UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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BOAT BASIN INVESTORS, LLC; PAPELL HOLDINGS, LTD.; MARC SIEGEL; DAVID STEFANSKY; and RICHARD ROSENBLUM,

Plaintiffs,

- against -

FIRST AMERICAN STOCK TRANSFER, INC.; PAUL EGAN; PHILLIP YOUNG; MARGAUX INVESTMENTS GROUP, S.A.; and JOHN DOES 1-10,

Defendants.

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03 Civ. 493 (RWS)

O P I N I O N

A P P E A R A N C E S:

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Sweet, D.J.,

Plaintiffs Boat Basin Investors, LLC ("Boat Basin"), Papell Holdings, Ltd. ("Papell"), Marc Siegel ("Siegel"), David Stefansky ("Stefansky") and Richard Rosenblum ("Rosenblum") (collectively, the "Sellers") have moved pursuant to Rule 65 of the Federal Rules of Civil Procedure for an injunction ordering the delivery of 7,707,332 free-trading shares of Freestar Technologies, Inc. ("Freestar") by the defendants, First American Stock Transfer ("First American"), Paul Egan ("Egan"), Phillip Young ("Young"), Margaux Investment Management Group, S.A. ("Margaux") and ten John Does 1-10.

The Sellers, while complaining of potential bankruptcy in the absence of equitable relief, are hoist on their own petard. In the absence of Freestar, a necessary party under Rule 19(a) of the Federal Rules of Civil Procedure, the merits may not be reached and a preliminary injunction may not be granted. ***Yet Freestar is currently mired in involuntary bankruptcy proceedings -- initiated by the Sellers -- and thus cannot be joined to this action at this time due to the involuntary stay in place pursuant to 11 U.S.C. § 326. Therefore, and for the following reasons, the motion is denied.***

FACTS

The following facts are drawn from the parties' moving papers and oral arguments and do not constitute findings of fact by the Court.

Parties

The Plaintiffs

Boat Basin is a Nevis, West Indies Company with its principal place of business in Nevis, West Indies.

Papell is a Turks & Caicos Islands Company with its principal place of business in the Turks & Caicos Islands.

Siegel is an individual who resides in Boca Raton, Florida.

Stefansky is an individual who resides in Lakewood, New Jersey.

Rosenblum is an individual who resides in Wayne, New Jersey.

The Defendants

First American is an out-of-state corporation with its principal place of business at 1717 East Bell Road, Suite 3, Phoenix, Arizona 85022. At all relevant times, First American acted as the stock transfer agent for Freestar.

Egan is an individual who resides in the Dominican Republic. At all relevant times, Egan was the President, Chief Executive Officer and most substantial shareholder of Freestar. Egan claims that he has a personal net worth of $600,000.

Young is an individual who resides in Phoenix, Arizona. At all relevant times, Young was the president of First American.

Margaux is a European corporation with its principal place of business located at 9 Rue de Commerce, Geneva, Switzerland.

John Does 1-10 are individuals and/or entities presently unknown who participated in a purported market manipulation of Freestar's stock.

Freestar

Freestar is a Nevada corporation that maintains its principal corporate headquarters in Santo Domingo, Dominican

Republic. It also has offices in Dublin, Ireland and Helsinki, Finland. It does not currently have any offices in the United States. Freestar is in the business of enabling security-enhanced financial transactions over the Internet using credit, debit, ATM and smart cards.

Freestar's common stock is publicly traded on the Over-the-Counter Electronic Bulletin Board Market of the National Association of Security Dealers ("NASD"). Freestar's market capitalization is in excess of $13 million. As of its most recent filing, Freestar had approximately 48 million shares of common stock issued and outstanding.

Freestar claims that it generally pays its creditors in a timely manner. For instance, Heroya Investments, which is owed $2 million, has attested that Freestar has been meeting its obligations. Freestar's largest creditor, Heroya also opposes the bankruptcy filing.

The March 2002 Convertible Notes

Prior to entering into the June 2002 Convertible Notes leading to the stock transfer at issue, Freestar had earlier sought similar financing from the Sellers.

