

**UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT**

FEDERAL TRADE COMMISSION,	*	
Plaintiff/Appellee,	*	No. 13-15768
	*	
v.	*	
	*	PRELIMINARY
	*	INJUNCTION
SHARLA JOHNSON ET AL.	*	APPEAL
Relief Defendants/Appellants.	*	

	*	*
	*	
FEDERAL TRADE COMMISSION,	*	
Plaintiff/Appellee,	*	No. 13-15778
	*	
v.	*	
	*	PRELIMINARY
DUANE FIELDING ET AL.,	*	INJUNCTION
Defendants/Interveners/Appellants.	*	APPEAL
	*	*

On Appeal from the United States District Court for the District of Nevada  
Case No. 2:10-CV-2203-MMD-GWF (Hon. Miranda D. Du)

**RESPONSE BRIEF OF PLAINTIFF/APPELLEE  
FEDERAL TRADE COMMISSION**

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## STATEMENT OF JURISDICTION

The district court has subject matter jurisdiction over this action pursuant to 15 U.S.C. § 53(b) and 28 U.S.C. §§ 1331 and 1345, as plaintiff, the Federal Trade Commission (“FTC” or “Commission”), is a federal agency enforcing federal statutes, the FTC Act, 15 U.S.C. § 45(a), and the Electronic Fund Transfer Act, 15 U.S.C. §§ 1693e and 1693o(c). This Court has jurisdiction over each of these appeals under 28 U.S.C. §§ 1292(a)(1) and (2) as they are appeals of an order clarifying the scope of a receivership estate created by a Preliminary Injunction.

## ISSUES PRESENTED FOR REVIEW

1. Whether, because the assets in the possession of the Appellants are part of the receivership estate, the district court has *in rem* or *quasi-in-rem* jurisdiction over them.
2. Whether the district court committed clear error in finding that, because the assets in the possession of the Appellants came from and were under the control of Defendant Jeremy Johnson and the named Corporate Defendants, these assets are within the scope of the receivership estate created by its Preliminary Injunction.
3. Whether the Appellants were afforded due process where they had actual notice of the Preliminary Injunction and the Receiver’s Motion

for Clarification, had the opportunity to file responses to the Motion and submit their own evidence, and presented argument at the hearing on the Motion.

### **STATEMENT OF THE CASE**

This appeal primarily addresses whether a district court may properly determine that assets in the possession of nonparties are part of a receivership estate where those assets are (1) under the control of or are beneficially owned by one or more of the named defendants in the action; and (2) the nonparties have no legitimate claims to those assets.

Based on substantial evidence submitted by the Receiver, the district court properly found that the assets of the Appellants and the Appellants themselves (other than Sharla Johnson and Duane Fielding) are under the control of Defendant Jeremy Johnson and the named Corporate Defendants. As a result, the assets in the possession of the Appellants are beneficially owned by Defendant Jeremy Johnson and the named Corporate Defendants, and are accordingly part of the receivership estate as defined in the Preliminary Injunction. Appellants' Briefs do not seriously contest the factual determinations made in the Order on appeal, focusing solely on supposed flaws in the district court's assertion of jurisdiction and in the procedures in employed.

The district court, however, had ample authority to exercise jurisdiction over the Appellants and the assets in their possession, pursuant to its determination, based upon exhaustive evidence submitted by the Receiver, that they were controlled and beneficially owned by Defendant Jeremy Johnson and the named Corporate Defendants. Because these assets were controlled by Jeremy Johnson and the named Corporate Defendants, the Order on appeal did nothing more than clarify and confirm that they are part of the receivership estate created by the district court's Preliminary Injunction and subject to the control of the Receiver. And the procedural protections afforded Appellants – actual notice of both the Preliminary Injunction and the Receiver's Motion that lead to the Order on appeal; and an opportunity to be heard, through both written responses and by argument of counsel at a hearing – were more than sufficient, particularly in light of the preliminary nature of the proceedings, only determined immediate possession of receivership estate assets and not their ultimate disposition.

The Commission commenced this action by filing a Complaint in the District of Nevada on December 21, 2010 (DCDE 1).<sup>1</sup> The Complaint

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<sup>1</sup> Citations to the District Court Docket Entries contained in the Record Excerpts are listed as "DCDE." To the extent that materials from the record in the district court are not contained in either of the Appellants' Record Excerpts, they are contained in the Commission's Supplemental Record Excerpts.

alleges that the Defendants, Jeremy Johnson, nine other individuals, and 61 corporations, acting as a common enterprise, conducted an Internet-based scheme that violated Section 5(a) of the FTC Act, 15 U.S.C. § 45(a), and the Electronic Fund Transfer Act, 15 U.S.C. §§ 1693e and 1693o(c). This scheme deceptively induced consumers to purchase unwanted products and services, charging their credit cards and debiting their bank accounts without the consumer's knowledge or authorization.

On, January 13, 2011 (DCDE 44), the district court entered a Temporary Restraining Order that, *inter alia*, appointed a temporary Receiver over the corporate Defendants and froze the assets of the named Corporate Defendants and those of Jeremy Johnson.

On February 10, 2011, following briefing and a hearing, the district court entered a Preliminary Injunction. (DCDE 130). The Preliminary Injunction made the Receiver permanent. (*Id.* at § XVI). It also ordered the Receiver to take exclusive custody, control and possession of the Receivership Defendants, which include the Corporate Defendants and the assets of Jeremy Johnson. The Corporate Defendants are the named Corporate Defendants as well as “any subsidiaries, affiliates, any fictitious business entities or business names created or used by these entities, or any

of them, and their successors and assigns individually, collectively, or in any combination.” (DCDE 130 at Defs. 8 & 32; ¶¶ XV.B & C).

On May 30, 2012, the Receiver filed a Motion to clarify the scope of the Preliminary Injunction as it applied to the receivership estate (“Clarification Motion”). (DCDE 580). The motion resulted from the Receiver’s extensive investigation into the Receivership Defendants and their financial affairs and assets, including the filing of two reports analyzing these affairs and assets (DCDE 127-1 (Feb. 8, 2011) (26 pages with 80 pages of documentary evidence as exhibits) and 464 (Feb. 3, 2012) (79 pages with 831 pages of documentary evidence as exhibits). These reports painstakingly document the flow of funds between Jeremy Johnson and the named Corporate Defendants and the Appellants.

On February 25, 2013, the Commission filed an Amended Complaint. (DCDE 830). Of relevance to these appeals, the Amended Complaint added eight Relief Defendants, among them Appellants Sharla Johnson, Orange Cat, Zibby and Zibby Flight.

On March 25, 2013, following an opportunity for all affected individuals and entities to submit responses to the Clarification Motion and to submit evidence of their own (no Appellant sought leave to take discovery) and a hearing, the district court issued an Order clarifying the

scope of the Preliminary Injunction (“Clarification Order”) (DCDE 900). Among other things, the district court held that certain of the corporate entities that are Appellants in the present appeal, as well as certain assets of Appellant Sharla Johnson, are “Receivership Defendants” as that term is used in the Preliminary Injunction, and, accordingly, subject to the control of the Receiver (DCDE 900, ¶¶ 2, 3).

On April 18, 2013, Appellants/Relief Defendants Sharla Johnson, Orange Cat, Zibby and Zibby Flight Service noticed an appeal of the Clarification Order (DCDE 953), docketed as No. 13-15768. On April 19, 2013, Defendants Duane Fielding, Anthon Holdings and Network Agenda, as well as Receivership Defendants iPrerogative, Rotortrends, SLI and Trigger, noticed an appeal of the Clarification Order (DCDE 960), docketed as No. 13-15778. On April 22, the Clerk consolidated these two appeals and directed expedited briefing under the authority of Ninth Cir. R. 3-3.

A third group of nonparty individuals and business entities, all associated with Todd Vowell (“Vowell Entities”) but found by the district court to be controlled and beneficially owned by Jeremy Johnson and the named Corporate Defendants, filed a separate appeal of the Clarification Order on April 24, 2013 (DCDE 969), docketed as No. 13-15822. While the Vowell Entities’ appeal is not consolidated with the instant appeals for

briefing, the Court has directed that all three appeals be calendared together for argument.

