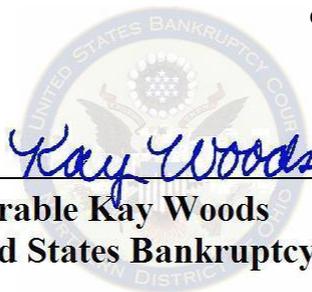


IT IS SO ORDERED.



Honorable Kay Woods  
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF OHIO

|                               |   |                           |
|-------------------------------|---|---------------------------|
| IN RE:                        | * |                           |
|                               | * |                           |
| RANDALL JOSEPH HAKE and       | * |                           |
| MARY ANN HAKE,                | * | CASE NUMBER 04-41352      |
|                               | * |                           |
| Debtors.                      | * |                           |
|                               | * |                           |
| * * * * *                     | * |                           |
|                               | * |                           |
| ELM ROAD DEVELOPMENT, CO.,    | * |                           |
| et al.,                       | * | ADVERSARY NUMBER 08-04020 |
|                               | * |                           |
| Plaintiffs,                   | * |                           |
|                               | * |                           |
| vs.                           | * |                           |
|                               | * |                           |
| BUCKEYE RETIREMENT CO., LLC., | * |                           |
| LTD., et al.,                 | * | HONORABLE KAY WOODS       |
|                               | * |                           |
| Defendants.                   | * |                           |
|                               | * |                           |
|                               | * |                           |

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MEMORANDUM OPINION REGARDING EMERGENCY MOTION FOR STAY  
OF ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT  
PENDING APPEAL AND IMPOSING REQUIREMENT OF SUPERSEDEAS BOND  
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On January 27, 2009, this Court entered Memorandum Opinion

Concerning Cross-Motions for Summary Judgment (Doc. # 61) and Order (i) Granting Defendants' Motion for Summary Judgment and (ii) Denying Plaintiffs' Motion for Summary Judgment (Doc. # 62) (collectively, "Summary Judgment Order"), which, among other things, (i) granted Motion for Summary Judgment (Doc. # 54) filed by Defendants Mark Gleason, Chapter 7 Trustee ("Trustee"), and Buckeye Retirement Co., LLC. Ltd. ("Buckeye") (collectively, "Defendants"); and (ii) denied Plaintiffs' Motion for Summary Judgment (Doc. # 55) filed by Plaintiffs Elm Road Development, Co., Tuller Brookfield Associates, Inc. ("Tuller"), Woodland Park Retirement Housing Limited Partnership ("Woodland Park"), Daniel P. Daniluk, and CI Residential Property Corp. (collectively, "Plaintiffs"). On February 6, 2009, Plaintiffs filed Emergency Motion for Stay of the Order Granting Defendants' Motion for Summary Judgment Pending Appeal Pursuant to Federal Rule of Bankruptcy Procedure 8005 or in the Alternative Motion to Accept Supersedeas Bond Pursuant to Federal Rule of Bankruptcy Procedure 7062 ("Motion for Stay") (Doc. # 65). That same day, Plaintiffs filed Notice of Appeal (Doc. # 66).

On February 6, 2009, the Court entered Order Granting Emergency Motion for Hearing and Imposing Stay Until Hearing is Held ("February 6 Order") (Doc. # 69), which (i) set the Motion for Stay for hearing on February 12, 2009 ("Hearing"); and (ii) stayed the Summary Judgment Order until conclusion of the Hearing. Defendants filed Response to Emergency Motion for Stay of the Order Granting Defendants' Motion for Summary Judgment Pending Appeal (Doc. # 72)

on February 11, 2009.

The Court held the Hearing, at which counsel for Plaintiffs, counsel for Buckeye, and counsel for Trustee were present. Counsel for Plaintiffs and Buckeye each presented arguments to the Court. In addition, Plaintiffs offered Daniel Daniluk as a witness to testify concerning (i) the element of harm to Plaintiffs and (ii) certain cash flow information about Tuller and Woodland Park. Defendants stipulated that Buckeye has a pending lawsuit against Daniluk and others in state court, one count of which contains Buckeye's allegations that Daniluk engaged in fraudulent conduct. Defendants also stipulated that Daniluk would testify that Tuller and Woodland Park currently yield nominal or "phantom" profits. The Court accepted the proffer of Daniluk's testimony.

