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UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA

In re: No. 2:09-cv-02938-MCE

SK FOODS, L.P., a California  
limited partnership, and RHM  
INDUSTRIAL /SPECIALTY FOODS,  
INC., a California Corporation,  
d/b/a Colusa County Canning Co.,

**MEMORANDUM AND ORDER<sup>1</sup>**

Debtors.

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SS FARMS, LLC., SSC FARMING, LLC,  
SSC FARMING 1, LLC, SSC FARMING 2  
LLC and SCOTT SALYER,

Appellants,

v.

BRADLEY D. SHARP, Chapter 11  
Trustee,

Appellee.

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<sup>1</sup>An identical Memorandum and Order was previously filed in Appellants' related Appeal, No. 2:09-cv-02942-MCE at Docket No. 32. That Order is being refiled here, without change, only so that the docket in both cases is clear.

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2 Through the present Motion, Appellants SSC Farms, LLC, SSC  
3 Farming LLC, SSC Farming 1, LLC, SSC Farming 2, LLC, and Scott  
4 Salyer (collectively referred to as "Appellants" or "Moving  
5 Parties" unless otherwise noted) request a stay of the Bankruptcy  
6 Court's Order which gave Bankruptcy Trustee Bradley D. Sharp  
7 ("Trustee") the authorization to continue to possess and review  
8 information in his possession relating to the moving party  
9 farming entities. The farming entities are not debtors in the  
10 underlying bankruptcy proceedings involving SK Foods, L.P. ("SK  
11 Foods"). Moving Parties seek a stay pending their appeal of the  
12 Bankruptcy Court's Order to this Court. For the reasons set  
13 forth below, Moving Parties' stay request will be granted.<sup>2</sup>  
14

15 **BACKGROUND**  
16

17 On May 5, 2009, creditors filed involuntary bankruptcy  
18 proceedings against SK Foods and RHM Industrial/Specialty Foods  
19 ("Debtors"), both of which are engaged in the processing of  
20 tomato products. The Debtors subsequently filed voluntary  
21 Chapter 11 petitions, and Bradley Sharp was appointed Trustee of  
22 the bankruptcy estate on May 18, 2009.

23 Scott Salyer founded SK Foods and owns the company both  
24 through a separate corporate entity and his trust. The farming  
25 entities, SS Farms, LLC, SSC Farming, LLC, SSC Farms I, LLC, and  
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27 <sup>2</sup> Because oral argument will not be of material assistance,  
28 the Court ordered this matter submitted on the briefs. E.D. Cal.  
Local Rule 230(g).

1 SSC Farms II, are owned by Salyer's children.

2 Those entities grow tomato and vegetable products processed by  
3 the Debtors.

4       Following his appointment, the Trustee and his counsel took  
5 possession and control of all records located at SK Foods,  
6 including electronic records stored on the company's computer  
7 servers. Although the farming entities maintain their own  
8 records on SK Foods' premises, they claim that this arrangement  
9 was under a joint cost sharing arrangement aimed at maximizing  
10 operational efficiency. The Trustee, on the other hand, contends  
11 that SK Foods had custody and control over the electronic and  
12 hard-copy records of the farming entities because debtors and  
13 those entities essentially functioned as a single operational and  
14 economic enterprise. The Trustee alleges the records were  
15 intermingled, that SK Foods employees had ready access to the  
16 farming entity records, and that all the affiliated entities  
17 shared servers and an email system owned by SK Foods. The  
18 farming entities dispute those factual assertions and take the  
19 Trustee and his counsel to task for accessing their private  
20 records along with the SK Foods records, then refusing to return  
21 the farming entity records.

22       Ultimately, after Appellants moved to disqualify both the  
23 Trustee and his counsel for improperly converting their property  
24 in violation of the Fourth Amendment, the Trustee filed his own  
25 counter-motion seeking an order from the Bankruptcy Court that he  
26 could continue to review information and documents pertaining to  
27 the farming entities on grounds that, under the circumstances,  
28 they had waived any separate rights and privileges to the

1 documents.  
2 On October 9, 2009, the Bankruptcy Court issued a single  
3 Memorandum decision denying the disqualification motion and  
4 granting the Trustee's counter-motion. The Bankruptcy Court  
5 found, as a matter of law, that the farming entities had waived  
6 any privacy rights associated with their records by failing to  
7 remove them from SK's premises before involuntary bankruptcy  
8 proceedings were commenced.

9 On October 19, 2009, the farming entities, along with Scott  
10 Salyer, filed a timely notice of appeal from the Bankruptcy  
11 Court's Order. Appellants then moved for an emergency stay of  
12 the Order from the Bankruptcy Court on October 28, 2009, pending  
13 completion of the instant appeal, but the Bankruptcy Court  
14 granted only a temporary stay until November 16, 2009 to permit  
15 Appellants to seek the necessary relief from this Court.

