FILED
U.S. Bankruptcy Appellate Panel
of the Tenth Circuit
June 27, 2003
Barbara A. Schermerhorn
Clerk

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE TENTH CIRCUIT

IN RE MEDICAL MANAGEMENT GROUP, INC., Debtor.	BAP No. WO-03-004
STATE OF OKLAHOMA EX REL. THE OKLAHOMA STATE DEPARTMENT OF HEALTH, Appellant, v. MEDICAL MANAGEMENT GROUP, INC.; OKLAHOMA EMPLOYMENT SECURITY COMMISSION; KITT WAKELEY; and JOEL C. HALL, Trustee, Appellees.	Bankr. No. 01-14494-WV Chapter 7 ORDER AND JUDGMENT*

Appeal from the United States Bankruptcy Court
for the Western District of Oklahoma

Before CLARK, NUGENT, and STARZYNSKI[1], Bankruptcy Judges.

STARZYNSKI, Bankruptcy Judge.

The parties did not request oral argument, and after examining the briefs and appellate record, the Court has determined unanimously that oral argument

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* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. 10th Cir. BAP L.R. 8018-6(a).

[1] The Honorable James S. Starzynski, Bankruptcy Judge for the District of New Mexico, sitting by designation.

would not materially assist in the determination of this appeal. Fed. R. Bankr. P. 8012. The case is therefore ordered submitted without oral argument.

Appellant Oklahoma State Department of Health ("OSDH") appeals the Order of the United States Bankruptcy Court for the Western District of Oklahoma denying OSDH's motion for relief from automatic stay as to Kitt Wakeley, a former officer of the Chapter 7 debtor Medical Management Group, Inc. ("MMGI" or "Debtor") to allow it to continue an administrative action (final accounting) against Mr. Wakeley in state court. For the reasons discussed below, we conclude that the bankruptcy court abused its discretion in denying OSDH's motion for relief from stay as to Mr. Wakeley and, therefore, we REVERSE.

APPELLATE JURISDICTION

This court, with the consent of the parties, has jurisdiction to hear timely-filed appeals from "final judgments, orders, and decrees" of bankruptcy courts within the Tenth Circuit. 28 U.S.C. § 158(a)(1), (b)(1), and (c)(1). The parties have consented to this court's jurisdiction in that they have not opted to have the appeal heard by the United States District Court for the Western District of Oklahoma. *Id.* § 158(c); 10th Cir. BAP L.R. 8001-1.

Before reaching the merits of this appeal, we must make an initial determination of whether we have jurisdiction. *Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 541 (1986) (a federal appellate court must determine whether it has jurisdiction over an appeal).

"The circuit courts consistently hold that orders granting or denying relief from the automatic stay are appealable final orders." *Eddleman v. United States Dep't of Labor*, 923 F.2d 782, 784 (10th Cir. 1991), *overruled in part on other grounds, Temex Energy, Inc. v. Underwood, Wilson, Berry, Stein & Johnson*, 968 F.2d 1003 (10th Cir.1992). *See also United States v. Fleet Bank (In re Calore Express Co., Inc.)*, 288 F.3d 22, 34 (1st Cir. 2002) (the denial of a stay motion

may be a final order if it decides the relevant dispute between the parties.); *FDIC v. Niagara Mohawk Power Corp. (In re Megan-Racine Assocs., Inc.)*, 102 F.3d 671, 675 (2d Cir. 1996) (denial of stay motion is final in 2d circuit); *Crocker Nat'l Bank v. American Mariner Indus., Inc (In re American Mariner Indus., Inc.)*, 734 F.2d 426, 429 (9th Cir. 1984) (BAP order affirming an order that denies stay relief is a final order), *overruled in part on other grounds, United Sav. Ass'n v. Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. 365, 368 (1988); *Grundy Nat'l Bank v. Tandem Mining Corp.*, 754 F.2d 1436, 1439 (4th Cir. 1985) (an order denying relief from the automatic stay is a final appealable order), *overruled in part on other grounds, Timbers,* 484 U.S. at 368; *Aetna Life Ins. Co. v. Leimer (In re Leimer)*, 724 F.2d 744, 745 (8th Cir. 1984) (order denying relief from stay is a final order).

> The grant of relief from the automatic stay is the equivalent of the lifting of a preliminary injunction; the denial of such relief is the opposite. Congress has specifically directed that orders granting or denying preliminary injunctions be deemed final for purposes of appellate review of district court orders. *See* 28 U.S.C. § 1292(a). The grant or denial of relief from the automatic stay implicates the same factors. In either case, important rights of the parties may be preserved or dissipated. . . . Most important, as in other instances where orders have been deemed final, it is fair to say that with respect to the issues before the court, nothing remains to be done.