This Court has jurisdiction pursuant to 28 U.S.C. § 1334 and the general order of reference (General Order No. 84) entered in this district pursuant to 28 U.S.C. § 157(a). Venue in this Court is proper pursuant to 28 U.S.C. §§ 1408 and 1409. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(A) and (O). The following constitutes the Court's findings of fact and conclusions of law pursuant to FED. R. BANKR. P. 7052.

As set forth on the record at the Hearing and for the following reasons, the Court grants the Motion for Stay and imposes the obligation on Plaintiffs to post a bond in the amount of \$10,000.00.

**I. THE MOTION FOR STAY IS NOT MOOT**

Debtors Randall J. Hake and Mary Ann Hake ("Debtors") filed a chapter 11 petition on March 25, 2004, which was assigned Case No.

04-41352 ("Main Case"). The Main Case was converted to a chapter 7 case on April 26, 2006. After a hearing, the Court granted Trustee's motion to sell Debtors' non-exempt assets, in part, and entered Amended Order of Court (Doc. # 810 in Main Case) on March 4, 2008 ("March 4 Order"). The March 4 Order (i) incorporated the compromise and agreement of Trustee, Buckeye and Plaintiffs to "carve out" from the sale certain assets denominated as the Carve Out Assets, which are the subject of the instant adversary proceeding; and (ii) authorized Trustee to sell Debtors' non-exempt assets, except for the Carve Out Assets to Buckeye for a purchase price of \$650,000.00 ("Purchase Price"). The Order provided that the Purchase Price would not be reduced if the Carve Out Assets could not be and were not transferred to Buckeye. Sale of the Carve Out Assets was contingent upon a determination of this Court in the instant adversary proceeding that such assets were (i) property of the bankruptcy estate and (ii) transferrable.

Defendants argue that, because the March 4 Order is a final and non-appealable order, pursuant to 11 U.S.C. § 363(m), the Motion for Stay is moot. Section 363(m) provides:

(m) The reversal or modification on appeal of an authorization under subsection (b) or (c) of this section of a sale or lease of property does not affect the validity of a sale or lease under such authorization to an entity that purchased or leased such property in good faith, whether or not such entity knew of the pendency of the appeal, unless such authorization and such sale or lease were stayed pending appeal.

11 U.S.C. § 363(m)(West 2008). Defendants contend that the sale of the Carve Out Assets was effective as of March 4, 2008.

Consequently, even though transferability of the Carve Out Assets was not determined until the Court entered the Summary Judgment Order, Defendants argue that Plaintiffs' failure to appeal the March 4 Order results in any appeal of the Summary Judgment Order being for naught.

Defendants concede that, subsequent to entry of the Summary Judgment Order, Trustee has taken no action to transfer any of the Carve Out Assets to Buckeye. The Summary Judgment Order did not affect a transfer of such assets, but instead reads: "Trustee is authorized to 'immediately and finally' sell and transfer such interests [in the Carve Out Assets] to Buckeye, with such transfer effective as of March 4, 2008." (Summary Judgment Order, Doc. # 62 at 2.) The Summary Judgment Order authorizes Trustee to take further action and contemplates further action by Trustee to effectuate the transfer of the Carve Out Assets. Since Trustee has taken no action to transfer the Carve Out Assets, the sale has not yet been consummated. Consequently, the Motion for Stay is not moot and the Court may stay implementation of the Summary Judgment Order.

In addition to the factual basis for finding that the Motion for Stay is not moot, this Court finds that Defendants' position concerning the legal effect of the March 4 Order is untenable. Even though transferability of the Carve Out Assets was not determined until the Court entered the Summary Judgment Order, Defendants argue that Plaintiffs' failure to appeal the March 4 Order results in any appeal of the Summary Judgment Order being moot. Defendants' position effectively robs Plaintiffs of any appellate review of this

Court's determination that the Carve Out Assets are transferrable, as set forth in the Summary Judgment Order.

