



SO ORDERED,

A handwritten signature in blue ink that reads "Neil P. Olack".

Judge Neil P. Olack  
United States Bankruptcy Judge  
Date Signed: March 4, 2016

The Order of the Court is set forth below. The docket reflects the date entered.

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UNITED STATES BANKRUPTCY COURT  
SOUTHERN DISTRICT OF MISSISSIPPI

IN RE:

RX PRO OF MISSISSIPPI, INC.,  
D/B/A MCDANIEL PHARMACY,

CASE NO. 16-00288-NPO

DEBTOR.

CHAPTER 11

IN RE:

OPUSRX, LLC,

CASE NO. 16-00291-NPO

DEBTOR.

CHAPTER 11

**ORDER ON MOTION OF OPUS RX, LLC  
TO FIND WHOLESALE ALLIANCE, LLC, D/B/A  
PHARMACY FIRST AND THIRD PARTY STATION  
IN VIOLATION OF THE AUTOMATIC STAYS AND MOTION  
OF RX PRO OF MISSISSIPPI, INC., D/B/A MCDANIEL PHARMACY TO  
FIND WHOLESALE ALLIANCE, LLC, D/B/A PHARMACY FIRST AND  
THIRD PARTY STATION IN VIOLATION OF THE AUTOMATIC STAYS**

In two (2) separate chapter 11 cases commenced by affiliated debtors, there came before the Court for hearing on February 29, 2016 and March 1, 2016 (the "Hearing"), a common issue as to the alleged violation of the automatic stay of 11 U.S.C. § 362(a)<sup>1</sup> by Wholesale Alliance, LLC d/b/a Pharmacy First and Third Party Station (collectively, "Third Party Station"). In the

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<sup>1</sup> Hereinafter, all code sections refer to the Bankruptcy Code found at title 11 of the U.S. Code unless noted otherwise.

first bankruptcy case, *In re Rx Pro of Mississippi, Inc. d/b/a McDaniel Pharmacy*, Case No. 16-00288-NPO (the “Rx Pro Case”), the debtor, Rx Pro of Mississippi, Inc. (“Rx Pro”), filed the Motion of Rx Pro of Mississippi, Inc., d/b/a McDaniel Pharmacy to Find Wholesale Alliance, LLC, d/b/a Pharmacy First and Third Party Station in Violation of the Automatic Stays (the “Rx Pro Motion”) (Rx Pro Case, Dkt. 57); and Third Party Station filed the Wholesale Alliance, LLC, d/b/a Pharmacy First and Third Party Station’s Response and Objections to Debtor’s Motion to Find Wholesale Alliance, LLC, d/b/a Pharmacy First and Third Party Station in Violation of the Automatic Stay (the “Response to Rx Pro Motion”) (Rx Pro Case, Dkt. 80). In the second bankruptcy case, *In re OpusRx, LLC*, Case No. 16-00291-NPO (the “OpusRx Case”), the debtor, OpusRx, LLC (“OpusRx,” or together with Rx Pro, the “Debtors”), filed the Motion of Opus Rx, LLC to Find Wholesale Alliance, LLC, d/b/a Pharmacy First and Third Party Station in Violation of the Automatic Stays (the “OpusRx Motion” or together with the Rx Pro Motion, the “Motions”) (OpusRx Case, Dkt. 62); Third Party Station filed the Wholesale Alliance, LLC, d/b/a Pharmacy First and Third Party Station’s Response and Objections to Debtor’s Motion to Find Wholesale Alliance, LLC, d/b/a Pharmacy First and Third Party Station in Violation of the Automatic Stay (the “Response to OpusRx Motion”) (OpusRx Case, Dkt. 83) and the Wholesale Alliance, LLC, d/b/a Pharmacy First and Third Party Station’s Amended and Restated Response and Objections to Debtor’s Motion to Find Wholesale Alliance, LLC, d/b/a Pharmacy First and Third Party Station in Violation of the Automatic Stay (together with the Response to Rx Pro Motion and Response to OpusRx Motion, the “Responses”) (OpusRx Case, Dkt. 110); and Express Scripts, Inc. (“Express Scripts”) filed the Express Scripts, Inc.’s Response and Objection to Debtor’s Motion to Find Wholesale Alliance, LLC d/b/a Pharmacy First and Third Party Station in Violation of the Automatic Stay [Dkt. No. 62], and Express Scripts, Inc.’s Joinder in

the Response and Objection Filed Thereto by Wholesale Alliance, LLC d/b/a Pharmacy First and Third Party Station [Dkt. No. 83] (the “Express Scripts Response”) (OpusRx Case, Dkt. 111).<sup>2</sup>

