IN THE UNITED STATES BANKRUPTCY COURT FOR THE EASTERN DISTRICT OF TENNESSEE

In re

MICHAEL KENNETH ROSE — Case No. 04-31145

Debtor

PEGGY ANN BUCKNER — Case No. 04-31270

Debtor

CLYDE E. STEELE — Case No. 04-31327

Debtor

DOUGLAS RAY SMITH — Case No. 04-31499

Debtor

INGRID ANNA LYNCH
a/k/a INGRID ANNA BEVERLY — Case No. 04-31700

Debtor

HEATHER RHANAE BARNETTE — Case No. 04-31701

Debtor

CLAUDIA SEBRING — Case No. 04-31752

Debtor

SILIA JEAN JACKSON — Case No. 04-31905

Debtor

JOSH WILEY
TRACEY WILEY
a/k/a TRACEY STEPHENS — Case No. 04-32328

Debtors

JOHNNY RICHARDSON
MARY RICHARDSON

Debtors

Case No. 04-32423

REGINA ANN HANCE

Debtor

Case No. 04-32550

MEMORANDUM ON BANKRUPTCY PETITION PREPARER MOTION FOR STAY PENDING APPEAL

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RICHARD STAIR, JR.
UNITED STATES BANKRUPTCY JUDGE

Presently before the court is the Motion to Stay Order Pending Appeal (Motion for Stay) filed August 26, 2004, by Kristin Motley, a bankruptcy petition preparer, seeking a stay of the Order entered by the court on August 18, 2004, (1) denying Ms. Motley's Motion for Certification of a Question to the Supreme Court of Tennessee, (2) directing Ms. Motley to disgorge the $214.00 paid by each of the captioned Debtors to their respective Chapter 7 Trustees within fourteen days and to certify that fact to the court, (3) enjoining Ms. Motley from distributing her Customer Packet to customers, referring the services of a supervising attorney, offering advice concerning how to fill out bankruptcy statements and schedules, performing any services other than typing information obtained from customers onto the bankruptcy forms, charging and receiving more than $50.00 for typing services, and charging and receiving more than $10.00 for copying charges, provided that the customers agree to paying the copy fee, and (4) finding that Ms. Motley has violated 11 U.S.C.A. § 110 (West 1993 & Supp. 2004) and has committed unfair and/or deceptive acts, and certifying those facts to the United States District Court for the Eastern District of Tennessee (District Court).

This is a core proceeding. 28 U.S.C.A. § 157(b)(2)(A) and (O) (West 1993).

I

Ms. Motley is a bankruptcy petition preparer, as that term is defined by § 110(a)(1), owning and operating We the People of Knoxville, a franchise of We the People Forms and Services Centers USA, Inc. (We the People USA). Pursuant to Orders entered by the court on April 9, 2004 and May 17, 2004, the court held an evidentiary hearing on July 13, 2004, to

determine whether the fees charged by Ms. Motley and paid by the Debtors for document preparation services were excessive and subject to disallowance and disgorgement, whether Ms. Motley engaged in the unauthorized practice of law through the document preparation services she offered, and whether Ms. Motley violated § 110, subjecting her to the imposition of statutory fines and an injunction.

On August 18, 2004, the court's Order (August 18, 2004 Order) and Memorandum on Bankruptcy Petition Preparer Show Cause Orders and on Related Objection and Motion (August 18, 2004 Memorandum) were filed in each of the above eleven cases. In the August 18, 2004 Memorandum, the court found that Ms. Motley was a bankruptcy petition preparer as defined by § 110. In response to Ms. Motley's questioning of the court's jurisdiction concerning the application of § 110, the court fully examined both 28 U.S.C.A. § 1334 (West 1993 & Supp. 2004) and 28 U.S.C.A. § 157 (West 1993), as well as the language of § 110, and determined that matters concerning § 110 were "core proceedings" and subject to entry of final orders by the bankruptcy court. Correspondingly, the court determined that it possessed the authority to impose statutory fines and/or issue an injunction for violations of § 110. The court also addressed Ms. Motley's arguments that § 110 was an improper exercise of Congressional authority, finding that both the Bankruptcy Clause and the Commerce Clause of the Constitution granted Congress the power to enact § 110. The August 18, 2004 Memorandum additionally answered Ms. Motley's challenges that § 110 was vague and overbroad, holding that it was not.

