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UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

FEDERAL TRADE COMMISSION,	:	MEMORANDUM OF LAW IN SUPPORT
Plaintiff	:	OF MOTION TO STAY
	:	ENFORCEMENT OF JUDGMENT
	:	PENDING APPEAL
v.	:	Case No. 2:10-cv-02203-RLH-GWF
JEREMY JOHNSON, individually, as	:	
officer of Defendants I Works, Inc.; Cloud	:	
Nine, Inc.; CPA Upsell, Inc.; Elite	:	
Debit, Inc.; Internet Economy,	:	
Inc.; Market Funding Solutions, Inc.; and	:	
Success Marketing, Inc.; as a member of	:	
Defendant Network Agenda LLC; and as	:	
the <i>de facto</i> principal of numerous	:	
Defendant Shell Companies;	:	
I WORKS, INC., a Utah Corporation, <i>et al.</i> ,	:	
Defendants	:	

COMES NOW, Duane Fielding, Anthon Holdings, and Network Agenda (Fielding Defendants), by and through their attorney of record, Michael Studebaker, and hereby files this Memorandum of Law in Support of Motion to Stay Enforcement of Judgment Pending Appeal. In support thereof, the Fielding Defendants adopt the following:

1 **FACTS**

2 1. The Fielding Defendants move the court for an emergency order staying the enforcement of
3 the court's Order entered August 26, 2011 pending conclusion of the appeal in this action. This
4 motion is made and based upon Federal Rule of Civil Procedure 62, the Points and Authorities
5 set forth below, the pleadings and papers on file herein, of which judicial notice is respectfully
6 requested pursuant to Federal Rule of Evidence 201, and such other evidence and oral argument
7 which may be presented at or before any hearing hereon.
8

9 **ARGUMENT**

10 **I. INTRODUCTION**

11 On August 26, 2011, the Court entered an order Authorizing and Confirming the Sale of
12 Personal Property by Public Auction; Authorizing and Confirming Sale and Redemption of
13 Investment Interest; Authorizing Receiver to List and Offer for Sale Houseboats, Aircraft, and
14 Multiple Real Properties; and Granting Relief from Local Rule 66-5 Pertaining to Notice to
15 Creditors (the "Order") in favor of Receiver, Robb Evans of Robb Evans & Associates LLC
16 ("Receiver"), and against the Fielding Defendants.
17

18 The Order provides for the immediate commencement of the sale or auction of certain
19 personal property, real property, and investment interests. The result of the enforcement of the
20 Order during the time the Order is under appeal would be devastating to the Fielding Defendants
21 in this action. Therefore, the Fielding Defendants believe that good cause exists to consider this
22 matter on an emergency basis.
23

24 **II. THE NINTH CIRUCIT HAS JURISICION TO HEAR THIS APPEAL**

25 As a threshold question, the issue is whether or not this order may be appealed. According
26 to 28 U.S.C. §1291, the Court of Appeals would not have jurisdiction over an order until it is
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1 final. However, under the collateral order exception, the Court of Appeals may exercise its
2 §1291 jurisdiction to review an interlocutory order. “This is a narrow exception to the
3 requirement that all appeals under § 1291 await final judgment on the merits. Jurisdiction exists
4 in only a small class of cases that are deemed too important to be denied review and too
5 independent of the cause itself to require that appellate consideration be deferred until the whole
6 case is adjudicated.” *McElmurry v. U.S. Bank Nat’l Ass’n*, 495 F.3d 1136, 1140 (9th Cir. Or.
7 2007).

8
9 To qualify as a collateral order suitable for appellate review, an order must:

- 10 1) Conclusively determine the disputed question;
11 2) Resolve an important issue completely separate from the merits of the action; and
12 3) Be effectively unreviewable on appeal from a final judgment.
13

14 *Id.* The United States Supreme Court held a District Court order appealable because it “[D]id
15 not make any step toward final disposition of the merits of the case and will not be merged in
16 final judgment. When that time comes, it will be too late effectively to review the present order,
17 and the rights conferred by the statute, if it is applicable, will have been lost, probably
18 irreparably.” *Cohen v. Benefit Indus. Loan Corp.*, 337 U.S. 541, 546-547 (U.S. 1949).
19 However, the 1st Circuit refused to review an order approving the sale of the defendant’s assets
20 as a final order, because before the sale became binding the district court had to “hold a hearing
21 and resolve potentially difficult and disputed issues, including tax matters, receivership costs,
22 and the actual amount that will be realized upon the . . . sale.” *State St. Bank & Trust Co. v.*
23 *Brockrim, Inc.*, 87 F.3d 1487 (1st Cir. 1996).
24
25