On March 25, 2002, Freestar entered into a $270,000 financing agreement, under which Freestar issued 8% promissory notes to Papell and Boat Basin for $200,000 and $70,000, respectively. The March 2002 Convertible Notes matured in March 2003 and were convertible into equity under certain circumstances. In exchange, Freestar received funds totaling $228,000. The remaining $42,000 represented brokerage commissions and fees. Egan personally guaranteed the March 2002 Convertible Notes and secured them with a stock pledge of 4 million shares of Freestar common stock.

On July 3, 2002, Egan notified the Sellers' counsel that the 4 million shares of stock were restricted and stated that the the holding period described by Rule 144 would expire in September 5, 2002.

Freestar defaulted on the March 2002 Convertible Notes. About the time of default, on May 29, 2002, Papell and Boat Basin notified Freestar of their right to proceed against Egan and convert their debt into the pledged stock. They foreclosed on the 4 million shares of common stock.

On June 7, 2002, 4 million restricted shares of Freestar common stock were irrevocably transferred out of Egan's name and into the names of Papell and Boat Basin on four certificates, 1711,

1712, 1713 and 1714. First American's record show that the 4 million shares were issued with the restriction.

In a letter dated June 10, 2002, Sellers' counsel wrote to First American and asked that the shares be reissued as unrestricted because she claimed that the 4 million shares had been registered on SEC Form S-8. Freestar now claims that the shares were not so registered.

On June 12, 2002, First American reissued the stock as unrestricted in response to the letter.

Freestar claims that Papell and Boat Basin over-converted the stock at issue, resulting in overpayment of $188,352 to Papell and $56,488 to Boat Basin.

The $60,000 Short Term Loan

Freestar claims that on June 12, 2002, plaintiffs Rosenblum, Stefansky and Siegel each loaned Freestar $20,000, for a total of $60,000. Freestar asserts that the loan was made without documentation and was intended to serve as a short-term bridge loan until the terms for a large convertible note could be agreed upon by the parties.

Freestar claims that it pledged one million shares, divided equally among the three plaintiffs, as collateral for the $60,000. After Freestar issued the one million shares, counsel for the three plaintiffs notified Freestar that they were treating the shares as commission and/or interest.

As of June 12, 2002, the market value of the shares was approximately $142,000.

<u>June 2002 Boat Basin Loan</u>

Freestar claims that also on June 12, 2002, Boat Basin loaned Freestar $50,000 as a short term bridge loan without any documentation.

<u>The June 2002 Convertible Notes at Issue</u>

On August 29, 2002, Freestar entered into a $400,000 convertible note financing agreement, dated as of June 27, 2002 (the "June 2002 Convertible Notes"). Under the terms of that agreement, Freestar issued six 8% convertible notes to the Sellers in the following amounts:

Papell:	***$117,000***
Boat Basin:	***$65,000***
vFinance:	***$58,000***

Rosenblum: ***$60,000***

Stefansky: ***$60,000***

Siegel: ***$40,000***

In return, Freestar claims that it received: (1) new funds of $100,000 from Papell; (2) defeasance of the June 2002 $60,000 loan; and (3)defeasance of the June 2002 $50,000 loan. The remaining $190,000 of the $400,000 note represented brokerage commissions and fees and did not include the 1 million shares that Freestar alleges were kept by the three individual plaintiffs as a commission or interest on the $60,000 loan.

Freestar agreed in a Registration Rights Agreement to register the stock underlying the Convertible Notes not later than November 22, 2002.

As part of the Agreement, Egan issued to the Sellers his unconditional personal guaranty of the full and timely performance of all of Freestar's obligations thereunder. To secure his guaranty, Egan pledged 14.4 million shares of Freestar common stock that he owned beneficially and of record.

