UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

v. Civil Action No: 09-C-506

WEALTH MANAGEMENT LLC,
JAMES PUTMAN, and SIMONE FEVOLA,

Defendants, and

WML GRYPHON FUND, LLC;
WML WATCH STONE PARTNERS, L.P.; WML PANTERA PARTNERS, L.P.; WML PALISADE PARTNERS, L.P.; WML L3, LLC;
WML QUETZAL PARTNERS, L.P., and
EMPLOYEE SERVICES OF APPLETON, INC.,

Relief Defendants.

REPLY IN SUPPORT OF MOTION TO ALTER OR AMEND COURT'S JUDGMENT OF FEBRUARY 15, 2011 [DOCKET NO. 353], ON RECEIVER'S MOTION TO COMPEL

Faye B. Feinstein, Receiver for Wealth Management LLC ("WM") and the Relief Defendants, hereby replies to the memorandum of law (Docket No. 359, the "Objection") of Wood, Hat & Silver, LLC ("WHS"), and Joseph Aaron in opposition to the Receiver's request (Docket No. 357, the "Motion") that the Court (a) reconsider its Decision and Order of February 15, 2011 [Docket No. 353] (the "Order"), and, upon such reconsideration, (b) either (i) vacate the Order or (ii) alter and amend it to provide that the Court may exercise personal jurisdiction with respect to the Receiver's Motion to Compel Discovery (Docket No. 315) (the "Motion to Compel")[1]

[1] Capitalized terms used but not defined herein are intended to have the meanings ascribed to them in the Motion.

ARGUMENT

The Objection perpetuates the confusion between, on the one hand, property of the receivership estates – partnership interests in The Baetis Fund, L.P. ("Baetis"), and the Brown Investment Fund, L.P. ("Brown"), each a Delaware limited partnership – and, on the other, *information sought* by the Receiver *about* that property, *i.e.*, documents that are not themselves property of the receivership and that the Receiver seeks only to have *produced* for her inspection. Through her subpoena to WHS, the Receiver seeks *information* about the receivership estates' interests in Baetis and Brown from WHS, their general partner, also a Delaware entity. No one disputes that receivership property, *i.e.*, limited partnership interests, is located in Delaware, where the partnerships were organized and are registered, or that the Receiver made the proper filing in Delaware to satisfy 28 U.S.C. §754 ("Section 754") and, thereby, authorize expansion of the Court's territorial jurisdiction pursuant to 28 U.S.C §1692 ("Section 1692"). (*See* WHS Memorandum in Opposition to Motion to Compel (Docket No. 321) at 10-11 & n.6; Order at 3 (discussing Receiver's filing of relevant documents in Delaware).)

The crucial misunderstanding that the Receiver respectfully asks the Court to correct is the one WHS also relies upon in its Objection, *i.e.*, that the Court's jurisdiction over Delaware entities commanded by subpoena to produce documents depends upon the Receiver's filing the Court's appointment order and the SEC's Complaint in California, where, the documents are, apparently, located, but where no *property of the receivership* is located. (Objection at 7-8 (mistakenly identifying the subpoenaed documents as receivership property.)

The information the Receiver seeks through document production is *not* property of the receivership estates. If WHS believes that the physical documents containing the information sought by the Receiver are, however, personal property of the receivership estates, WHS has not

explained why it has not turned over to the Receiver property that is hers to administer. If, instead, the documents are WHS's property, then their physical location has no relevance to the Receiver's obligations under Section 754, and filing the appointment order in California would have had no effect on this Court's territorial jurisdiction. Section 754 requires filing in federal judicial districts where "receivership property" is found, and, once that is accomplished, Section 754, in conjunction with Section 1692, "acts to extend the receiver court's personal jurisdiction over individuals in that district." Order at 2 (*citing SEC v. Bilzerian*, 378 F.3d 1100 (D.C. Cir. 2004)). Those statutes were enacted to free a receiver from having to undertake the expense and guesswork involved in filing in every district where, at some point, the receiver might later find a person or entity with some information relevant to some issue in the receivership proceeding. This is particularly true in this case, where there is nothing stopping WHS from moving the subpoenaed documents to another state and demanding that the Receiver file the appointment order again in the state where the documents would then be located.

Once recognizing its jurisdiction over WHS, the sole general partner of Baetis and Brown, the Court may order production of documents within WHS's control, and "the location of the documents is irrelevant." *Dexia Credit Local v. Rogan*, 231 F.R.D. 538, 541 (N.D. Ill. 2004) (citing *In re Uranium Antitrust Litig.*, 480 F. Supp. 1138 , 1144 (N.D. Ill. 1979)). This is true "*whether or not* the materials are located within the District or within the territory within which the subpoena can be served". *Hay Group, Inc. v. E.B.S. Acquisition Corp.*, 360 F.3d 404, 412 (3d Cir. 2004) (citing Advisory Committee Notes to Fed. R. Civ. P. 45, 1991 Amendments)

(emphasis added).[2] WHS complains that the Receiver did not raise this argument earlier, but the Receiver had no way of knowing that the Court would determine that the geographical location of non-receivership property – the subpoenaed documents – was critical to the Court's ability to command persons over whom it has jurisdiction to produce those documents.