Banc of America Commercial Fin. Corp. v. CGE Shattuck, LLC (In re CGE Shattuck, LLC), 255 B.R. 334, 336 (1st Cir. BAP 2000). In our case, nothing remains to be done by the court on the Stay motion.

The *American Mariner* case provides additional support for finding that stay orders deserve special consideration as final orders:

> A threshold issue presented by this case . . . is whether a decision of the appellate panel affirming an order that denies relief from the automatic stay is final for the purpose of this court's jurisdiction. We think it is. In reaching this conclusion, we adopt the reasoning of the court in *In re Regency Woods Apartments, LTD*, 686 F.2d 899, 902 (11th Cir. 1982). In *Regency*, the court initially observed that the collateral order doctrine and *Forgay-Conrad* rule appeared to apply to a district court order granting relief from the automatic stay. More important, the court also noted the provisions

> of the Bankruptcy Code for expedited and ex parte proceedings on complaints for relief from the automatic stay. From these provisions the court concluded, and we agree, that Congress intended the courts to conclusively and expeditiously adjudicate, apart from the bankruptcy proceedings as a whole, complaints for relief from the automatic stay. Immediate appeal from decisions of the bankruptcy appellate panel is plainly necessary to fulfill such congressional intent. We hold, therefore, that decisions of the bankruptcy courts granting or denying relief from the automatic stay under section 362(d) are final decisions reviewable by this court.

American Mariner, 734 F.2d at 429 (citations omitted). We agree with this reasoning. We therefore find that the bankruptcy court's denial of the Stay motion was a final order over which we have jurisdiction.

Furthermore, as discussed in more detail below, to the extent that the bankruptcy court's Order imposed an injunction under 11 U.S.C. § 105(a)[2] preventing OSDH from proceeding against Mr. Wakeley in state court, such an order is also a final order, or an interlocutory order over which it is appropriate to grant leave to appeal. 28 U.S.C. §§ 158(a)(1) & (3) & 1292(a)(1); Fed. R. Bankr. P. 8003.

BACKGROUND[3]

In 1999, Mr. Wakeley was appointed as a temporary manager for three Oklahoma nursing homes. At the time he was associated with the Debtor, an Oklahoma corporation.[4] In May 2000, an Order was entered by the state court removing him as the temporary manager. Under Oklahoma statutes, a temporary

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[2] Unless otherwise stated, all future statutory references are to title 11 of the United States Code.

[3] OSDH's statement of facts generally does not cite to the record. This makes the job of the reviewing court much more difficult than it needs to be. *See, e.g.,* Brief of Appellant at 6-7 (Only one reference to the record on each page). The Court therefore had to search the appendix to find the sources of some of OSDH's factual claims.

[4] The parties dispute whether the appointment of Mr. Wakeley was in his individual capacity or as the agent of the Debtor. We do not need to resolve that dispute in order to decide this appeal.

manager must render an accounting within 30 days of being removed.[5] Wakeley submitted an accounting on June 5, 2000, but it failed to satisfy OSDH's requirements. On October 26, 2000 an Administrative Law Judge ordered Wakeley "to immediately turn over the funds in his possession derived from the operation of Cyril and Rosewood to Rex Hodges, the current temporary manager of Rosewood and Cyril." (Appellant's App. at 0048.) Wakeley did not comply with this order. On December 22, 2000, the Administrative Law Judge entered Findings of Fact and ordered:

> IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that Kitt Wakely [sic] has not properly accounted for all of the funds that came into his possession and control as temporary manager and that he has not shown that all expenditures were reasonable and proper.
>
> IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Kitt Wakely's [sic] request for management fees is denied.
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> IT IS ADDITIONALLY ORDERED, ADJUDGED AND DECREED that the Applicants[6] are authorized to proceed with an action in the District Court against Kitt Wakely [sic] and Medical Management Group, Inc. for contempt of court for willfully violating the lawful orders of the Oklahoma State Department of Health, and for damages for breach of fiduciary duty and gross negligence.

(Appellant's App. at 0052.)