## **STATEMENT OF RELEVANT FACTS**

### **Introduction**

The substance of the underlying case – the Internet-based scam the named Defendants operated – is straightforward. Led by Defendant Jeremy Johnson and his principal business entity, Defendant iWorks, Inc., Defendants obtained consumers' credit card or bank account information by promising to provide them information about various government grants for personal needs and money-making opportunities for a nominal shipping and handling charge. Defendants then took this financial information and charged consumers for unwanted goods and services, generating more than \$300 million in revenue and approximately \$51 million in operating profits paid to Jeremy Johnson or for his benefit.

In contrast, the efforts of the Defendants to conceal their ill-gotten gains have been, by design and intent, complex. Indeed, they are so complex that even today, despite the passage of more than two years since the entry of a Preliminary Injunction (DCDE 130) freezing all of the assets of Jeremy Johnson and the named Corporate Defendants and their affiliates and placing these assets under the control of a Receiver, the Receiver has not

yet been able to take control of all of the assets that are a part of the receivership estate.

The consolidated appeals addressed in this Brief involve the March 25, 2013, Order Clarifying the Scope of the Preliminary Injunction (“Clarification Order”) (DCDE 900). The Order clarifies and confirms what assets are included in the receivership estate created by the February 2011, Preliminary Injunction. It provides, in relevant part:

2. The Court hereby clarifies that the following entities are Receivership Defendants within the meaning of . . . the Preliminary Injunction . . . and their assets constitute property of the receivership estate in this case: Zibby, LLC; Zibby Flight Service, LLC; Orange Cat Investments, LLC; New Horizons Finance, Inc.; SLI, LLC; Trigger, LLC; iPrerogative Inc.; and the assets of Sharla Johnson other than her interest in Quilted Works, Inc.

Thus, through the Order the district court clarified and confirmed that the assets in the possession of these entities and Sharla Johnson are frozen and that these assets and these entities are under the control of the Receiver and have been since February 2011.

### **The Parties to these Consolidated Appeals**

The Appellants in appeal No. 13-15768 are Relief Defendants Sharla Johnson (Jeremy Johnson’s wife) and three LLCs in which she and her husband are the sole members: Orange Cat Investments, LLC (“Orange Cat”); Zibby, LLC (“Zibby”); and Zibby Flight Service, LLC (“Zibby

Flight”) (collectively these Appellants are sometimes referred to as the “Sharla Johnson Appellants”). As explained below, all of these entities are controlled by Jeremy Johnson and inextricably intertwined with the named Corporate Defendants.

The Appellants in appeal No. 13-15778 are Defendants Duane Fielding, Anthon Holdings Corp. (“Anthon”), and Network Agenda, LLC, as well as iPrerogative, LLC; Rotortrends, LLC; SLI, LLC; and Trigger, LLC (collectively these Appellants are sometimes referred to as the “Fielding Appellants”). As explained below, iPrerogative, Rotortrends, SLI and Trigger, which are expressly referenced in the Clarification Order, are controlled by and inextricably intertwined with Jeremy Johnson and the named Corporate Defendants.

### **The Underlying Case**

The Commission filed its complaint in the District of Nevada on December 21, 2010. (DCDE 1). The Complaint alleged that lead Defendant Jeremy Johnson, Appellant/Defendant Duane Fielding, eight other individuals, and 61 business entities operated an Internet-based scam that violated Section 5(a) of the FTC Act, 15 U.S.C. § 45(a), and the Electronic Fund Transfer Act, 15 U.S.C. §§ 1693e and 1693o(c).

Defendants lured customers to websites that purported to provide information on how to obtain various government grants for personal needs and money-making opportunities. Defendants made obtaining this information appear to be a low-risk proposition by seeming to charge only a nominal shipping and handling fee of \$2.99 or less. In fact, sometimes hidden in fine print on the websites – and often not disclosed at all – was a statement that paying this nominal fee enrolled consumers into agreements to purchase costly and unwanted goods and services. These additional purchases involved an initial charge of up to \$189 and subsequent monthly recurring charges of up to \$59.95. Consumers provided payment information reasonably believing that the information would be used solely to collect the nominal shipping and handling fee. Defendants, however, used this payment information to charge consumers’ credit cards and debit their bank accounts for unwanted and unauthorized goods and services. (DCDE 830, ¶¶ 5-6).

Some consumers attempted to mitigate Defendants’ deception by getting credit for the unauthorized charges through chargebacks from their credit card issuers.<sup>2</sup> To attempt to avoid the repercussions of high

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<sup>2</sup> A “chargeback” occurs when a consumer obtains a credit to his account from his credit card issuer for unauthorized charges. The chargeback process is expensive for credit card issuers, so if a particular merchant has

chargeback rates (especially the closing of the merchant accounts necessary to collect credit and debit card charges), Defendants routinely created new corporate shells and used the shells' clean records to obtain new merchant accounts. In all, Defendants churned through more than 50 shell companies. (DCDE 127-2 at 26). For several years, from 2006 through 2010, this strategy was quite successful.<sup>3</sup>

### **Proceedings in the Court Below**

On January 13, 2011, on motions by the Commission (DCDE 17 & 19), the district court entered a Temporary Restraining Order ("TRO"). (DCDE 44). Among other things, the TRO appointed Robb Evans of Robb Evans & Assocs., LLC as the temporary receiver ("Receiver") over the operations and assets of the named Corporate Defendants as well as the assets of Jeremy Johnson (DCDE 44, § I).

On February 8, 2011, the Receiver filed a 26-page First Report (plus 80 pages of documentary evidence as exhibits), based on his review of the Defendants' accounting records and other materials. (DCDE 127-2). The

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what an issuer deems to be an excessive chargeback rate, the issuer takes remedial steps to protect itself, ranging from requiring imposing reserve requirements to cover chargebacks to cancelling a merchant's account, depending upon the frequency and value of the chargebacks.

<sup>3</sup> The Commission's Complaint and Amended Complaint (DCDEs 1 and 830) cover the time period 2006 through 2010, not 2007 through 2010 as asserted in Sharla Johnson Appellants' Br. at 17.

Receiver reported that Defendants generated revenue of approximately \$332 million (*Id.* at 26) and distributed approximately \$51 million in operating profits to Jeremy Johnson and entities that he controlled. (*Id.* at 26).

Johnson used these funds to, among other things, live a lavish lifestyle and purchase real property, aircraft, vehicles, securities and precious metals, and to give gifts to friends and family. (*Id.*).

On February 10, 2011, following briefing and a hearing, the district court entered a Preliminary Injunction. (DCDE 130). The Preliminary Injunction made the Receiver a permanent appointment. (*Id.* at § XVI). The Preliminary Injunction ordered the Receiver to take exclusive custody, control and possession of the Receivership Defendants, which includes the Corporate Defendants and the assets of Jeremy Johnson.<sup>4</sup> The Corporate Defendants are defined in the Preliminary Injunction as the corporate defendants named in the Complaint as well as – “any subsidiaries, affiliates, any fictitious business entities or business names created or used by these entities, or any of them, and their successors and assigns individually, collectively, or in any combination.” (DCDE 130 at Defs. 8 & 32; ¶¶ XV.B & C).

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<sup>4</sup> The receivership estate includes only the assets of Jeremy Johnson; it does not extend to his “affairs” as asserted in Sharla Johnson Appellants Br. at 6, 12.

The Preliminary Injunction directs the Receiver to accomplish a number of tasks. These tasks include taking “exclusive custody, control, and possession of all assets and documents in the possession, custody, or under the control of, the Corporate Defendants wherever situated.” (DCDE 130, ¶ XV.B). The Receiver also has the authority to take “possession, hold, and manage all assets and documents of the Corporate Defendants and other Persons or entities whose interests are now under the direction, possession, custody, or control of, the Corporate Defendants.” (*Id.*). The Receiver has similar authority over the assets of Jeremy Johnson (DCDE 130, ¶ XV.C). Subject to some exceptions not germane to this appeal, the Receiver is to take “exclusive custody, control, and possession of the assets and income of Individual Defendant Jeremy Johnson.” (*Id.*).

All persons who receive notice of the preliminary injunction must “fully cooperate with and assist the Receiver in taking the possession and maintaining possession, custody, or control of the assets of the Receivership Defendants.” (DCDE 130, ¶ XVIII). Upon request by the Receiver, they are to immediately transfer to the Receiver all assets of the Receivership Defendants. (*Id.*, ¶ XVI.A).