26 In the present matter, the sale of the Fielding Defendants’ property and assets will be
27 unreviewable on appeal from a final judgment because relief cannot be granted after
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1 confirmation of judicial sale. The United States Supreme Court has held that “[N]either
2 inadequacy of price, nor offers of better prices, nor anything but fraud, accident, mistake or some
3 other cause for which equity would avoid like sale between private parties, will warrant court
4 voiding sale or receiving subsequent bids.” *Morrison v Burnette* (1907, CA8 Indian Terr) 154 F
5 617, app dismd (1909) 212 US 291, 53 L Ed 517, 29 S Ct 394.
6

7 Accordingly, the Order in the present matter falls under the collateral order exception
8 because the sale conclusively determines that the property is to be sold, it was granted based not
9 on the merits of the case, but on the Receiver’s request, and is effectively unreviewable unless
10 fraud, accident, or mistake in the sale can be shown.
11

12 **III. THE FIELDING DEFENDTS REUQET A STAY PENDING APPEAL**

13 Federal Rule of Civil Procedure 62(c) provides, in pertinent part:

14 While an appeal is pending from an interlocutory order or final
15 judgment that grants, dissolves, or denies an injunction, the court may
16 suspend, modify, restore, or grant an injunction on the terms for bond
17 or other terms that secure the opposing party’s rights. . . .

18 FRAP 8(a) expressly provides:

19 A party must ordinarily move first in the district court for the following relief:

20 (A) a stay of the judgment or order of a district court pending appeal;

21 (B) approval of a supersedeas bond; or

22 (C) an order suspending, modifying, restoring, or granting an injunction while an
23 appeal is pending.

24 Therefore, it is proper for the District Court to determine whether or not a stay should be
25 imposed pending the appeal in this case. *United States v. Lang*, 2008 U.S. Dist. LEXIS 67572
26 (Sept. 2, 2008).
27

28 The traditional factors governing the issuance of a stay pending appeal are:

- 1 (1) Whether the stay applicant has made a strong showing that he is likely to succeed on
- 2 the merits;
- 3 (2) Whether the applicant will be irreparable injured absent a stay;
- 4 (3) Whether the issuance of a stay will substantially injure the other parties interested in
- 5 the proceeding; and
- 6 (4) Where the public interest lies.

7
8 *Hilton, Superintendent, New Jersey State Prison, et al. v. Braunskill*, 481 U.S. 770 (1987). *See*
9 *also, Alpine Lakes Protection Society v. T.A. Schlapfer*, 518 F.2d 1089 (9th Cir. 1975); *J.W.*
10 *Schwartz v. Covington*, 341 F.2d 537 (9th Cir. 1965). Based on the above factors, the Court has
11 the inherent power to preserve the status quo during an appeal where, in its sound discretion, the
12 court deems the circumstances so justify. *McClatchy Newspapers v. Central Valley*
13 *Typographical Union No. 46*, 686 F.2d 731 (9th Cir. 1982).

14
15 **A. The Fielding Defendants Are Likely To Succeed On Their Appeal**

16 Courts in this Circuit have been persuaded that the success on the merits factor should not
17 and cannot be rigidly applied. *Himebaugh v. Smith*, 476 F. Supp. 502 (C.D. Cal. 1978). “If it
18 were so, a stay would seldom, if ever, be granted because the district court would have to
19 conclude that it was probably incorrect in its determination on the merits.” *Id.*, at 510.
20 Accordingly, where the moving party establishes that the “harm” factors “tip decidedly in its
21 favor,” the “likelihood of success” factor is “somewhat relaxed.” *FTC v. Mainstream Mktg.*
22 *Servs., Inc.*, 345 F.3d 850, 852 (10th Cir. 2003). In such circumstances, a likelihood of success
23 on the merits is demonstrated if the movant raises “questions going to the merits so serious,
24 substantial, difficult, and doubtful as to make the issue ripe for litigation and deserving of more
25 deliberate investigation.” *Id.* at 853.
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1 In the present matter, the Court granted an order to sell the Fielding Defendants' property
2 without a hearing. The court primarily relied upon 28 U.S.C. § 2001(b), which provides:

3 After a hearing, of which notice to all interested parties shall be given by
4 publication or otherwise as the court directs, the court may order the sale
5 of such realty or interest or any part thereof at private sale for cash or
6 other consideration and upon such terms and conditions as the court
7 approves, if it finds that the best interests of the estate will be conserved
8 thereby.

