

**ROBB EVANS**  
**Receiver of**  
**Asset Protection Group, Inc., et al.**  
11450 Sheldon Street  
Sun Valley, California 91352-1121  
Telephone No.: (818) 768-8100  
Facsimile No.: (818) 768-8802

**Federal Trade Commission v. Asset Protection Group, Inc., et al.**  
**CASE No. 4:96 CV02225 SNL**

**Memorandum and Order Re: Motion to Stay**  
**Amended Civil Contempt Order as to Contempt Defendants**  
**Richard C. Neiswonger, William S. Reed and Asset Protection Group, Inc.**

**Filed October 16, 2008**

**UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF MISSOURI  
EASTERN DIVISION**

**FEDERAL TRADE COMMISSION,** )

**Plaintiff,** )

**vs.** )

**RICHARD C. NEISWONGER, ET. AL.,,** )

**Defendants.** )

**Case No. 4:96CV2225SNLJ**

**MEMORANDUM AND ORDER**

This matter is before the Court on defendants' joint motion to stay July 30, 2008 amended civil contempt order pending appeal (#276), filed August 11, 2008. Plaintiff FTC has filed a responsive pleading opposing the imposition of a stay pending appeal. *See*, Document #278, filed August 18, 2008.

On or about July 30, 2008, this Court entered its Amended Civil Contempt Order (#275), directing defendants Neiswonger and Reed to pay judgments of \$3,213,719.13 and \$5,752,093.77, respectively, within ten (10) days or to turn over certain assets to the court-appointed Receiver in partial or full satisfaction of those judgments. In lieu of satisfying the said judgments, defendants Neiswonger and Reed seek a stay of the subject order pending their appeal of same. As of today's date, no supersedeas bond has been posted in seeking this stay.<sup>1</sup>

Rule 62 Federal Rules of Civil Procedure provides, in pertinent part, that:

If an appeal is taken, the appellant may obtain a stay by supersedeas

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<sup>1</sup>At the time of the filing of the parties' pleadings regarding this matter, defendants had not yet filed a notice of appeal. However, the Court's docket of this case shows that on August 27, 2008 the defendants filed their notice of appeal (#288); however, no supersedeas bond was posted as of that date or to-date.

bond, except in an action described in Rule 62(a)(1)<sup>2</sup> or (2). The bond may be given upon or after filing the notice of appeal or after obtaining the order allowing the appeal. The stay takes effect when the court approves the bond.

Rule 62(d) Fed.R.Civ.P. “With respect to money judgments, Rule 62(d) has been interpreted to mean that an appellant may obtain a stay of the money judgment during the pendency of the appeal as a matter of right by posting an adequate supersedeas bond.” United States v. Mansion House Center Redevelopment Co., 682 F.Supp. 446, 449 (E.D.Mo. 1988); *see also*, Halbach v. Great-West Life & Annuity Insurance Co., 2007 WL 4564209 (E.D.Mo. 2007, J. Webber)<sup>3</sup>. The purpose of posting a supersedeas bond is to preserve the status quo while protecting the non-appealing party’s rights. Central Telecommunications, Inc. v. TCI Cablevision, Inc., 610 F.Supp. 891, 911 (W.D.Mo. 1985); *see also*, American Family Mutual Ins. v. Miell, 2008 WL 2773713 (N.D.Iowa 2008, Mag.J. Scoles). A supersedeas bond for the full amount of judgment, interest and costs is the normal amount required to procure a stay pursuant to Rule 62(d). Hopfinger v. Kidder International, Inc., 827 F.Supp. 1444, 1452-53 (E.D.Mo. 1993) *citing* Mansion House Center Redev., at 449 (internal citations omitted). “The burden of justifying a bond less than the full amount owed lies with the moving party.” American Family Mutual Ins. v. Miell, *supra*. (*citing* Poplar Grove Planting and Refining Co. v. Bache Halsey Stuart, Inc., 600 F.2d. 1189,

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<sup>2</sup>It could be argued that pursuant to Rule 62(a)(1) the matter of a stay is a moot point because defendants are seeking a stay from a final judgment in a “receivership” action and normally stays are not allowed in such actions. However, for purposes of addressing the instant motion, the Court will assume that this cause of action does not fall within the receivership exemption of Rule 62(a)(1).

<sup>3</sup>Although it is not the Court’s usual practice to cite unpublished opinions, it does so in circumstances wherein the unpublished opinion offers legal guidance to the Court in reaching a determination on the issue(s) at hand.

1191 (5th Cir. 1979)); *see also*, Weber v. Logan County Home for the Aged, 1986 WL 12878 (D.N.D. 1986, J. Van Sickle).

