UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 16-24678-CIV-COOKE/TORRES

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

v.

ONIX CAPITAL, LLC, and ALBERTO CHANG-RAJII,

Defendants, and

DEEP OCEAN LLC, et. al.,
NEXT CAB VENTURES LLC,
NEXT CALL VENTURES LLC,
NEXT CHAT VENTURES LLC,
NEXT PAY VENTURES LLC,
NEXT TRACK VENTURES LLC, and
PROGRESSIVE POWER LLC,

Relief Defendants.
_____/

REPORT AND RECOMMENDATION ON PUTATIVE PETITIONERS' MOTION FOR PERMISSION TO FILE INVOLUNTARY BANKRUPTCY PETITION AND JOINT LIQUIDATORS' MOTION FOR PERMISSION FOR RELIEF DEFENDANTS TO FILE VOLUNTARY BANKRUPTCY PETITIONS

This matter is before the Court on Putative Petitioners'[1] Motion for Permission to File Involuntary Bankruptcy Petition and Joint Liquidators'[2] Motion for Permission for Relief Defendants to File Voluntary Bankruptcy Petitions

[1] Ely Magendzo, Inver Corp, NES SPA and Estanislao Bernardo Gonczanski (collectively "Putative Petitioners") are holders of claims totaling approximately $500,000 or about 7% of claims against Onix Capital, LLC.
[2] Marcus Wide and Mark McDonald (the "Joint Liquidators") are joint liquidators of the British Virgin Islands-based parent companies of Relief Defendants. [D.E. 107].

(collectively, the "Motions"). [D.E. 81]; [D.E. 107]. Putative Petitioners and Intervenor Carlos Antonio Parada Abate ("Liquidator") seek to place Onix Capital, LLC into bankruptcy, while Joint Liquidators seek to place the Relief Defendants into bankruptcy. After a review of the briefing on the Motions, the Court set the matter for a hearing on June 28, 2017. After reviewing the documents and considering the parties' arguments, we find that both Motions should be **DENIED** for reasons set forth below.

I. BACKGROUND

The Securities and Exchange Commission ("S.E.C.") commenced this action on November 8, 2016, alleging that Alberto Chang-Rajii ("Chang-Rajii") violated anti-fraud provisions of federal securities laws by defrauding investors in the course of operating Onix Capital, LLC and Relief Defendants as part of "what appears to be the largest Ponzi scheme in Chilean history." *See S.E.C. v. Onix Capital, LLC, et al.*, Case No. 16-CV-24678-MGC; [D.E. 1]; [D.E. 54, p. 2]. The same day, the S.E.C. filed its Emergency Motion for Appointment of Receiver, recommending that a Receiver be appointed for Onix Capital, LLC and Relief Defendants. [D.E. 4]. In November 2016, the Court issued its Order Granting Emergency Motion for Asset Freeze and Other Relief ("Freeze Order") notifying all parties and financial institutions known to have control over assets belonging to Onix Capital, LLC and the Relief Defendants to freeze any assets belonging to those entities. [D.E. 18].

Chang-Rajii fled to Malta in the spring of 2016, and stopped using his U.S.-based bank accounts around May 2016. [D.E. 1].

Carlos Antonio Parada Abate ("Liquidator"), the liquidator in the bankruptcy of Onix Capital, S.A., motioned to intervene to oppose the appointment of a Receiver. [D.E. 54]. Liquidator argued that it would be duplicative to appoint a Receiver and that appointing a Receiver would deplete the assets of Onix Capital, LLC. *Id*.

After a hearing on January 23, 2017, the Parties agreed to file a Proposed Order of Appointment which would narrowly tailor the power of the Receiver to the assets at issue in the S.E.C. proceedings. [D.E. 72]. The S.E.C. submitted its Proposed Receivership Order on January 26th, and Liquidator filed an Objection to the Proposed Receivership Order four days later. [D.E. 63]; [D.E. 65]. The Court entered a Report and Recommendation on the Proposed Receivership Order on February 28, 2017 [D.E. 72], which was adopted in an Endorsed Order on March 28, 2017. [D.E. 78]. The signed Receivership Order was entered on April 4, 2017. [D.E. 84].