9 Consequently, the Court held that the Receiver adequately showed that "liquidating these assets
10 will limit expenses and avoid further deterioration or loss of value."

11 However, the receiver has gone beyond his duty to preserve the estate by performing this
12 liquidation previous to a final judgment on the merits. Under, the FTC Act, 15 U.S.C §52(b), the
13 Court's authority to grant permanent injunctive relief includes the authority to grant whatever
14 interlocutory relief is appropriate to preserve the possibility of effective final relief, including a
15 preliminary injunction, a freeze of assets, and appointment of a receiver. *F.T.C. v. World Travel*
16 *Vacation Brokers, Inc.*, 861 F.2d 1020, 1026 (7th Cir.1988). The purpose of a receiver is to
17 assure effective relief, and in other cases where a receiver was considered and either granted or
18 denied, an element of preservation of the financial status quo was a key consideration.¹ In fact,
19 certain courts have held that, "[T]he appointment of a receiver is a recognized form of relief
20 in cases, but is an extraordinary remedy, to be employed cautiously and usually when no lesser

21 _____
22 ¹ See, e.g., *U.S. Oil & Gas Corp.*, 748 F.2d at 1434 (receiver and asset freeze upheld as incident
23 to permanent injunction); *Crescent Publ'g* 129 F. Supp.2d at 319 (denying receiver as part of
24 preliminary injunction because less restrictive measures would be sufficient to preserve the
25 financial assets of the defendants); *FTC v. Five-Star Auto Club*, 97 F. Supp.2d 502, 533-34
26 (S.D.N.Y. 2000) (reconfirming appointment of receiver who had been appointed as part of
27 preliminary injunction and ordering him to wind up business because it could not be operated as
28 a going concern without engaging in the wrongful misrepresentations and omissions); *Patriot*
Alcohol Testers, Inc., 1992 U.S. Dist. LEXIS 1409, 1992 WL 27334, at (temporary receiver had
been appointed, asset freeze then ordered based upon report of said receiver which indicated that
a finding of dissipation of assets is warranted); *Southwest Sunsites*, 665 F.2d at 718 (district court
may order temporary relief preventing dissipation of funds that may constitute part of the relief
that will eventually be awarded).

1 relief would be effective. In fact, plaintiffs themselves call such relief ‘Draconian.’ Particularly
2 on a preliminary injunction motion, when the evidence is incomplete, the Court should not grant
3 relief beyond what is needed.” *FTC v. Crescent Publ'g Group, Inc.*, 129 F. Supp. 2d 311, 326
4 (S.D.N.Y. 2001); *see also FTC v. Direct Mktg. Concepts, Inc.*, 2006 U.S. Dist. LEXIS 1946 (D.
5 Mass. Jan. 19, 2006).

6
7 By merely showing “sound business reasons” for liquidating the assets, the receiver has failed to
8 provide justification that liquidation is necessary to preserve the financial status quo.
9 Accordingly, the Court has granted the receiver power beyond duty.

10
11 **B. The Fielding Defendants Will Suffer Irreparable Injury if a
Stay Pending Appeal is not Granted**

12 If the Court does not stay the enforcement of its Orders pending the Fielding Defendants’
13 appeal in this case, they will suffer irreparable injury. Nevada law historically has treated real
14 property as unique. *In re Fullmer*, 323 B.R. 287 (Bankr. Nev. 2005) (breach of an agreement to
15 sell real property cannot be adequately compensated by money damages). *See Stoltz v. Grimm*,
16 689 P.2d 927, 930 (Nev. 1984); *Carcione v. Clark*, 618 P.2d 346, 348 (Nev. 1980). The Order
17 provides for a judicial sale of many properties, which the Fielding Defendants will not be able to
18 get back following a final judgment. If the Properties are sold prior to the determination of the
19 appeal, the Fielding Defendants will be irreparably injured because the Properties are unique,
20 irreplaceable, and their loss cannot be adequately compensated by money damages.
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23 The same can be said of the Personal Property to be sold including classic cars,
24 houseboats, aircraft, and security interests. There has been no judgment of guilt against the
25 Fielding Defendants, yet their unique personal property is effectively being taken away from
26 them as money damages will never suffice for such unique items.
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CERTIFICATE OF SERVICE

I hereby certify that on this the 23rd day of August 2011 I electronically filed the foregoing with the Clerk of Court using the CM/ECF system which sent notification of such filing to the following:

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