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[5] Okla. Stat. tit. 63, § 1-1914.2(L) provides:
(2) Within thirty (30) days after release, the temporary manager shall give the Department a complete accounting of all property of which the temporary manager has taken possession, or all funds collected, and of the expenses of the temporary managership.
(3) After a complete accounting, and payment of reasonable expenses incurred as a result of the temporary managership, the Commissioner shall order payment of the surplus to the owner. If funds are insufficient to pay reasonable expenses incurred as a result of the temporary managership, the owner shall be liable for the deficiency. Any funds recovered from the owner shall be used to reimburse any unpaid expenses due and owing as a result of the temporary managership.

[6] The Order defines the "Applicants" as the OSDH, No-More Associates, L.P., O.K. Properties, L.P. and Rex Hodges (Temporary Manager for Cyril Nursing Homes and Rosewood Manor Nursing Home). No-More Associates, L.P. and O.K. Properties, L.P. are owners/lessors of the real property at Rosewood and Cyril.

The Debtor filed its Chapter 11 petition on May 1, 2001. On that date, the Debtor held $642,000 in its bank accounts, and it listed these funds in its Schedules as assets. Almost all the funds were derived from Mr. Wakeley's operation of the nursing homes.

The bankruptcy court granted the Debtor's motion to appoint a trustee, and Joel Hall was appointed trustee on May 10, 2001. Mr. Hall filed a motion to convert the bankruptcy case from Chapter 11 to Chapter 7. This motion was granted, and Mr. Hall was appointed Chapter 7 trustee.

On October 2, 2001, OSDH filed its "Motion to Dismiss Certain Fiduciary Funds from the Bankruptcy Estate for Lack of Jurisdiction" ("Fiduciary motion"). The Trustee, and creditors Rex Hodges (successor temporary manager to Kitt Wakeley), Internal Revenue Service, and Kitt Wakeley objected. The legal theory for the Fiduciary motion was that the funds on deposit were trust funds and not part of the bankruptcy estate. The bankruptcy court heard oral argument on the motion, and took the matter under advisement. On March 13, 2002, the Court entered an order concluding that the funds were property of the bankruptcy estate and denied the Fiduciary motion.

On March 25, 2002, OSDH filed its "Motion to Dismiss Proceeding, or in the Alternative, for a Rehearing of the Order Denying Abandonment with Memorandum Brief in Support" ("Dismissal motion"). OSDH alleged that there was newly discovered evidence that justified either dismissal of the Chapter 7 case, or a granting of the relief sought in the Fiduciary motion. The trustee and Kitt Wakeley objected. The bankruptcy court denied the Dismissal motion. OSDH appealed that order to the United States District Court for the Western District of Oklahoma, where it is still pending. The parties are stayed from proceeding against the funds pending further orders of the District Court.

On August 30, 2002, OSDH filed its "Motion for Relief from the Automatic

Stay as to Kit Wakely [sic]" ("Stay motion") seeking to proceed with a pending regulatory action in the Oklahoma State District Court. OSDH asked the court to lift the automatic stay as to Mr. Wakeley, or declare that the automatic stay did not apply to regulatory actions against him in regard to his role as a temporary manager of the nursing homes. Specifically, the Stay motion only sought relief against "Wakely [sic] in regard to his role as a temporary manager of the Cyril and Rosewood nursing homes . . . ." (Appellant's App. at 0176.) The Stay motion alleges that "additional regulatory proceedings against Wakely [sic] alone will not create a conflict with MMGI's bankruptcy as those proceedings will not involve a determination of the validity of any debt held by a creditor of MMGI" and "Movant is not attempting to bring any claims against Wakely [sic] which it might file against MMGI's debtor estate – it seeks only a conclusion of its regulatory obligation to complete the accounting mandated by law." (Appellant's App. at 0177, 0179.) Both Kitt Wakeley and the Trustee filed objections to the Stay motion.

Mr. Wakeley claimed that the Stay motion is a third attempt by OSDH to get issues adjudicated in state court and, basically, argues that despite OSDH's claims to the contrary, what it really is doing is attempting to obtain possession of the funds. He also argued that the accounting OSDH seeks will impermissibly impact on his[7] and other claims in the bankruptcy. He acknowledges that normally the automatic stay would not protect him, but in this case he claims that the real party in interest is the Debtor.