Egan pledged the 14.4 million shares pursuant to the terms of the Stock Pledge Agreements. The pledge was in the form of one certificate for 14.4 million restricted shares registered in

Egan's name. Because the shares had not been registered, Egan pledged as follows:

> *5. Pledgors' Warranty. [Egan] represents and warrants hereby to the [Sellers] as follows with respect to the Pledged Shares as set forth opposite such Pledgor's name on Schedule 2 to this Agreement:*
>
> *A. Title: (i) that upon transfer by [Egan] of the Pledgor's Certificates and Stock Powers to [Sellers] pursuant to this Agreement at such time, if any, as the occurrence of an Event of Default by [Freestar] under the Notes, the [Sellers] (to the extent of the Notes held by such [Seller]) will have good title (both record and beneficial) to the Pledged Shares;*
>
> *(ii) that there are no restrictions upon transfer and pledge of the Pledged Shares pursuant to the provisions of this Agreement except the restrictions imposed by Rule 144 under the Securities Act of 1933, and that such restrictions on resale shall not be applicable if an Event of Default occurs under the Notes, and the Secured Party exercises its remedies under the Guaranty and foreclose on the Pledged Shares.*

Stock Pledge Agreement, ¶ 5.

Freestar was a party to the Stock Pledge Agreement. It also warrantied "that the Pledged Shares are duly authorized, validly issued, fully paid and non-assessable and that it will not permit the transfer of the Pledged Shares except in accordance with this Agreement . . . ." Id.

Freestar then issued written instructions to its transfer agent, First American, requiring the transfer of the Pledged Shares. That instruction provided, in part:

> ***This letter shall serve as our irrevocable authorization and direction to you to record the transfer of the Pledged Shares to the Holders of the Notes upon their respective exercise of rights as a Secured Party under the Stock Pledge Agreements, from time to time, upon surrender to you of (i) one or more of the stock certificates evidencing the Pledged Shares, and (ii) stock transfer powers properly executed by the registered owner of such Pledged Shares, in the form attached hereto as Exhibit B relating to the certificate or certificates so surrendered for transfer, (iii) the opinion of counsel to the Company or to the Holders in the form attached as Exhibit C hereto, indicating that upon disposition of such shares, the new certificate issued as a consequence of the disposition and evidencing the transferred shares will be free of restrictive legend, pursuant to the provisions of Rule 144 under the Securities Act of 1933, as amended.***

First American then agreed in writing to be so bound:

> ***By affixing its signature hereto, [First American] agrees to abide by the directions set forth in this letter and understands that these instructions may not be modified, either orally or in writing, by Freestar Technologies, Inc. or by Paul Egan at any time without the written consent of the Holders. Further, [First American] hereby acknowledges that other than the documentation described herein, and set forth as Exhibits hereto, provided such exhibits are properly completed by the appropriate party, no other documentation will be required to effectuate a transfer of the Pledged Shares into the names of the Holders, and to remove any restrictive legend which presently appears on the Pledged Shares and on the certificate described in Exhibit A below.***

At the time of entering the Stock Pledge Agreements, the Sellers obtained the opinion of Brian F. Faulkner, counsel to Freestar and Egan, who, after analyzing the number of Freestar shares then outstanding and the average weekly trading volume for the past four trading weeks for Freestar stock, opined that Egan could sell 1,615,375 Freestar shares without restrictive legend.[1]

The Conversion of the June 2002 Convertible Notes

Freestar failed to register the shares underlying the Convertible Notes by November 22, as agreed. The Convertible Notes therefore were in default, entitling the Sellers to exercise their rights under the Convertible Notes, the Stock Pledge Agreements and Egan's Unconditional Guaranty. The Sellers, therefore sent in conversion notices to establish the number of shares to which it was entitled under the Stock Pledge Agreements and the Unconditional Guaranty. Based upon these conversion notices, the Sellers claim that First American and Egan were obligated to deliver approximately 8.5 million freely-trading common shares of Freestar.

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[1] ***Stefansky claims that the number of unrestricted shares that Egan may sell does not have anything to do with the number of unrestricted shares that the Sellers may sell. Stefansky Aff. at n. 5. Stefansky does not explain, however, by what alchemical processes the restricted shares transferred from Egan to the Sellers would become unrestricted.***

On December 11, 2002, the Sellers submitted to First American the stock certificate for 14.4 million shares, the stock powers that had been signed by Egan and a copy of the opinion of Brian Faulkner. The Sellers then requested that First American issue to each of the Sellers his or its respective proportional amount of the pledged shares with the restrictions removed, in accordance with the obligations of Freestar, First American and Egan and under the terms of the operative agreements. Counsel for the Sellers claims that First American stated that the Sellers had submitted all documentation necessary for the transfer of freely trading shares. The defendants claim, however, that the documentation submitted at that time, which included the Faulkner opinion, only authorized First American to deliver, at most, approximately 1.6 million unrestricted shares.