The court then focused on Ms. Motley's violations of § 110, finding that she had violated § 110(b)(1), requiring each bankruptcy petition preparer to sign and file a certification for all documents prepared. Along those lines, the court examined Ms. Motley's actual activities, as well as those of Heather Silas, the typist employed by We the People USA and utilized by Ms. Motley, and determined that Ms. Motley has engaged in the unauthorized practice of law by distributing Customer Packets to customers that provided a workbook to be filled out instead of the Official Bankruptcy Forms, as well as instructions concerning what information to put in the workbook including state-specific information regarding exemptions, and an overview of the bankruptcy process, complete with definitions and "generic" legal questions and answers, some of which were incomplete and misleading. The court also found that Ms. Motley's actions of "hand-holding" and alerting customers of blanks to be filled in constituted the unauthorized practice of law. Based upon current case law, the court also denied Ms. Motley's motion requesting that the bankruptcy court certify a question to the Tennessee Supreme Court concerning whether Ms. Motley's activities constituted the unauthorized practice of law.

Next, the court found that some of Ms. Motley's activities, including those constituting the unauthorized practice of law, as well as her recommendations of a "supervising" attorney from whom customers could make "generic" inquiries, were unfair and deceptive, requiring the court to certify those facts to the District Court and authorizing the court to enjoin Ms. Motley from engaging any further in those activities. As a result, the court enjoined Ms. Motley from providing anything more than typing services to customers, based upon hand-

written information received from customers on the Official Bankruptcy Forms. Ms. Motley was enjoined from disseminating the Customer Packet, from offering the services of a "supervising" attorney, and from "hand-holding" in general, whether it be by answering "generic" non-legal questions or prompting customers to fill in blanks in their forms.

Finally, the court found that the total of $214.00 in fees charged by Ms. Motley and paid by each of the above Debtors was excessive and unreasonable for the services she actually rendered, especially in light of the fact that Ms. Motley did not type any of the Debtors' bankruptcy documents. Although she was directed to present proof to support her fees, Ms. Motley did not do so, and the court, based upon the facts presented in conjunction with the findings of other courts, held that a $50.00 fee was reasonable for providing typing services. Additionally, the court authorized Ms. Motley to collect $10.00 for copying charges, as long as each customer agreed, in writing, to pay those charges. However, the court found that Ms. Motley had not rendered any compensable services to the above Debtors, and thus, ordered her to disgorge the $214.00 paid in each case to the Debtors' respective Chapter 7 Trustees within fourteen days, and to certify that fact to the bankruptcy court in writing.[1]

Ms. Motley filed a Notice of Appeal in each case on August 26, 2004, and in accordance therewith, filed the Motion for Stay, requesting that the court stay the effect of the August 18, 2004 Order.

[1] The fourteen-day deadline ended on September 1, 2004. As of the date of this Memorandum, Ms. Motley has certified disgorgement of fees in eight (8) of these bankruptcy cases.

II

The Motion for Stay is governed by Federal Rule of Bankruptcy Procedure 8005, which states, in material part:

> A motion for a stay of the judgment, order, or decree of a bankruptcy judge, for approval of a supersedeas bond, 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 . . . 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.

FED. R. BANKR. P. 8005. Whether to grant a motion for a stay pending appeal is within the court's discretion. *In re Level Propane Gases, Inc.*, 304 B.R. 775, 777 (Bankr. N.D. Ohio 2004).

In making its determination, the bankruptcy court looks to the following factors:

> [W]e consider the same four factors that are traditionally considered in evaluating the granting of a preliminary injunction. These well-known factors are: (1) the likelihood that the party seeking the stay will prevail on the merits of the appeal; (2) the likelihood that the moving party will be irreparably harmed absent a stay; (3) the prospect that others will be harmed if the court grants the stay; and (4) the public interest in granting the stay.