16 Appellants filed an emergency stay request here on  
17 November 6, 2009. Although they requested a hearing date of  
18 November 12, 2009 so as to obtain a decision before expiration of  
19 the temporary stay on November 16, by Order filed November 10,  
20 2009, this Court extended the temporary stay until the matter  
21 could be normally heard on December 10, 2009 and decided  
22 thereafter.

23  
24 **STANDARD**  
25

26 Federal Rule of Bankruptcy 8005 permits a bankruptcy court  
27 to stay its orders pending appeal, and states that stay  
28 applications must ordinarily be made before the bankruptcy court

1 before relief is requested from the district court:

2 A motion for stay of the judgment, order, or decree of  
3 a bankruptcy judge...pending appeal must ordinarily be  
4 presented to the bankruptcy judge in the first  
5 instance....A motion for such relief, or for  
6 modification or termination of relief granted by a  
7 bankruptcy judge, may be made to the district court...  
8 but the motion shall show why the relief,  
9 modification, or termination was not obtained from the  
10 bankruptcy judge...

11 In evaluating a motion for stay pending appeal, the Ninth  
12 Circuit has directed that equitable criteria be utilized similar  
13 to the criteria applicable for evaluating a motion for  
14 preliminary injunction. See Los Angeles Mem'l Coliseum Comm'n v.  
15 Nat'l Football League, 634 F.2d 1197, 1200 (9th Cir. 1980). The  
16 balancing test in that regard requires consideration of four  
17 intersecting factors: (1) whether the appellant is likely to  
18 succeed on the merits on appeal; 2) whether appellant is likely  
19 to suffer irreparable harm in the absence of a stay; 3) whether  
20 the appellant's threatened injury outweighs potential damage from  
21 a stay to the appellee; and 4) whether the stay is in the public  
22 interest. American Trucking Ass'n, Inc. v. City of Los Angeles,  
23 559 F.3d 1046, 1052 (9th Cir. 2009)). Courts apply these same  
24 factors in considering a stay under Rule 8005. See In re Irwin,  
25 338 B.R. 839, 843 (E.D. Cal. 2006).

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2 **ANALYSIS**

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4 In granting the Trustee's counter-motion for authorization  
5 to possess and utilize data and documents belonging to the  
6 farming entities and being stored on SK Foods' business premises,  
7 the Bankruptcy Court found that the farming entities, even though  
8 they were not bankruptcy debtors, had no expectation of privacy  
9 under the Fourth Amendment with regard to such records. The  
10 Bankruptcy Court made that determination as a matter of law on  
11 grounds that the relevant facts were undisputed. In the absence  
12 of undisputed facts, however, the Bankruptcy Court itself noted  
13 that whether a reasonable expectation of privacy exists  
14 ordinarily presents a mixed question of law and fact. See Hill  
15 v. Nat'l Collegiate Athletic Ass'n., 7 Cal. 4th 1, 39-40 (1994).  
16 Any determination of the reasonableness of a search or seizure in  
17 that regard requires an assessment of all surrounding  
18 circumstances. Skinner v. Ry. Labor Executives' Ass'n, 489 U.S.  
19 602, 619 (1989). Because Appellants contend that the facts  
20 surrounding the maintenance and use of the farming entity records  
21 are anything but undisputed, they maintain that the Bankruptcy  
22 Court erred in finding no right of privacy as a matter of law,  
23 instead of conducting an evidentiary hearing in order to weigh  
24 the conflicting evidence before reaching any conclusion.

25 A bankruptcy court abuses its discretion if it bases its  
26 decision on an incorrect view of the law or on clearly erroneous  
27 factual findings. See Warrick v. Birdsell (In re Warrick), B.R.  
28 182, 184 (9th Cir. B.A.P. 2002).

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2 Application of the wrong legal standard also constitutes an abuse  
3 of discretion. See Simantob v. Claims Prosecutor, LLC (In re  
4 Lihijani), 325 B.R. 282, 287 (9th Cir. B.A.P. 2005).

5 Whether or not a stay is appropriate here depends, in large  
6 part, on whether Appellants have demonstrated a "fair chance of  
7 success on the merits." Gilder v. PGA Tour, Inc., 936 F.2d 417,  
8 422 (1991).<sup>3</sup> A stay may also be warranted if sufficiently  
9 serious questions going to the merits of Appellants' claims  
10 exist. Artukovic v. Rison, 784 F.2d 1354, 1356 (9th Cir. 1986).

11 The Bankruptcy Court's decision granting the Trustee's  
12 counter-motion, as delineated above, hinged on a determination  
13 that because the nature of Appellants' allegedly intertwined  
14 business dealings with the farming entities was undisputed, the  
15 Court could determine that there was no cognizable privacy  
16 interest as a matter of law and grant the motion on that ground  
17 alone.