Paragraph 21 of the Receivership Order enjoins all "creditors, banks, investors, or others" from filing a bankruptcy claim against Onix Capital, LLC or the Relief Defendants "without permission from this Court." [D.E. 84, ¶ 21]. The Receivership Order allows the Receiver to pursue only those assets which are located within the United States, preserving the Liquidator's power to pursue any assets located internationally. [D.E. 84]. The Liquidator may bring a claim against Receiver if he establishes superior claim to any assets, and the Receiver is required to notify and cooperate with Liquidator if she discovers any assets outside of the

United States. *Id*. In turn, "any directors, officers, agents, employees, attorneys, attorneys-in-fact, shareholders, and other persons," must refrain from "attempts to interfere, obstruct or hinder the efforts of the Receiver[.]" [D.E. 84, p. 4-5].

Putative Petitioners filed their Motion for Permission to File Involuntary Bankruptcy Petition (the "Motion for Involuntary Bankruptcy") against Onix Capital, LLC on April 3, 2017. [D.E. 81]. In their Motion, Putative Petitioners argue that it would be "inefficient and duplicative" for the Receiver to bring claims on their behalf, and that the Bankruptcy Court is a more appropriate forum to resolve their claims. [D.E. 81, p. 4]. They state that they would suffer substantial injury if they are restricted from bringing claims in the Bankruptcy Court for the Southern District of Florida (the "Bankruptcy Court"). *Id*. Liquidator subsequently filed his Notice of Joinder in the Motion for Permission to File Involuntary Bankruptcy. [D.E. 85].

Receiver filed her Response in Opposition to Motion for Permission to File Involuntary Bankruptcy Petition on April 17th. [D.E. 86]. Both Putative Petitioners and Liquidator filed Replies on April 24, 2017 disputing each of Receiver's arguments. [D.E. 87]; [D.E. 88]. Liquidator's Reply also questioned the existence of investors referenced in Receiver's Response. [D.E. 87]. Receiver filed a Supplement to her Response revealing names and amounts invested of some of the Relief Defendants' investors on May 10, 2017. [D.E. 91].

Liquidator filed a Motion for Hearing on May 19, 2017. [D.E. 93]. The Court granted the Motion for Hearing on pending motions, and set the hearing for June

28th. [D.E. 105]. On June 16, 2017, Liquidator filed Notice of his appointment by a Chilean court as the liquidator of Chang-Rajii's personal estate. [D.E. 104].

On June 21, 2017, Joint Liquidators filed their Motion for Permission for Relief Defendants to File Voluntary Bankruptcy Petitions ("Motion for Voluntary Bankruptcy"). [D.E. 107]. Joint Liquidators argued that their control of the voting shares in most of the Relief Defendants made them responsible for the administration of the legal proceedings relating to Relief Defendants and that they risked substantial injury if they were not permitted to file for bankruptcy. *Id.*

Receiver filed her Response in Opposition to the Motion for Permission for Relief Defendants to File Voluntary Bankruptcy Petitions on June 26, 2017. [D.E. 110]. Receiver countered that she is the appointed party to administer the assets of Relief Defendants, not the shareholders. *Id.*

The Court held a hearing on the matter on June 28, 2017, where counsel for Liquidator, Putative Petitioners, and Joint Liquidators appeared to oppose the Receivership. Counsel for Liquidator and the counsel for Putative Petitioners argued that Onix Capital, LLC should be placed into involuntary bankruptcy. Counsel for Joint Liquidators argued that Relief Defendants should be placed into bankruptcy. Counsel for the Receiver argued in favor of maintaining the Receivership and denying the Putative Petitioners' Motion.

II. ANALYSIS

The effect of granting both the Motion for Involuntary Bankruptcy and the Motion for Voluntary Bankruptcy would be to remove all entities administrated by

the receivership into the Bankruptcy Court. Absent compelling reasons as to why the Bankruptcy Court is the superior forum to resolve the issues surrounding the liquidation of Defendant and Relief Defendants' assets, this Court will not so easily dismantle the receivership created to enforce this Court's judgment. Because neither party shows it will suffer substantial injury if enjoined from bankruptcy, and for other reasons laid out below, we find that both the Motion for Involuntary Bankruptcy and the Motion for Voluntary Bankruptcy should be denied.