Finally, whether or not the Order is technically a "judgment," the Court may nonetheless exercise its power to review and correct it. The term *judgment* includes "any order from which an appeal lies." Fed. R. Civ. P. 54(a). The Court's Order on the Motion to Compel may, in this case, indeed be considered to be "final because there is no pending litigation in the district court" between the Receiver and WHS. *Heraeus Kulzer, GmbH v. Biomet, Inc.* 633 F.3d 591, 593 (7th Cir. 2011). Therefore, because "the court is finished with the matter – as the only matter is discovery – and . . . no further proceedings are contemplated, the court's last order, even if it is a discovery order, is an appealable final order." *Id.*

Alternatively, if the Order is not one "from which an appeal lies," Fed. R. Civ. P. 54(a), then, as a non-final order, Fed. R. Civ. P. 54(b) permits the Court to change, set aside, or otherwise revise the Order at any time. *See Trustees of the Pension, Welfare, & Vacation Fringe Benefit Funds of IBEW Local 701 v. Pyramid Elec.*, 223 F.3d 459, 469 (7th Cir. 2000). The Court has the inherent power to reconsider non-final orders, even absent a manifest error of law or newly discovered evidence. *Manitowoc Marine Group LLC v. Ameron Int'l Corp.*, No. 03-C-0232, 2006 WL 2519219, at *1 (E.D. Wis. Aug. 29, 2006) (Griesbach, J.) (copy attached per Civil L.R. 7(j)(2)).

[2] As the Receiver noted in the Motion (at 7 n.2), she believes that service of the document subpoena provided due process of law and did no harm to the ability of WHS, Baetis, or Brown to ascertain their interests and protect their rights. However, if the Court concludes that the manner selected by the Receiver was procedurally ineffective, the Receiver respectfully submits that she "should be afforded the opportunity to obtain" proper service. *Haile v. Henderson Nat'l Bank*, 657 F.2d 816, 826 n.11 (6th Cir. 1981).

WHEREFORE, for the reasons stated herein and in the Motion, the Receiver asks the Court to overrule the Objection and enter an order granting the relief requested in the Motion and such other and further relief as the Court deems appropriate.

Respectfully submitted this 12th day of April, 2011.

s/ Christopher Combest
One of the Receiver's Attorneys

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EXHIBIT A

***Manitowoc Marine Group LLC v. Ameron Int'l Corp.*, No. 03-C-0232, 2006 WL 2519219, at *1 (E.D. Wis. Aug. 29, 2006) (Griesbach, J.)**

Not Reported in F.Supp.2d, 2006 WL 2519219 (E.D.Wis.)
(Cite as: 2006 WL 2519219 (E.D.Wis.))

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Only the Westlaw citation is currently available.

United States District Court,
E.D. Wisconsin.
MANITOWOC MARINE GROUP LLC, Plaintiff,
v.
AMERON INTERNATIONAL CORP., et al., Defendants.

No. 03-C-0232.
Aug. 29, 2006.

Aaron H. Kastens, David A. Krutz, Michael Best & Friedrich LLP, Waukesha, WI, for Plaintiff.

David J. Hanus, Jeffrey S. Fertl, Hinshaw & Culbertson LLP, Milwaukee, WI, I. David Cherniak, Lawrence J. Seiter, Johnstone Adams Bailey Gordon & Harris LLC, Mobile, AL, for Defendants.

MEMORANDUM AND ORDER

WILLIAM C. GRIESBACH, District Judge.

***1** Defendant Ameron International Corp. has filed a motion seeking reconsideration of the court's June 28, 2006, decision which in effect revived that portion of Plaintiff Manitowoc Marine Group's claim against Ameron that I had previously held was extinguished as a result of the settlement agreement Manitowoc had entered with Defendant International Marine & Industrial Applicators, Inc. (IMIA). Manitowoc and IMIA reformed their settlement agreement and sought reconsideration of the court's previous decision that partially granted Ameron's motion for summary judgment. In my decision of June 28, I granted Manitowoc's and IMIA's motion for reconsideration and concluded on the basis of the reformed agreement that Manitowoc's claim against Ameron now included its indebtedness to IMIA. Ameron seeks reconsideration of my decision granting the motion for reconsideration filed by Manitowoc and IMIA. Ameron claims that I committed manifest error in granting the motion since it was based on a change in facts rather than newly discovered evidence or an erroneous legal analysis. Ameron further claims that even if a change in facts can support a motion for reconsideration, reform of a settlement agreement may not resurrect a claim after the court has ruled on it. In the alternative, Ameron requests that the issue be certified for an interlocutory appeal pursuant to 28 U.S.C. § 1292(b). Ameron's motion will be denied.