As stated earlier, the burden is on the party seeking the stay to demonstrate that a lesser amount for the bond or no bond at all is required. “The party seeking the stay must objectively demonstrate that it has the present financial ability to facilely respond to a money judgment and present to the court a financially secure plan to maintain that ability during the pendency of the appeal.” Weber v. Logan County Home for the Aged, *supra*. (*citing* Poplar Grove, at 1191).

In the present case, defendants offer no reason as to why they should be allowed to stay the execution of the money judgments pending appeal without the posting of a supersedeas bond. Essentially, they are asking the FTC and the Receiver to bear the risk of defendants’ inability to pay the judgments after appeal solely on their word. Given the nature of the present cause of action (scheme to defraud) and the defendants’ past documented history of concealment of assets and financial misrepresentations, the Court does not believe that the FTC and the Receiver should bear such a risk. *See*, Central Communications, at 911; Bancorp Services, L.L.C. v. Hartford Life Ins. Co., 2002 WL 32727077 (E.D.Mo. 2002, J. Jackson); Weber v. Logan County Home for the Aged, *supra*. The Court finds that the defendants have not adequately supported their request for a stay without posting security for the full amounts of their respective judgments.

Although it is unclear, the Court assumes that the defendants also seek to stay the injunctive provisions of the Amended Civil Contempt Order. When determining whether to stay the injunctive provisions of a judgment or order, the Supreme Court has articulated four (4) factors for courts to consider: 1) whether the stay applicant has made a strong showing that s/he is likely to succeed on the merits; 2) whether the stay applicant will be irreparably injured absent a stay; 3) whether the issuance of the stay will substantially injure the other parties interested in the

proceedings; and 4) where the public interest lies. Hilton v. Braunskill, 481 U.S. 770, 776 (1987); Halbach v. Great-West Life & Annuity Ins. Co., et. al., 2008 WL 1805607 (April 21, 2008 J. Webber); Barzilay v. Barzilay, 2008 WL 554608 (February 28, 2008 J. Webber); *see also*, Fargo Women's Health Organization v. Schafer, 18 F.3d. 526, 538 (8th Cir. 1994). Upon review of these factors, the Court determines that no basis exists for staying the injunctive provisions of the Amended Civil Contempt Order.

The defendants have not made a strong showing of a likelihood that they will succeed on the merits. Despite ample opportunity to put on evidence at the lengthy hearing, defendants chose not to do so. In the instant pleadings, the defendants simply restate arguments already carefully considered and rejected by this Court when it entered the Amended Civil Contempt Order. Defendants are not entitled to a hearing on the monetary judgment award and their due process rights have not been violated. As repeatedly pointed out by the Court, an evidentiary hearing was held, and the defendants chose not to participate in any meaningful manner. They have not opposed or challenged the FTC's July 2006 contempt motion, the Receiver's preliminary analysis indicating the each defendant earned over \$2 million from the APG scheme; or the Court's own Memorandum Opinion presenting findings as to the preliminary disgorgement amounts. Defendants have never presented their own evidence as to their earnings or any figures to dispute the findings of the FTC, the Receiver, or this Court. Now, at this late date, for the first time, defendants challenge the disgorgement amounts. Defendants' rights have been considered throughout this protracted litigation, and it is by their own choice, not to take the numerous opportunities available to them to advocate their position.

This Court is confident in the fact that substantial credible evidence supports the FTC and Receiver's findings, and the Court's adoption of same. Defendants allege "inconsistencies" and "

lack of basic evidentiary support”, but fail to provide any evidence of these “inconsistencies” or provide their own evidence to challenge the evidence already on the record. They simply have not offered one scintilla of evidence which specifically challenges the final accounting of the disgorgement amount. Furthermore, the Court, having reviewed the cited caselaw in the FTC’s memorandum in opposition to the defendants’ stay motion (#278), has the authority to order these defendants, or third parties holding the defendants’ assets, to turn over said assets in FTC cases concerning fraudulent conduct on the part of the defendants. The defendants, once again, challenge the Court’s order that they turn over assets without any supporting statutory law or caselaw; just general allegations to “State and Federal Law”.<sup>4</sup> They argue that the properties cannot be turnover because of third-party lien holders; yet, fails to identify these “third-party lien holders” nor provide any citation to legal authority for this proposition.

This Court held a proper evidentiary hearing, and provided all parties significant opportunities to brief fully their respective positions. The current motion does nothing more than rehash old arguments already considered and rejected by the Court. The current motion fails to present any new law or facts demonstrating that the defendants are likely to succeed on their appeal.

As to irreparable harm, the Court does not find that the defendants will suffer same if a stay is not granted. “In order to demonstrate irreparable harm, a party must show that the harm is certain and great and of such imminence that there is a clear and present need for equitable relief.” Iowa Utilities Bd. v. Federal Communications Commission, 109 F.3d. 418, 425 (8th Cir. 1996).

