

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

In re:	)	
SEMCRUDE, L.P., et al.,	)	Chapter 11
Debtors.	)	Case No. 08-11525 (BLS) (Jointly Administered)
VESS OIL CORPORATION,	)	
Plaintiff,	)	Adv. Proc. No. 08-51142 (BLS)
v.	)	
SEMGROUP, L.P. and EAGLWING, L.P.,	)	Hearing Date: TBD
Defendants.	)	Objection Date: TBD

**PLAINTIFF’S EMERGENCY MOTION FOR A TEMPORARY RESTRAINING  
ORDER AND PRELIMINARY INJUNCTION AND MEMORANDUM IN  
SUPPORT THEREOF**

**Background**

By its Emergency Motion for a Temporary Restraining Order and Preliminary Injunction pursuant to 11 U.S.C. § 105(a) and in accordance with Federal Rule of Civil Procedure 65, made applicable hereto by Federal Rule of Bankruptcy Procedure 7065, Vess Oil Corporation (“Vess”) requests that this Court immediately direct SemGroup L.P. (“SemGroup”) and Eaglwing, L.P. (“Eaglewing” and collectively with SemGroup the “Debtors”) to provide an accounting of all payments received from Teppco Crude Oil LLC (“Teppco”) and from Vess, and enjoin the Debtors from commingling or otherwise making any use of such payments received from Teppco and Vess. Vess has filed, contemporaneously, its Complaint for (I) Declaratory Relief and (II) An Order Directing

#5  
8/6/08

Turnover of Non-Estate Property (the "Complaint") against SemGroup and Eaglwing, debtors in the above-captioned jointly administered bankruptcy cases of SemCrude, L.P. and certain direct and indirect subsidiaries of SemGroup, L.P.

1. Vess is the operator of certain oil and gas wells located in Texas including the Kurten Field located in Brazos, Texas (the "Kurten Field"). Vess operates the Kurten Field properties and has an affiliated ownership in the Kurten Field under the name VOC Brazos Energy Partners, L.P. ("VOC Brazos"). Vess, as operator, represents the royalty owners and working interest owners, including VOC Brazos, of the Kurten Field (collectively referred to herein as the "Vess Group"), each of whom is entitled to certain shares and payments derived from the sale of oil and gas products from the Kurten Field.

2. In 2003, Vess entered into an agreement (the "Eaglwing Arrangement") with SemGroup and Eaglwing pursuant to which Eaglwing, with the assistance of its independent contractor, Iberia Management Systems, Inc. ("IMS"), agreed to act as the "paying agent" for Vess for oil and gas products sold by Vess from the Kurten Field.

3. In 2005, Vess entered into an agreement with Teppco to sell oil products from the Kurten Field to Teppco and, pursuant to the Eaglwing Arrangement, Teppco was directed to forward payments for the purchase of the Kurten Field oil products, net of state taxes, directly to Eaglwing.

4. Vess paid to Eaglwing on a monthly basis the gas revenue net of state taxes to be disbursed to the royalty and working interest owners who make up the Vess Group. This money was paid directly to Vess by the gas and liquids purchaser. Eaglwing received all payments from Vess for gas products sold from the Kurten Field.

5. As part of the Eaglwing Arrangement, Vess provided Eaglwing with a detailed monthly report allocating the oil and gas sales volumes and revenue to the various tracts within the Kurten Field.

6. Pursuant to the Eaglwing Arrangement, Eaglwing received all payments from Teppco for oil products purchased by Teppco and all payments from Vess for gas products sold to the gas and liquids purchaser, and Eaglwing distributed the net amount of the payments to the Vess Group. Pursuant to the Eaglwing Agreement, Eaglwing acted only as a bailee of the payments received from Teppco and Vess and, accordingly, such payments were held by Eaglwing only in trust for the benefit of the Vess Group.

7. At no time did the payments received by Eaglwing from Teppco and/or from Vess constitute property owned by Eaglwing pursuant to Sections §§ 541(a), (b)(1) and (d) of title 11 of the United States Bankruptcy Code (the "Bankruptcy Code").

8. As of the Petition Date, Eaglwing was holding \$2,860,582.70 received from Teppco and Vess and owed to the Vess Group related to sales and transfers of gas and oil products during the month of April 2008. Notwithstanding repeated requests and demands from Vess, Eaglwing has failed and refused to respond with an accounting of the payments received from Teppco and Vess and has refused to turn over to Vess the payments received from Teppco and Vess.