Stephenson v. Rickles Elecs. & Satellites (In re Best Reception Sys., Inc.), 219 B.R. 988, 992 (Bankr. E.D. Tenn. 1998) (quoting *Mich. Coalition of Radioactive Material Users, Inc. v. Griepentrog*, 945 F.2d 150, 153 (6th Cir. 1991)). "These factors are to be balanced." *Baker v. Adams County/Ohio Valley Sch. Bd.*, 310 F.3d 927, 928 (6th Cir. 2002); *see also Best Reception Systems*, 219 B.R. at 993. As the movant, Ms. Motley bears the burden of proving each factor by a preponderance of the evidence. *Level Propane Gases*, 304 B.R. at 777.

In *Griepentrog*, the Sixth Circuit Court of Appeals set forth the following standard for the balancing test:

> [A] motion for a stay pending appeal is generally made after the district court has considered fully the merits of the underlying action and issued judgment, usually following completion of discovery. As a result, a movant seeking a stay pending review on the merits of a district court's judgment will have greater difficulty in demonstrating a likelihood of success on the merits. In essence, a party seeking a stay must ordinarily demonstrate to a reviewing court that there is a likelihood of reversal. Presumably, there is a reduced probability of error, at least with respect to a court's findings of fact, because the district court had the benefit of a complete record that can be reviewed by this court when considering the motion for a stay.
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> To justify the granting of a stay, however, a movant need not always establish a high probability of success on the merits. The probability of success that must be demonstrated is inversely proportional to the amount of irreparable injury plaintiffs will suffer absent the stay. Simply stated, more of one excuses less of the other. This relationship, however, is not without its limits; the movant is always required to demonstrate more than the mere "possibility" of success on the merits. For example, even if a movant demonstrates irreparable harm that decidedly outweighs any potential harm to the defendant if a stay is granted, he is still required to show, at a minimum, "serious questions going to the merits."
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> . . . .
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> Of course, in order for a reviewing court to adequately consider these four factors, the movant must address each factor, regardless of its relative strength, providing specific facts and affidavits supporting assertions that these factors exist. This, in turn, develops an adequate record from which we can determine the merits of the motion.

Griepentrog, 945 F.2d at 153-54 (internal citations omitted). In summary,

> [t]he strength of the likelihood of success on the merits that needs to be demonstrated is inversely proportional to the amount of irreparable harm that will be suffered if a stay does not issue. However, in order to justify a stay of the district court's ruling, the defendant must demonstrate at least serious questions going to the merits and irreparable harm that decidedly outweighs the harm that will be inflicted on others if a stay is granted.

Baker, 310 F.3d at 928.

A

Griepentrog does not require the court to balance each of the four factors equally; however, Ms. Motley must prove, at a minimum, that she stands more than a mere possibility of success in her appeal. Ms. Motley argues that a stay should be granted because her appeal presents material issues of law. First, Ms. Motley avers that the August 18, 2004 Order denies her the following constitutional rights: her right to freedom of speech, her right to procedural due process, and her right to substantive due process. Second, Ms. Motley maintains that the August 18, 2004 Order is not supported by the record. Third, Ms. Motley argues that the bankruptcy court lacked subject matter jurisdiction because Congress did not possess the authority to enact § 110 under the Bankruptcy Clause. Fourth, Ms. Motley argues that the bankruptcy court lacked the authority to enter a final order under § 110(i)(1). Fifth, Ms. Motley argues that absent a determination by the Tennessee Supreme Court regarding the unauthorized practice of law, the bankruptcy court was without the authority to find that Ms. Motley had, in fact, engaged in the unauthorized practice of law.

The court acknowledges that it faces an "inherent conflict of a rendering court determining the probability that its own judgment will or will not be reversed on appeal." *In re Cacioli*, 302 B.R. 429, 431 (Bankr. D. Conn. 2003). Nevertheless, Ms Motley has not offered sufficient evidence to convince the court that she will succeed on the merits of this appeal in order to justify granting the Motion for Stay. The court's opinion mirrors that of