At the outset, the court rejects Ameron's contention that a district court may not reconsider its rulings absent a showing of a manifest error of law or newly discovered evidence. Because entry of judgment has not been made, Rule 54(b) of the Federal Rules of Civil Procedure authorizes reconsideration of the court's nonfinal orders. Fed.R.Civ.P. 54(b) ("any order or other form of decision, however designated, which adjudicates fewer than all the claims ... is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties."); *see also Fisher v. Nat'l R.R. Passenger Corp.*, 152 F.R.D. 145, 149 (S.D.Ind.1993) ("[I]t is well established that a district court has the inherent power to reconsider interlocutory orders and reopen any part of a case before entry of final judgment.") (citing *Marconi Wireless Tel. Co. v. United States*, 320 U.S. 1, 47-48 (1943)). "[I]f an interlocutory decree be involved, a rehearing may be sought at any time before final decree, provided due diligence be employed and a revision be otherwise consonant with equity." *John Simmons Co. v. Grier Bros. Co.*, 258 U.S. 82, 90-91 (1922). Here, because of the change in facts represented by the Rescission Agreement, I conclude grounds existed to reconsider my earlier decision.

The more difficult question is whether a settlement agreement can be reformed after the court has adjudicated the parties' rights *vis a vis* a third party under the original agreement. Ameron is correct that *Krenz v. Medical Protective Co.*, 204 N.W.2d 663 (1973), is not controlling on this issue. In *Krenz*, a doctor, who was alleged to have negli-

gently set the plaintiff's broken ankle, was the unintended beneficiary of a general release that the plaintiff gave to the insurer of the premises in which she fell in settlement of a separate case brought to recover for the same injury. After the doctor moved for summary judgment on the basis of the release given the landowner's insurer in the other case, the parties in the other action reopened their case and reformed the release. Based on the reformed document, the doctor's motion was denied.

***2** It is true that in *Krenz*, unlike this case, the parties reformed the release prior to the court's ruling on the motion of the alleged third-party tortfeaser for summary judgment. Here, of course, Manitowoc and IMIA denied that the legal effect of their agreement was to extinguish any portion of the claim against Ameron and only moved to amend their agreement after the court ruled otherwise. Nevertheless, I concluded in my previous decision that the same rationale applied. The doctor in *Krenz*, like Ameron here, argued that a court should not allow reformation if it will result in an injury to third parties. However, the Wisconsin Supreme Court rejected this argument, stating:

> But we see no injury to Dr. Sievers. The original release in effect gave him a free ride without his knowledge, consent, or any consideration so far as the Krenzes' rights are concerned. He cannot stand in the position of a third-party beneficiary of a contract because the parties did not intend to contract for his benefit or intend any part of the promised consideration to go to him. Dr. Sievers stands in no equitable position. He is an alleged independent tortfeasor liable for his wrongdoing. He did nothing to his damage in reliance on the original release and therefore the original parties to the release are not precluded from amending the release without his consent to fully express their intent.
>
> 204 N.W.2d at 666.

I find the same rationale persuasive in this case. Ameron was not a party to the original release between Manitowoc and IMIA, and it certainly was not intended to benefit from it. Although I agree with Ameron that the legal effect of the original settlement agreement between Manitowoc and IMIA was to extinguish a portion of Manitowoc's claim against Ameron, this clearly was not their intent. By allowing Manitowoc and IMIA to reform their agreement, the court is giving effect to the intent of the parties to the agreement and placing the parties precisely where they would have been absent such an agreement. Ameron is simply denied a potential windfall. Absent compelling authority to the contrary, I conclude reformation under the circumstances of this case should be allowed. Accordingly, Ameron's motion for reconsideration will be denied.

I also conclude that Ameron's alternative request that the issue be certified for interlocutory appeal to the Seventh Circuit should also be denied. The criteria for granting certification for immediate appeal are: "there must be a question of law, it must be controlling, it must be contestable, and its resolution must promise to speed up the litigation." *Ahrenholz v. Board of Trustees of University of Illinois*, 219 F.3d 674, 675 (7th Cir.2000). The Seventh Circuit has made clear that "[u]nless all these criteria are satisfied, the district court may not and should not certify its order to us for an immediate appeal under section 1292(b)." *Id.* at 676. Here, I conclude that at least two of the foregoing criteria are absent. The issue raised by Ameron is one of many and relates only to damages. It is hardly controlling of the litigation between the parties.

***3** More importantly, certification for immediate appeal on this issue would not speed up the litigation. The case has been pending more than three years and is set for trial next month. Certification would significantly delay proceedings. Even if the court's ruling on the damage issue is later found to be in error, it would have no effect on the liability issues that a trial will resolve. If the parties reach agreement on liability, they can certainly structure a

settlement agreement that will preserve the right to seek appellate review of the damage issue. And if they can't, reversal on the damage issue is not likely to require a whole new trial. Certification of this issue for appeal now would merely delay the ultimate resolution of the case and potentially result in piecemeal appeals. Accordingly, Ameron's request for certification under § 1292(b) is denied.

IT IS THEREFORE ORDERED that Ameron's motion for reconsideration or, alternatively, for certification under 28 U.S.C. § 1292(b) (Docket # 178) is DENIED.

E.D.Wis.,2006.
Manitowoc Marine Group LLC v. Ameron Intern. Corp.
Not Reported in F.Supp.2d, 2006 WL 2519219 (E.D.Wis.)

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