Plaintiffs commenced this adversary proceeding the day before the hearing on Trustee's motion to sell Debtors' non-exempt assets to Buckeye. The adversary proceeding put at issue whether Trustee could legally transfer the Carve Out Assets. Because Trustee sought to sell all assets in one bulk with no allocation of purchase price to any specific asset, this Court indicated that it was inclined to defer ruling on Trustee's motion to sell until the adversary proceeding could be resolved. In lieu of waiting for the adversary proceeding to be resolved, Trustee, Buckeye and Plaintiffs entered into a compromise, which was embodied in the March 4 Order. This agreement provided for Trustee to sell all assets to Buckeye, except for the Carve Out Assets, with sale of the Carve Out Assets being dependent upon this Court's ruling in this adversary proceeding.

Abrogation of appellate review is not what the Court or the parties contemplated when the Court incorporated the parties' compromise and agreement into the March 4 Order. The Court finds that Defendants' position goes too far and does not comport with the March 4 Order. As a consequence, the Court rejects Defendants' position that the Motion for Stay is moot to the extent such argument is based on Plaintiffs' failure to appeal the March 4 Order. The March 4 Order contemplated that Trustee would take additional action to transfer the Carve Out Assets if the Court determined, in the adversary proceeding, that such assets were property of the bankruptcy estate and were transferable. The

adversary proceeding is a separate proceeding subject to appellate review.

## II. STANDARD FOR IMPOSITION OF STAY

The parties agree that the test for granting a stay pending appeal requires the Court to balance certain equities. The Court is required to consider the following four factors: (i) the likelihood that the movant will prevail on appeal; (ii) the likelihood that movant will be irreparably harmed if a stay is not granted; (iii) whether others will be substantially harmed by granting a stay; and (iv) the public interest in granting the stay. *Stephenson v. Rickles Electronics & Satellites (In re Best Reception Sys., Inc.)*, 219 B.R. 988 (Bankr. E.D. Tenn. 1998); accord, *Mich. Coalition of Radioactive Material Users, Inc. v. Griepentrog*, 945 F.2d 150, 153 (6th Cir. 1991). Both parties appear to concede that the fourth factor is not relevant in the instant case. The parties disagree about which of them has any likelihood of suffering harm in the event this Court grants or refuses to grant a stay pending appeal and they further disagree about the likelihood that Plaintiffs will succeed on appeal.

The Court will examine each of the factors noted above. The first factor is the likelihood that Plaintiffs will prevail on appeal. The primary issue in this adversary proceeding is whether certain oral agreements that require consent of the non-selling shareholder are enforceable with respect to transfer of the Carve Out Assets. As detailed in the February 6 Order, there is a paucity of Ohio law regarding the enforceability of shareholder consent

requirements. Plaintiffs' request for a stay pending appeal is similar to the circumstances in *Culwell v. Texas Equip. Co., Inc.* (*In re Texas Equip. Co., Inc.*), 283 B.R. 222 (Bankr. N.D. Tex. 2002), which involved the appeal of an adversary proceeding seeking declaratory judgment that plaintiffs held a right of possession in certain properties. Noting that there was no Texas case directly on the point decided in the adversary proceeding, the Texas Bankruptcy Court stated:

With respect to the first element, the Fifth Circuit has explained that the movant "need not always show a 'probability' of success on the merits; instead, the movant need only present a substantial case on the merits when a serious legal question is involved and show that the balance of the equities weighs heavily in favor of granting the stay." . . . With respect to questions of law, however, especially questions involving the application of law, or when the law has not been definitively addressed by a higher court, the movant more easily satisfies the first element.

*Id.* at 227 (internal citations omitted). Like the *Texas Equipment Case*, there is no Ohio law directly on the controlling issue in this adversary proceeding. As a result, the Court finds that Plaintiffs have presented a serious legal question that is sufficient to find in favor of Plaintiffs on the first factor.