At the Hearing, the Debtors were represented by Stephen W. Rosenblatt; Third Party Station was represented by Matthew W. McDade; Express Scripts was represented by James A. McCullough II and Gary Vincent; and Henry G. Hobbs Jr., Acting U.S. Trustee, was represented by Ronald H. McAlpin. Two (2) witnesses testified at the Hearing, Robert Dickey (“Dickey”), the chief executive officer of Third Party Station, and Jack West (“West”), the operations manager for Opus Management Group Jackson LLC, an affiliate of the Debtors. During the Hearing, the Debtors introduced six (6) exhibits into evidence, and Third Party Station introduced three (3) exhibits.<sup>3</sup> The Court, after considering the testimony, other evidence, and arguments presented at the Hearing, ruled from the bench that Third Party Station willfully violated the automatic stay of § 362(a) and was in civil contempt because it withheld and failed to remit funds to the Debtors under the terms of nearly identical written Pharmacy Services Agreements (together, the “Agreements”) (Debtors Exs. 1 & 2). Accordingly, the Court directed Third Party Station to purge its civil contempt by immediately releasing ninety percent (90%) of the funds to the Debtors and depositing the remaining ten percent (10%) into the registry of the Court. (*See* Adversaries as defined herein.) In addition, the Court instructed Third Party Station to allow the Debtors access to its web portal, which provides data regarding the status of

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<sup>2</sup> Express Scripts also filed the Express Scripts, Inc.’s Motion to File Documents Under Seal Pursuant to Fed. R. Bankr. P. 9018 and Miss. Bankr. L.R. 9018-1 (the “Express Scripts Motion”) (OpusRx Case, Dkt. 114). By separate order, the Court has denied the Express Scripts Motion as moot. (OpusRx Case, Dkt. 125).

<sup>3</sup> Third Party Station attempted to introduce into evidence a fourth exhibit which was excluded and marked for identification purposes only. The stickers on the exhibits introduced into evidence by Third Party Station refer to Third Party Station as Wholesale Alliance but for consistency are cited in this Order as “(TPS Ex. \_\_\_\_ )”. The exhibits introduced into evidence by the Debtors are cited as “(Debtors Ex. \_\_\_\_ )”.

prescription claims (the “Web Portal”). This Order memorializes and supplements the Court’s bench ruling.

### **Jurisdiction**

This Court has jurisdiction over the parties to and the subject matter of this proceeding pursuant to 28 U.S.C. § 1334. These are core proceedings under 28 U.S.C. § 157(b)(2)(A) and (O). Notices of the Motions were proper under the circumstances.

### **Facts**

The Debtors are independent pharmacies that commenced separate chapter 11 bankruptcy cases on February 2, 2016.<sup>4</sup> Several months before the bankruptcy filings, Third Party Station agreed to assist the Debtors in collecting and processing payments for prescriptions from third-party payors through pharmacy benefit managers (“PBMs”), which are used by the third-party payors to administer their prescription drug benefits programs. Third Party Station drafted the contracts and entered into the Pharmacy Services Agreement with OpusRx (the “OpusRx Agreement”) (Debtors Ex. 1) on May 14, 2015 and the nearly identical Pharmacy Services Agreement with Rx Pro (the “Rx Pro Agreement”) on November 16, 2015 (Debtors Ex. 2). After learning from the news media that the Federal Bureau of Investigation executed search and seizure warrants on the offices of OpusRx on January 22, 2016, and after purportedly having a “supplier” confirm that information, Third Party Station sent a letter to OpusRx on January 29, 2016, before the bankruptcy filings, immediately terminating the OpusRx Agreement pursuant to section 4.2(c)(x). (TPS Ex. 1). Under that provision, either party could terminate the OpusRx

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<sup>4</sup> Five (5) other affiliated debtors also filed bankruptcy cases on February 2, 2016. *See In re Estonna Mgmt. LLC*, Case No. 16-00292-NPO; *In re Rx Pro Pharmacy & Compounding Inc.*, Case No. 16-00294-NPO; *In re Care Rx Pharmacy Group, L.L.C.*, Case No. 16-00295-NPO; *In re World Health Jets LLC*, Case No. 16-00296-NPO; *In re Opus Mgmt. Group Jackson LLC*, Case No. 16-00297-NPO.