The receivership provisions of the Preliminary Injunction are not final dispositions as to the ownership of the assets that make up the receivership

estate. Rather, the Preliminary Injunction only authorizes the Receiver to take possession of those assets until this matter is finally resolved so that, if the Commission prevails on the merits, the district court can craft full equitable relief.

Based on the mandate of the Preliminary Injunction, the Receiver conducted further investigation into the activities of the named Defendants as well as their “subsidiaries, affiliates, any fictitious business entities or business names created or used by these entities, or any of them, and their successors and assigns individually, collectively, or in any combination.” The Receiver conducted extensive discovery; he took depositions, served and obtained responses to more than 150 document subpoenas, and obtained public records. This amounted to a review of more than 150,000 pages of documents, business records, electronic ledgers, deposition transcripts and banking records. (DCDE 581 ¶¶ 8 & 9). Based on this investigation, on February 3, 2013, the Receiver filed a 79-page Second Report, supported by 831 pages of documentary evidence as exhibits. (DCDE 464).

The Second Report concluded that the Defendants used at least 65 entities in an effort to conceal their assets. Many of these entities were formed after February 2010, when the Commission gave notice to Jeremy

Johnson that he and his company, Defendant iWorks, were under investigation. (DCDE 464 at 5, 7).

Based on the evidence uncovered by his investigation, on May 30, 2012, the Receiver filed a motion for clarification of the scope of the Preliminary Injunction (“Clarification Motion”). (DCDE 580). The Clarification Motion did not seek to expand or modify the scope or terms of the underlying Preliminary Injunction (DCDE 130); it only sought judicial guidance as to the scope of the receivership estate established by the Preliminary Injunction. Of relevance to these appeals, the Receiver sought confirmation from the district court that Appellants iPrerogative, Rotortrends, SLI, Trigger, Orange Cat, Zibby, and Zibby Flight and their assets, as well as certain assets of Appellant Sharla Johnson, are Receivership Defendants because they are controlled by or held for the benefit of Jeremy Johnson and the named Corporate Defendants and that the Appellants’ assets, therefore, are frozen and subject to the control of the Receiver.

On February 25, 2013, during the pendency of the Clarification Motion, the Commission filed an Amended Complaint. (DCDE 830). Of relevance to these appeals, the Amended Complaint added eight Relief

Defendants, among them Appellants Sharla Johnson, Orange Cat, Zibby and Zibby Flight.<sup>5</sup>

The entities and individuals potentially affected by the Clarification Motion had ample opportunity to file responses supplemented by any written admissible evidence they desired. In fact, nine responses were filed.

(DCDEs 627-29, 636-38, 650, 655 and 665). The district court conducted a lengthy hearing on March 19, 2013, at which the court permitted additional argument on behalf of all interested entities and individuals, even those who had chosen not to file a written response or submit evidence of their own.

Considering all of these inputs, the district court entered its Clarification Order on March 25, 2013. (DCDE 900).<sup>6</sup> The court granted the Clarification Motion in its entirety, clarifying and confirming that all of the Appellants and the property in their possession are within the scope of the Preliminary Injunction and are Receivership Defendants. (DCDE 900 at ¶ 2). The Order also clarified and confirmed that, more generally, the receivership estate includes “all other entities and assets owned or

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<sup>5</sup> Separately, the Receiver filed a contempt motion against Sharla Johnson and her counsel, Christensen & Jensen, for Sharla’s transfer and Christensen & Jensen’s acceptance of a quitclaim deed on the residence shared by Sharla and Jeremy Johnson. (DCDE 855; *see* Sharla Johnson Appellants Br. at 8, n.2). This motion remains pending as of the filing of this Brief.

<sup>6</sup> The March 25 Clarification Order on appeal is actually a corrected version of the district court’s original order, issued on March 22, 2013 (DCDE 897).

controlled, directly or indirectly, by Jeremy Johnson, including but not limited to (i) all assets and entities held in the name of a third party for the benefit of Jeremy Johnson and/or (ii) all assets the source of funding for which came in whole or in part from funds or assets of the Receivership Defendants.” (*Id.* at ¶ 3).

Because a Preliminary Injunction determines only interim possession of receivership estate assets, the Clarification Order permits individuals claiming an ownership interest in any of the assets within the receivership estate to show why a specific asset should be exempted from the scope of the receivership estate. (DCDE 900, ¶ 3.C).

By its own terms in ¶ 2, the Clarification Order did not in any way affect the status or obligations of Defendants Fielding, Anthon and Network Agenda with regard to the receivership. As named Defendants they have been bound by the terms of the Preliminary Injunction since its entry on February 19, 2011, and they did not appeal that order.<sup>7</sup>

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<sup>7</sup> Since the Clarification Order on appeal does not change their status or obligations under the Preliminary Injunction, they lack standing to appeal this order except insofar as they assert ownership interests in an entity Appellant. *See generally Pension Trust Fund for Operating Engineers v. Federal Ins. Co.*, 307 F.3d 944, 947 n.1 (9<sup>th</sup> Cir. 2002) (in order to have standing to bring an appeal, a party must be aggrieved by the district court’s order); *Estate of Bishop v. Bechtel Power Corp.*, 905 F.2d 1272, 1276 (9<sup>th</sup> Cir. 1990) (same).

The Appellants filed their Notices of Appeal of the Clarification Order on April 18 and April 19, 2013. (DCDEs 953 and 960).

**The Relationships Between the Appellants, Defendant Jeremy Johnson, and the Other Receivership Defendants and Their Affiliates**

**Non-Appellants Important to These Appeals**

*Jeremy Johnson* is a Defendant and the sole owner and officer of iWorks. He had full control over and authority for its operations. (DCDEs 22-8; 22-9; 23-0; 43-1 at 40; 90; 127-2 at 4-5). Johnson has a 50% ownership interest in Appellants SLI (DCDE 581, ¶ 80), Trigger (*Id.*, ¶ 79), Orange Cat, Zibby and Zibby Flight. (*Id.*, ¶ 75).

*iWorks* is a Defendant and Jeremy Johnson is its sole owner. Under various fictitious names,<sup>8</sup> iWorks used websites to market information about purported government grants for personal needs and money-making opportunities. Consumers were lured in with the representation that they would only be charged a nominal shipping and handling fee of \$3 or less for this information. In fact, consumers were unwittingly enrolled in programs to purchase unwanted goods and services, for which they were charged substantial initial fees and recurring monthly charges. iWorks had revenue of approximately \$332.5 million, (DCDE 127-1 at 4). iWorks paid

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<sup>8</sup> DCDEs 43-1, p. 30 and Exh. 4; 928 ¶ 15.

approximately \$50.4 million (99.6% of its operating profits) to Jeremy Johnson or for his benefit. (*Id.* at 5, 15-26).

***Elite Asset Management, LLC.*** Defendant Jeremy Johnson is the sole member of Receivership Defendant Elite Asset Management. It appears to have no purpose other than being a conduit for receiving funds from Jeremy Johnson-controlled entities and then transferring these funds to other Johnson-controlled entities. (DCDE 464 at 50 and Exh. 61).

***New Horizons Finance, Inc.*** (“New Horizons”) is a Receivership Defendant per the Clarification Order. (DCDE 900 at 2).<sup>9</sup> It was a conduit for significant sums of the Defendants’ money, taking in approximately \$7 million in revenue, primarily through processing consumer payments for the Defendants’ enterprise. (DCDE 581 at ¶ 78). It received lease payments for a helicopter titled to Appellant/Relief Defendant, Zibby Flight. (DCDE 620-1; 620-2; 636-5, ¶¶ 5-7). Jeremy Johnson used real property titled to New Horizon to secure a personal loan. (DCDEs 620; 620-1; 620-2; 620-5 through 620-7 and Exhs. 1, 2 & 5-7 thereto; 679, ¶ 5 and Exh. 42 thereto).

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<sup>9</sup> New Horizon did not appeal the Clarification Order.

Defendant **Andy Johnson** was New Horizon's nominal owner<sup>10</sup> and Defendant Kevin Pilon its manager. However, Jeremy Johnson provided all of New Horizons's capital (\$565,000), directly and through iWorks. (DCDEs 127-2 at 13; 127-4 at Tab 11; 581, ¶ 78). In turn, a significant portion of New Horizon's revenue (more than \$2.2 million) was paid out to Defendants iWorks and Jeremy Johnson and to Appellant/Relief Defendant Zibby. (DCDEs 127-2 at 13; 581 at ¶ 78).

