

**UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WISCONSIN  
GREEN BAY DIVISION**

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SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

vs.

WEALTH MANAGEMENT, LLC, JAMES E. PUTMAN,  
AND SIMONE FEVOLA, ET AL.,

Case No. 09-CV-506

Defendants.

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**EXPEDITED MOTION TO STAY ORDER CONFIRMING  
RECEIVER'S DISTRIBUTION PLAN PENDING APPEAL**

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Creditors, the Edwin Wilson M.D. IRA ("Wilson") and the James P. and Sandra J. Verhoeven Revocable Trust ("Verhoeven"), by their counsel, hereby move, pursuant to Fed. R. Civ. P. 62, and Civil L.R. 7.4, to stay, without security, the Order Confirming the Receiver's Distribution Plan pending appeal.

**BACKGROUND**

1. The Receiver filed her proposed plan of distribution on September 8, 2009. After reviewing objections and the Receiver's response, conducting a hearing and reviewing letter briefs, the Court issued an Order confirming the Receiver's Distribution Plan on November 20, 2009 (the "Order"). The Order acknowledges that creditors are given absolute priority over investors or equity holders. Nonetheless, it adopts the Receiver's position that Wilson's and Verhoeven's exercise of redemption rights pursuant to WML Gryphon Fund LLC's ("Gryphon") Operating Agreement does not give them creditor status. In so concluding, the Court rejected state law in favor of "analogous" provisions of the Bankruptcy Code.

2. On December 18, 2009, Wilson and Verhoeven appealed.

**GROUND FOR RELIEF**

3. Granting a Motion for Stay is within the Court's discretion. See Fed. R. Civ. P. 62. Moreover, the Court may waive the requirement that a party prevailing on a stay request must post a supersedeas bond. See *In re Carlson* 224 F.3d 716, 719 (7th Cir. 2000) (A district court may waive bond requirement if appellant demonstrates ability to satisfy judgment and appellees' rights are not prejudiced);

*Olympia Equip. Leasing Co. v. W. Union Tel. Co.*, 786 F.2d 794, 796 (7<sup>th</sup> Cir. 1986) (under special circumstances, district court may stay execution pending appeal on less than complete bond). Here, a bond is unnecessary and would be a waste of money. *Id.*

4. Whether a stay is granted turns on four factors: (a) movant's likelihood of success on the merits; (b) whether movant will suffer irreparable injury if a stay is not granted; (c) whether other parties will suffer substantial harm if a stay is issued; and (d) whether public interest will be harmed. *Sofinet v. INS.*, 188 F.3d 703, 706 (7<sup>th</sup> Cir. 1999). In the instant case, the first three factors support issuing a stay.<sup>1</sup>

5. Wilson and Verhoeven likely will succeed on the merits. They are creditors under state law. As provided by 28 U.S.C. § 959(b), the Receiver manages and operates "the property according to the laws of the state where the property is located". See also *Waag v. Hamm*, 10 F. Supp 2d 1191, 1193 (D. Colo. 1998); *Midwest Sav. Ass'n v. Riversbend Assocs. P'ship*, 724 F. Supp. 661, 661-62 (D. Minn. 1989). Here, applicable state law provides that upon making a withdrawal request, Wilson and Verhoeven became creditors of Gryphon. See Wis. Stat. §183.0606. Pursuant to Wis. Stat. § 183.0905, Wilson and Verhoeven are entitled to receive a distribution prior to members who chose to continue their investment. Moreover, under Gryphon's Operating Agreement, the managing member had the option of segregating the investment or creating an account payable; the managing member elected the latter option for both Wilson and Verhoeven, creating a contract right in their favor. Finally, the U.S. Supreme Court has long recognized that claims accorded statutory priority must be honored by a court of equity. *Wiswall v. Sampson*, 55 U.S. 52, 66 (1852). See also *SEC v. Enter. Trust Co.*, 559 F.3d 649, 653 (7<sup>th</sup> Cir. 2009) ("[t]he absolute priority rule in bankruptcy means that one class of creditors may be paid in full before junior creditors get anything; a similar approach might have been appropriate here. But none of the custodial investors has appealed").

6. Section 510(b) of the Bankruptcy Code is not applicable. *Butner v. United States*, 440 U.S. 48, 55 (1979) ("[p]roperty interests are created and defined by state law"). Accord, *Barnhill v. Johnson*, 503 U.S. 393, 398 (1992). There is no statutory analogue to section 510(b) in Chapter 183 of the Wisconsin statutes. Indeed, Wis. Stat. § 183.0607(4) provides that Gryphon's indebtedness to Wilson

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<sup>1</sup> Because the public interest is not implicated in this matter, Wilson and Verhoeven believe that this factor weighs neither for nor against issuance of a stay pending appeal.

and Verhoeven “is at parity with the limited liability company’s indebtedness to its general, unsecured creditors, except to the extent subordinated by written agreement.” All of the funds, including Gryphon, have positive net equity. Accordingly, Wilson and Verhoeven are entitled to receive a proportionate distribution (with other unsecured creditors) with respect to the claim which arose when they withdrew -- and were dissociated from -- Gryphon. Even if Gryphon were insolvent, payment of a note/account payable for the redemption of a membership stake is not “damages” under 510(b) of the Bankruptcy Code. See *In re Blondheim Real Estate, Inc.*, 91 B.R. 639, 640 (Bankr. D. N.H. 1988) (“‘damages’ has the connotation of some recovery ‘other than’ the simple recovery of an unpaid debt due upon an instrument”); *In re Wyeth Co.*, 134 B.R. 920 (Bankr. W.D. Mo. 1991) (promissory note given for the sale of stock would not be subordinated under section 510(b) since the amount paid was not “damages”).

7. Wilson and Verhoeven will be irreparably injured if a stay pending appeal is not granted. On December 1, 2009, the Court entered its order establishing a creditor bar date of January 27, 2010, and an investor claim objection deadline of January 15, 2010. Pursuant to the Order, the Receiver will distribute the assets of the Wealth Management Funds. Accordingly, if a stay is not granted and Wilson and Verhoeven prevail on appeal, there will be no opportunity to correct the error as the funds’ assets will have been distributed.

8. The remaining investors will not suffer substantial harm if the Court’s Order approving distribution is stayed pending appeal. Although the investors who did not submit redemption requests will be required to wait a bit longer to receive what they are justly owed, such harm pales in comparison to the harm that will be suffered by Wilson and Verhoeven in the event the Court’s Order is reversed after the funds’ assets have been distributed.

For all of the foregoing reasons, the Court should issue an unsecured stay pending appeal.

Dated: December 23, 2009.

/s/ Bruce G. Arnold

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SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

vs.

CIVIL ACTION NO. 09-CV-506

WEALTH MANAGEMENT, LLC;  
JAMES E. PUTMAN;  
AND SIMONE FEVOLA,

Defendants, and

WML GRYPHON FUND, LLC;  
WML WATCHSTONE PARTNERS, L.P.;  
WML PANTERA PARTNERS, L.P.;  
WML PALISADE PARTNERS, L.P.;  
WML L-3, LLC;  
WML QUETZAL PARTNERS, L.P.;

Relief Defendants

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**CERTIFICATE OF SERVICE**

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I hereby certify that on December 23 2009, I electronically filed the Expedited Motion to Stay Order Confirming Receiver's Distribution Plan Pending Appeal using the ECF system, which will send notification of such filing to the following:

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