The next factor is the likelihood that Plaintiffs will suffer irreparable harm if the stay is not imposed. Here, Plaintiffs argue that the harm arises because of the animosity between Buckeye and Daniluk (based on the pending state court litigation) and the difficulty Plaintiffs anticipate in dealing with Buckeye as a shareholder in a closely held corporation. Plaintiffs also speculate that Buckeye could cause the corporation to be dissolved

if Buckeye and Daniluk cannot agree on its management. Defendants counter that Plaintiffs will not be irreparably harmed and that any risk regarding dissolution currently exists because of the 50/50 shareholder relationship.

The Court finds that Plaintiffs would suffer irreparable harm if they are deprived of an enforceable right to consent to the person or entity to whom shares in their closely held corporations will be transferred. If the Court has incorrectly determined that the consent requirement is not enforceable, transfer of the Carve Out Assets would annul Plaintiffs' rights and provide them with no recourse. The irreparable harm results if the Carve Out Assets are not transferable absent consent and transfer occurs without such consent. Under such circumstances, Plaintiffs would be deprived of a valuable right without any recourse.

The third element is the likelihood of harm to Defendants. The Court finds that continuing the status quo during the pendency of appeal will not result in harm to Defendants. The Court has previously ruled that the Carve Out Assets are property of the bankruptcy estate over which Trustee has control. Because Trustee has control of the Carve Out Assets, he is entitled to request documentation to make sure such estate property is being preserved and maintained. The Carve Out Assets are shares of stock; the real estate assets, in which the Carve Out Assets have equity, operate subject to certain legal restrictions. There is no evidence that the Carve Out Assets will dissipate or deteriorate during the pendency of the appeal. Buckeye has paid Trustee the entire

Purchase Price, which is not subject to being reduced if the Carve Out Assets cannot be transferred to Buckeye. Since the amount of the Purchase Price was not dependent upon receipt of the Carve Out Assets, Buckeye received all that it bargained for when Trustee transferred Debtors' assets (less the Carve Out Assets).

As noted above, the parties recognize that the fourth factor of likelihood of harm to the public is not implicated in this case.

Applying the four factors, the Court finds that Plaintiffs have established sufficient cause for the Court to stay implementation of the sale of the Carve Out Assets, pending appeal of the Summary Judgment Order.

### **III. SUPERSEDEAS BOND**

Plaintiffs, moved, in the alternative, to post a supersedeas bond in the amount of \$10,000.00. Rules 7062 and 8005 of the Federal Rules of Bankruptcy Procedure govern appeals and posting of supersedeas bonds. Whether to require the posting of a bond is within the discretion of the Bankruptcy Court. See *Havens Steel Co. v. Commerce Bank, N.A. (In re Havens Steel Co.)*, 2005 U.S. Dist. LEXIS 16859 (W.D. Mo. 2005) (Rule 8005 must be read in conjunction with Rule 7062; Bankruptcy Court has discretion to determine amount of supersedeas bond.) Based upon Debtors' valuation in 2005 of the corporations in which the Carve Out Assets have equity, Defendants argue that, if the Court grants a stay pending appeal, the bond should be in the range of \$250,000.00 to \$750,000.00.

As set forth above, the Carve Out Assets are not subject to deterioration or dissipation. The Summary Judgment Order did not

contain a monetary judgment in favor of Defendants. Defendants have presented no evidence that Plaintiffs must post a bond to protect against risk of loss to Defendants. As a consequence, Defendants' rights pending appeal are fully protected without a supersedeas bond.

Noting that when the four factors are met, a supersedeas bond is not necessary, the District Court for the Northern District of Illinois stated, "the bankruptcy court may stay the sale without the posting of a supersedeas bond in certain situation." *Goldstein v. Bell (In re Normco, Inc.)*, 199 U.S. Dist. LEXIS 17673 at \* 6-7 (N.D. Ill. 1997). "The bankruptcy court determines the amount of a supersedeas bond by reviewing the facts of each case." *Id.* at \*9. "The 'purpose of a supersedeas bond is to preserve the status quo while protecting the non-appealing party's rights pending appeal.' . . . The amount of the bond and the sufficiency of the sureties are matters of discretion of and for determination by the Bankruptcy Court." *In re Innovative Commc'ns*, 2007 Bankr. LEXIS 4654 (Bankr. D. V.I. 2007) (internal citations omitted).