After submission of documentation, Young acknowledged the receipt thereof to Stefansky and Rosenblum. As a courtesy to Egan, however, Young wanted to hear directly from Egan that he approved of the issuance of freely trading shares. The three parties called Egan, who verbally approved the issuance of the freely trading shares. First American then issued 14.4 million of such freely trading shares to the Sellers by certificates dated December 13, 2002. The Sellers received the certificates (No. 1816, 1817, 1818, 1819 and 1820) on December 16, 2002.

Each of the Sellers deposited the free-trading shares in Pond Equities, a broker dealer ("Pond"). The Sellers then sold 7,707,332 shares of what they believed to be freely trading Freestar stock, which they had received at prices of approximately $0.085 per share. The sales cleared through Wexford Clearing Services, Inc., and Pond Equities credited the Sellers' accounts with the proceeds of the sales.

According to their late-filed Forms 144, the Sellers began selling the Freestar stock as early as December 10, 2002, prior to receiving the certificates. The Sellers sold in the following amounts and time periods:

Seller	No. of Stock	Value	Time Period
Boat Basin	1,682,416	$144,687	12/10 - 12/30/02
Papell	2,983,325	$256,565.95	12/11 - 12/18/02
Rosenblum	1,198,382	$103,060	12/16 - 12/23/02
Siegel	1,036,000	$89,096	12/10 - 12/23/02
Stefansky	1,554,575	$133,693	12/13 - 12/30/02

The Forms 144 recording these transactions were inadvertently not filed until January 7, 2003.[2]

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[2] The Forms 144 were filed on the same day that counsel for the Sellers wrote to First American with an opinion that disagreed with the Faulkner letter, arguing that all the shares could be issued as unrestricted and not be in contravention of Rule 144. The fact that the Forms 144 had been filed, albeit late, was a requisite part of that opinion.

Freestar claims that the Sellers overconverted the notes in the following amounts:

Boat Basin:	***$98,145***
Papell:	***$319,170***
Rosenblum:	***$60,084***
Siegel:	***$68,712***
Stefansky:	***$60,085***

The December 2002 Loan

Plaintiffs loaned Freestar an additional $237,000 on December 20, 2002. There was no documentation but Freestar claims that the Sellers assured Freestar that the terms would be the same as the March 2002 and June 2002 Convertible Note Financing. The loan was collateralized by the remaining 5.9 million of the 14.4 million original Freestar shares that the Sellers did not attempt to sell in December 2002.

First American Reissues the Shares as Restricted

By letter dated December 20, 2002, Brian Faulkner, counsel for Freestar, wrote to First American with regard to the transaction at issue. He noted that in the legal opinion that was a requisite part of First American's ability to transfer the Freestar stock, he had asserted that under Rule 144, only 1,615,375

out of the 14.4 million shares of common stock could be freed up during any three-month period. He further directed First American, on behalf of Freestar, that "[i]f certificates in excess of that amount have been issued without restrictive legend, then you are instructed to place an immediate stop on them to prevent their sale." Faulker further threatened legal action if First American did not comply.

First American thereafter put a stop to all the stock that it had issued to the Sellers.

On December 30, 2002, Stefansky requested that Pond wire money from his account. When his broker attempted to do so, he discovered that there was a negative balance in Stefanksy's account. The broker investigated the matter and informed Stefansky that First American had returned the stock certificates that the Sellers had sold with a restrictive legend prohibiting their public sale.

Pond thereafter reversed the delivery of the stock in the Sellers' accounts. As a result of the reversal of the delivery, short positions were created in the Sellers' accounts in Freestar shares. Because the Sellers had no freely trading Freestar stock in their possession, Pond had begun buying Freestar shares in the open market to cover the short position in the Sellers' accounts. In that time, the price of Freestar shares had risen from

approximately $0.085 per share to $0.19 per share. The Sellers claim that the price increase was as a result of market manipulations by the defendants.