9. Injunctive relief is necessary to prevent the Debtors from commingling the payments received from Teppco and Vess and/or from treating the funds received from Teppco and Vess as property of the Debtors' Estates and using such funds for the Debtors' own purposes.

## Argument

10. To grant injunctive relief under Bankruptcy Code § 105(a), the Court must consider the following factors: (1) the reasonable likelihood that the moving party will succeed on the merits of its claims; (2) the irreparable harm suffered by the moving party; (3) the irreparable harm, if any, that may be suffered by the opposing party; and (4) the public interest. *Kos Pharm., Inc. v. Andrx Corp.*, 369 F.3d 700, 708 (3d Cir. 2004); *Video Pipeline, Inc. v. Buena Vista Home Ent., Inc.*, 342 F.3d 191, 196 (3d Cir. 2003).

### **Plaintiff is Likely to Succeed on the Merits of its Claim**

11. Interim injunctive relief is required in order to preserve the status quo. Pursuant to the Eaglwing Arrangement, Eaglwing acts solely as a “paying agent” for the purpose of receiving payments from Teppco and Vess and then forwarding such payments directly to the Vess Group. At no time do such payments ever become or constitute in any way property that belongs to the Debtors.

12. Bankruptcy Code § 541(a)(1) states that the bankruptcy estate is composed of “all legal or equitable interests of the debtor in property as of the commencement of the case.” However, Bankruptcy Code § 541(b)(1) further provides that “Any power that the debtor may exercise solely for the benefit of an entity other than the debtor” is excluded from the bankruptcy estate and that property over which the debtor holds “only legal title and not an equitable interest . . . becomes property of the estate . . . only to the extent of the debtor’s legal title to such property, but not to the extent of any equitable interest in such property that the debtor does not hold.”

13. Monies held in trust by a debtor for the benefit of a creditor are not included in the bankruptcy estate. Bankruptcy Code § 541(d). This applies to

constructive trusts as well as express trusts. *In re Columbia Gas Systems, Inc.*, 997 F.2d 1039 (3d Cir. 1993). In *Columbia Gas*, the Third Circuit noted that the legislative history of Bankruptcy Code § 541 indicates that funds in the possession of a debtor held for another party do not become part of the bankruptcy estate, *Id.* at 1059, and that the indicia of a constructive trust include: (i) manifestation of intention to create a trust (including language, conduct and circumstance when there is no document); (ii) absence of the payment of interest, and (iii) the commingling of trust funds. *Id.* at 1060. When a debtor acts only as a “conduit” for funds to move from one party to another, it lacks any equitable interest in such funds. *Id.* at 1056, 1059. When the debtor is serving only as a “delivery agent” and does not have the right to use the funds for its own purposes, the creditor for whom the funds are held by the debtor should have the right to such funds because the debtor has no financial interest in the funds and would not have the independent right to retain the funds for its own use. *Id.* at 1061 (*quoting In re United Milk Products Co.*, 261 F. Supp. 76 (N.D. Ill. 1966)).

14. In a case involving the overpayment to an operator of oil wells in Oklahoma under an operating agreement whereby the operator would bill the interest owner for his proportionate share of drilling and completion costs, a court found that the operating agreement imposed a “duty of fair dealing” and a “trustee type relationship.” *Mahan & Rowsey, Inc. v. Mahan & Rowsey, Inc.*, 817 F.2d 682 (10<sup>th</sup> Cir. 1987). The operator received the money for a particular purpose and therefore held the money in trust only for that intended purpose. *Id.* at 684. A constructive trust was imposed and the sums involved declared not to be a part of the bankruptcy estate. *Id.*

15. When the debtor is merely an agent or bailee of funds or other property, such funds or property are not considered property of the bankruptcy estate. *In re MCZ, Inc.*, 82 B.R. 40 (Bankr. S.D. Tex. 1987). In *MCZ, Inc.*, the debtor deposited proceeds from production into an account for the benefit of the interest owners. When the debtor filed for bankruptcy, there were funds in the account. The interest owners filed an action in state court to recover the funds and the bankruptcy court determined that the interest owners could pursue their action in state court for the funds because the funds were not property of the bankruptcy estate. *Id.* at 42.

16. Accordingly, Vess is likely to succeed on the merits of its Complaint.

**Imminent Threat of Irreparable Harm if Injunctive Relief is Not Granted**

17. Absent the relief requested – specifically, an accounting, an injunction to prevent commingling, and an injunction to prohibit the Debtors’ use of the funds received from Teppco and Vess – Vess will be irreparably harmed. The Debtors are holding \$2,860,582.70 that rightfully belongs to the Vess Group. These funds are payments from Teppco and Vess for oil and gas products that were sold by Vess in May of this year. Teppco and Vess made payments to Eaglwing for the oil and gas products as required. Eaglwing, however, has failed and refused to distribute the payments to the Vess Group.