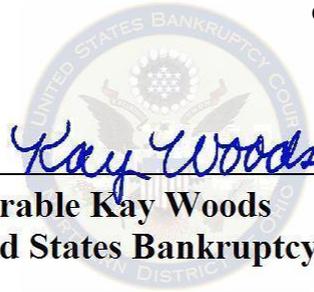
Since the Court has found that the four factors favor Plaintiffs and the imposition of a stay pending appeal, a supersedeas bond is not necessary in this case. Nonetheless, in its discretion and as a separate basis for staying the Summary Judgment Order, the Court will require Plaintiffs to post a bond in the amount of \$10,000.00 by February 23, 2009.

An appropriate order will follow.

# # #



IT IS SO ORDERED.



Honorable Kay Woods  
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF OHIO

|                               |   |                           |
|-------------------------------|---|---------------------------|
| IN RE:                        | * |                           |
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| RANDALL JOSEPH HAKE and       | * |                           |
| MARY ANN HAKE,                | * | CASE NUMBER 04-41352      |
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| Debtors.                      | * |                           |
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| ELM ROAD DEVELOPMENT, CO.,    | * |                           |
| et al.,                       | * | ADVERSARY NUMBER 08-04020 |
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| Plaintiffs,                   | * |                           |
|                               | * |                           |
| vs.                           | * |                           |
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| BUCKEYE RETIREMENT CO., LLC., | * |                           |
| LTD., et al.,                 | * | HONORABLE KAY WOODS       |
|                               | * |                           |
| Defendants.                   | * |                           |
|                               | * |                           |
|                               | * |                           |

\*\*\*\*\*  
ORDER GRANTING EMERGENCY MOTION FOR STAY  
OF ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT  
PENDING APPEAL AND IMPOSING REQUIREMENT OF SUPERSEDEAS BOND  
\*\*\*\*\*

For the reasons set forth on the record at the Hearing on

February 12, 2009, and as more fully set forth in the Memorandum Opinion Regarding Emergency Motion for Stay of Order Granting Defendants' Motion for Summary Judgment Pending Appeal and Imposing Requirement of Supersedeas Bond, entered contemporaneously with this Order, this Court hereby:

1. Grants the Emergency Motion for Stay of the Order Granting Defendants' Motion for Summary Judgment Pending Appeal Pursuant to Federal Rule of Bankruptcy Procedure 8005 or in the Alternative Motion to Accept Supersedeas Bond Pursuant to Federal Rule of Bankruptcy Procedure 7062 ("Motion for Stay") (Doc. # 65) filed by Plaintiffs Elm Road Development, Co., Tuller Brookfield Associates, Inc., Woodland Park Retirement Housing Limited Partnership, Daniel P. Daniluk, and CI Residential Property Corp. (collectively, "Plaintiffs") on February 6, 2009;
2. Imposes a stay pending Plaintiffs' appeal of this Court's January 27, 2009, Order (i) Granting Defendants' Motion for Summary Judgment and (ii) Denying Plaintiffs' Motion for Summary Judgment ("Summary Judgment Order") (Doc. # 62), based upon finding that Plaintiffs have established (i) a serious legal question concerning the issue being appealed; (ii) potential for irreparable harm to them if a stay is not granted; and (iii) no harm to Defendants Mark Gleason, Chapter 7 Trustee ("Trustee"), and/or Buckeye Retirement Co., LLC Ltd. (collectively,

"Defendants") if a stay is not imposed; and

3. Separately imposes a stay pending Plaintiffs' appeal of the Summary Judgment Order upon Plaintiffs' posting of a supersedeas bond in the amount of \$10,000.00 ("Bond"). Such Bond shall be obtained from a bonding company acceptable to and approved by Trustee.
4. Defendants are hereby stayed from taking any action to sell or otherwise transfer the Carve Out Assets, or take any other action to effectuate the terms of the Summary Judgment Order pending Plaintiffs' appeal of the Summary Judgment Order.

# # #