

STATE OF NORTH CAROLINA
COUNTY OF MECKLENBURG

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
Civil Action No: 07 CVS 5097

WACHOVIA BANK, NATIONAL
ASSOCIATION and WACHOVIA
CAPITAL MARKETS, LLC

Plaintiffs,

v.

HARBINGER CAPITAL PARTNERS
MASTER FUND I, LTD., *et al.*

Defendants.

ORDER

The Court has before it the following Motions: (1) Defendants' Renewed Motion to Modify the Preliminary Injunction, (2) Plaintiffs' Motion to Lift Stay, and (3) Plaintiffs' Motion for Contempt. With the consent of all parties, the Court rules on these Motions without a hearing. For the reasons set forth below, the Court (1) **GRANTS** Defendants' Renewed Motion to Modify the Preliminary Injunction, (2) **DENIES** Plaintiffs' Motion to Lift Stay, and (3) **DENIES** Plaintiffs' Motion for Contempt.

FACTS

This case arises out of Plaintiff Wachovia Bank's role as administrative agent for a \$285 million loan commitment ("the Credit Agreement") made to Le-Nature's, Inc. ("Le-Nature's" or the "Company"), a Pennsylvania entity that at one time was in the business of developing and marketing bottled water and other noncarbonated beverages. (14 Mar. 2007 Harkness Aff. ¶ 3, Exs. G, K.) Le-Nature's is now bankrupt, following the discovery of a massive fraud apparently perpetrated by the Company's management which, among other things, involved the dissemination of inflated profit reports (and related false financial statements) to the public, including Le-Nature's creditors. (Compl. ¶¶ 1, 4, 44-47.)

Wachovia Bank funded a portion of the Credit Agreement directly and created a syndicate of lenders to fund the balance (hereinafter the “Credit Facility”). (Compl. ¶ 4; 14 Mar. 2007 Harkness Aff. ¶ 5.) Although not a party to the Credit Facility, Plaintiff Wachovia Capital Markets (“WCM”) served as Lead Arranger and Sole Bookrunner for the transaction. (Compl. ¶¶ 1, 4.)

In their Complaint filed on 14 March 2007, Plaintiffs allege that Defendants purchased (or aided others in purchasing) certain interests in the Credit Facility from various original syndicate lenders, after news of Le-Nature’s fraud became public. (Compl. ¶ 2; 14 Mar. 2007 Harkness Aff. ¶¶ 13, 15.) Plaintiffs further allege Defendants acquired their interests in the Credit Facility with an eye toward pursuing contract and tort claims against Plaintiffs as a result of Le-Nature’s financial demise. (Compl. ¶ 2.) Plaintiffs contend Defendants’ acquisition of interests in the Credit Facility is governed by North Carolina law, which (they say) “flatly” prohibits the assignment of tort claims. (Compl. ¶ 2.)

On 12 April 2007, Plaintiffs obtained a preliminary injunction, which effectively enjoined Defendants from pursuing their tort claims against Plaintiffs in any court other than this one. On 17 September 2007, several of the Defendants, along with ten other parties who purchased interests in the Credit Facility (either directly from Plaintiffs in the syndication process or in the secondary loan market), filed suit in the United States District Court for the Southern District of New York (“SDNY”) against WCM, BDO Seidman, LLC (Le-Nature’s independent auditors) and two of Le-Nature’s senior corporate officers (the “SDNY Action”). On 10 October 2007, Plaintiffs moved that the Court find Defendants in civil contempt for lodging a federal Racketeer Influenced and Corrupt Organizations Act (“RICO”) conspiracy

claim against WCM in New York, asserting that the filing of the claim in the SDNY Action violated the preliminary injunction.

On 13 March 2008, the Court granted Defendants' Motion to dissolve the preliminary injunction and stay the action (the "Stay Order") in favor the SDNY Action, concluding that the SDNY was a convenient, reasonable, fair, and more comprehensive forum for the resolution of the primary claims in this litigation. The Court took no action on Plaintiffs' Motion for Contempt. The North Carolina Court of Appeals affirmed the Stay Order on 22 December 2009.

While the appeal of the Stay Order was pending, the SDNY Action was dismissed on 27 August 2008, after the trial court (1) found that the sole federal claim providing a basis for subject matter jurisdiction was filed prematurely, and (2) declined to exercise supplemental jurisdiction over the state law claims. Two days later, all plaintiffs in the SDNY Action (except for the Defendants in this action) filed suit in the New York Supreme Court (the "NY State Action") asserting virtually all of the same substantive claims as were alleged in the SDNY Action. The NY State Action has been assigned to the Commercial Division of the New York Supreme Court.

Defendants now request that the Court modify the preliminary injunction to permit them to join as plaintiffs in the NY State Action. Plaintiffs oppose this motion and seek instead to have the Court lift the stay so as to allow them to pursue their affirmative claims here. Finally, Defendants request that the Court deny Plaintiffs' Motion for Contempt.

RULING

After considering the Court file, the parties' papers on the Motions, the Stay Order, and the current procedural posture of the respective actions in New York and North Carolina, the Court affirms and adopts anew the findings of fact in its Stay Order. The Court finds further that

(1) the NY State Action is better able to arrive at a more comprehensive resolution of the dispute in this case, given the broader scope of claims and parties before it, and (2) judicial economy counsels again in favor of litigation in New York.

Accordingly, the Court holds that (1) a stay continues to be warranted by those factors present in the record, (2) the Commercial Division of the New York Supreme Court is a convenient, reasonable, fair, and more comprehensive forum for the resolution of the primary claims in this litigation, and (3) it would work a substantial injustice for this action to be tried in North Carolina. The Court therefore **GRANTS** Defendants' Renewed Motion to Modify the Preliminary Injunction and **DENIES** Plaintiffs' Motion to Lift Stay.

The Court also **DENIES** Plaintiffs' Motion for Contempt. In that motion, Plaintiffs alleged that Defendants Harbinger Capital Partners Master Fund I Ltd., Aurelius Capital Master, Ltd., Aurelius Capital Partners, LP, Schultze Master Fund, Ltd., UBS Willow Fund, LLC, Arrow Distressed Securities Fund, and Latigo Master Fund, Ltd. (collectively, the "Fund Defendants"), violated the Court's preliminary injunction by asserting federal RICO claims in the SDNY Action.

In its 22 December 2009 opinion affirming the Stay Order, however, the North Carolina Court of Appeals stated that the "preliminary injunction order does not explicitly enjoin the [Defendants] from asserting claims against the [Plaintiffs] that arise under federal law." *Wachovia Bank, N.A. v. Harbinger Capital Partners Master Fund I, Ltd.*, 687 S.E.2d 487, 495 (N.C. Ct. App. 2009). The Court agrees with that conclusion, and therefore finds no grounds for holding the Fund Defendants in contempt.

CONCLUSION

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that:

1. Defendants' Renewed Motion to Modify the Preliminary Injunction is **GRANTED** so as to allow Defendants to assert in the NY State Action all claims arising from their acquisition of interests in the Le-Nature's Credit Facility. That portion of the preliminary injunction barring Defendants from further assignment of the Personal Tort Claims (as that term is defined in the Court's Stay Order) to entities not a party to this litigation, except on the express terms set forth in the preliminary injunction, shall remain in full force and effect;

2. Plaintiffs' Motion to Lift Stay is **DENIED**; and

3. Plaintiffs' Motion for Contempt is **DENIED**.

SO ORDERED, this the 15th day of March, 2010.

/s/ Albert Diaz
Albert Diaz
Special Superior Court Judge