The Sellers Attempt to Have the Restriction Removed And the Shares Are Cancelled

On January 7, 2003, the Sellers submitted to First American the independent opinion of an attorney, Guy K. Stewart ("Stewart"), opining that all of the shares could be issued to them as freely trading.

Sometime thereafter, First American cancelled the 14.4 million restricted shares that had been transferred to the Sellers.[3]

By letter dated January 9, 2003, Freestar's counsel wrote to Stewart, disagreeing with his conclusions. Stewart later affirmed in an affidavit dated January 22, 2003 that Freestar's counsel had told him that Freestar would withdraw its opposition to the mid-December sales if the financial arrangements were re-negotiated.

The SEC Investigation

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[3] *The Sellers attached four of the five stock certificates -- Nos. 1816, 1817, 1818 and 1820 -- as an exhibit to their motion papers. Each has been stamped "CANCELLED." It is presumed that the fifth stock certificate similarly was stamped "CANCELLED" although it was not included as part of the papers.*

On January 7, 2002, Egan was notified that the Securities Exchange Commission ("SEC") had begun investigating the stock transactions at issue here. Approximately one week later, on January 15, 2003, the SEC's Division of Enforcement asked Freestar to produce documents relating to its financial transactions with the Sellers, among others not apparently related to the transactions at issue.

Prior and Related Proceedings

On January 9, 2003, the Sellers commenced an involuntary bankruptcy petition against Freestar pursuant to 11 U.S.C. § 303. The petition includes claims based on promissory notes in an amount of $637,000. The only petitioners are the Sellers and vFinance, which was involved in the Freestar transactions although not a named plaintiff. The claims are in the following amounts:

Boat Basin:	*$135,000*
Papell:	*$187,000*
Rosenblum:	*$103,000*
Siegel:	*$40,000*
Stefansky:	*$103,000*
vFinance:	*$69,000*

On January 22, 2003, the Sellers commenced the instant action and obtained the Order to Show Cause.

Oral argument was heard on January 29, 2003. Margaux did not appear at the hearing, and the other parties who did appear (including non-party Freestar) claimed not to have been timely notified of the hearing as they did not find out until January 27, 2003 that the hearing was scheduled for two days later. The defendants (and Freestar) did not request additional time for briefing, however, and argued the merits of the preliminary injunction motion. Additional papers were submitted on January 31, 2003, and the motion was considered fully submitted at that time.

Discussion

I. Subject Matter Jurisdiction

This Court has jurisdiction pursuant to 28 U.S.C. § 1332.

II. Personal Jurisdiction

Because none of the defendants raised the defense of lack of personal jurisdiction and because the motion is denied on other grounds, this issue will not be addressed at this time. It should be noted, however, that the Complaint contains nebulous assertions

to that effect given the asserted residences and places of business of the defendants.

III. Lack of Proper Notice

At oral argument, the only entities who appeared by counsel were First American, Egan, Young and the non-party Freestar. They argued that the notice of the hearing had not been adequate, referring to Egan's receipt of the Order to Show Cause ("OSC").

Egan received the OSC at approximately 5 p.m. on Friday, January 24, 2003 by two-day express delivery. The OSC required the defendants to appear at a hearing "on the day of January __, 2003 at Noon," omitting that the hearing was scheduled for January 29, 2003 -- less than five days from the time of receipt. The OSC also ordered that return papers be filed and served "at least three days prior to the return date hereof." Counsel for the defendants called Sellers' counsel twice on January 24 seeking the papers filed in support of the OSC. On January 27, 2003, Sellers' counsel faxed only the OSC, again missing the hearing and answer date, and certain affirmations without exhibits.

Despite the apparent lack of notice, because First American, Egan and Young appeared at the January 29, 2003 hearing, argued against the Sellers' motion on the merits (as opposed to

requesting a less frenetic briefing schedule), and were successful in that argument, this deficiency will not prevent the opinion from issuing.