Agreement immediately in the event of the “commencement by any governmental office or agency (Federal, State or local) of an investigation concerning Medicaid fraud or any other crime (misdemeanor or felony) in any way relating to the operations of the Pharmacy.” (OpusRx Agmt. § 4.2(c)(x)). Third Party Station also sent a letter to Rx Pro after the bankruptcy filings terminating the Rx Pro Agreement effective March 5, 2016. (Debtors Ex. 3; TPS Ex. 3). In a letter dated February 10, 2016, the Debtors notified Third Party Station of their bankruptcy filings and demanded that Third Party Station withdraw and rescind both termination notices. (Debtors Ex. 4). Third Party Station rescinded its post-petition termination notice to Rx Pro, but not its pre-petition termination notice to OpusRx. (TPS Ex. 3). At the Hearing, the parties disputed the effectiveness of the pre-petition termination letter to OpusRx. Although it was sent prior to the bankruptcy filing, OpusRx asserted at the Hearing that Third Party Station lacked grounds for terminating the OpusRx Agreement under section 4.2(c)(x). Regardless, Third Party Station stopped remitting funds to the Debtors that had been paid by PBMs and simultaneously precluded the Debtors from accessing its Web Portal.

In the Motions, the Debtors alleged that Third Party Station did not effectively terminate the Agreements and may not do so now without seeking relief from the automatic stay.<sup>5</sup> The Debtors further alleged in the Motions and at the Hearing that Third Party Station’s refusal to remit funds collected from various PBMs in the amounts of \$1,251,373.39 on behalf of OpusRx and \$74,751.89 on behalf of Rx Pro constituted violations of the automatic stay. (TPS Ex. 2). According to the Debtors, they need Third Party Station’s services and the funds to operate their businesses as debtors-in-possession under § 1108.

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<sup>5</sup> On February 29, 2016, Third Party Station filed a Motion for Relief from Automatic Stay to Terminate Contract or, in the Alternative, to Require Debtor to Assume or Reject Contract by Wholesale Alliance, LLC, d/b/a Pharmacy First and Third Party Station (Rx Pro Case, Dkt. 108) in the Rx Pro Case.

Third Party Station filed the Responses, alleging that it could not determine what funds it rightfully owed the Debtors without the input of all parties who may have an interest in the funds, including all PBMs and the U.S. Government. With regard to potential claims of PBMs to the funds, Dickey explained at the Hearing that after initial payments are made and processed to the Debtors, there are offsets and reverses by third-party payors, through PBMs, in the normal course of business. The PBMs offset or reverse such amounts by withholding future payments to Third Party Station, regardless of whether the future payments relate to the payments against whom the adjustment is made. In other words, the adjustments to claims are pharmacy specific, but not the offsets. Instead, offsets are applied against an aggregated payment stream that includes amounts owed to all pharmacies. Under section 3.10 of Appendix 2 to the Agreements, Third Party Station may withhold funds from future payments to the pharmacies when a PBM offsets or reverses a claim. According to Third Party Station, however, if it remits all of the funds to the Debtors paid by the PBMs, it has no way of applying adjustments downstream to the Debtors but must absorb the loss out of its own pockets, which it is not financially able to do. With regard to the U.S. Government's potential claims to the funds, Dickey speculated that the funds could be the subject of a criminal forfeiture action or could be seized as "substitute" assets. Dickey admitted, however, that Third Party Station had not received notice of any such proceedings and had been processing offsets and reverses in the ordinary course of business.

Only minutes before the Hearing began, Third Party Station filed two (2) adversary proceedings:

*Wholesale Alliance, LLC d/b/a Pharmacy First and Third Party Station*

v.

