

**IN THE UNITED STATES BANKRUPTCY COURT**  
**FOR THE DISTRICT OF IDAHO**

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**In Re:**

JIM LEE WIERSMA and  
PATRICIA DARLENE  
WIERSMA,

**Debtors.**

**Bankruptcy Case**  
**No. 01-41874**

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**SUMMARY ORDER**

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This Summary Order disposes of former Chapter 11 Debtors Jim and Patricia Wiersmas' "Motion to Alter or Amend the Court's Order Re: Stay Pending Appeal." Docket No. 444. Their motion asks the Court to impose a stay against any attempts by their creditors to seize approximately \$1.48 million in proceeds from the settlement of a law suit pending the Wiersmas' appeal of several issues in this case to the Ninth Circuit Court of Appeals. Creditor Bank of the West objects to their motion. Docket No. 452. The Court conducted a hearing on the Wiersmas' motion on April 20, 2005. What follows represents the Court's

findings of fact and conclusions of law, Fed. R. Bankr. P. 7052; 9014, and its disposition of the Wiersmas' motion.<sup>1</sup>

## **BACKGROUND**

The Wiersmas filed for Chapter 11 relief on October 1, 2001. During their bankruptcy case, the Wiersmas received a large cash settlement to compromise their claim against Gietzen Electric. This Court ruled that Creditor (or more properly, its predecessor in interest) held a secured interest in the settlement proceeds. *In re Wiersma*, 283 B.R. 294 (Bankr. D. Idaho 2002). In addition, on April 4, 2003, the Court dismissed the Wiersmas' bankruptcy case. Docket No. 329. The Wiersmas appealed both the Court's decision regarding Creditor's secured status and its dismissal of their bankruptcy case.

The Wiersmas requested a stay pending appeal pursuant to Fed. R. Bankr. P. 8005. Docket No. 390. One reason for making this request was to stop Creditor's collection efforts in state court. The Court granted the Wiersmas' motion in part, ordering that "the parties to [the state court case] . . . take no further action as against Debtors [the Wiersmas] or the cash settlement proceeds

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<sup>1</sup> The Wiersmas also filed a motion to strike certain portions of an affidavit filed in support of Creditor's objection. Docket Nos. 444 (Aff. of R. Ann Ybarguen); 454 (Mot. to Strike Aff. of R. Ann Ybarguen). This motion was mentioned briefly at the hearing on the stay motion, but the motion to strike was not scheduled for hearing. The Court declines to rule on the motion at this time.

pending entry of a final order concerning Debtors' appeal of this Court's order dismissing their Chapter 11 case." Order, Docket No. 418.

Creditor timely filed a motion to alter or amend the Court's stay order. Docket No. 423. In its motion, Creditor requested that the Court modify the stay pending appeal it had entered, making it applicable to all of the Wiersmas' creditors, some of whom had renewed their collection efforts against the Wiersmas after their bankruptcy case had been dismissed. Creditor argued all of the Wiersmas' creditors should be placed in the same position pending appeal. Alternatively, Creditor suggested the stay pending appeal could be limited to the settlement proceeds.

The Court granted Creditor's motion. Docket Nos. 430, 431. The new stay issued by the Court provided that "from now until the entry of a final order by the Bankruptcy Appellate Panel concerning Debtors' [the Wiersmas'] appeal of this Court's order dismissing their Chapter 11 case, no party may take any action against the settlement proceeds . . . ." Docket No. 431. In explaining its decision, the Court focused on the need to preserve the settlement proceeds pending the outcome of the Wiersmas' appeal, while not unduly interfering with the parties' rights under nonbankruptcy law given that the case had been dismissed. Mem. of Decision, Docket No. 430. Importantly, in both its initial

decision to grant the stay and its subsequent decision to modify the stay, the Court found that imposing a stay that prevented the Wiersmas and Creditor from accessing the funds until the appeal was resolved was appropriate.

On February 1, 2005, the Bankruptcy Appellate Panel of the Ninth Circuit affirmed this Court's rulings. *Wiersma v. O.H. Kruse Grain & Milling (In re Wiersma)*, \_\_\_ B.R. \_\_\_, No. ID-02-1523, 2005 WL 464889 (B.A.P. 9<sup>th</sup> Cir. Feb. 1, 2005). The Wiersmas have now appealed to the Ninth Circuit. Docket No. 449. Through their present motion, they request either an extension of the prior stay or the imposition of a new stay. Mem. in Support, Docket No. 445.

## **DISCUSSION**

### **A. The Legal Basis for the Wiersmas' Motion.**

The Wiersmas captioned their motion as one to "alter or amend." Although no legal authority is expressly cited, this phrase suggests the Wiersmas intend to invoke Fed. R. Civ. P. 59, applicable here via Fed. R. Bankr. P. 9023. However, Rule 59(e) states that "[a]ny motion to alter or amend a judgment must be filed no later than 10 days after entry of the judgment." Fed. R. Civ. P. 59(e). Since the Court entered the modified stay order well over a year ago, a true motion to alter or amend would be untimely.