IV. The Sellers Have Failed to Justify a Preliminary Injunction Due to the Absence of Freestar

The standard for granting a preliminary injunction under Rule 65 in this Circuit is "(1) a showing of irreparable injury and (2) either (a) a likelihood of success on the merits or (b) sufficiently serious questions going to the merits to make them a fair ground for litigation and the balance of hardships tipping in favor of the movant." North Atlantic Instrs., Inc. v. Haber, 188 F.3d 38, 42 (2d Cir. 1999); see also Fun-Damental Too, Ltd. v. Gemmy Indus. Corp., 111 F.3d 993, 998-99 (2d Cir. 1997); Blum v. Schlegel, 18 F.3d 1005, 1010 (2d Cir. 1994).

The Sellers have failed to establish the need for a preliminary injunction because they cannot show the likelihod of success on the merits or serious questions going to the merits in the absence of Freestar, which is an indispensable party under Rule 19(a) of the Federal Rules of Civil Procedure.

Fed. R. Civ. P. 19(a) provides, in pertinent part:

> *A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in this action if (1) in the person's absence complete relief cannot be*

> *accorded among those already parties, or (2) the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may (i) as a practical matter impair or impede the person's ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple or otherwise inconsistent obligations by reason of the claimed interest. If the person has not been so joined, the court shall order that the person be made a party.*

Fed. R. Civ. P. 19(a). The lengthy facts (and factual disputes) presented above reveal that both subdivisions (1) and (2) require the presence of Freestar.

As an initial matter, because Freestar has submitted papers and appeared before the Court, it is assumed that it has acquiesced to the jurisdiction of this Court. Further there is no evidence that Freestar would destroy diversity jurisdiction. Therefore, Freestar meets the jurisdictional requirements of Rule 19.

Further Freestar is a necessary party. Complete relief may not be accorded in the absence of Freestar, which is the principal in a principal/agent relationship with both Egan[4] and First American and has given its agents limited ability to provide

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[4] *It is unclear whether Egan personally owns 7.7 million unrestricted (or restricted shares). Egan's claim of a personal net worth of $600,000 suggests that he does not, given the prices of stock cited by the Sellers. There is no claim that First American owns any stock outside that which it was given the authority to transfer.*

the relief requested. The agency relationship "results from a manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and the consent by the other to act." New York Marine & General Ins. Co. v. Tradeline, 266 F.3d 112, 122 (2d Cir. 2001) (quoting Meese v. Miller, 79 A.D.2d 237, 242, 436 N.Y.S.2d 496, 499 (4th Dep't 1981)[5]); see also In re Shulman Transp. Enterprises, Inc., 744 F.2d 293, 295 (2d Cir. 1984) ("Agency is the fiduciary relation which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other so to act.") (quoting Restatement (Second) of Agency, §1(1) (1958)).

The limits of First American's power as agent to Freestar are defined in the Transfer Agent Instructions signed by defendant Young on September 12, 2002. First American is given the authority to transfer unrestricted shares to the Sellers as long as the Sellers meet three requirements. They must provide to First American (1) a stock certificate evidencing the shares to be transferred, (2) stock transfer powers properly executed by Egan relating to the stock certificate in (1), and (3) an opinion by either the Seller's or Freestar's counsel that to transfer that

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[5] *The parties did not discuss choice of law. The Stock Pledge Agreements, however, provide that New York law shall govern. Stock Pledge Agreement, ¶ 13.9. So do the Convertible Notes, § 10. Because the events arise out of these agreements, and in the absence of any argument from the parties to the contrary, New York law therefore shall apply.*

amount of unrestricted shares would not violate Rule 144. The authorization was irrevocable unless the Sellers agreed to any change therein.