other courts facing similar arguments involving both We the People USA and Ms. Motley's attorney of record. *See, e.g., Scott v. United States Tr. (In re Doser)*, 292 B.R. 652, 656 (D. Idaho 2003); *Martini v. We the People Forms & Serv. Ctrs. USA, Inc. (In re Barcelo)*, ___ B.R. ___, 2004 WL 1833245, 2004 Bankr. LEXIS 1202 (Bankr. E.D.N.Y. Aug. 5, 2004); *McDow v. We the People Forms & Serv. Ctrs., Inc. (In re Douglas)*, 304 B.R. 223, 232 (Bankr. D. Md. 2003); *In re Moore*, 283 B.R. 852, 857 (Bankr. E.D.N.C. 2002). Ms. Motley has offered nothing to indicate or suggest that this bankruptcy court or any of the other courts reaching the same conclusions have erred in their holdings on the issues raised in the Motion for Stay, much less by a preponderance of the evidence.

B

In addition to finding that Ms. Motley has not produced evidence that she has more than a possibility of success on the merits, the court also finds that Ms. Motley has failed to satisfactorily prove that she will be irreparably harmed absent a stay of the August 18, 2004 Order. As stated by the Sixth Circuit in *Griepentrog*,

> In evaluating the harm that will occur depending upon whether or not the stay is granted, we generally look to three factors: (1) the substantiality of the injury alleged; (2) the likelihood of its occurrence; and (3) the adequacy of the proof provided. In evaluating the degree of injury, it is important to remember that
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> > [t]he key word in this consideration is *irreparable*. Mere injuries, however substantial, in terms of money, time and energy necessarily expended in the absence of a stay, are not enough. The possibility that adequate compensatory or other corrective relief will be available at a later date, in the ordinary course of litigation, weighs heavily against a claim of irreparable harm.

> In addition, the harm alleged must be both certain and immediate, rather than speculative or theoretical. In order to substantiate a claim that irreparable injury is likely to occur, a movant must provide some evidence that the harm has occurred in the past and is likely to occur again.

Griepentrog, 945 F.2d at 154 (quoting *Sampson v. Murray*, 94 S. Ct. 937, 953 (1974)).

In support of her Motion for Stay, Ms. Motley argues that she will suffer irreparable harm because it denies her "the right and ability to offer her services to the public [and] puts [her] out of business." However, the August 18, 2004 Order does not preclude Ms. Motley from providing typing services to customers for a fee. Ms. Motley may type bankruptcy statements and schedules, based upon hand-written statements and schedules received from customers, for a fee of $50.00. As long as she does nothing more than transcription from the hand-written Official Forms received from customers to typed Official Forms, that she herself types, Ms. Motley is not violating either § 110 or the court's injunction.

Moreover, the court's August 18, 2004 Order only applies to Ms. Motley's bankruptcy document preparation services. At the July 13, 2004 hearing, she testified that We the People of Knoxville offers preparation services for approximately fifty other types of legal documents, including uncontested divorces, powers of attorney, name changes, wills, and trusts. The court's August 18, 2004 Order does not have any effect on Ms. Motley's other preparation services. Her averment that the court's August 18, 2004 Order will put Ms. Motley out of business is not supported by any substantial proof, but instead, is "speculative and theoretical." *Griepentrog*, 945 F.2d at 154.

Because Ms. Motley has failed to demonstrate a likelihood of success on the merits, as well as providing no evidence that she will suffer certain, immediate, likely, or irreparable harm, the Motion for Stay shall be denied.

An order consistent with this Memorandum will be entered.

FILED: September 8, 2004

BY THE COURT

/s/ Richard Stair, Jr.

RICHARD STAIR, JR.
UNITED STATES BANKRUPTCY JUDGE

IN THE UNITED STATES BANKRUPTCY COURT FOR THE EASTERN DISTRICT OF TENNESSEE

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REGINA ANN HANCE

Debtor

Case No. 04-32550

O R D E R

For the reasons stated in the Memorandum on Bankruptcy Petition Preparer Motion for Stay Pending Appeal, the court directs that the Motion to Stay Order Pending Appeal filed August 26, 2004, by Kristin Motley, is DENIED.

SO ORDERED.

ENTER: September 8, 2004

BY THE COURT

/s/ Richard Stair, Jr.

RICHARD STAIR, JR.
UNITED STATES BANKRUPTCY JUDGE