**Kevin Pilon** is a Defendant. He was an employee of iWorks who assisted with payment processing for the charges and debts for the purchase of the goods and services sold by iWorks – both the disclosed nominal fees as well as the undisclosed fees for unwanted goods and services. He nominally owned many of the shell companies that iWorks used to obtain new merchant accounts as existing merchant accounts became tainted by chargebacks. (DCDEs 43-1 at 47 and Exh. 3 at 7). He was a manager of Defendant New Horizons (DCDEs 127-2 at 13; 127-4 at Tab 11; 581, ¶ 78) and Appellant Rotortrends (DCDEs 464 at 6, 72; 581, ¶ 50; 636-5 at 2).

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<sup>10</sup> Jeremy Johnson used his brother Andy as the nominal owner of other assets that he purchased and controlled. For example, Andy nominally held title to 212,500 shares in a bank holding company, SunFirst Corp., even though Jeremy controlled and indirectly paid for these shares. (DCDE 581, ¶ 78).

## **The Appellants and Their Relationships to Defendant Jeremy Johnson and the Named Corporate Defendants**

Appellant/Defendant *Duane Fielding* is a nominal owner and manager of Defendant/Appellant Network Agenda (Jeremy Johnson is the other member) and is the nominal owner and officer of Defendant Anthon. (DCDE 98 at 3). Fielding has nominal control and authority over the operations of Anthon and Network Agenda as well as iWorks. (DCDEs 43-1 at 41; 636-3 at 2). He is the nominal owner of Appellant iPrerogative. (DCDE 581, ¶ 50). He has a nominal 50% ownership interest in both Appellants Trigger and SLI (Jeremy Johnson is the other member). (DCDE 581 at ¶¶79, 80). The Clarification Order did not include any relief against Fielding. (DCDE 900).

Appellant/Defendant *Anthon*, under fictitious names, provided some of the unwanted goods and services that Defendants forced on unwitting consumers. It also arranged for payment processing for the goods and services marketed by iWorks, both the disclosed nominal fees as well as the undisclosed fees for unwanted goods and services. (DCDE 43-1, p. 30). Anthon and iWorks each provided half of the funds (\$565,000 each) to purchase the trailer park titled in the name of Appellant SLI. (DCDEs 250-1, ¶¶ 3-4 and Exhs. 4 & 5; 388; 581, ¶ 80). The Clarification Order did not include any relief against Anthon. (DCDE 900).

Appellant/Defendant *Network Agenda, LLC* (“Network Agenda”) is owned and controlled by Defendant Jeremy Johnson with Fielding holding a nominal 50% ownership interest. It provided some of the unwanted goods and services that iWorks deceptively forced on consumers. It also obtained merchant accounts to process consumer payments for the sales of goods and services offered by iWorks – both the disclosed nominal fees as well as the undisclosed fees for unwanted goods and services. (DCDE 43-1, pp. 35-36). It paid for a helicopter titled in the name of Appellant Trigger. (DCDEs 581, ¶¶ 79-80; 581-2 Exh. 33). The Clarification Order did not include any relief against Network Agenda. (DCDE 900).

Appellant *iPrerogative* is nominally owned by Defendant Duane Fielding. At one point it held title to two helicopters – its only apparent assets. (DCDEs 464 at 73; 581, ¶ 50). *iPrerogative* purportedly sold both of the helicopters to Appellant Rotortrends. *iPrerogative*’s records indicate that iWorks paid for one of the helicopters and did so even before Rotortrends came into existence. (DCDE 464 at 72-73). Months after it transferred title for both helicopters to Rotortrends, *iPrerogative* revealingly paid \$122,000 for repairs to the other helicopter. (DCDEs 464 at 73; 581, ¶ 50).

*iPrerogative*, in February and April, 2011, paid a total of \$435,000 to attorneys (Travis Marker and the Jones, Waldo firm) who represented

Jeremy Johnson, and other named Defendants in this proceeding. (DCDE 680, ¶ 7 and Exh. 44 thereto).

Appellant/Relief Defendant *Orange Cat* is owned and controlled by Jeremy Johnson with Appellant/Relief Defendant Sharla Johnson holding a nominal 50% ownership interest. (DCDE 581, ¶ 75). Its purpose was to hold title to, among other things, a multi-million dollar property in Santa Monica, California, and a houseboat. *Id.* All of its capital – approximately \$4.1 million – came from iWorks. *Id.* Jeremy Johnson controlled Orange Cat. (*Id.*, ¶ 77).

Appellant *Rotortrends* is nominally owned by nonparty Shane Scott and managed by Defendant Kevin Pilon. (DCDEs 464 at 6, 72; 581, ¶ 50). Its primary purpose is to hold title to aircraft. It holds title to two helicopters it obtained from iPrerogative. (DCDE 464 at 72). iWorks paid for the purchase of one these helicopters. (DCDE 464 at 73; 581 at ¶ 50). iWorks was repaid for the funds it used to purchase the helicopter by Defendant Network Agenda. (DCDE 681, ¶ 6 and Exh. 43 thereto).

Appellant *SLI* is owned and controlled by Jeremy Johnson, with Fielding holding a nominal 50% ownership interest; its sole asset is a trailer park. (DCDE 581, ¶ 80). SLI did not use its own funds to purchase the trailer park. Rather, Appellant/Relief Defendant Zibby paid for the

purchase, acting as a conduit for funds it received from Defendants iWorks and Anthon. There is no evidence that Fielding paid any consideration for his ownership interest in SLI. (DCDEs 250-1, ¶¶ 3-4 and Exhs. 4 & 5; 288; 581, ¶ 80).

Appellant *Trigger* is owned and controlled by Jeremy Johnson, with Fielding holding a nominal 50% ownership interest; its primary asset is a helicopter. (DCDE 581, ¶ 79). Defendant Network Agenda provided the funds used to pay for the helicopter to which Trigger holds title. There is no evidence that Fielding paid any consideration for his ownership interest in Trigger. (DCDEs 581, ¶¶ 79-80; 581-2 Exh. 33). Following the commencement of this action, Jeremy Johnson used Trigger's helicopter to try to start a flight service in Costa Rica. (DCDE 581, ¶ 80).

Appellant/Relief Defendant *Zibby* is owned and controlled by Jeremy Johnson, with Appellant/Relief Defendant Sharla Johnson holding a nominal 50% ownership interest. (DCDE 581, ¶ 75). Its sole purpose was to hold title to various real properties. These properties have included the residences of Jeremy and Sharla and of Jeremy's parents. *Id.* All of Zibby's capital – approximately \$9.8 million – came from iWorks. *Id.* Jeremy Johnson controlled Zibby. (*Id.*, ¶ 77).

Appellant/Relief Defendant *Zibby Flight* is owned and controlled by Jeremy Johnson, with Appellant/Relief Defendant Sharla Johnson holding a nominal 50% ownership interest. (DCDE 581, ¶ 75). Its sole purpose was to hold title to aircraft. (*Id.*). All of its capital – approximately \$4.6 million – came from iWorks. (*Id.*). Jeremy Johnson controlled Zibby Flight. (*Id.*, ¶ 77). Loan payments for some of the aircraft titled to Zibby Flight were paid by Receivership Defendant Elite Asset Management, which is wholly owned by Jeremy Johnson. (DCDE 581, ¶ 55).

Appellant/Relief Defendant *Sharla Johnson* is Jeremy’s wife. She contributed no capital or other funds to obtain her 50% ownership interests in Orange Cat, Zibby or Zibby Flight. Her only independent income consists of modest earnings from a fabric store named Quilted Works (which is not part of the receivership estate). (DCDE 581, ¶¶ 75 and 77)

### **STANDARD OF REVIEW**

This Court reviews preliminary injunctions for “abuse of discretion,” and its review is “limited and deferential.” Legal principles are reviewed *de novo*. *Shell Offshore, Inc. v. Greenpeace, Inc.*, 709 F.3d 1281, 1286 (9<sup>th</sup> Cir. 2013), citing *Southwest Voter Registration Educ. Project v. Shelley*, 344 F.3d 914, 918 (9<sup>th</sup> Cir. 2003) (en banc). Factual findings are reviewed for clear error, *Shell Offshore*, 709 F. 3d at 1286, and whether assets are

included as part of a receivership estate is a question of fact. *In re San Vicente Medical Ptnrs*, 962 F.2d 1402, 1405 (9<sup>th</sup> Cir. 1992).