*Rx Pro of Mississippi, LLC, Prime Therapeutics, LLC, OptumRx, Inc., Change Healthcare Solutions, LLC, Catamaran Inc., Argus Health Systems Inc., Envision Pharmaceutical Services, LLC, McKesson Specialty Distribution, LLC,*

*Pharmaceutical Technologies, Inc., WellDyneRx, Incorporated, Script Care, Ltd., and US Script, Inc.*

Adv. Proc. No. 16-00010-NPO (the “Rx Pro Adversary”)

and

*Wholesale Alliance LLC d/b/a Pharmacy First and Third Party Station*

v.

*Opus Rx, LLC, Express Scripts, Inc., Prime Therapeutics, LLC, OptumRx, Inc., MedImpact Healthcare Systems, Inc., Navitus Health Solutions, LLC, Change Healthcare Solutions, LLC, Catamaran Inc., Argus Health Systems, Inc., and Caremark, L.L.C.*

Adv. Proc. No. 16-00011-NPO (together with the Rx Pro Adversary, the “Adversaries”).

In each of the Adversaries, Third Party Station filed a Complaint for Interpleader Relief (Adversaries, Dkt. 1), asking permission to interplead the funds paid by the PBMs into the registry of this Court. Third Party Station did not assert an independent claim to the funds in the Adversaries.

Third Party Station raised a procedural issue in the Responses and at the Hearing, alleging that the Motions are essentially an attempt to bring a turnover action under § 542 as a contested matter rather than as an adversary proceeding as required by FED. R. BANKR. P. 7001. *See Feld v. Zale Corp. (In re Zale Corp.)*, 62 F.3d 746, 762 n.49 (5th Cir. 1995) (“Contested matters are those issues for which [FED. R. BANKR. P.] 7001 does not require an adversary proceeding.”). At the Hearing, counsel for the Debtors maintained that the Debtors are not asserting a turnover action in the Motions but are seeking relief for alleged violations of the automatic stays. Given that limitation on the scope of the Hearing, the parties agreed to proceed with the § 362/contempt action as a contested matter.

Express Scripts, a PBM, filed the Express Scripts Response in the OpusRx Case, essentially reiterating Third Party Station’s concerns regarding potential competing claims to the funds. Express Scripts attempted to support Third Party Station’s position by alleging that its

inventory audit of OpusRx “uncovered \$355,585.38 in inappropriately billed medications for the period between July 21, 2015, and December 1, 2015.” (Express Scripts Resp. ¶ 3). Because Express Scripts was not named in the Motions and otherwise was unable to show standing, the Court excluded the Express Scripts Response from consideration. *See St. Paul Fire & Marine Ins. Co. v. Labuzan*, 579 F.3d 533 (5th Cir. 2009) (standing under § 362 has both constitutional and prudential requirements). As alternative relief, Express Scripts asked the Court to consider the Express Scripts Response “as a preliminary motion for relief from the automatic stay.” (Exp. Scr. Resp. ¶ 43). The Court denied the request as procedurally improper. To obtain relief on its own behalf, Express Scripts must file a separate and appropriate contested motion in the OpusRx Case or initiate an adversary proceeding.

At the Hearing, counsel for the Debtors represented to the Court that the Debtors are not seeking any “actual damages, including costs and attorneys’ fees” under § 362(k) for the alleged violations of the automatic stay by Third Party Station.<sup>6</sup> Rather, the Debtors ask the Court to require Third Party Station to purge its violation of the automatic stay and its civil contempt by: (1) releasing all funds held by Third Party Station or, in the alternative, releasing ninety percent (90%) of the funds, with ten percent (10%) reserved for normal adjustments, and (2) reopening the Web Portal through which adjustments are made and determined. Thus, the issues before the Court at the Hearing were narrowed to an alleged violation of the automatic stay of § 362(a) and a civil contempt matter under § 105(a).

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<sup>6</sup> The Debtors asserted in the Motions that as a general rule, a corporation is not an “individual” entitled to recover damages under § 362(k) but maintained that the Court could award relief to the corporate Debtors in the form of contempt sanctions under § 105(a). *See In re MD Promenade*, No. 08-34113, 2009 WL 80203 (Bankr. N.D. Tex. Jan. 8, 2009).