18. Because the payments received from Teppco and Vess are not property of the Debtors’ Estates, such funds cannot be declared to be cash collateral or other monies owned by the Debtors and thereby available to be used for the Debtors’ purposes. Moreover, if the Debtors are not enjoined, the Debtors may commingle the payments received from Teppco and Vess, thereby making it more difficult for Vess to later specifically identify such funds.

19. Eaglwing may commingle or otherwise make use of the funds received from Teppco, such that absent an injunction to prohibit such commingling and/or use of the funds, Vess may be unable to recover the funds during the Debtors' bankruptcy case. *Elliot v. Kieseletter*, 98 F.3d 47, 58 (3d Cir. 1996) (plaintiff likely unable to recover funds without a preliminary injunction). An injunction here is especially necessary to prevent ongoing damage to Vess that the Debtors may be unable to otherwise remedy.

20. Vess has attempted to communicate with the Debtors for the purposes of requesting an accounting of the payments received from Teppco and Vess and to request that such payments be turned over to Vess. The Debtors have failed and refused to respond to the communications from Vess. As a result, the Debtors continue to hold the payments received from Teppco and Vess and, on information and belief, may be using those funds for the Debtors' own benefit.

#### **Absence of Harm to the Debtor**

21. The relief requested will do no more than preserve the status quo. In the ordinary course of business, the payments received by Eaglwing from Teppco and Vess do not constitute property belonging to the Debtors and, therefore, are not available for the Debtors to use for their own purposes. Because it is not property of the Debtors' Estates, such funds do not constitute cash and, therefore, cannot be considered cash collateral that could be used by the Debtors during their bankruptcies in the form of adequately protected cash collateral. In short, enjoining the Debtors from commingling and/or otherwise making any use of the payments received from Teppco and Vess will not adversely impact on the Debtors' operations during the bankruptcies. The injunction will merely preserve the funds pending this Court's ruling on the Complaint.

**Public Interest**

22. The public interest requires that Eaglwing be required to abide by the private and contractual arrangements that have existed between the Debtors and Vess for nearly five years. The public interest favors the enforcement of a private contract that can be shown to be valid at the preliminary phase of this dispute.

23. Accordingly, there is a need for immediate injunctive relief to, at the very least, require the Debtors to provide an accounting of the payments received from Teppco and Vess and to enjoin the Debtors from commingling and/or otherwise making use of such payments for the Debtors' benefit.

WHEREFORE, Plaintiff respectfully requests that the Court (1) grant this Motion, (2) enter the proposed Temporary Restraining Order, attached hereto as Exhibit 1, (3) grant preliminary injunctive relief; and (4) grant such further relief as the Court deems just and appropriate

Dated: August 6, 2008  
Wilmington, Delaware

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# **EXHIBIT 1**

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

In re:	)	
	)	Chapter 11
SEMCRUDE, L.P., et al.	)	
	)	Case No. 08-11525 (BLS)
Debtors.	)	(Jointly Administered)
	)	
VESS OIL CORPORATION,	)	
	)	
Plaintiff,	)	Adv. Proc. No. 08-51142 (BLS)
	)	
v.	)	
	)	
SEMGROUP, L.P. and EAGLWING, L.P.,	)	
	)	
Defendants.	)	
	)	

**TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION**

Plaintiff, Vess Oil Corporation (“Vess”), having moved the Court for entry of a temporary restraining order and preliminary injunction pending a final decision in this adversary proceeding, and the Court having considered the matter and determined that a temporary restraining order is appropriate, makes the following findings and conclusions:

1. Vess is the operator of certain oil and gas wells located in Texas including those producing properties located in the Kurten Field in Brazos County, Texas (the “Kurten Field”). Vess operates the Kurten Field properties and has an affiliated ownership in the Kurten Field under the name VOC Brazos Energy Partners, L.P. (“VOC Brazos”). Vess as operator represents the royalty owners and working interest owners, including VOC Brazos, of the Kurten Field (collectively referred to herein as the “Vess Group”), each of whom is entitled to certain shares and payments derived from the sale of

oil and gas products from the Kurten Field. Teppco Crude Oil LLC (“Teppco”) purchases the oil product from the Kurten Field. Other purchasers acquire the gas and liquid products from the Kurten Field.

