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United States Bankruptcy Court, M.D. Florida, Ft. Myers Division.

In re FIDDLER'S CREEK, LLC., et al., Debtors.

No. 9:10–bk–03846–ALP.
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Sept. 15, 2010.

Attorneys and Law Firms

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ORDER (A) GRANTING DEBTORS' MOTION FOR AN ORDER ENFORCING THE AUTOMATIC STAY, AND (B) RESERVING RULING ON THE DEBTORS' REQUEST TO HOLD PLAINTIFFS MATTHEW SUFFOLETTO, RAYMOND DAVID, STEVEN TAUB AND STEPHEN SHULMAN AND ATTORNEYS ROBERT STOCHEL, GLENN VICIAN AND ERIC VASQUEZ IN CONTEMPT OF COURT FOR THE INTENTIONAL AND WILLFUL VIOLATION OF THE AUTOMATIC STAY AND FOR THE AWARD OF SANCTIONS IN CONNECTION THEREWITH

K. RODNEY MAY, United States Bankruptcy Judge.

***1 THIS MATTER** came before the Court on June 4, 2010 at 9:30 a.m. (the "Hearing") upon the Motion by the Debtors [1] for an Order (I) Enforcing the Automatic Stay, (II) Awarding Sanctions for Intentional and Willful Violation of the Automatic Stay and (III) Holding Plaintiffs Matthew Suffoletto, Raymond David, Steven Taub and Stephen Shulman (the "Plaintiffs") and Attorneys Robert Stochel, Glenn Vician and Eric Vasquez (the "Plaintiffs' Counsel") in Contempt of Court (D.E.203) (the "Original Motion"), the Supplement to the Motion filed by the Debtors (D.E.222) (the "Supplement") and the Debtors' Submission of Supplemental Authority in Support of Motion for Enforcement of Automatic Stay, and Reply to the Plaintiffs' Response (D.E. # 256) (the "Supplemental Authority")(collectively, with the Original Motion, the Supplement and the Supplemental Authority are referred to herein as the ("Motion"). [2]

1 The Debtors in these jointly administered proceedings are: (i) Fiddler's Creek, LLC; (ii) 951 Land Holdings, LLC; (iii) 951 Land Holdings, Ltd.; (iv) DY Associates, LLC; (v) DY Land Associates, Ltd .; (vi) FC Beach, LLC; (vii) FC Beach, Ltd.; (viii) FC Golf, LLC; (ix) FC Golf, Ltd.; (x) FC Hotel, LLC; (xi) FC Hotel, Ltd.; (xii) FC Marina, LLC; (xiii) FC Resort, LLC; (xiv) FC Resort, Ltd.; (xv) Fiddler's Creek Management, Inc.; (xvi) GBFC Development, LLC; (xvii) GBFC Development, Ltd.; (xviii) GBFC Marina, Ltd.; (xix) Gulf Bay Hospitality Company, LLC; (xx) Gulf Bay Hospitality, Ltd.; (xxi) Gulf Bay Hotel Company, LLC; (xxii) Gulf Bay Hotel Company, Ltd.; (xxiii) DY Land Holdings II, LLC; (xxiv) FC Commercial, LLC; (xxv) FC Parcel 73, LLC; (xxvi) GB Peninsula, Ltd., (xxvii) GBP Development, Ltd. and (xxviii) GBP Development, LLC.

2 All capitalized terms used herein and not otherwise defined shall have the meanings set forth in the Motion.

Based on the findings and conclusions, and for the reasons stated on the record in open court at a bench ruling on August 20, 2010, as supplemented in detail below, the Court finds and concludes that the commencement of the Class Action Lawsuit by the Plaintiffs against Aubrey Ferrao violates the automatic stay provisions of the Bankruptcy Code, namely sections 362(a)(1), 362(a)(3) and 362(a)(6). As a result, the Class Action Lawsuit is null and void *ab initio* and is therefore without effect.

The Court having considered the Motion, the Response filed by the Plaintiffs to the Debtor's

Motion for Enforcement of Automatic Stay, for Sanctions and for Contempt (D.E.249) and a Supplemental Response filed by the Plaintiffs to the Debtors' Motion (D.E.250) (collectively, the "Response"), having reviewed the documents submitted by the parties in connection with the Motion and the Response, including the Class Action Lawsuit and the Golf Club Membership Agreements, having reviewed the entire record in these proceedings, having heard argument of counsel, and after due deliberation and consideration, and for good and sufficient cause appearing therefore:

THE COURT HEREBY MAKES THE FOLLOWING FINDINGS OF FACT AND CONCLUSIONS OF LAW:

1. The Class Action Lawsuit asserts causes of action ostensibly against Aubrey Ferrao as the sole defendant therein, namely for breach of contract in respect of the Golf Club Membership Agreements, civil conversion related to the Initiation Deposits delivered to the Debtors under the Golf Club Membership Agreements, "pierce corporate veil claim" and class action certification. These same counts were pled in a pre-petition related lawsuit brought by other plaintiffs and current Plaintiffs' counsel (as a Golf Club Member) against both the Debtors and Mr. Ferrao. In both actions, Plaintiffs' counsel asserted that Mr. Ferrao is the alter ego of the Debtors in that he is alleged to have dominated and controlled the Debtors and caused the Debtors to breach the Golf Club Membership Agreements, and used the Debtors as a vehicle to take and convert certain Initiation Deposits paid by the Plaintiffs pursuant to the Membership Plan to acquire golf memberships in the Golf Club. [3] The Plaintiffs are each a counter-party to a certain Golf Membership Agreement with FC Golf, Ltd., d/b/a The Golf Club at Fiddler's Creek (the "Golf Club"), which is one of the Debtors herein. The Golf Club was previously owned and operated by another of the Debtors, namely 951 Land Holdings, Ltd., previously doing business as the Golf Club. 951 Land Holdings, Ltd. and FC Golf, Ltd. are collectively referred to herein as the Golf Club Debtors.

[3] These factual allegations are the basis of all causes of action asserted against Mr. Ferrao. (See ¶¶ 43, 44, 66, 67, 74, 77, 83, 90, 91, 92, 96, 102, 140, 158, 165, 170, 171, 172, 208, 211, 212, 213, 215, 216, 223, 225, and 234. Based upon principles of judicial estoppel, Plaintiffs are bound by their factual allegations and cannot amend to plead inconsistent facts. *See Lott v. Sally Beauty Co., Inc.,* 2002 WL 533651 (M.D.Fla.2002) ("This doctrine ... precludes a party from assuming a position in a legal proceeding inconsistent with one previously asserted when inconsistency would allow the party to 'play fast and loose with the Courts.' ") (citation omitted).

A. The Golf Club Debtors are the Real Parties in Interest in the Class Action Lawsuit.

***2** 2. The automatic stay under section 362 of the Bankruptcy Code does not act as a stay against a creditor pursuing truly independent causes of action against the Debtors' officers, directors or shareholders. However, it is black letter law in Florida that seeking a determination that a shareholder is the "alter ego" of a corporation and therefore liable for the corporation's debts, or similarly seeking to pierce the corporate veil of a corporation to impose liability on the shareholder for the corporation's debts, is *not* an independent claim or cause of action. *See Tara Productions, Inc. v. Hollywood Gadgets, Inc.,* 2010 WL 1531489 at *9 (S.D.Fla. Apr.16, 2010)("[a]lter ego is not a separate cause of action for which relief can be granted...."). Rather, it is a means of imposing liability on the shareholder based on an underlying cause of action for which the corporation is liable, including tort liability or liability for breach of contract. *See id.; see also Turner Murphy Co. v. Specialty Constructors, Inc.,* 659 So.2d 1242, 1245 (Fla. 1st DCA 1995)("[p]iercing a corporate veil is not itself a cause of action any more than the doctrine of *respondeat superior* is"); *International Fin. Serv. Corp. v. Chromas Technologies Canada, Inc.,* 356 F.3d 731, 736 (7th Cir.2004)("[p]iercing the corporate veil, after all, is not itself an action; it is merely a procedural means of allowing liability on a substantive claim, here breach of contract"); 1 *Fletcher Cyclopedia of the Law of Private Corporations* § 41.28 (2010) and cases cited therein; *see also Peacock v. Thomas,* 516 U.S. 349, 354, 116

S.Ct. 862, 866, 133 L.Ed.2d 817 (1996)(piercing the corporate veil " 'is a means of imposing liability on an underlying cause of action' ")(internal citation omitted).

3. As a result, in order to succeed in respect of the Class Action Lawsuit, the Plaintiffs would first be required to first establish the Golf Club Debtors' alleged liability for breach of contract of the Golf Club Membership Agreements or civil conversion in connection with the Initiation Deposits before, and as a condition precedent to, pursuing the remedy of alter ego or veil piercing against Mr. Ferrao for those same damages.

4. Importantly, Mr. Ferrao is not a party to the Golf Club Membership Agreements and is not alleged to be a party to any other contract or agreement with the Plaintiffs or any Golf Club members. As such, the Court finds and concludes that the substantive claims in the Class Action Lawsuit are clearly causes of action against the Golf Club Debtors for allegedly breaching the Golf Club Membership Agreements and allegedly converting and improperly disbursing the Initiation Deposits in connection therewith. As a result, the commencement and the continued prosecution of the Class Action Lawsuit violates the automatic stay provisions of section 362 of the Bankruptcy Code.