A. Motion for Permission to File Involuntary Bankruptcy Petition

Both the Motion for Involuntary Bankruptcy and the Motion for Voluntary Bankruptcy argue that the moving parties will suffer substantial injury if they are enjoined from bringing claims against Onix Capital, LLC and Relief Defendants in the Bankruptcy Court. When determining whether a stay against litigation should be lifted, the Court considers: (1) 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; (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. *S.E.C. v. Wencke*, 742 F.2d 1230, 1231 (9th Cir. 1984) (reversing district court's refusal to lift a stay against litigation because the receivership was in its late stages and the parties stood to suffer substantial injury if denied the ability to bring their claims); *see also S.E.C. v. Byers*, 592 F. Supp. 2d 532, 536-37 (S.D.N.Y. 2008), *aff'd*, 609 F.3d 87 (2d Cir. 2010) (applying the *Wencke* factors and affirming an injunction against litigation); *U.S. v. Acorn Tech. Fund, L.P.*, 429 F.3d

438, 445 (3d Cir. 2005) (affirming stay against litigation) *S.E.C. v. Stanford Int'l Bank, Ltd.*, 424 F. App'x 338, 341-42 (5th Cir. 2011) (affirming stay against litigation).

Putative Petitioners and Joint Liquidators argue that leaving the stay in place substantially injures them because they risk losing avoidance powers unique to a bankruptcy trustee if preferential payments to insiders are uncovered. Under 11 U.S.C. § 547(b)(4)(B), a bankruptcy trustee may avoid the transfer of an interest of the debtor made "between ninety days and one year before the date of the filing of the petition, if such creditor at the time of such transfer was an insider[.]" This would include transfers made to Chang-Rajii and other directors or officers in control of the debtor estate. *See* 11 U.S.C. § 101(31). However, there is a similar one-year avoidance provision in state law which Receiver could use to pursue any claims should they be uncovered. *See* Fla. Stat. § 726.106(2); Fla. Stat. § 726.110(3). Therefore, the moving parties are not deprived of the one-year avoidance power if Onix Capital, LLC and the Relief Defendants remains under the control of the Receiver.

Moreover, the Eleventh Circuit recognizes a presumption that transfers made in furtherance of a Ponzi scheme are fraudulent. *Wiand v. Lee*, 753 F.3d 1194, 1201 (11th Cir. 2014) (finding that proof a transfer made in furtherance of a Ponzi scheme establishes actual intent to defraud under Florida state law); *Perkins v. Haines*, 661 F.3d 623, 626 (11th Cir. 2011) (holding that the Eleventh Circuit recognizes a presumption that transfers made in furtherance of a Ponzi scheme are

made with the intent to defraud). Applied here, the presumption means the Receiver can bring a claim to recover any transfers that Chang-Rajii or others made in furtherance of Chang-Rajii's Ponzi scheme under the Florida Uniform Fraudulent Transfers Act ("FUFTA"), so long as the claim is made within the four years permitted by the statute of limitations. *See* Fla. Stat. § 726.105(1)(a) (a transfer is fraudulent if it is made with "actual intent to hinder, delay, or defraud any creditor of the debtor[.]"); Fla. Stat. § 726.110(1) (claims barred if not made "within 4 years after the transfer was made or the obligation was incurred or, if later, within 1 year after the transfer or obligation was or could reasonably have been discovered by the claimant[.]"); *Wiand v. Wells Fargo Bank, N.A.*, 86 F. Supp. 3d 1316, 1325-26 (M.D. Fla. 2015), *aff'd*., No. 15-10968, 2017 WL 371939 (11th Cir. Jan. 26, 2017) (barring FUFTA claims made more than four years prior to the commencement of the action).

State law provides ample avenues which a Receiver may use to avoid fraudulent transfers, although the Receiver may not even exercise those powers in the course of this receivership. At the hearing, Receiver said she had not uncovered any evidence of any preferential transfer payments and no other parties forwarded any evidence of preferential payments made to insiders. Because Chang-Rajii stopped using the U.S.-based bank accounts in May 2016, and this Court issued its Freeze Order in November 2016, it is unlikely that there are any preferential transfers that either a bankruptcy trustee or a Receiver would be able to avoid. Absent evidence of preferential payments and given the unlikelihood that

preferential payments were made within a time period that either a Receiver or a bankruptcy trustee could pursue, and accounting for the comparable powers of a Receiver to a bankruptcy trustee in pursuing fraudulent transfers, this Court finds that Putative Petitioners and Joint Liquidators will not suffer substantial injury as the result of the stay against litigation.

Putative Petitioners nevertheless argue that they will suffer substantial injury if they are not able to access the Bankruptcy Court because the Receiver states in her Response that she believes she could treat defrauded investors *pari pasu* with creditors. [D.E. 86, p. 9]; *cf. Wencke*, 742 F.2d at 1231. However, as the Receiver has not yet proposed a plan for distributing assets, this argument is premature.