2. Prior to the Petition Date, Eaglwing, L.P. (“Eaglwing”), with the assistance of its independent contractor, Iberia Management Systems, Inc. (“IMS”), provided payor services for the Kurten Field operations pursuant to which Eaglwing received payments from Teppco for oil purchased products and received payments from Vess for gas purchased products, maintained division orders on the funds and handled distribution of the funds. Because there is typically a 30 day holding period between receipt of payments by Eaglwing from Teppco and distribution of those payments to Vess, by agreement Eaglwing received compensation for its services by retaining interest earned on the payments received while such funds were held by Eaglwing. Collectively, this is referred to as the Eaglwing Arrangement.

3. As of the Petition Date, Eaglwing owed to the Vess Group \$2,860,582.70 which amount was due and owing as of July 20, 2008.

4. The parties did not intend that the payments received by Eaglwing from Teppco and Vess would become property of or be owned by the Debtors but rather, the parties intended that the Teppco and Vess payments would be held by Eaglwing in trust for the benefit of the Vess Group. The Plaintiff asserts that the payments received by Eaglwing from Teppco and Vess for sales of oil and gas products from the Kurten Field were not and are not property of the Debtors’ Estates under Bankruptcy Code § 541(a).

5. The Court concludes that Vess is entitled to an accounting of the payments received by the Debtors from Teppco and Vess.

FOR THE FOREGOING REASONS, IT IS HEREBY ORDERED THAT, until further ordered by this Court:

1. The payments received by the Debtors from Teppco for oil products purchased by Teppco from the Kurten Field and payments received by the Debtors from Vess for gas products purchased from the Kurten Field shall, to the extent they are not already, immediately be segregated and held by the Debtors in an interest bearing account (the "Kurten Field Account") and such funds shall not be commingled with any other funds or monies.

2. Absent further order from this Court, the Debtors shall not use, lease, sell or otherwise transfer nor shall the Debtors permit any lien, security interest or other encumbrance to be placed upon the funds held in the Kurten Field Account.

3. The Debtors shall promptly, but not later than within 15 days from the date of this Order, prepare and deliver to Vess a full accounting of all funds held in the Kurten Field Account.

4. This Order shall remain in effect pending judgment on the Plaintiff's Complaint or until further order of this Court.

Dated: August \_\_, 2008  
Wilmington, Delaware

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Hon. Brendan L. Shannon  
United States Bankruptcy Judge

MIME-Version:1.0  
From:DEBdb\_ECF\_Reply@deb.uscourts.gov  
To:dummail@deblei.deb.circ3.dcn  
Bcc: cthompson@cblh.com, kbifferato@cblh.com, mfinnegan@rlf.com, rbgroup@rlf.com  
Message-Id:<6489001@deb.uscourts.gov>  
Subject:Ch- 08-51142-BLS Vess Oil Corporati Motion for Temporary Restraining Order (

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**U.S. Bankruptcy Court**

**District of Delaware**

Notice of Electronic Filing

The following transaction was received from Bifferato, Karen C entered on 8/6/2008 at 5:12 PM EDT and filed on 8/6/2008

**Case Name:** Vess Oil Corporation v. SemGroup, L.P. and Eaglwing, L.P.

**Case Number:** 08-51142-BLS

**Document Number:** 5

**Docket Text:**

Motion for Temporary Restraining Order *and Preliminary Injunction and Memorandum in Support Thereof* (related document(s)[4] ) Filed by Vess Oil Corporation (related document(s)[4]). (Attachments: # (1) Proposed Form of Order) (Bifferato, Karen)

The following document(s) are associated with this transaction:

**Document description:**Main Document

**Original filename:**C:\Documents and Settings\mew\Desktop\Vess Motion for TRO.pdf

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[STAMP bkecfStamp\_ID=983460418 [Date=8/6/2008] [FileNumber=6488999-0]  
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c6b2f84df0e0c3635bb7caab2cdcc53bfa1ee6c90bf50d14a173d69b933]]

**Document description:**Proposed Form of Order

**Original filename:**C:\Documents and Settings\mew\Desktop\Vess Order for TRO.pdf

**Electronic document Stamp:**

[STAMP bkecfStamp\_ID=983460418 [Date=8/6/2008] [FileNumber=6488999-1]  
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7cdceff84f35a5d596be0ff455ede864b924456e04943d3c799005016b3]]

**08-51142-BLS Notice will be electronically mailed to:**

Karen C Bifferato kbifferato@cblh.com

Christina Maycen Thompson cthompson@cblh.com

**08-51142-BLS Notice will not be electronically mailed to:**

SemGroup, L.P. and Eaglwing, L.P.

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