The Trustee agreed that normally Mr. Wakeley would not be protected by MMGI's automatic stay, but claimed that this is a situation in which it would be appropriate to extend the stay to a non-debtor. He stated that if OSDH were

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[7] Okla. Stat. tit. 63, § 1-1914.2(H) provides that "The Commissioner shall set the compensation of the temporary manager, who shall be paid by the facility."

allowed to proceed against Mr. Wakeley it would adversely affect the administration of the estate and possibly permit OSDH to do indirectly that which the bankruptcy court has already ruled it cannot do. The Trustee alternatively requested that, if the court did lift the automatic stay, that its order be narrowly drawn so as to preclude OSDH from having a carte blanche opportunity to interfere with the bankruptcy court's jurisdiction over property of the estate. He also maintained that the order should "make clear that the stay is not lifted with respect to any property of the bankruptcy estate or property from the estate or exercising control over property of the estate, including but not limited to the funds held by the Trustee or the books and records of the Debtor, or any act which may otherwise interfere with the Trustee's administration of the bankruptcy estate." (Appellant's App. at 0203.)

The bankruptcy court heard the Stay motion on October 16, 2002 and orally ruled:

> The facts in the present case, of course, are unusual in that the ultimate issue, it seems to this Court, is the issue that's on appeal to the District Court at this time; and, that is, whether the funds which are included in the schedules of this debtor MMGI do, in fact, constitute property of the estate or whether they do not. . . .
> . . . .
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> . . . [T]he essence of the state court proceeding appears to be, of the regulatory proceeding, appears to be to this Court at least that the state's seeking accounting from Mr. Wakely [sic]. . . .
> . . . .
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> Now, it seems to this Court that in order for Wakely [sic] to render an accounting, the records of MMGI will have to be utilized. . . . [T]hose records all are property of the debtor. . . . And it does seem to the Court that in order to render an accounting, the records of this debtor would have to be utilized. . . .
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> . . . But it is very difficult to separate what this Court views as being the objective of the state court, that of rendering an accounting, from the claims process in this court and the administration of the estate in this court, assuming, of course, that the funds are ultimately determined by the District Court as being funds of the estate. The *Continental* case does allow the extension of the automatic stay to non-debtor parties where there is an identity of interests. And it seems to this Court that the ultimate issue still is

whose funds are those in question, who do they belong to. . . .

> And so the Court at the present time has concluded to deny the state's motion without prejudice to reasserting that motion or a similar motion after the appeal is decided. Now, if the appeal is decided in favor of the state, then that issue, I'm sure, won't come back here. But if it's not, then the Court would suggest that the state seek a, if it determines to seek relief that it do so in a narrow manner so as to ensure that there will be no interference with the bankruptcy process and also so that there would not be a determination of claims in the state court proceeding that ought to be decided in this proceeding.

(Appellant's App. at 0237-41.)

STANDARD OF REVIEW

The Bankruptcy Appellate Panel may affirm, modify, or reverse a bankruptcy court's judgment, order, or decree, or remand with instructions for further proceedings. Fed. R. Bankr. P. 8013. "For purposes of standard of review, decisions by judges are traditionally divided into three categories, denominated questions of law (reviewable de novo), questions of fact (reviewable for clear error), and matters of discretion (reviewable for 'abuse of discretion')." *Pierce v. Underwood*, 487 U.S. 552, 558 (1988). *See* Fed. R. Bankr. P. 8013. "However, when a court's factual findings are premised on improper legal standards or on proper ones improperly applied, they are not entitled to the protection of the clearly erroneous standard, but are subject to *de novo* review." *Osborn v. Durant Bank & Trust Co. (In re Osborn)*, 24 F.3d 1199, 1203 (10th Cir. 1994).

The denial of a motion for relief from automatic stay is reviewed for abuse of discretion. *Franklin Sav. Ass'n v. Office of Thrift Supervision*, 31 F.3d 1020, 1023 (10th Cir. 1994) (*citing Pursifull v. Eakin*, 814 F.2d 1501, 1504 (10th Cir. 1987)). The denial or imposition of an injunction also is reviewed for abuse of discretion. *See, e.g., Hawkins v. City & County of Denver*, 170 F.3d 1281, 1292 (10th Cir. 1999).

A court abuses its discretion when it relies upon clearly erroneous findings

of fact or when it improperly applies the law or uses an erroneous legal standard. *In re Marvel Entm't Group, Inc.*, 140 F.3d 463, 470 (3rd Cir. 1998); *Mapother & Mapother, P.S.C. v. Cooper (In re Downs)*, 103 F.3d 472, 480-81 (6th Cir. 1996). "Under this standard, we will not disturb a bankruptcy court's decision unless we have a definite and firm conviction that the bankruptcy court made a clear error of judgment or exceeded the bounds of permissible choice under the circumstances." *United States v. Berger (In re Tanaka Bros. Farms, Inc.)*, 36 F.3d 996, 998 (10th Cir. 1994).