In the December 2002 request for transfer, the Sellers failed to satisfy the third requirement. They sent the Faulkner opinion to First American, which stated that First American could only transfer approximately 1.6 million unrestricted shares -- not 14.4 million shares. Therefore, First American acted outside its authority. When notified of this mistake by its principal, Freestar, First American first reissued the stock as restricted and later cancelled the stock. This cancellation presents another problem for First American. In order for First American to have authority to issue the stock, the Sellers must present the stock certificate evidencing the shares. Presumably, the only stock certificates they had, however, have now been cancelled. New stock certificates surely must come from Freestar, and therefore, in its absence, the Sellers cannot establish that First American has the authority to issue any, much less 7.7 million, shares, and relief may not be granted.[6]

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[6] *On January 7, the Sellers presented an alternative opinion by their counsel, as they were permitted to do, in order to have First American fulfill its duty. First American did not do so. Whether First American should have transferred the stock upon receipt of the Sellers' counsel's opinion, instead of cancelling the stock, is not at issue here. What is at issue is whether First American can now perform its duties. In the absence of Freestar, apparently it cannot.*

Second, Freestar has persuasively laid the ground work for a number of potential counterclaims in this action should it be named a party. In its absence, the Sellers (and potentially some of the defendants) may be subject to inconsistent obligations because Freestar will almost certain commence suit in the absence of joinder. Freestar appears to claim that the Sellers are not entitled to have converted the number and amount of March 2002 and June 2002 Convertible Notes that they did. In addition, the suspiciously large brokerage commissions and fees charged on these deals may also provide grist for the mill. These claims underscore the fact that Freestar is a party to almost all of the agreements underlying the dispute here and should not have those agreements interpreted, enforced or vitiated in its absence.

In addition, the SEC has taken a keen interest in the transactions and parties at the heart of this dispute. Freestar may be held liable for failure to ensure that the Sellers complied with Rule 144. SEC Interpretative Release 5121 ("Precautions by issuers are essential to ensure that a public offering does not result from resale of securities initially purchased in transactions claimed to be exempt under § 4(2) of the Act."). Another federal court may take a different view of issues than this Court. Freestar has a justifiable interest in having the issues litigated only once, and enjoying (or suffering) the results of the doctrines of collateral estoppel and res judicata.

Finally, the Sellers themselves appear to acknowledge that Freestar should be a party to this action. Stefansky Affm. at n. 2 (discussing why they did not join Freestar) & ¶ 29 (asserting that there is "no harm to . . . Freestar . . . in compelling [it] to comply with [its] written agreements") & Compl. ¶ 7 (referring to "Defendant Freestar").

It is patent, however, why the Sellers did not join Freestar: they could not if they wanted immediate relief.[7] *On January 9, 2003, the Sellers initiated an involuntary bankruptcy petition under 11 U.S.C. § 303 against Freestar. The filing of such petition*

> *operates as a stay, applicable to all entities, of - (1) . . . the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor . . .; and (6) any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case under this title.*

11 U.S.C. § 362(a).

It is inconceivable that this case proceed in the absence of the party whose stock underlies the transactions at issue and who will be irrevocably affected by any large-scale transfer of

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[7] *Indeed, they admit as much. See Stefansky Affm. at n.2 ("Freestar has not been joined as a party to this suit because Plaintiffs have filed an involuntary petition in bankruptcy against Freestar . . . [and] the automatic stay contained in 11 U.S.C. § 362 prevents Plaintiffs from joining Freestar at this time.")*

unrestricted shares of its common stock. Yet § 362 bars the commencement of an action against it. In the absence of the stay, this Court would order the joinder of Freestar. Because of the stay, this Court has no alternative but to stay this action until such time as Freestar, as a necessary party, may be joined.

The defendants did not seek to have this action dismissed pursuant to Fed. R. Civ. P. 19(b). Rule 19(b) "commands a district court to dismiss an action where it is impossible to have the participation of an indispensable party." Universal Reinsurance Co., Ltd. v. St. Paul Fire and Marine Ins. Co., 312 F.3d 82, 87 (2d Cir. 2002). It is not "impossible" to join Freestar because its joinder will not defeat the jurisdiction of this Court. Rather, Freestar is unable to be joined at this time, but may be so joined in the future. Therefore, it is held that the fact that a necessary party is currently the subject of a stay pursuant to 11 U.S.C. § 326 does not result in joinder being not feasible pursuant to Rule 19(b).

Conclusion

The Sellers' motion is denied for the foregoing reasons, and the action is stayed until such time as the stay in the bankruptcy action is lifted and Freestar may be joined.

It is so ordered.

New York, NY
February 7, 2003

ROBERT W. SWEET
U.S.D.J.