As a result, allowing Putative Petitioners to place Onix Capital, LLC into involuntary bankruptcy would not serve the interest of creditors or investors better than the receivership. Both the Receiver and a bankruptcy trustee have the power to pursue fraudulent transfers because neither is subject to the *in pari delicto* defense. *Official Comm. of Unsecured Creditors of PSA Inc. v. Edwards*, 437 F.3d 1145, 1151-52 (11th Cir. 2006) ("Fraudulent conveyances also are an exception to the general rule that a trustee takes the debtor estate as it is at the commencement of the bankruptcy."). The Receiver's claim that she may seek to propose a distribution plan which treats investors *pari pasu* with creditors is not proof of substantial injury under *Wencke*. *Wencke*, 742 F.2d at 1231. Further, without evidence that a bankruptcy trusteeship is less expensive than the federal

receivership, there is no basis for the claim that the receivership will unnecessarily deplete the assets of Onix Capital, LLC and Relief Defendants.

The Receiver argues persuasively that she has the superior ability to bring actions to recover fraudulent transfers because she is not subject to the *in pari delicto* defense, but a bankruptcy trustee bringing a fraudulent transfer claim is also exempt from the defense. *Official Comm. of Unsecured Creditors of PSA Inc.*, 437 F.3d at 1151-52; *In re Pearlman*, 472 B.R. 115, 123 (Bankr. M.D.Fla. 2012) ("When application of the [*in pari delicto* defense] would not be in the public interest, such as where a trustee is seeking to recover assets fraudulently transferred in furtherance of a Ponzi scheme, courts will allow the trustee to proceed."); *In re Palm Beach Finance Partners, L.P.*, No. 09-36379, 2012 WL 12865225, *12 (Bankr. S.D.Fla. July 3, 2012) ("[T]he *in pari delicto* defense cannot be raised against fraudulent transfer claims brought by a bankruptcy trustee pursuant to 11 U.S.C. §§ 544 and 548."). Because both the Receiver and a bankruptcy trustee bringing a fraudulent transfer action are immune to the *in pari delicto* defense, neither one stands on superior footing for the purpose of recovering fraudulent transfers.

Putative Petitioners and Liquidator both express concern that because the Receiver's compensation is not statutorily capped the way a bankruptcy trustee's is, the receivership may unnecessarily deplete the assets of Onix Capital, LLC and Relief Defendants. [D.E. 87]; [D.E. 88]. Yet Putative Petitioners acknowledge that Receiver is serving at a substantially reduced rate. [D.E. 88, p. 10]. Neither of the

moving parties offers proof as to how this receivership is more expensive than a bankruptcy trusteeship. Adjudicating this dispute will be expensive whether it is receivership or the Bankruptcy Court, and absent evidence that one is substantially less expensive than the other, this Court should maintain the receivership.

B. Motion for Permission to File Voluntary Bankruptcy Petitions

Commencing bankruptcy proceedings for the Relief Defendants is inappropriate where the Receiver is already appointed and has a clear, narrowly-tailored mandate. Shareholders of the Relief Defendants are ordered to cooperate with the Receiver to ensure the efficient, timely adjudication of claims. [D.E. 84]. That the receivership is not "substantially underway" is not a compelling factor to lift a stay against litigation when balanced against the Receiver's interest in preventing ancillary litigation during the early stages of the receivership. *In re Kreisers, Inc.*, 112 B.R. 996, 1000 (Bankr. D.S.D. 1990); *Stanford Int'l. Bank Ltd.*, 424 F. App'x at 342-43. Moreover, it is unlikely that Joint Liquidators will suffer substantial injury as a result of being denied access to the bankruptcy court. *See Wencke*, 742 F.2d at 1231.

The Joint Liquidators' position as shareholders does not entitle them to the administration of the Relief Defendants' assets. They claim that they "have the ability and obligation to oversee and direct the administration of, and legal proceedings relating to, the Relief Defendants[,]" by virtue of their ownership of 100% of the voting shares over six of the Relief Defendants and 20% of the membership interest in the seventh. [D.E. 107, p. 11]. But the Court appointed the

Receiver, not the shareholders, to oversee the administration of the Relief Defendants' assets. As shareholders, the Receivership Order compels Joint Liquidators to "[c]ooperate with and assist the Receiver with carrying out the responsibilities and powers outlined in this Order[,]" and to refrain from "any attempts to interfere, obstruct or hinder the efforts of the Receiver." [D.E. 84, p.4-5]. The purpose of the federal receivership is to safeguard the Relief Defendants' assets for the benefit of shareholders and investors alike and enforce this Court's judgment. While the Court and the Receiver may account for the views of shareholders, they are not the *de facto* administrators of the Relief Defendants.