B. *The Automatic Stay Has Been Routinely Enforced and Extended in Respect of Non–Debtors in Circumstances Substantially Similar to the Class Action Lawsuit.*

***3** 5. The automatic stay has been routinely enforced and extended in respect of non-debtors in circumstances substantially similar to the Class Action Lawsuit. Specifically, in *Johns–Manville Corp. v. Asbestos Litigation Group (In re Johns–Manville Corp.),* 26 B.R. 420 (Bankr.S.D.N.Y.1983), *rev. in part on other grounds,* the court considered the issue of whether the automatic stay under section 362 of the Bankruptcy Code can be extended to non-debtor defendants in litigation outside of the bankruptcy court. In *Johns–Manville,* among other things, the court addressed an uncertified class action complaint that was filed two weeks after the bankruptcy cases were filed, where the plaintiffs, the Herrmans, sued officers and directors of the debtors related to alleged misstatements in the federal securities filings of the debtors.[4] The court determined that the Herrman litigation violated the automatic stay under section 362 and concluded that injunctive relief was appropriate. In reaching this conclusion, the court found that there would be a risk that the debtor would be a "controlling nonparty" in the Herrman litigation and thus "could be collaterally stopped in subsequent suits from relitigating issues determined against its officers and directors." *Id.* at 429.

4 It is clear to the Court that the Class Action Lawsuit is merely an attempt by Plaintiffs' counsel to re-assert claims that were raised pre-petition and which included the Debtors as named defendants therein. The same situation existed in the *Johns Manville* case wherein a pre-petition class action was stayed by virtue of the filing of the *Johns Manville* bankruptcy case. The court in *Johns Manville* concluded that the post petition class action was "for all practical purposes ... a replay of the enjoined ..." prepetition class action suit. *Id.* at 428. The same is true in respect of the Class Action Lawsuit.

6. In addition, the court found that "[e]ven if it is not so bound, Manville may be disadvantaged in subsequent suits." *Id.* The court further found that deposition or trial testimony of the debtors' executives may be used against the debtor, and that the debtor would not have the "benefit of the most fundamental protections available to a party defendant, such as the right of cross-examination." *Id.* Lastly, the court found that the debtor would need to devote valuable resources in responding to interrogatories and document requests, and that the need to protect attorney client and other privileges may require the debtor to intervene in pretrial discovery in order to protect its rights. *Id.* at 429–430.

7. Additionally, in the case of *Mazur v. U.S. Air Duct Corp. (In re U.S. Air Duct Corp.),* 8 B.R. 848 (Bankr.N.D.N.Y.1981), the court considered whether a pending state court case that sought the recovery of employee trust funds from the

president of the debtor could continue outside of the bankruptcy court. In reaching the conclusion that the action could *not* continue, the court found that the claims asserted against the president of the debtor were identical to those that could be asserted against the debtor, namely the failure to make employee contributions under a collective bargaining agreement. The court then stated that the "[t]he fundamental question of relation to a case under the Bankruptcy Code is whether the determination of the claims against the Non–Debtor will or will not effect [sic] the Debtor's assets **and/or liabilities as they existed at the date of the petition....**" *Id.* at 851 (emphasis added). The court held that the state court case could not proceed because the "proof to substantiate claims in issue against the Debtor ... will be identical to that proof required to hold the Non–Debtor liable.... This duplicative and uneconomical use of judicial resources is clear." *Id.* at 854; *see also Federal Life Ins. Co. v. First Fin. Group of Texas, Inc.*, 3 B.R. 375, 376 (S.D.Tex.1980) (in pre-petition lawsuit against debtor and non-debtor co-defendants, allegations "are inextricably interwoven, presenting common questions of law and fact, which can be resolved in one proceeding" and to allow case to proceed "would not be conducive to judicial economy and would unduly hinder the efforts of the Bankruptcy Court").

***4** 8. The Court adopts the reasoning and analysis of the courts in *Johns–Manville* and *U.S. Air Duct* in connection with the present case. Moreover, unlike the "claims" against Mr. Ferrao in the Class Action Lawsuit, the claims asserted in *Johns–Manville* and *U.S. Air Duct* were separate, independent claims available to creditors against the officers and directors of the debtor, yet the court still concluded that the automatic stay applied. As set forth above, the causes of action which are being asserted in the Class Action Lawsuit are actually against the Golf Club Debtors for alleged breach of contract and civil conversion. As a result, the facts in the present case involving the Golf Club Debtors and Mr. Ferrao are far more compelling than those in *Johns–Manville* and *U.S. Air Duct* and therefore support application of the automatic stay. Moreover, the proof to substantiate and pursue the remedy of alter ego and veil piercing against Mr. Ferrao will be identical to the proof required to show whether the Golf Club Debtors breached their contractual obligations, which by definition means that the Class Action Lawsuit will affect the liabilities of the Golf Club Debtors as of the petition date.