DISCUSSION

The issue before the Court is whether the bankruptcy court abused its discretion in denying OSHA's Stay motion, thus enjoining proceedings against Mr. Wakeley. We conclude that the bankruptcy court erred in denying the Stay motion, because Mr. Wakeley is not entitled to a stay of the state court proceedings as a result of the Debtor's Chapter 7 case as a matter of law and the record in this case.

When a debtor files bankruptcy, it is automatically entitled, subject to certain express exceptions, to the protection of the automatic stay set forth in section 362(a). This section provides, in relevant part, that:

> Except as provided in subsection (b) of this section, a petition filed under section 301 . . . operates as a stay, applicable to all entities, of–
>
> (1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title;
> . . .
>
> (3) any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate; . . . .

11 U.S.C. § 362(a). Although the scope of the automatic stay set forth in this

section is broad, the clear language of the statute only protects debtors. *Otoe County Nat'l Bank v. W & P Trucking, Inc.*, 754 F.2d 881, 883 (10th Cir. 1985). The stay in section 362(a) may not be invoked by nondebtors who are related to the Debtor in some way. *McCartney v. Integra Nat'l Bank North*, 106 F.3d 506, 509-10 (3rd Cir. 1997); *Teachers Ins. and Annuity Ass'n of Am. v. Butler*, 803 F.2d 61, 65 (2nd Cir. 1986); *Fortier v. Dona Anna Plaza Partners*, 747 F.2d 1324, 1329-30 (10th Cir. 1984). *See also Provincetown Boston Airline, Inc. v. Miller (In re Provincetown Boston Airline, Inc.)*, 52 B.R. 620, 624 (Bankr. M.D. Fla. 1985) (The protection afforded by § 362 of the Bankruptcy Code is not available to non-debtors even if they are affiliated with a debtor.); *In re Arrow Huss, Inc.*, 51 B.R. 853, 856 (Bankr. D. Utah 1985) ("It is well settled that Section 362 of the Bankruptcy Code, which stays actions against the debtor and against property of the estate, does not forbid actions against its nondebtor principals, partners, officers, employees, co-obligors, guarantors, or sureties."). *Cf.* 11 U.S.C. §§ 1201 and 1301 (affirmatively providing stay protection for co-debtors in Chapters 12 and 13). Therefore, the automatic stay does not apply to actions by OSDH against Mr. Wakeley, a nondebtor, and any injunction thereunder resulting from the bankruptcy court's denial of the Stay motion was in error.[8]

In certain circumstances, however, bankruptcy courts have enjoined actions against non-debtors through application of section 105(a), which provides: "The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title." 11 U.S.C. § 105(a); *see, e.g.*, *Landsing Diversified Properties-II v. First Nat'l Bank & Trust Co. (In re Western Real Estate Fund, Inc.)*, 922 F.2d 592, 599 (10th Cir.) ("'[s]ection 105(a) has been

[8] Because the automatic stay of § 362(a) does not apply, we need not discuss the exceptions of § 362(b), or OSDH's claim that the bankruptcy court failed to apply *Eddleman v. United States Dep't of Labor*, 923 F.2d 782 (10th Cir. 1991).

widely utilized in attempts to enjoin court proceedings against nondebtor parties that allegedly will have an impact on the debtor's bankruptcy case.'") (quoting 2 *Collier on Bankruptcy* ¶ 105.02 (15th ed. 1990)), *modified on other grounds, Abel v. West*, 932 F.2d 898 (10th Cir. 1991); *accord A.H. Robins Co., Inc. v. Piccinin (In re A.H. Robins Co., Inc.)*, 788 F.2d 994, 1002 (4th Cir. 1986); *TRS, Inc. v. Peterson Grain & Brokerage Co., Inc. (In re TRS, Inc.)*, 76 B.R. 805, 809 (Bankr. D. Kan. 1987); *Otero Mills, Inc. v Security Bank & Trust (In re Otero Mills)*, 25 B.R. 1018, 1020 (D. N.M. 1982). Although the language of section 105 is broad, relief under this section is "extraordinary." *Arrow Huss*, 51 B.R. at 857. Furthermore, section 105 may only be used to protect a debtor's interests: "unless this extension [of the automatic stay] is designed to protect the debtor's interests, it cannot be granted." *GAF Corp. v. Johns-Manville Corp. (In re Johns-Manville Corp.)*, 26 B.R. 405, 415 (Bankr. S.D.N.Y. 1983), *aff'd*, 40 B.R. 219 (S.D.N.Y. 1984); *accord Western Real Estate Fund,* 922 F.2d at 599. "[T]he pivotal question is whether the ***debtor*** will suffer irreparable harm if the proceedings against the nondebtor go forward. It is the debtor's interests, and not the interests of nondebtors, which the extraordinary powers of § 105 are designed to protect." *Glassman v. Electronic Theatre Restaurants Corp. (In re Electronic Theatre Restaurants Corp.)*, 53 B.R. 458, 462 (N.D. Ohio 1985) (emphasis in original); *accord Western Real Estate Fund*, 922 F.2d at 599*; see also Celotex Corp. v. Edwards,* 514 U.S. 300, 308 (1995) (bankruptcy court has no jurisdiction over actions that have no effect on the debtor).