Given that the Receiver is only beginning her investigation into the affairs of Onix Capital, LLC and Relief Defendants, the litigation injunction serves to guard the assets of Onix Capital, LLC and Relief Defendants by preventing ancillary litigation. The Court should lift the stay if there is good reason to do so, but part of the purpose of the stay against litigation is to preserve the assets for the benefit of creditors and investors while the Receiver investigates claims; requiring the Receiver to monitor and engage in litigation early on in the receivership would deplete the assets of Onix Capital, LLC and the Relief Defendants. *See Stanford Int'l. Bank Ltd.*, 424 F. App'x at 341-42 (holding that the receivership was still in its early stages and thus maintaining the stay against litigation was appropriate where Receiver had been in place for one year and was tasked with investigating a Ponzi scheme involving "many entities and billions of dollars."); *Acorn Tech. Fund, L.P.*, 429 F.3d at 443 ("[T]he 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."). The Joint Liquidators' assertion that they should be permitted to allow Relief Defendants to file voluntary bankruptcy petitions solely because the receivership is not "substantially underway" is not, without more, enough to remove the Relief Defendants from the Receiver's purview and thrust them into bankruptcy. *Kreisers*, 112 B.R. at 1000. Rather, whether the receivership is "substantially underway" should be considered in light of the other *Wencke* factors and balanced against the other interests of the receivership. *Id.*; *Wencke*, 742 F.2d at 1231. Here, we determine, it is not enough that the receivership is not substantially underway when weighed against the Receiver's interest in preventing ancillary litigation to persuade this Court to remove the Relief Defendants from the receivership and place them into the Bankruptcy Court.

Joint Liquidators likely do not stand to incur substantial injury if the stay against litigation remains in place because the receivership is limited in scope to only those assets found within the United States and because the Receiver is subject to oversight by this Court. Joint Liquidators argue that they will suffer substantial injury under *Wencke* because the Receiver is ill-equipped to reach assets that have been transferred outside of the U.S., and that the receivership runs the risk of becoming a "creeping receivership" which may result in the "haphazard liquidation" of the Relief Defendants' assets. *Id.*; [D.E. 107, p. 11].

Joint Liquidators forget, however, that the Receiver is authorized by paragraph three of the Receivership Order to pursue only those assets which are located within the United States so as to avoid disputes with the ongoing liquidation of other assets involved in Chang-Rajii's Ponzi scheme. [D.E. 84, ¶ 3]. Reaching assets outside of the United States is the responsibility of the Liquidator, not the Receiver. *Id.* If the Receiver is to uncover any assets located internationally, she is ordered to notify the Liquidator and cooperate with him to ensure that all parties charged with disentangling Chang-Rajii's intricate scheme are able to do so in an efficient manner which maximizes recovery for all stakeholders. [D.E. 84, ¶ 8].

Additionally, the receivership is supervised by this Court, as the Receiver may not distribute assets or retain professionals without consent of the Court. [D.E. 84]. Should Joint Liquidators fear that a "haphazard" liquidation is imminent, they may file an objection and dispute proposed actions in front of this Court. But undoing the stay against litigation is not a measure warranted by the existing record.

III. CONCLUSION

In light of the above, it is hereby **RECOMMENDED** that both Putative Petitioners' Motion for Permission to File Involuntary Bankruptcy Petition and Joint Liquidators' Motion for Permission to File Voluntary Bankruptcy Petitions be **DENIED**.

Pursuant to Local Magistrate Rule 4(b), objections, if any, shall be filed within fourteen days before the District Judge. Failure to timely file objections shall

bar the parties from *de novo* determination by the District Judge of any factual or legal issue covered in the Report *and* shall bar the parties from challenging on appeal the District Judge's Order based on any unobjected-to factual or legal conclusions included in the Report. *See* 28 U.S.C. § 636(b)(1); 11th Cir. Rule 3-1; *see, e.g., Patton v. Rowell,* 2017 WL 443634 (11th Cir. Feb. 2, 2017); *Cooley v. Commissioner of Social Security,* 2016 WL 7321208 (11th Cir. Dec. 16, 2016).

DONE AND SUBMITTED in Chambers at Miami, Florida, this 24th day of July, 2017.

/s/ *Edwin G. Torres*
EDWIN G. TORRES
United States Magistrate Judge