### **SUMMARY OF ARGUMENT**

The district court properly exercised jurisdiction over the Appellants and the assets in their possession. Appellants ignore the straightforward basis for this exercise of jurisdiction. This case involves the alleged misdeeds of Jeremy Johnson and a number of corporate entities he controls. And, since the court below unquestionably had personal jurisdiction over Jeremy Johnson and the named Corporate Defendants, it had plenary authority to freeze all assets *they* owned or controlled, as part of the Preliminary Injunction. The ruling on appeal simply confirms – on the basis of an extensive factual record provided to the district court by the Receiver – that all of the assets at issue here were in fact owned or controlled by those Defendants. Under Circuit precedent, therefore, the district court had *in rem* or *quasi-in-rem* jurisdiction over the corporate entity Appellants and their assets as well as the relevant assets of Sharla Johnson. For that reason, any claims about a lack of “minimum contacts” is simply irrelevant. In any event, although not required, the district court also has personal jurisdiction over most of the Appellants.

Moreover, in receivership proceedings at the preliminary injunction stage, in which a receiver seeks possession of assets held by a nonparty, all that this Court requires procedurally is that the nonparty: (1) receive actual notice of the preliminary injunction and the motion seeking determination of who has the right to possession; and (2) be afforded an opportunity to be heard prior to the entry of any order affecting the specific assets. Possession can then be determined in a summary proceeding. There is no need for the plaintiff to amend a complaint and formally add an individual or entity as a defendant or relief defendant, or for the receiver to commence an ancillary action.

Here, all of the necessary predicates to a summary proceeding were present. Appellants received actual notice of both the Preliminary Injunction and the Receiver's Motion for Clarification, at a minimum through their owners, members, managers or counsel. Many also received direct service through the district court's CM/ECF system or by email. Appellants effectively had a time period of approximately six weeks following service of the Clarification Motion to file a response and to submit evidence in support of their positions. Since the hearing on the Clarification Motion did not take place until approximately nine months after this filing deadline, the Appellants also had a significant window within which to request leave to

file a response out of time (which no Appellant did). At the hearing prior to the entry of the Clarification Order, the district court also provided an opportunity for argument from all potentially affected persons or entities, even if they had chosen not to file a written response. These proceedings amply satisfied due process requirements.

On the record of this case, the district court did not commit clear error in determining that the assets in the possession of the Appellants were received from Jeremy Johnson and the named Corporate Defendants and that the Appellants have no legitimate claim to those assets. The district court's Clarification Order came only after the Receiver submitted exhaustive support for his Clarification Motion and the Appellants failed to provide any substantial evidence that countered the Receiver's overwhelming evidence. There is more than ample evidence to support the district court's determination that Jeremy Johnson and the named Corporate Defendants controlled or beneficially owned the entity Appellants and their assets and the assets of Appellant/Relief Defendant Sharla Johnson.

## ARGUMENT

### I. THE DISTRICT COURT HAD A PROPER LEGAL BASIS FOR EXERCISING AUTHORITY OVER APPELLANTS AND THEIR ASSETS

#### A. The District Court Has Jurisdiction Over The Assets Of All Of The Appellants

This Court addressed the extent of a forum's jurisdiction over non-parties and the assets in their possession in *In re San Vicente Medical Partners, Ltd.*, 962 F.2d 1402 (9<sup>th</sup> Cir. 1992). Although both sets of Appellants rely on this case (Sharla Johnson Appellants Br. at 23-26; Fielding Appellants Br. at 15-21), a proper understanding of its holding firmly supports the ruling below.

In *San Vicente*, the district court had created a receivership including the assets controlled by the sole named defendant, a company called APHI. The district court had personal jurisdiction over APHI. In turn, the district court found, as a matter of fact, that: (1) APHI controlled a subsidiary named APC; (2) APC was the general partner in San Vicente Medical Partners LP ("San Vicente LP"); (3) APHI, through its control of APC, controlled San Vicente LP and its assets. As result, the district court had *quasi-in-rem* jurisdiction over any assets controlled by defendant APHI, including San Vicente LP and its assets. *Id.* at 1407.

Appellants are correct that the California-based district court found it had “sufficient contacts” over nonparty San Vicente LP to exercise *quasi-in-rem* jurisdiction over San Vicente LP and the assets in its possession based upon the limited partnership having been formed under of the laws of California and its principal place of business being in the state. *Id.*

Appellants’ description of the *San Vicente* decision is critically incomplete, however. It fails to state that, in *San Vicente*, this Court found an alternative basis for the district court to have sufficient contacts to exercise *quasi-in-rem* jurisdiction over San Vicente LP and the assets in its possession, even in the absence of direct contacts with the forum state. Specifically, *San Vicente* held that the sufficient contacts requirement regarding San Vicente LP and the assets in its possession was independently satisfied by the facts that “the district court had jurisdiction over APhi, and APhi controlled San Vicente and all of its property through APC.” *Id.*

In *FTC v. Productive Marketing, Inc.*, 136 F. Supp. 2d 1096 (C.D. Cal. 2001), the court instructively followed this Court’s alternative holding in *San Vicente*. The *Productive Marketing* court held that, even if a district court lacks personal jurisdiction over a nonparty, it can exercise *in rem* jurisdiction over the assets of a receivership defendant that are in the possession of that nonparty, so long as the defendant has minimum contacts

with the forum. The court then stated that, if the property belongs to the receivership estate, the nonparty's contacts with the forum are irrelevant so long as the nonparty defendant has notice and an opportunity to be heard concerning the property issue. *Id.* at 1103 n.7.

To the same effect is *FTC v. Strano*, 2013 WL 3064952 at \*1- \*2 (2<sup>nd</sup> Cir. Jun. 20, 2013). The *Strano* court held that, if a court has personal jurisdiction over a defendant, it also has jurisdiction over the defendant's assets that are in the possession of a nonparty. A court does not need to separately establish personal jurisdiction over a nonparty in possession of a defendant's assets in order to have jurisdiction over those assets.

*San Vicente* and its progeny thus squarely support the decision below. *One*, the district court has personal jurisdiction over Jeremy Johnson and the named Corporate Defendants. *Two*, the district court's Preliminary Injunction covers all assets owned or controlled by Jeremy Johnson and the named Corporate Defendants. *Three*, it was shown below that all of the Appellant corporate entities and their assets are under the control of Jeremy Johnson and the named Corporate Defendants. *Four*, it was also shown below that Jeremy Johnson controls and is the beneficial owner of the assets in the possession of his wife, Sharla Johnson. As a result, the district court has jurisdiction, whether characterized as *in rem* or *quasi-in-rem*, over all of

the corporate entity Appellants and their assets, as well as over the specified assets of Sharla Johnson.

The strong showing made below regarding the ownership and control of Jeremy Johnson and the named Corporate Defendants over the assets in the possession of the Appellants distinguishes the other principal case on which Appellants rely to challenge the district court's jurisdiction, *SEC v. Ross*, 504 F.3d 1130 (9<sup>th</sup> Cir. 2007). The appellant/intervenor in *Ross* was a sales representative the court found was an independent agent to whom the defendant paid a commission for services (sales of pay phones) he rendered to the defendant. Based on these sales, the appellant/intervenor had a legitimate claim to the funds he held – he was not a mere custodian holding assets for the defendant. In the Court's words, there was “no evidence that [the sales agent] was a mere puppet holding an account into which [defendant] funneled its fraudulent earnings.” *Id.* at 1142. Because the sales representative had a colorable legitimate claim to the funds in his possession, the district court held it lacked a basis to exercise *in rem* jurisdiction over the assets in his possession.

Here, the monies funneled by Jeremy Johnson and the named Corporate Defendants into the Appellants were not in return for any services or goods that Appellants provided to the defendants. Rather, all of the assets

in question were purchased with funds from Jeremy Johnson and the named Corporate Defendants, and were held solely for the benefit of, and were controlled by, Jeremy Johnson and the named Corporate Defendants. See Part II, *infra*. The Appellants are “mere custodians” of those assets.

**B. Though Not Required, The District Court Has Personal Jurisdiction Over Most Of The Appellants**

In any event, even if personal jurisdiction *were* necessary to support the decision under review, the district court in fact *has* personal jurisdiction over most of the Appellants.