9. Similarly, the issues of fact and law involved in the Class Action Lawsuit as they relate to whether the Golf Club Debtors breached the Golf Club Membership Agreements with the Plaintiffs are the same as the facts and law that will necessarily be dealt with in these Chapter 11 cases, including in the process of developing and confirming a plan of reorganization and in the claims allowance process. Moreover, many of the putative class members, including certain of the Plaintiffs, have filed proofs of claims in these Chapter 11 cases. Therefore, the continued prosecution of the Class Action Lawsuit is not conducive to judicial economy and will necessarily and significantly hinder the efforts of this Court as well as the Golf Club Debtors' efforts to reorganize.

10. In the seminal case of *A.H. Robins Co., Inc. v. Committee Representatives of Dalkon Shield Claimants (In re A.H. Robins Co., Inc.)*, 788 F.2d 994 (4th Cir.1986), the court faced a request for an injunction from the debtors seeking to prevent numerous lawsuits from proceeding against non-debtor co-defendants in respect of claims relating to damages caused by the use of the Dalkon Shield. In entering the injunction preventing such suits from proceeding against the non-debtor co-defendants, the court analyzed sections 362(a)(1) and (a)(3) of the Bankruptcy Code.

11. At the outset, the court recognized that section 362(a)(1) applies by its terms only to the debtor and not co-defendants. However, the court held that the stay under section 362(a)(1) can be available to non-debtor co-defendants in "unusual circumstances." The court held that such circumstances would exist "when there is such identity between the debtor and the third-party defendant that the debtor may be said to be the real party defendant and that a judgment against the third-party defendant will in effect be a judgment or finding against the debtor." *Id.* at 999. The court went on to identify one example of such unusual circumstances as being a

situation where the third party co-defendant had a right of indemnity back against the debtor on account of any judgment against that third party. In this situation, the court concluded that "[t]o refuse application of the statutory stay ... would defeat the very purpose and intent of the statute." *Id.*

***5** 12. In the present case, the Class Action Lawsuit seeks "in effect a judgment or findings against the debtor" because, as stated above, the condition precedent to pursuing an alter ego or veil piercing remedy against Mr. Ferrao is a finding and conclusion that the Golf Club Debtors breached the Golf Club Membership Agreements with the Plaintiffs and improperly converted the Initiation Deposits. The Court finds the fact that the Plaintiffs seek this relief against the Golf Club Debtors (even though the Golf Club Debtors are not named as defendants in the Class Action Lawsuit) is not subject to reasonable dispute.

13. Moreover, and importantly, the indemnification example identified in *A.H. Robins* as a basis to extend and enforce the automatic stay exists in the present case as Mr. Ferrao asserts that he is entitled to indemnity from the Debtors, including the Golf Club Debtors. Still further, Mr. Ferrao has potential claims against the Golf Club Debtors arising out of the Class Action Lawsuit, including for contribution, unjust enrichment and similar claims. As a result, the existence of these potential claims clearly implicates the automatic stay in favor of the Golf Club Debtors and provides further justification for this Court to enforce the stay in respect of the Class Action Lawsuit.

14. In addition to its analysis under section 362(a)(1) discussed above, the court in *A.H. Robins* analyzed whether the lawsuits against third party co-defendants violated section 362(a)(3) of the Bankruptcy Code as being an "action, *whether against the debtor or third-parties,* to obtain possession or to exercise control over property of the debtor." *Id.* at 1001 (emphasis in original). The court first concluded that the term "property of the debtor" was very broadly defined in section 541 of the Bankruptcy Code, and included "all legal or equitable interests of the debtor in property as of the commencement of the case." *Id.* Referring to insurance contracts in the name of the debtors, the court went on to conclude that "[a]ny action in which the judgment may diminish this 'important asset' is unquestionably subject to a stay under this subsection." *Id.* (internal citation omitted).

15. A debtor's interests in its pre-petition contracts become property of the debtor's estate upon the filing of a bankruptcy petition. *Grant v. Lathan Construction Corp. (In re Construction Contractors of Ocala, Inc.),* 196 B.R. 188, 194 (Bankr.M.D.Fla.1996); *see also Hutchins v. Fordyce Bank and Trust Co. (In re Hutchins),* 216 B.R. 1, 7 (Bankr.E.D.Ark.1997) ("[A] debtor's interest in a contract, even if it is nonassumable, constitutes property of the estate.")(citing *Bell v. Alden Owners, Inc.,* 199 B.R. 451, 462 (S.D.N.Y.1996)). Because a debtor's contracts are property of the estate, Section 362(a)(3) of the Bankruptcy Code acts as a stay of any act to "exercise control" over the debtor's pre-petition contracts. *See Hutchins,* 216 B.R. at 7 ("Upon the filing of the petition in bankruptcy, the automatic stay prohibited any action against both the debtor and estate property, including the rights associated with the contracts in which the debtor had an interest.").