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<sup>4</sup>Although it appears that only Neiswonger is challenging the Order as to the turnover of his tangible assets, for purposes of the instant motion which was filed on behalf of both individual defendants, the Court will assume that Reed also challenges the Order as to the turnover of his tangible assets.

The Court recognizes that the defendants will suffer some degree of economic harm as a result of the Amended Civil Contempt Order. They are legally obligated to transfer certain assets to the Receiver for liquidation and inclusion in the receivership estate. However, economic loss, in and of itself, does not constitute irreparable harm. Packard Elevator v. Interstate Commerce Commission, 782 F.2d. 112, 115 (8th Cir. 1986). The threat of **unrecoverable economic harm** may qualify as irreparable harm. Kemin Foods, L.C. v. Pigmentos Vegetales Del Centro S.A., 384 F.Supp.2d. 1334, 1341 (N.D.Iowa 2005)(internal citations omitted); Knutson v. AG Processing, 302 F.Supp.2d. 1023, 1037 (N.D.Iowa 2004). Defendants have not proffered any argument or evidence to support a contention that their economic harm is unrecoverable. Neither has been denied a legitimate means of income by any order of this Court.

Finally, it is clear to this Court that the harm to the plaintiff FTC and to the public at large far outweighs the harm to the defendants. These defendants have consistently engaged in fraudulent conduct involving millions of dollars. The Court concurs with the plaintiff FTC's concerns that if these defendants do not turn over their assets pending appeal, they are likely to attempt (and perhaps, succeed) in dissipating those assets; thereby, frustrating the FTC's lengthy collection efforts. If such dissipation occurs, then those collection efforts must once again be initiated in order to locate any additional remaining assets. Significant public resources have already been expended to locate the current assets necessary to secure the money judgment. This Court has a well-documented history of concern regarding these defendants' propensity to engage in fraudulent conduct regarding others' money and their own assets; consequently, asset freeze provisions have been included in the TRO, the Preliminary Injunction, and in the instant Amended Civil Contempt Order. In light of these defendants' past fraudulent behavior and the Court's well-documented concerns regarding possible dissipation of assets by the defendants, the Court

finds that the harm to the plaintiff and the harm to the public at large if the stay is not granted far outweighs any harm to the defendants if the stay is not granted.

The Court concludes that the defendants have not carried their burden as to why a stay should be granted; and therefore, the issuance of a stay is not appropriate in this case. The Court does not believe that the defendants are likely to succeed on appeal, nor does the Court believe that the prejudice to defendants outweighs the prejudice to the plaintiff and the public. The defendants' motion to stay the Amended Civil Contempt Order pending appeal will be denied.

Accordingly,

**IT IS HEREBY ORDERED** that the defendants' motion to stay July 30, 2008 Amended Civil Contempt Order pending appeal (#276) be and is **DENIED**.

Dated this 16th day of October, 2008.



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UNITED STATES DISTRICT JUDGE

**Coates, Pamela**

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**U.S. District Court**

**Eastern District of Missouri (LIVE)**

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**ORDER - IT IS HEREBY ORDERED** that the defendants motion to stay July 30, 2008 Amended Civil Contempt Order pending appeal (#276) be and is **DENIED**. Signed by Honorable Stephen N Limbaugh, Jr on 10/16/08. (LAH, )

**4:96-cv-2225 Notice has been electronically mailed to:**

Leonard J. Frankel lfrankel@frankelrubin.com, jfrankel@sbcglobal.net

Gerald P. Greiman ggreiman@spencerfane.com, alindner@spencerfane.com, esolverud@spencerfane.com, nhlewis@spencerfane.com

Erik O. Solverud esolverud@spencerfane.com, kmm@spencerfane.com, mcummins@spencerfane.com

Michael J. Roessner michael.j.roessner@usdoj.gov, central.taxcivil@usdoj.gov

Melinda Claybaugh mclaybaugh@ftc.gov

10/16/2008

Joshua S. Millard jmillard@ftc.gov

Gary Owen Caris gcaris@mckennalong.com, pcoates@mckennalong.com

Lesley Anne Hawes lhawes@mckennalong.com, pcoates@mckennalong.com

Randall K. Edwards randallkedwards@yahoo.com

Robert T. McAllister rtmcallister@qwest.net, sarah\_culver@qwest.net

**4:96-cv-2225 Notice has been delivered by other means to:**

George Gakoumis  
841 Edge Hill Road  
Glenside, PA 19038

Anthony G. Kirby(Terminated)  
P.O. Box 409  
New Alexandria, PA 15670

Brian Lovett(Terminated)  
1416 W. Wolfram St. #1  
Chicago, IL 60657-4117

Michael Singer  
4475 South Pecos Road  
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