However, in the exercise of its discretion, the Court concludes the Wiersmas' motion should be viewed as one under Fed. R. Bankr. P. 8005. That Rule provides:

A motion for a stay of the judgment, order, or decree of a bankruptcy judge . . . or for other relief pending appeal must ordinarily be presented to the bankruptcy judge in the first instance. Notwithstanding Rule 7062 but subject to the power of the district court and the bankruptcy appellate panel reserved hereinafter, the bankruptcy judge may suspend or order the continuation of other proceedings in the case under the Code or make any other appropriate order during the pendency of an appeal on such terms as will protect the rights of all parties in interest. A motion for such relief, or for *modification* or termination of relief granted by a bankruptcy judge, may be made to the district court or the bankruptcy appellate panel, but the motion shall show why the relief, modification, or termination was not obtained from the bankruptcy judge.

Fed. R. Bankr. P. 8005 (emphasis added). Under this Rule, the Wiersmas' motion amounts to a request for a modification of relief previously granted by the Court.<sup>2</sup>

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<sup>2</sup> Seen this way, the Court is not being asked to grant a new stay. This approach obviates the need to address Creditor's argument that it did not receive adequate notice of the Wiersmas' request that a new stay be imposed. Even so, in light of Wiersmas' brief, which was served on Creditor's counsel and asks that the Court "enter a stay order pending resolution of ALL appeals . . .," Mem. in Support at 3, Docket No. 445, the Court doubts notice was inadequate.

## **B. The Merits of the Wiersmas' Motion.**

The same reasons that justified imposing a stay during the pendency of the Wiersmas' appeal to the B.A.P. justify extending the stay until the Ninth Circuit makes its decision. *See* Docket Nos. 417, 430 (Mems. of Decision explaining the Court's reasoning). Many of Creditor's objections to extending the stay revisit issues the Court has already resolved in favor of imposing a stay preventing any acts against the settlement proceeds. The Court is not persuaded by the latest briefing that the analysis should be any different now.

Creditor does note one compelling difference: the B.A.P. has affirmed this Court's prior rulings. Creditor argues it is now more difficult, if not impossible, for the Wiersmas to show a probability they will succeed on the merits of their appeal, an element necessary for the imposition of a stay pending appeal. *See* Mem. of Decision at 5–8, Docket No. 417 (discussing this element). The Court respectfully disagrees. While the Ninth Circuit now has the benefit of the B.A.P.'s decision, which was not favorable to the Wiersmas, their ability to obtain a reversal of this Court's decisions is essentially no more daunting than before. Previously, the Court found that, under the controlling legal authorities, a stay was warranted. The Court continues to hold that opinion.

Still, the Court is reluctant to grant the specific relief the Wiersmas have requested. They ask the Court to confirm that its first order granting a stay pending appeal applied “to all appeals, or in the alternative, to alter its previous order and enter a stay order pending resolution of ALL appeals.” Mem. in Support at 3, Docket No. 445. The parties have engaged in a whipsaw approach to these stay issues: the Wiersmas requested a stay, which was issued; Creditor requested the stay be narrowed, and so it was; the Wiersmas now request the stay be expanded. It is not difficult to envision how a stay applicable to “all” appeals might be fodder for subsequent disputes.<sup>3</sup>

Therefore, consistent with its two prior orders regarding a stay pending appeal, and in the exercise of its discretion, the Court concludes it should stay any acts by the parties as against the settlement proceeds pending a final resolution of the Wiersmas’ appeal from the B.A.P. to the Ninth Circuit, and any appeal from the Ninth Circuit’s decision, assuming *certiorari* is granted.

### **ORDER**

For these reasons, and for other good cause, **IT IS HEREBY ORDERED THAT** the Wiersmas’ Motion to Alter or Amend the Court’s Order Re: Stay Pending Appeal, Docket No. 444, be and is hereby **GRANTED**. The

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<sup>3</sup> As a legal maxim cautions: *Debet esse finis litium*. *Black’s Law Dictionary* 1713 (8<sup>th</sup> ed. 2004) (“There ought to be a limit to litigation.”).

stay granted by this Court pending appeal of this Court's order dismissing the Wiersmas' case, Docket No. 418, as subsequently amended, Docket No. 431, is further amended and extended as follows: None of the parties may take any action against the settlement proceeds from the Wiersmas' lawsuit against Gietzen Electric pending: (1) a final disposition by the Ninth Circuit concerning the Wiersmas' appeal from the B.A.P.'s decision in *Wiersma v. O.H. Kruse Grain & Milling (In re Wiersma)*, \_\_ B.R. \_\_, No. ID-02-1523, 2005 WL 464889 (B.A.P. 9<sup>th</sup> Cir. Feb. 1, 2005) and a final disposition in any appeal taken by any of the parties from the Ninth Circuit's decision, or the expiration of time to file any such appeal; and (2) further order of this Court.

Dated: May 3, 2005



Honorable Jim D. Pappas  
United States Bankruptcy Judge