***6** 16. As in *A.H. Robins,* the central focus of the Class Action Lawsuit are the rights and obligations of the Golf Club Debtors and the Plaintiffs, along with the putative class of other Golf Club Members, under pre-petition contracts between the Golf Club Debtors and the Plaintiffs (but not Mr. Ferrao), namely the Golf Club Membership Agreements. It is undisputed that Mr. Ferrao is not a party to such Golf Club Membership Agreements. Moreover, it is undisputed that the Plaintiffs in the Class Action Lawsuit seek, and in fact, are required, to adjudicate the rights and obligations of the Golf Club Debtors under the Golf Club Membership Agreements in order to attempt to prove that the Golf Club Debtors breached such agreements and in connection therewith improperly converted the Initiation Deposits. Such a determination of the Golf Club Debtors' rights under the Golf Club Membership Agreements is subject to a stay under section 362(a)(3).

17. In the case of *Eastern Air Lines, Inc. v. Rolleston (In re Ionosphere Clubs, Inc.),* 111 B.R. 423 (Bankr.S.D.N.Y.1990), the court addressed the issue of whether a post-petition putative class action lawsuit that sought damages against several non-debtor defendants based on, among other things, the alleged failure of Eastern Airlines to pay pilots interest on funds paid to them from their pension plans. The causes of action included claims under the Racketeer Influenced and Corrupt Organization Act, the Railway Labor Act and deprivation of civil rights. In its opinion, the court cited with approval the analysis of the courts in *Johns Manville* and *First Financial Group* cited above when it found that a "stay should be provided to codefendants when the claims against them and the claims against the debtor are 'inextricably interwoven, presenting common questions of law and fact, which can be resolved in one proceeding.' " *Id.* at 434 (internal citations omitted).

18. Moreover, the court in *Ionosphere Clubs* concluded that the lawsuit in question "threatens not only to disrupt Eastern's operations, but also to deprive this Court of the ability to decide issues that are central to the administration of Eastern's estate and critical to Eastern's reorganization." *Id.* In addition, as with other courts before it facing similar situations, the court in *Ionosphere Clubs* concluded in respect of the lawsuit in question that "issues critical to [the bankruptcy case] may be resolved without providing Eastern an opportunity to present an effective defense. For example, a finding of liability on the part of its codefendants with respect to the ... RICO claims could foreclose an effective defense by Eastern in a subsequent suit." *Id.* at 435.

19. The facts and issues that faced the court in *Ionosphere Clubs* are substantially similar to the facts and issues present in respect of the Class Action Lawsuit. First, it is clear that the facts and legal issues presented by the Class Action Lawsuit in respect of the Golf Club Debtors are inextricably interwoven with, and present common questions of fact and law, in these Chapter 11 cases as they relate to the Golf Club Membership Agreements, the disposition of the Initiation Deposits, the allowance or disallowance of claims of the Plaintiffs related thereto and the assumption or rejection of the Golf Club Membership Agreements if they are in fact executory in nature. All of such issues are critical to the Golf Club Debtors' reorganization as they collectively involved potential claims that exceed $13 million, although the Court makes no findings as to the validity of any such claims. There can be no doubt that the determination and allowance of such alleged claims, as well as resolution of the alleged breach of the Golf Club Membership Agreements and the Initiation Deposit issues in connection therewith, will be a central feature of the Golf Club Debtors' plan of reorganization. To allow another court, outside of the global context of these Chapter 11 proceedings, to decide the Golf Club Debtors' rights and obligations in connection with these important bankruptcy related issues, would deprive this Court, much like the court in *Ionosphere Clubs,* of the right to decide issues central to the administration of these Chapter 11 cases and the ultimate reorganization effort by the Golf Club Debtors.

***7** 20. In the case of *Lomas Financial Corp. v. Northern Trust Co. (In re Lomas Financial Corp.),* 117 B.R. 64 (S.D.N.Y.1990), the court addressed a request by the debtor to enforce the automatic stay under section 362 of the Bankruptcy Code or for an injunction under section 105 of the Bankruptcy Code in connection with a post-petition lawsuit filed by a bank against two of the debtor's principals alleging that such principals made negligent or fraudulent misrepresentations concerning the debtor's financial condition in connection with a loan made by the bank to the debtor. The two principals did not provide separate guarantees of the debt owing by the debtor to the bank.