**1. Sharla Johnson, Orange Cat, Zibby and Zibby Flight**

Sharla Johnson, Orange Cat, Zibby and Zibby Flight (the “Sharla Johnson Appellants”) were all named as Relief Defendants in the Commission’s Amended Complaint. They filed a motion to dismiss the Amended Complaint asserting, *inter alia*, that the district court lacked personal jurisdiction over them. (DCDE 886). In support of their motion, the Sharla Johnson Appellants put forward the same arguments contained in their Brief to this Court: (1) they lacked minimum contacts with the District of Nevada; and (2) neither of two nationwide service of process provisions apply to relief defendants, § 13(b) of the FTC Act, 15 U.S.C. § 53(b) (which provides for nationwide service of in actions brought under the FTC Act) and the tandem provisions of 28 U.S.C. §§ 754 and 1692 (which provide for

nationwide service of process in receivership proceedings, so long as certain filing requirements are fulfilled). (Sharla Johnson Appellants Br. at 35-38).

Following briefing, on June 6, 2013, the district court issued an Order ruling that it has personal jurisdiction over Sharla Johnson, Orange Cat, Zibby and Zibby Flight. (DCDE 1070 at 11-14). After finding that provisions for nationwide service of process and jurisdiction of the federal securities statutes, 15 U.S.C. §§ 77v(a) and 78aa, are analogous to § 13(b) of the FTC Act, the district court held that the nationwide service and jurisdiction provisions of § 13(b) apply to relief defendants since their joinder can be necessary to effect full relief by marshaling the assets that are the fruit of the illegal acts, citing *SEC v. Pegasus Wireless Corp.*, 2009 WL 3047223 (N.D. Cal. Sep. 21, 2009).<sup>11</sup> This conclusion is fully supported by the text of Section 13(b), which provides that, once a district court determines that it has jurisdiction over one defendant, it may exercise jurisdiction over “any other person” it “determines that the interest of justice require . . . should be made a party,” and that nationwide service of process is available as to such persons. Appellants baldly assert that this provision

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<sup>11</sup> The district court did not address the availability to receivers of nationwide service of process for receivership issues under 28 U.S.C. §§ 754 and 1692.

does not apply to relief defendants, but present no reason, in language or logic, why this is so. Cf. Sharla Johnson Br. at 39-40.

In any event, this Court need not resolve the issue in the present appeal, both because the existence of personal jurisdiction is not needed for the reasons explained above, and because the lower court's June 6 Order confirming its jurisdiction is not on appeal.<sup>12</sup>

## **2. Duane Fielding, Anthon and Network Agenda**

Duane Fielding, Anthon and Network Agenda are all named Defendants in the Commission's original Complaint. They have not challenged that the district court has personal jurisdiction over them. Therefore, they are unquestionably bound by the terms of the Preliminary Injunction. Accordingly, Fielding has no legitimate objection to the lower court's order that the entities in which he asserts an ownership interest (Receivership Defendants iPrerogative, SLI and Trigger) are part of the

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<sup>12</sup> The Sharla Johnson Appellants spend considerable space addressing *when* they became bound by the terms of the Preliminary Injunction. (Br. at 31-50). The only possible relevance of this issue is in the context of various post-Preliminary Injunction transfers of property by Sharla Johnson. Most prominent among these is her transferring, by quitclaim deed, the title to the residence that she shares with her husband to her counsel as payment for legal fees. (See Br. at 8 n.2 and 26). A contempt proceeding (DCDE 855) brought by the Receiver against Sharla Johnson and her counsel is pending before the district court. Of relevance to this Appeal, none of these transfers nor the contempt proceeding are before this Court, and, therefore, any issues regarding them need not be resolved as part of this appeal.

receivership estate. As explained above, moreover, the district court properly exercised authority over the latter entities regardless of the existence of personal jurisdiction as to them.

**C. A Nonparty Afforded Actual Notice And A Timely Opportunity To Be Heard Need Not Be Named As A Nominal Or Relief Defendant to Be Bound By An Order Regarding Property Owned By a Defendant**

Appellants contend that they cannot come within the scope of the Preliminary Injunction unless they are formally served with process, either by being named as defendants or relief defendants in the Commission's enforcement action or as defendants in an ancillary action brought by the Receiver. This position is simply wrong.

While serving formal process on a nonparty is always an option, it is not mandatory in situations such as this, where the Appellants are mere custodians of assets controlled or beneficially owned by Jeremy Johnson and the named Corporate Defendants. This is apparent from this Court's decision in *CFTC v. Topworth Int'l, Ltd.*, 205 F.3d 1107 (9<sup>th</sup> Cir. 2000). In *Topworth*, a receiver sought to obtain \$300,000 held in the trust fund of Topworth's counsel, asserting that the funds belonged to Topworth. The receiver obtained a turnover order for the funds against counsel. Of relevance here, Topworth's counsel was never named as a defendant, relief defendant, or a defendant in an ancillary action. 205 F.3d at 1110-12.

Rather, this Court held that a receiver's claim for property held by nonparties is procedurally sufficient "so long as there is adequate notice and opportunity to be heard." *Id.* at 1113.

In *SEC v. Wencke*, 783 F.2d 829 (9<sup>th</sup> Cir. 1986), a receiver sought disgorgement of receivership assets held by a nonparty. The receiver initially commenced two potential avenues for obtaining this relief: (1) by filing a motion for disgorgement in the primary case (from which the nonparty was absent); and (2) by commencing a separate ancillary action against the nonparty. The nonparty was served with both the motion in the primary case and the complaint and summons in the ancillary case. *Id.* at 832. The receiver only prosecuted the motion in the primary case, and the district court granted the motion. On appeal, the nonparty objected to an order being entered against him in an action to which he was not a party, asserting that the receiver should have been required to pursue the ancillary action. This Court rejected that argument, holding that summary proceedings are appropriate in determining receivership asset issues. Due process requires only that a nonparty get actual notice of the motion that may affect his claim to assets in his possession and have the opportunity to be heard concerning his claims. *Id.* at 837-38.

Other decisions are to the same effect. *See, e.g., SEC v. Lewis*, 173 Fed. Appx. 565, 566 (9<sup>th</sup> Cir. 2006); *SEC v. American Capital Investments, Inc.*, 1996 WL 608527 at \*5 (9<sup>th</sup> Cir. Oct. 22, 1996); *SEC v. Vassallo*, 2011 WL 3875640 at \*2-\*3 (E.D. Cal. Sep. 1, 2011); *SEC v. Private Equity Mgmt Group, Inc.*, 2009 WL 3074604 at \*6 (C.D. Cal. Sep. 21, 2009); *FTC v. J.K. Publications, Inc.*, 2009 WL 997421 at \*4 (C.D. Cal. Apr. 13, 2009).

This rule makes abundant sense. The purpose of a district court's appointing a receiver and creating a receivership estate in a preliminary injunction is to allow the receiver efficiently and quickly to take possession of receivership estate assets in order to preserve the possibility of full equitable relief at the conclusion of an action. Especially since a preliminary injunction addresses only interim possession of assets and not the ultimate issue of their ownership, actual notice to a nonparty of a receiver's motion concerning such assets, followed by an opportunity for the nonparty to be heard, afford the nonparty ample protection. Moreover, since the receiver is not a party to the case, he does not have the authority to amend a complaint to add defendants or relief defendants. And requiring a receiver to commence full-blown ancillary actions against every nonparty in possession of receivership estate assets would be costly, time-consuming and an unnecessary burden on judicial resources. The notice and hearing afforded

here provided Appellants with ample procedural protections (as addressed further in Part III, *infra*), while allowing the receiver efficiently to administer the receivership estate and marshal its assets.<sup>13</sup>

## **II. THE DISTRICT COURT HAD A PROPER FACTUAL BASIS FOR EXERCISING AUTHORITY OVER THE APPELLANT CORPORATE ENTITIES, AND THE ASSETS OF SHARLA JOHNSON**

The district court's exercise of jurisdiction over the assets at issue in this appeal – in accordance with the legal principles discussed in Part I of this brief – serves a vital purpose often implicated in this type of case. In its consumer protection law enforcement cases, the Commission typically seeks monetary equitable relief, for the benefit of consumers injured by defendants' unfair or deceptive practices. Defendants frequently attempt to shield or hide their assets by transferring them to persons or entities who are not defendants, who front as the nominal owners of these assets.