## Discussion

When a bankruptcy petition is filed, an automatic stay operates as a self-executing injunction that prevents creditors from pursuing any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate. 11 U.S.C. § 362(a)(3). The purpose behind the automatic stay is to allow a debtor “breathing room” and a chance for a fresh start. *Templeton Mortg. Corp. v. Chesnut (In re Chesnut)*, 422 F.3d 298, 301 (5th Cir. 2005). Should the automatic stay be violated, Congress has provided an individual with a private right of action for any “willful violation.” 11 U.S.C. § 362(k).

Specific intent to violate the automatic stay is not required to prove the willfulness of a violation. *Campbell v. Countrywide Home Loans, Inc.*, 545 F.3d 348, 355 (5th Cir. 2008). Instead, the Fifth Circuit Court of Appeals has established a three-part test for establishing an actionable violation of the stay: (1) the creditor must have known of the existence of the stay, (2) the creditor’s acts must have been intentional, and (3) the creditor’s acts must have violated the stay. *Young v. Repine (In re Repine)*, 536 F.3d 512, 519 (5th Cir. 2008). In addition, a court may address a violation of the stay by exercising its civil contempt powers under § 105(a). *In re San Angelo Pro Hockey Club, Inc.*, 292 B.R. 118, 124 (Bankr. N.D. Tex. 2003). A finding of civil contempt requires clear and convincing evidence that (1) a court order was in effect, (2) the order required certain conduct by the respondent, and (3) the respondent failed to comply with the order. *Petroleos Mexicanos v. Crawford Enters., Inc.*, 826 F.2d 393, 400 (5th Cir. 1987). For civil contempt purposes, the automatic stay is a self-executing injunction that constitutes an order of the bankruptcy court. *Sanchez v. Ameriquest Mortg. Co. (In re Sanchez)*, 372 B.R. 289, 311 (Bankr. S.D. Tex. 2007).

Here, the Debtors alleged that Third Party Station actually knew about the commencement of their bankruptcy cases since at least February 10, 2016 and willfully continued to violate the stay by withholding the funds and refusing to open the Web Portal. Third Party Station's alleged violation of the stays had continued, as of the date of the Hearing, for twenty-seven (27) days after the filing of the bankruptcy cases when the stay automatically went into effect. At the Hearing, West testified that unless Third Party Station releases the funds, OpusRx will not meet its payroll obligations on Friday, March 4, 2016. The consequences are less dire for Rx Pro because of the current balance in its checking account.

The Court finds that clear and convincing evidence at the Hearing demonstrated that Third Party Station had knowledge of the filing of the Debtors' bankruptcy petitions and that its steadfast refusal to remit the funds to the Debtors or to open the Web Portal was intentional. Therefore, the Debtors have satisfied the first two elements of the three-part test set forth by the Fifth Circuit in *Repine* for establishing an actionable violation of the stay as well as the first two elements of a civil contempt action. Regarding the final element for both a § 362(a) violation and civil contempt, Third Party Station denied any violation of the stay or, in the alternative, denied any "willful" violation of the stay on the ground that the Debtors have not shown that they own the funds.

Third Party Station insisted that the termination of the OpusRx Agreement meant only that it had to release "any obligations accrued" under section 4.3 of the OpusRx Agreement.<sup>7</sup> That determination cannot be made until all PBMs have had an opportunity to stake a claim to the funds, according to Third Party Station. As to Rx Pro, Third Party Station admitted there has

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<sup>7</sup> Section 4.3 provides, in pertinent part, "[i]n the event of termination of this Agreement for any reason, the Parties shall be entitled to payment of any obligations accrued under this Agreement prior to the effective date of termination." (OpusRx Agmt. § 4.3).

been no effective termination of the Rx Pro Agreement and that it rescinded its post-petition termination notice, but it offered no explanation as to why it treated the Rx Pro Agreement as if it had been terminated.

Third Party Station described its role under the Agreements as an intermediary or a “middle man” between the Debtors and the PBMs. As a conduit for payments, Third Party Station did not want to be stuck “holding the bag.” Yet Third Party Station’s counsel was unable to point to any provision in the Agreements that would allow Third Party Station to stop the flow of funds to the Debtors when asked by the Court at the Hearing. Counsel for Third Party Station admitted that the mechanics to stop the flow are missing from the Agreements, that is, the Agreements do not contain a “valve” for Third Party Station to switch on or off. Indeed, the Agreements, drafted by Third Party Station, are void of any provision authorizing Third Party Station to undertake the actions it has taken in these bankruptcy cases.