21. The *Lomas* court adopted the test established by the court in *A.H. Robins, supra,* and found that the lawsuit against the two principals of the debtor violated the automatic stay under section 362(a)(1) of the Bankruptcy Code because, among other things, the debtor was allegedly required to indemnify its officers and the alleged misrepresentations were made by the principals in their capacity as officers of the debtor. In the present case, the allegations are that Mr. Ferrao,

as the ultimate owner of the Golf Club Debtors, is the alter ego of the Golf Club Debtors because he controlled and dominated the Golf Club Debtors, causing them to violate their duties and obligations to the Plaintiffs and other putative class members. The Golf Club Debtors fully expect Mr. Ferrao to assert indemnification rights and perhaps other claims back against the Golf Club Debtors under these circumstances.

22. Whether those indemnity rights or other claims against the Golf Club Debtors arising out of these circumstances are disputed or not, the existence or non-existence of such indemnity claims is not dispositive of the determination of whether the automatic stay should be enforced to prevent the prosecution of actions against non-debtor co-defendants. However, the existence of such indemnity rights is further support for enforcing the automatic stay under the test announced in *A.H. Robins.* Reading the Class Action Lawsuit in the manner most favorable to the Plaintiffs shows that the alleged actions of Mr. Ferrao, which the Plaintiffs assert allows the remedy of alter ego, allegedly occurred as a result of Mr. Ferrao's ownership of and control over the Golf Club Debtors. Therefore, as in *Lomas,* the automatic stay applies to the Class Action Lawsuit.

23. In the case of *Sudbury, Inc. v. Escott (In re Sudbury, Inc.),* 140 B.R. 461 (Bankr.N.D.Ohio 1992), the court addressed the issue of whether to enjoin the prosecution of two district court lawsuits brought against certain non-debtor co-defendants, including present and former officers and directors of the debtor, for fraud related to the debtor's financial and business information. The claims in the cases were based on fraud allegedly committed by the non-debtor parties in their capacity as officers or directors of the debtor. In its opinion, the *Sudbury* court followed *A.H. Robins* and *Lomas, supra,* and enforced the automatic stay against non-debtor co-defendants.

***8** 24. In analyzing the facts, the *Sudbury* court found that "it is not plausible that the defendants in these actions could be found liable to Plaintiffs except on facts that would impose liability on the Debtor. Debtor asserts credibly that under these circumstances its liability may be determined on collateral estoppel principles in Plaintiffs' actions." *Id.* at 463.

25. The plaintiffs in the *Sudbury* case questioned the enforceability of any indemnity claims that the non-debtor defendants could make against the debtor, arguing that because the allegations are of securities fraud, the indemnities would be against public policy and therefore void. Following that logic, the plaintiffs in *Sudbury* attempted to distinguish *A.H. Robins* and *Lomas* arguing that the test in *A.H. Robins* and *Lomas* does not apply because the indemnification rights in the *Sudbury* case likely do not exist. The court rejected that argument and found that "these distinctions miss the fundamental similarities between this case and those. Plaintiffs' actions are based upon their prepetition transactions with the Debtor, and Debtor will be compelled to defend them because of legitimate indemnity and collateral estoppel concerns as if it were a named defendant. This will entail a substantial and costly litigation effort on major prepetition claims." *Id.* at 464.

26. In the present case, it is clear that Mr. Ferrao cannot be found to be the alter ego of the Golf Club Debtors (and therefore liable for the claims of the Plaintiffs against the Golf Club Debtors) unless and until the alleged claims of the Plaintiffs against the Golf Club Debtors are proven. Thus, as in *Sudbury,* it is implausible that Mr. Ferrao could be found liable to the Plaintiffs except on facts that would impose liability on the Golf Club Debtors. Moreover, the Golf Club Debtors will necessarily be compelled to defend themselves because of legitimate indemnity and other claims that will be asserted against them by Mr. Ferrao as well as collateral estoppel concerns as if the Golf Club Debtors were named defendants. Lastly, as in *Sudbury,* there is no question that the defense of such action will entail a substantial and costly litigation effort on major prepetition claims.

27. In the case of *American Film Technologies, Inc. v. Taritero (In re American Film Technologies, Inc.),* 175 B.R. 847 (Bankr.D.Del.1994), the court granted an injunction staying the prosecution of wrongful discharge claims against the debtor's former and

present directors. The court found that in order to avoid collateral estoppel, the debtor would be required to participate in the state court lawsuit, which is "precisely what the automatic stay is intended to excuse it from doing." *Id.* at 851. More succinctly, the court found that a debtor could not be " 'a bystander to a suit which may have a $20 million issue preclusion effect against it.' " *Id.* at 850 (quoting *Lomas,* 117 B.R. at 66–67).

***9** 28. As in *Lomas* and *American Film,* the Golf Club Debtors in the present case cannot stand idly by while the Plaintiffs' in seek a determination that the Golf Club Debtors breached their contractual obligations to the Plaintiffs and other putative class members, causing alleged damages of over $13 million.