18 In this Court's estimation, that approach may well be  
19 flawed. Appellants have raised a host of disputed factual  
20 questions which were not addressed by the Bankruptcy Court simply  
21 upon its determination that, as a preliminary matter, Appellants  
22 waived any privacy interest in their data and records because

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24 <sup>3</sup> While the Trustee also argues that the appeal itself is an  
25 unappealable interlocutory order, that argument appears to be  
26 largely premised on the Trustee's characterization of the dispute  
27 as concerning a discovery order. See Trustee's Opp'n, 15:26-  
28 16:8. Access to the farming entities' data and records, however,  
does not relate to any discovery request by the Trustee.  
Instead, the issue here relates to constitutional privacy  
concerns of a non-party to the bankruptcy proceedings. That  
issue would appear susceptible to interlocutory review.

1 they failed to retrieve them before SK's bankruptcy.  
2 As Appellants point out, however, a reasonable expectation of  
3 privacy in their financial, personal and other related documents  
4 remains even if such documents are stored or left at the premises  
5 of a third party. See U.S. v. Fultz, 146 F.3d 1102, 1105 (9th  
6 Cir. 1998). Intermingling of documents, alone, does not waive  
7 Appellants' constitutional rights. See U.S. v. Comprehensive  
8 Drug Testing, 579 F.3d 989, 1004-05 (9th Cir. 2009). The Trustee  
9 has cited no authority for the proposition that such privacy  
10 interests are waived simply because the companies may have shared  
11 storage and access capabilities, and may not have immediately  
12 segregated and taken their own materials once the debtors'  
13 bankruptcy filing occurred. Appellants correctly point out that  
14 any waiver of the constitutional right of privacy must be  
15 narrowly rather than expansively construed. Fortunato v.  
16 Superior Court, 114 Cal. App. 4th 475, 482 (2003).

17       Significantly, Appellants have identified evidence  
18 suggesting that electronic data for each non-debtor entity was  
19 maintained in separate folders and was not intermingled with data  
20 belonging to other entities. See Decl. of John Matthew Gallegly  
21 in Opp'n to Counter-Motion, ¶ 11. Appellants have further  
22 identified evidence that the servers used to store the data in  
23 question was not owned by the debtor, that SK Foods' access to  
24 documents and information pertaining to the non-debtor entities  
25 required authorization, and that Appellants immediately demanded  
26 the return of their own private and confidential information once  
27 the Trustee intervened. See generally Appellants' Reply herein,  
28 pp. 7-11.

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2 Particularly given the Trustee's argument to the contrary that  
3 all of the concerned entities operated as a singular whole, all  
4 of this creates disputed facts that arguably should have been  
5 resolved through an evidentiary hearing rather than as a matter  
6 of law.

7 This Court therefore concludes that a sufficient showing of  
8 success on the merits has been raised to justify issuance of a  
9 stay of the Bankruptcy Court's Order pending the appeal presently  
10 before the Court. The other equitable factors that must also be  
11 addressed in determining whether to permit a stay fall readily  
12 into place once that assessment has been made. First, with  
13 respect to the requisite irreparable harm, it appears axiomatic  
14 that such harm is met if Appellants' confidential business  
15 materials are improperly taken and used against their interests  
16 during the bankruptcy proceeding. Second, turning to the balance  
17 of potential harms, although the Court appreciates the Trustee's  
18 argument that his inability to access and identify assets of the  
19 debtor could potentially be compromised by a stay, in fact a stay  
20 simply preserves the status quo as it has existed for many  
21 months, first on a voluntary basis prior to the Bankruptcy  
22 Court's Order, and now in anticipation of this Court's ruling on  
23 Appellants' appeal.

24 Importantly, too, the briefing on the appeal itself should  
25 be completed within the coming two weeks, which means that a  
26 decision as to the matter in its entirety should be forthcoming  
27 shortly. If the Court declines to issue a stay at this time, the  
28 Trustee's access to Appellant's data and materials may for all

1 practical purposes make adjudication of the appeal itself moot.  
2 Similarly, the public interest is served in preserving the  
3 integrity of the right to appellate review since that right may  
4 be undermined if a stay is not forthcoming.

5  
6 **CONCLUSION**

7  
8 For all the foregoing reasons, Appellants' Motion to Stay  
9 the Bankruptcy Court's Order granting the Trustee Counter Motion  
10 Pending Appeal (Docket No. 7) is GRANTED.

11 IT IS SO ORDERED.

12 Dated: May 11, 2010

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15 MORRISON C. ENGLAND, JR.  
16 UNITED STATES DISTRICT JUDGE  
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