In support of its position, Third Party Station cited *Citizens Bank of Maryland v. Strumpf*, 516 U.S. 16 (1995) and *Mwangi v. Wells Fargo*, 432 B.R. 812 (B.A.P. 9th Cir. 2010). In *Strumpf*, the U.S. Supreme Court held that a bank may impose a temporary administrative hold on a debtor’s account to preserve its setoff rights without violating the automatic stay. *Strumpf*, 516 U.S. at 18. In *Mwangi*, the 9th Circuit B.A.P. held that *Strumpf*’s allowance of a temporary administrative hold applied only to protect setoff rights. *Mwangi*, 432 B.R. at 819. The Court concludes that *Strumpf* and *Mwangi* do not support Third Party Station’s refusal to remit the funds. Unlike the bank in *Strumpf*, Third Party Station does not assert any right of setoff under applicable law or any claim whatsoever to the funds. In contrast, the bank’s setoff rights in *Strumpf* were asserted under both Maryland law and § 553(a), which, in general, provides “that any right of setoff that a creditor possessed prior to the debtor’s filing for bankruptcy is not

affected by the Bankruptcy Code.” *Strumpf*, 516 U.S. at 19-20. *Mwangi* recognized the limited holding of *Strumpf*. *Mwangi*, 432 B.R. at 819. In the absence of a valid, enforceable right of setoff, *Strumpf* and *Mwangi* do not insulate Third Party Station from action that violates the automatic stay.

Significantly, Third Party Station has placed too narrow a definition on property of the estate. Under § 541, the commencement of a bankruptcy case creates an estate comprising of all legal or equitable interests of the debtor in property “wherever located and by whomever held.” 11 U.S.C. § 541. The Debtors clearly have at least a legal or equitable interest in the funds whereas Third Party Station has no contractual right or other authority to withhold the funds from the Debtors. Accordingly, the Court finds that Third Party Station willfully violated the automatic stay of § 362 and is in civil contempt because it withheld and failed to remit the funds under the terms of the Agreements. The Court also finds that the attempted termination of the OpusRx Agreement was ineffective since Third Party Station did not have a basis for invoking section 4.2(c)(x) of the OpusRx Agreement on January 29, 2016.<sup>8</sup> No evidence was presented at the Hearing of the “commencement by any governmental office or agency (Federal, State or local) of an investigation concerning Medicaid fraud or any other crime (misdemeanor or felony) in any way relating to the operations of the Pharmacy.” (OpusRx Agmt. 4.2(c)(x)).

### **Conclusion**

Third Party Station acted with knowledge of the pendency of the bankruptcy cases and deprived the Debtors of their interest in property of the estate. The Court acknowledges the testimony of Dickey regarding potential future adjustments by PBMs in the normal course of

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<sup>8</sup> Third Party Station alleged that it had uncovered various other grounds for termination of the OpusRx Agreement, but Third Party Station admitted at the Hearing that its termination on January 29, 2016, was based solely on section 4.2(c)(x) of the OpusRx Agreement.

business and the testimony of West regarding the percentage amount needed for potential offsets and reverses of claims. Given their testimony, the Court directs Third Party Station to purge its contempt by immediately releasing ninety percent (90%) of the funds to the Debtors and interpleading the remaining ten percent (10%) into the Court registry pending disposition of the Adversaries. In addition, the Court directs Third Party Station to allow the Debtors access to its Web Portal. The Court is not resolving all issues regarding the funds at this time, including whether ten percent (10%) of the funds is sufficient for future adjustments. The Court may act in the future to change this amount.

IT IS, THEREFORE, ORDERED that the Motions are hereby granted as set forth herein.

IT IS FURTHER ORDERED that Third Party Station shall release ninety percent (90%) of the funds to the Debtors and deposit the remaining ten percent (10%) into the Court registry.

IT IS FURTHER ORDERED that Third Party Station shall allow the Debtors immediate access to its Web Portal.

##END OF ORDER##