29. Finally and importantly, the Golf Club Debtors would be further prejudiced if they were not able to prosecute potential counterclaims against the Plaintiffs. The Golf Club Debtors are not party defendants in the Class Action Lawsuit and thus lack standing to assert counterclaims in such action. It would be prejudicial to the Golf Club Debtors if the Plaintiffs were free to seek and obtain a determination of the Golf Club Debtors' alleged breach of contract and therefore liability in respect of the Golf Club Membership Agreements while at the same time not be subject to any compulsory counterclaims that the Golf Club Debtors have against the Plaintiffs and Plaintiffs' Counsel in connection therewith. Since the Golf Club Debtors are not party defendants in the Class Action Lawsuit, they would necessarily be prevented from bringing any such compulsory counterclaims. Since counterclaims are clearly property of the Golf Club Debtors' estates under section 541 of the Bankruptcy Code, the Class Action Lawsuit has a direct effect on, and in fact, may eliminate the Golf Club Debtors' ability to realize on an asset of the estate.

C. *The Cases Relied Upon by the Plaintiffs are Inapposite.*

30. In their Response, the Plaintiffs cite to two cases that they assert are dispositive of the issues before the Court, namely *Sioux City Foundry Co. v. Penrod (In re Dakotas' Farm Manufacturing Co.),* 31 B.R. 92 (Bankr.D.S.D.1983) and *In re Nashville Album Productions, Inc.,* 33 B.R. 123 (M.D.Tenn.1983). As set forth below, such cases do not support the Plaintiffs position, but rather support the Motion and the Debtors' position that the Class Action Lawsuit violates the Automatic Stay Provisions.

31. In *Dakotas' Farm,* a creditor filed suit against the debtor prepetition and **obtained a default judgment against the debtor prepetition.** After entry of the judgment against the debtor, the creditor filed an action seeking to pierce the corporate veil and collect on the judgment against the debtor's principal and certain other non-debtor parties. Thereafter, the debtor filed its chapter 11 bankruptcy case. The creditor filed a request with the bankruptcy court seeking a determination that the automatic stay did not apply to the action against the principal of the debtor. The bankruptcy court found that "[u]nder these narrow facts, it is clear that neither the debtor herein nor the debtor's property is affected by the state court proceedings against [the principal]." *Dakotas' Farm,* 31 B.R. at 94.

32. The critical and important distinction between *Dakotas' Farms* and the present case involving the Golf Club Debtors and the Class Action Lawsuit is simply that the creditor in *Dakotas' Farms* obtained a prepetition judgment against the debtor and as such the debtor's liability to the creditor was fully and finally established **prior to** the commencement of the chapter 11 case. Therefore, all of the concerns expressed in the cases set forth above, including that collateral estoppel and defense of proceedings where the liability of the debtor is directly at issue in another court, were not present in *Dakotas' Farms.* Therefore, *Dakotas' Farms* does not support Plaintiffs and is wholly inapposite on the issues before the Court.

***10** 33. In *Nashville Album,* the court, with little to no analysis, concluded that an action seeking to pierce the corporate veil of the debtor to reach the assets of the debtor's principals did not violate the automatic stay. There was no discussion of when or whether the creditor in the case obtained its judgment against the debtor prior to the bankruptcy filing, which as set forth above

is a critical issue for purposes of these proceedings. Rather, the court based its ruling on a finding that the lawsuit had no adverse effect on the debtor or the debtor's property. In making that finding, the court referred to the brief filed by the debtor's counsel in the case wherein debtor's counsel admitted that " '[t]he issues in the bankruptcy proceeding **are wholly separate** from those issues that the Plaintiff has raised in its three count Petition in the present matter.' " *Nashville Album,* 33 B.R. at 124 n. 4 (emphasis added).

34. Clearly, the admission by debtor's counsel in *Nashville Album* was evidence that the court was entitled to rely upon in reaching its decision. Here, the opposite is true. The Golf Club Debtors have not admitted the absence of adverse effect. Rather, to the contrary, the Golf Club Debtors assert the existence of a significant adverse impact in the absence of the enforcement of the automatic stay. Therefore, *Nashville Album* supports the Golf Club Debtors' position and not the Plaintiffs on the issues before the Court.

D. *The Golf Club Debtors' Motion is Procedurally Correct.*

35. In the Response, the Plaintiffs argue that the Golf Club Debtors are seeking relief in the Motion (including injunctive relief) that should be sought in an adversary proceeding. The Court disagrees.