The relief available under section 105 is in the nature of an injunction and is governed by the principles that govern injunctions in general. *Western Real Estate Fund*, 922 F.2d at 599; *Provincetown Boston Airline, Inc.*, 52 B.R. at 624. The United States Court of Appeals for the Tenth Circuit has established that the party seeking an injunction must prove:

> "(1) a substantial likelihood of prevailing on the merits; (2) irreparable harm unless the injunction is issued; (3) [that] the threatened injury outweighs the harm that the preliminary injunction may cause the opposing party; and (4) [that] the injunction, if issued, will not adversely affect the public interest."

Greater Yellowstone Coalition v. Flowers, 321 F.3d 1250, 1255 (10th Cir. 2003) (quoting *Fed. Lands Legal Consortium ex rel. Robart Estate v. United States*, 195 F.3d 1190, 1194 (10th Cir. 1999)). *See also Commonwealth Oil Refining Co., Inc. v. United States Envtl. Prot. Agency (In re Commonwealth Oil Refining Co., Inc.)*, 805 F.2d 1175, 1189 (5th Cir. 1986) (same four factors needed to issue § 105 stay.)

The record before this Court indicates that Mr. Wakeley did not meet his burden of proving that he was entitled to a § 105(a) injunction. Indeed, it does not appear that he presented any evidence needed to make such findings. And, presumably this could only be done in an adversary proceeding. *See* Fed. R. Bankr. P. 7001(7); S*tate Bank v. Gledhill (In re Gledhill)*, 76 F.3d 1070, 1077 (10th Cir. 1996).

The bankruptcy court expressed its concern that the administrative proceeding would impact administration of the estate. This concern cannot override the general rule that the automatic stay does not protect non-debtors, and that a section 105(a) injunction cannot be issued based on a record such as the one in this case. Furthermore, as the Trustee suggests in his brief, any order can be tailored to ensure that the estate is minimally impacted. Thus, for instance, nothing prevents creditors from obtaining the Debtor's records pursuant to valid discovery requests not made for the purpose of collecting from the debtor or property of the estate. *In re Hillsborough Holdings Corp.*, 130 B.R. 603, 605 (Bankr. M.D. Fla. 1991).

The Court finds that the bankruptcy court's reliance on *Gillman v. Continental Airlines, Inc. (In re Continental Airlines)*, 177 B.R. 475 (D. Del.

1993) was misplaced. First, *Continental* involved an ongoing reorganization under Chapter 11, unlike the liquidation in this case. *See Celotex*, 514 U.S. at 310 (bankruptcy court's jurisdiction in context of § 105 injunction is more limited in Chapter 7 cases than in Chapter 11 cases). Second, the *Continental* court found not only that there was an "identity of interest" between the debtor and the non-debtor such that the debtor was the real party in interest, but also that the litigation would "directly affect the debtor and, more particularly, the debtor's assets or its ability to pursue a successful plan of reorganization." *Continental*, 177 B.R. at 479. In our case the accounting would affect Mr. Wakeley but not the funds, which are under the control and supervision of the Chapter 7 trustee. Finally, the *Continental* court found that the allegations were that Continental itself was the alleged wrongdoer. In our case, OSDH seeks an accounting from Mr. Wakeley and a review of his actions. OSDH does not claim that the Debtor owed or breached any fiduciary duties.

CONCLUSION

For the reasons stated above, the bankruptcy court abused its discretion in enjoining OSDH's litigation against Mr. Wakeley. Accordingly, the bankruptcy court's Order is REVERSED.