Consequently, courts are often called upon to their inherent powers to extend equitable relief against persons who themselves are not accused of any

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<sup>13</sup> Although the naming of relief defendants is thus not required, the Commission nevertheless does so in some instances – for example, where receivership assets are owned by spouses. Here, Orange Cat, Zibby and Zibby Flight are owned by spouses Jeremy and Sharla Johnson. The Commission did the same in *Strano*, 2013 WL 2064952, where the relief defendant was the spouse of the malfeasant, virtually all of the couple's assets were in her name, and the spouse's minimal independent earnings could not explain the amount of assets held solely in her name.

wrongdoing but who: (1) have received assets from a party who is accused of wrongdoing; and (2) have no legitimate claim to those assets. *Ross*, 504 F.3d at 1142. *See also, e.g., CFTC v. Kimberlynn Creek Ranch, Inc.*, 276 F.3d 187, 192-93 (4<sup>th</sup> Cir. 2002); *SEC v. Cavanagh*, 155 F.3d 129, 136 (2<sup>nd</sup> Cir. 1998); *SEC v. Cherif*, 933 F.2d 403, 414 n. 11 (7<sup>th</sup> Cir. 1991).

The Receiver provided the court below with overwhelming factual evidence to support the exercise of such jurisdiction, showing that Appellants received funds or assets from Jeremy Johnson and the named Corporate Defendants, and that Appellants themselves have no legitimate claim to those funds or assets. This evidence demonstrates that Jeremy Johnson and the named Corporate Defendants controlled and are the beneficial owners of all of the assets at issue in this appeal. The district court, therefore, had a solid basis for the factual determinations that underlie the Clarification Order and did not commit clear error in making its determinations.

**A. The Business Entity Appellants Are Within The Scope Of The Receivership Estate**

While this section of the Brief addresses the specific facts that demonstrate how each Appellant was subject to the control of Jeremy Johnson and the named Corporate Defendants, there is a common theme to

what manifests this control. That theme is that this Court should “follow the money.” By observing how funds and assets flowed into the Appellants from Jeremy Johnson and the named Corporate Defendants – and that the Appellants provided no goods or services that could justify these payments – it is manifest that these assets are under the control of Jeremy Johnson and the named Corporate Defendants; that the Appellants have no legitimate claim to the assets in their possession; and that the district court did not commit clear error in finding that these assets are part of the receivership estate.

**1. Appellants/Relief Defendants Orange Cat, Zibby and Zibby Flight**

The ownership structure of Orange Cat, Zibby and Zibby Flight facially establishes that they fall within the scope of the Receivership Estate as assets of Defendant Jeremy Johnson since he has a 50% ownership interest in all three entities. His wife, Sharla Johnson, ostensibly owns the other 50% but, as explained below, her interest is only nominal and there is no evidence that she exercised control over these entities. All of the capital for these three entities came from Defendant iWorks (which is wholly-owned by Jeremy Johnson). iWorks contributed capital of \$4.1 million for Orange Cat, \$9.8 million for Zibby, and \$4.6 million for Zibby Flight. None

of these capital contributions are explicable unless Jeremy Johnson controlled these three entities.

While these three entities primarily are asset-holding vehicles, they received benefits from other Jeremy Johnson-controlled entities without any evidence that they performed any services or provided any goods to earn such benefits. For example, an entity wholly-owned by Jeremy Johnson, Elite Asset Management, paid some of the loan payments for an aircraft titled to Zibby Flight.

Based on evidence of control, capital contributions by a Corporate Defendant, and inter-relatedness with other Jeremy Johnson-controlled entities, the district court's factual finding that Orange Cat, Zibby and Zibby Flight and their assets are part of the receivership estate is not clearly erroneous.

## **2. Appellants SLI and Trigger**

Jeremy Johnson holds a 50% ownership interest in both SLI and Trigger. Defendant Duane Fielding nominally owns the other 50% ownership interest in both SLI and Trigger but there is no evidence that he paid any consideration for these interests. All of the funds used to purchase the assets titled to SLI and Trigger came from named Corporate Defendants. Defendants iWorks and Anthon paid for the trailer park titled to SLI,

funneling the funds through Appellant/Relief Defendant Zibby. Defendant Network Agenda paid for the helicopter owned by Trigger. None of these transactions is explicable unless Jeremy Johnson and the named Corporate Defendants controlled SLI and Trigger.

Based upon the evidence of control and capital contributions, the district court was not clearly erroneous in finding that SLI and Trigger and their assets are part of the receivership estate. All of the assets titled to SLI and Trigger were paid for by Corporate Defendants, Jeremy Johnson held a 50% ownership in both SLI and Trigger, and there is no evidence that Defendant Duane Fielding paid any consideration for his ownership interests.

### **3. Appellant iPrerogative**

iPrerogative owned two helicopters. It transferred title for both of them to another Appellant, Rotortrends. iWorks paid iPrerogative for one of the helicopters and made this payment before Rotortrends even came into existence. Months after transferring title to Rotortrends, iPrerogative paid \$122,000 for repairs to the helicopter not paid for by iWorks. There is no plausible reason why iPrerogative would transfer title for a helicopter to Rotortrends without the payment of any consideration or pay for repairs to a helicopter months after its title transferred to Rotortrends unless iPrerogative

– like Rotortrends – was controlled by Jeremy Johnson and the named Corporate Defendants.

In 2011, iPrerogative paid a total of \$435,000 to counsel who represented Jeremy Johnson and other Defendants in this action. There is no reasonable explanation for these payments other than that Jeremy Johnson and the named Corporate Defendants controlled iPrerogative and directed its assets.

Based on evidence of payments made by a Corporate Defendant for the purported sale of a helicopter made to Rotortrends, iPrerogative's transfer of title to a second helicopter to Rotortrends without any evidence of receiving consideration in return, its paying for repairs to a helicopter to which it did not hold title, and its substantial payments to Defendants' attorneys, the district court did not commit clear error in finding that iPrerogative is controlled by Jeremy Johnson and the named Corporate Defendants and that it and its assets are part of the receivership estate.

#### **4. Appellant Rotortrends**

As noted in the prior section, Rotortrends holds title to two helicopters it obtained from Appellant iPrerogative. Defendant iWorks paid for the purchase of one of the helicopters. iWorks later was reimbursed for the purchase price, the reimbursements coming from Defendant Network

Agenda. There is no plausible reason why one of the Corporate Defendants (Network Agenda) would pay for a helicopter titled to Rotortrends unless Rotortrends was controlled by Jeremy Johnson and one of the named Corporate Defendants.

Based on evidence of payments made by Corporate Defendants to pay for one helicopter and Rotortrends' obtaining title to the other helicopter seemingly without paying any consideration to iPrerogative, the district court did not commit clear error in finding that Rotortrends and its assets are controlled by Jeremy Johnson and the Corporate Defendants and that it and its assets part of the receivership estate.

**B. Appellant Sharla Johnson's Interests in Orange Cat, Zibby and Zibby Flight are Within the Scope of the Receivership Estate**

Sharla Johnson's only independent income consists of modest earnings from a fabric store that she owns. Mrs. Johnson is an owner of the store and neither the Commission nor the Receiver asserts that the store or Mrs. Johnson's income from it are part of the receivership estate.

As stated above, all of the capital contributed to Orange Cat, Zibby and Zibby Flight came from Defendant iWorks, which Jeremy Johnson controls. The record is devoid of any evidence that Mrs. Johnson paid any consideration for her 50% ownership interests in Orange Cat, Zibby or

Zibby Flight. Nor does the record contain any evidence that Mrs. Johnson ever exercised any control over any of these three entities.

Based on the evidence, the district court did not clearly err in determining that Sharla Johnson has no more than a nominal interest in Orange Cat, Zibby and Zibby Flight, that Jeremy Johnson is their beneficial owner, and that any ownership interest Mrs. Johnson may assert in these three entities (or any other assets apart from her interest in her store) are part of the receivership estate.

### **III. THE APPELLANTS WERE AFFORDED PROCEDURAL DUE PROCESS PRIOR TO THE ENTRY OF THE ORDER ON APPEAL**

The district court correctly determined Jeremy Johnson and the named Corporate Defendants controlled and were the beneficial owners of the assets in the possession of the Appellants. As a result, the district court also properly exercised jurisdiction over those assets and the Appellants.