36. First, Mr. Ferrao does not need to seek an injunction prohibiting the Class Action Lawsuit from proceeding against him. Rather, the Golf Club Debtors are seeking to enforce the automatic stay designed for their benefit because the Class Action Lawsuit seeks to tread on substantial rights of the Golf Club Debtors. Such rights, and the determination of claims related to such rights by creditors of the Golf Club Debtors, are clearly core proceedings under 28 U.S.C. § 157(b)(2)(A), (B), (C) and (O). Under section 157(b)(2)(A), the matters sought to be determined against the Golf Club Debtors in the Class Action Lawsuit directly concern the administration of the estate as they go to material contracts between the Golf Club Debtors and their creditors, including the Plaintiffs. Moreover, under section 157(b)(2)(B), the determination of whether the Golf Club Debtors breached the Golf Club Membership Agreements necessarily involves the allowance or disallowance of the claims of over 200 creditors of the Golf Club Debtors' estates.

37. In addition, under section 157(b)(2)(C), the Golf Club Debtors have counterclaims against one or more of the Plaintiffs and putative class members, as well as Plaintiffs' Counsel. The prosecution of counterclaims available to the Golf Club Debtors is a core proceeding. As determined above, the Golf Club Debtors would be severely prejudiced if they were not able to prosecute those counterclaims in this Court.

***11** 38. Second, under section 157(b)(2)(O), the determination of the respective rights of the Golf Club Debtors and the Plaintiffs (and the other putative class members) in connection with the Golf Club Membership Agreements and the disposition of the Initiation Deposits unquestionably affects the debtor-creditor relationships in these Chapter 11 cases.

39. Lastly, under section 362 of the Bankruptcy Code, "[t]he [automatic] stay is self-executing, effective upon the filing of the bankruptcy petition." *In re Pettit,* 217 F.3d 1072, 1077 (9th Cir.2000); *see also Ionosphere Clubs,* 111 B.R. at 436 ("Additionally, pursuant to [sections] 362(a)(1), (3) and (6) of the Code, this Court finds that the relief requested regarding the pension plan funding issue and [the lawsuit] violates the automatic stay.").

E. *The Class Action Lawsuit is Void Ab Initio.*

40. "It is the law of this Circuit that '[a]ctions taken in violation of the automatic stay are void and without effect.' " *U.S. v. White,* 466 F.3d 1241, 1244 (11th Cir.2006)(*quoting Borg–Warner Acceptance Corp. v. Hall,* 685 F.2d 1306, 1308 (11th Cir.1982)) (*citing Kalb v. Feuerstein,* 308 U.S. 433, 60 S.Ct. 343, 84 L.Ed. 370 (1940)); *See also In re Willford,* 294 Fed. Appx. 518, 521 (11th Cir.2008)(same); *U.S. v. Klohn,* 2010 WL 1379961 at *1 n. 1 (M.D.Fla. March 31, 2010)(same); *In re Newgent Golf, Inc.,* 402 B.R. 424, 433 (Bankr.M.D.Fla.2009)("In the Eleventh Circuit, actions taken in violation of the automatic stay are void *ab initio* and therefore without effect.").

41. The Court finds that Plaintiffs' claims against Ferrao are disguised claims against the Golf Club Debtors and will hinder the efforts of this Court and the Golf Club Debtors to reorganize under Chapter 11.

NOW, THEREFORE, based on the Motion, the findings and conclusions set forth above and the record before this Court, and good and sufficient cause appearing, it is:

ORDERED that:

1. The Motion is GRANTED as set forth herein.

2. The filing and prosecution by the Plaintiffs and Plaintiffs' Counsel of those certain proceedings pending before the United States District Court for the Middle District of Florida, Case No. 2:10–CV–241–FTM–36–DNF (the "Class Action Lawsuit") violates each of Sections 362(a)(1), 362(a)(2) and 362(a) 6) (the "Automatic Stay Provisions") of Title 11 of the United States Code, 11 U.S.C. § 101 et seq. (the "Bankruptcy Code").

3. As a result, the Class Action Lawsuit is null and void *ab initio* and is therefore without any effect. The Golf Club Debtors are directed to file a copy of this Order with the United States District Court for the Middle District of Florida in the Class Action Lawsuit.

4. The Plaintiffs and the Plaintiffs' Counsel are prohibited from prosecuting in any manner the Class Action Lawsuit, and the claims asserted therein, and are hereby directed to dismiss the Class Action Lawsuit within five (5) business days after the date hereof.

***12** 5. The Court is reserving ruling on the Golf Club Debtors' request in the Motion to hold the Plaintiffs and the Plaintiffs' Counsel in contempt for willful and intentional violation of the Automatic Stay Provisions and for the award of sanctions in connection therewith (the "Sanctions"). The Golf Club Debtors shall inform the Court on or before September 2, 2010 as to whether the Golf Club Debtors intend to pursue the Sanctions. In the event the Golf Club Debtors elect to pursue the Sanctions, then the Court shall set a hearing on the request for Sanctions by further order of the Court.

All Citations

Not Reported in B.R., 2010 WL 6618876