similar in object and purpose to the Movant’s Misrepresentation and Securities Actions. However, the Trustee has not filed a complaint

asserting such causes of actions. The Trustee explained that the nature of the actions he intends to bring is very complex and requires coordination with various prosecutorial agencies.

The Court finds it appropriate to stay the Misrepresentation Actions and Securities Actions at this time. Assuming the Trustee files his complaint as indicated, the continuation of the automatic stay benefits this Estate since any recovery against Defendants constitutes property of the estate and facilitates a recovery that will benefit all creditors, including 14 of the 20 Movants named in the Complaint who have filed proofs of claims. Also, the pursuit of the Estate's claims against the Defendants may prevent the Estate from having to litigate separately over the legitimacy of the Defendants' potential claims of indemnification against IBG.

### **B. Breach of Fiduciary Duties**

Movants' cause of action for breach of fiduciary duties ("Breach of Fiduciary Duties Action") alleges that Cordell, LLC, managed by members of IBG's board of directors, separately sold stock in IBG to Movants and by selling such stock, Cordell, LLC had a separate duty of care, loyalty, and/or good faith to the Movants. Movants further allege that Cordell, LLC, through its members, made misrepresentations to the Movants concerning the financial status of IBG. Moreover, Movants allege that Morgan Keegan, acting through its agent, Keith Meyers, was hired by IBG to perform various tasks related to issuance of IBG securities, and that Keith Meyers, acting as agent for Morgan Keegan, made misrepresentations at investor meetings on which Movants relied. The Breach of Fiduciary Duties Action is a new cause of action added to the Amended Complaint.

The Trustee argues that the Breach of Fiduciary Duties Action is derivative because its allegations revolve around management of IBG's affairs by its board of directors. However, the Movants appear to allege wrongful actions taken by certain defendants not in their capacity as

directors of IBG, but in their capacity as members of Cordell, LLC and/or agents of Morgan Keegan. Assuming that these defendants owed a fiduciary duty to the Movants, this may be a direct cause of action because Movants do not appear to be pursuing these actions as shareholders of IBG, but in their capacity as clients of Cordell, LLC and Morgan Keegan. The Trustee argued at the hearing that Debtor has similar causes of actions against Cordell, LLC and Morgan Keegan and thus the Estate should get the first opportunity to pursue such actions. However, the Trustee has yet to bring a complaint against these Defendants, making it difficult for the Court to determine whether the Movants' Breach of Fiduciary Duty Action is similar to or interferes with the Trustee's alleged causes of action. The Court will allow the automatic stay to remain in effect on an interim basis until further order of the Court.

### **C. Conversion and Unjust Enrichment**

Movants' causes of action for conversion ("Conversion Action") and unjust enrichment ("Unjust Enrichment Action") allege that Defendants took possession of a sum of not less than one million Dollars (\$1,000,000.00) from Movants and that the Defendants used these funds for their own benefit and Movants received no benefit or return. The Trustee claims that the Conversion Action and Unjust Enrichment Action are derivative in nature, and thus, are property of the estate.

Under both South Carolina and Nevada law, if the Movants are alleging that the board members diverted or misappropriated Movants' intended investments in IBG, the harm is to the corporation, and the Conversion Action is derivative and thus belongs to IBG.<sup>10</sup> See Page v. Walser, 213 P. 107, 110 (Nev. 1923) (stating that if security holders seek to bring an action for

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<sup>10</sup> Because the Conversion and Unjust Enrichment Actions are contained in both the Complaint and Amended Complaint, the Court assumes Movants intended to invest in IBG; however, if Movants demonstrate that Defendants took possession of the Movants' money for some other purpose, the Court may further consider whether the Conversion and Unjust Enrichment Actions are direct or derivative in nature.

the restoration of stock lost to the corporation through the neglect of the corporation's agents or for the wrongful diversion of money from the corporation the action is derivative in nature); In re Glo-Tex International, Inc., slip op., 2010 WL 4916574 at \*4 (2010) (finding conversion of corporate funds by the directors caused injury to the debtor and all of its creditors and would constitute a derivative action).

In addition, if funds which were intended to be invested by Movants into IBG and misappropriated by the Defendants (including corporate directors, officers, and shareholders) while IBG was insolvent (or made for no consideration), the Trustee may have potential fraudulent transfer claims pursuant to §§ 544 and 548 against Defendants, which constitute property of the Estate. Moreover, the Trustee claims damages based on deepening insolvency, whereby Defendants wrongfully prolonged the corporate life of IBG and caused it to incur additional liabilities, which constitutes property of the estate. In re Derivium, LLC, slip op. at 18.

Assuming the money given to Defendants was intended to be invested in IBG, the Conversion Action and Unjust Enrichment Action appear to be derivative in nature and the Trustee has not abandoned these claims. Therefore, the Motion is denied as to the Conversion Action and Unjust Enrichment Action.

#### **IV. Stay of Proceedings due to Unusual Circumstances**

Relying on A.H. Robbins Co. v. Piccinin, 788 F.2d 994 (4th Cir. 1986), the Trustee argues that the bankruptcy court should stay proceedings against non-bankrupt co-defendants. In order for relief for such non-bankruptcy defendants to be available under §§ 105 and 362(a)(1), there must be "unusual circumstances," and something more than the mere fact that one of the parties to the lawsuit has filed for relief under the Bankruptcy Code. A.H. Robbins Co., 788 F.2d at 999. "Such unusual circumstances might arise where 'there is such identity between the

debtor and the third-party defendant that the debtor may be said to be the real party defendant and that a judgment against the third-party defendant will in effect be a judgment or finding against the debtor,' or 'where proceedings against non-debtor codefendants would reduce or diminish "the property of the debtor [such as the debtor's insurance fund or pool] to the detriment of the debtor's creditors as a whole.'" Credit Alliance Corp. v. Williams, 851 F.2d 119, 121 (4th Cir. 1988) (quoting A.H. Robbins, 788 F.2d at 1008). The Trustee argues that "unusual circumstances" are present in the case at bar because a judgment for Movants on account of their Amended Complaint for actions of the directors may result in the Estate being forced to indemnify the directors for their actions.

The Court finds that the evidence presented to the Court at this time is insufficient to justify an extension of the stay for "unusual circumstances."

## **V. Conclusion**

The Trustee indicated at the hearing that the Estate would file a complaint by the end of May; however, the Trustee has failed to do so. Because the Trustee has yet to file a complaint and the Movants' Amended Complaint is written in broad and general terms, it is difficult for the Court to issue a definitive order on whether the automatic stay applies to all of the Causes of Actions. The Court concludes that even if the Movants' Securities Actions and Misrepresentation Actions are direct causes of actions, these actions appear similar to and could potentially interfere with actions that may be brought by the Trustee. The Court is unable at this time to determine whether the Breach of Fiduciary Duty Action, also a direct cause of action, is going to interfere with any potential actions of the Trustee. Therefore, such actions shall be stayed at this time and **a further status hearing shall be held at 9:00 a.m. on July 12, 2011 at the J. Bratton Davis United States Bankruptcy Courthouse, 1100 Laurel Street, Columbia,**

**South Carolina 29201.** The Court requests that the Trustee file any complaint against the defendants named in the Movants' Amended Complaint within 14 days of this Order and prior to this hearing. The Court will further evaluate at that time whether the stay should remain in effect as to the alleged direct causes of action.

**AND IT IS SO ORDERED**

**FILED BY THE COURT  
06/22/2011**



Entered: 06/22/2011

Chief US Bankruptcy Judge  
District of South Carolina