Accordingly, this Court must uphold the district court's Clarification Order so long as it finds that the Appellants were afforded due process with respect to the Clarification Order. In fact, the summary proceedings used to determine whether the assets at issue were part of the receivership estate readily pass muster under the pertinent standards, since they included full

actual notice, and afforded Appellants ample opportunity to present evidence and argument.

**A. The District Court Properly Used Summary Proceedings to Clarify the Scope of the Receivership Estate**

A district court may use summary proceedings in situations involving nonparties who hold property claimed by a receiver so long as there is adequate notice and an opportunity to be heard. *Topworth*, 205 F.3d at 1113; *Wencke*, 783 F.2d at 836-38; *Lewis*, 173 Fed. Appx. at 566; *American Capital Investments*, 1996 WL 608527 at \*5; *SEC v. Vassallo*, 2010 WL 3835729 at \*2 (C.D. Cal. Sep. 29, 2010); *Private Equity Mgmt Group*, 2009 WL 3074604 at \*5-\*6; *J.K. Publications*, 2009 WL 997421 at \*4.

Summary proceedings are especially appropriate where – as here – an Order only determines possession of assets and not their ultimate disposition.

*United States v. Arizona Fuels Corp.*, 739 F.2d 455, 459 (9<sup>th</sup> Cir. 1984). If an appellant contends that a summary proceeding was insufficient, it must demonstrate: (1) how the proceeding was prejudicial; and (2) that a plenary proceeding would have permitted the appellant to better defend itself.

*Wencke*, 783 F.2d at 838; *American Capital Investments*, 1996 WL 608527 at \*5.

**B. Appellants had Actual Notice of the Receiver's Motion to Clarify the Scope of the Preliminary Injunction**

The entity Appellants here received actual notice, at a minimum, though their owners, members or managers (Jeremy Johnson, Duane Fielding and Kevin Pilon) or their counsel. All of the named Defendants, including Jeremy Johnson, Duane Fielding, and Kevin Pilon, iWorks, Anthon and Network Agenda were served with initial process and with all subsequent orders, including the Preliminary Injunction. Jeremy Johnson's knowledge of the Preliminary Injunction provided actual knowledge to all of the Appellants in which he has an ownership interest: Orange Cat; SLI; Trigger; Zibby; and Zibby Flight. Similarly, Duane Fielding's knowledge of the Preliminary Injunction provided actual notice to iPrerogative, SLI, and Trigger, and Kevin Pilon's knowledge provided actual notice to Rotortrends.

The Appellants received actual notice of the Receiver's Clarification Motion through its service on the named Defendants via the district court's CM/ECF system. Additionally, some of the Appellants received direct service of the Motion. The Receiver's Certificate of Service for the Clarification Motion (DCDE 583), dated May 30, 2012, states that the Receiver served the Clarification Motion by email on Jeremy Johnson and Sharla Johnson and by both email and first-class mail on Kevin Pilon.

(DCDE 583 a 5-6). Michael Studebaker, counsel for Duane Fielding and the other Fielding Appellants, received service of the Clarification Motion through the district court's CM/ECF system (DCDE 583 at 2).

**C. Appellants Had Ample Opportunity to Participate in the Proceedings Leading to Entry of the Clarification Order**

Assuming three days for service, Appellants had actual notice of the Clarification Motion by no later than June 3, 2012. Through a series of Stipulations and Orders, any persons or entities potentially affected by the Clarification Motion were able to obtain an extension until July 16, 2012, to respond to the Clarification Motion. (See DCDEs 591, 598-605, 608-10). Nine responses were filed. (DCDE 627-29, 636-38, 650, 655 and 665). Since the hearing on the Clarification Motion did not occur until March 19, 2013, even if a person or entity initially failed to seek an extension to respond, there was a significant window within which to request leave to file a response even after July 16, 2012. Thus, if a person or entity potentially affected by the Clarification Motion did not file a written response to the Motion, it was entirely of their volition and not due to lack of notice or opportunity.

Any argument that Appellants were prejudiced by a summary proceeding is specious. As a practical matter, no discovery should be

necessary for an Appellant to obtain the evidence necessary to demonstrate that the Appellant and its (or her) assets are neither under the control of nor beneficially owned by Jeremy Johnson and the named Corporate Defendants. Similarly, an Appellant would not need discovery to demonstrate that it (or she) has a colorable legitimate claim to the assets in its (or her) possession. As the Receiver commented at the Clarification Motion hearing, presumably every reasonable person knows the source of all the funds that come through her or its bank account. This logic equally holds true for how a person came to obtain title to property and how that person paid the purchase price for that property.

Appellants had approximately six weeks to respond to the Clarification Motion and more than nine months passed between the filing of the Motion and the hearing on the Motion. While there is no cognizable reason why any of the Appellants would need to conduct discovery to establish that they had a legitimate claim to the assets sought by the Receiver, even if, *arguendo*, they could enunciate one, they had more than ample opportunity to seek leave of court to conduct discovery focused on the

issues raised by the Clarification Motion and how it related specifically to them.<sup>14</sup>

The Sharla Johnson Appellants (Br. at 52) also assert they were prejudiced because they did not have an opportunity to challenge the Preliminary Injunction on the merits. This argument is specious for two reasons. First, the only issues germane to them are whether these Appellants possess assets that are property of the receivership estate and whether those assets are under the control of Jeremy Johnson. Second, there is no basis for these Appellants to relitigate on the merits the substantive legal issues that led to the entry of the Preliminary Injunction since, as Relief Defendants, they are not alleged to have violated any laws.

**D. The Clarification Order Serves Only To Determine Possession of Assets, Not to Resolve Their Ultimate Ownership**

Appellants' due process arguments also ignore that the Preliminary Injunction only directs that the Receiver take possession of the assets that constitute the receivership estate. It does not make a final determination as to the ownership or disposition of the assets in the Appellants' possession.

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<sup>14</sup> In *Wencke*, this Court held that a nonparty appellant was not prejudiced in a summary proceeding by lack of discovery where the nonparty appellant failed to seek leave to take any discovery even though it had a large window between the receiver filing the motion to compel the disgorgement of receivership assets and when the hearing on the motion took place. 783 F.2d at 838-39.

At the very least, Appellants will get one more opportunity to be heard about the assets at issue – if and when the Receiver seeks court approval to liquidate any of these assets.

They also ignore that the Clarification Order itself, in ¶ 3.C, provides a procedure for challenging the possession determinations made by the Clarification Order. In ¶ 3.C, the Clarification Order permits any individuals claiming ownership in any of the assets within the receivership estate to file a motion with the district court setting forth the reasons and evidence why a specific asset should be exempted from the scope of the receivership estate.

### **CONCLUSION**

For the reasons set forth above, the district court's Clarification Order should be affirmed.

DATED: June 28, 2013

/S/ John Andrew Singer

John Andrew Singer  
*Counsel for Plaintiff/Appellee*  
*Federal Trade Commission*

## **CIRCUIT RULE 28-2.6 STATEMENT OF RELATED CASES**

The Court has directed that these two consolidated cases are to be calendared for argument with *FTC v. Alpha Yankee, LLC et al.*, No. 13-15822. All three appeals are from the same Order by the District Court.

**FED. R. APP. P. 32 CERTIFICATE OF COMPLIANCE WITH  
TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS,  
AND TYPE STYLE REQUIREMENTS**

I hereby certify that:

1. This Brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 10,395 words, excluding the parts of the Brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).
2. This Brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this Brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010, Times New Roman 14 point font.

DATED: June 28, 2013

/S/ John Andrew Singer  
John Andrew Singer  
*Counsel for Plaintiff/Appellee*  
*Federal Trade Commission*

## CERTIFICATE OF SERVICE

I hereby certify that on the 28<sup>th</sup> day of June, 2013, I served electronic copies of the Response Brief of Plaintiff/Appellee Federal Trade Commission and both volumes of the Plaintiff/Appellee's Excerpts of Record, via the Ninth Circuit ECF/CM system, on:

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# CERTIFICATE FOR BRIEF IN PAPER FORMAT

*(attach this certificate to the end of each paper copy brief)*

9th Circuit Case Number(s): 13-15768

I, John Andrew Singer, certify that this brief is identical to the version submitted electronically on [date] Jun 28, 2013.

Date Jul 2, 2013

Signature s/John Andrew Singer  
(either manual signature or "s/" plus typed name is acceptable)