

**ROBB EVANS OF
ROBB EVANS & ASSOCIATES LLC
Receiver of I Works, Inc., et al. and
the Assets of Jeremy Johnson**

11450 Sheldon Street
Sun Valley, California 91352-1121
Telephone No.: (818) 768-8100
Facsimile No.: (818) 768-8802

**Federal Trade Commission v. Jeremy Johnson, I Works, Inc., et al.
CASE No. 2:10-CV-02203-MMD-GWF**

Notice of Motion and Motion for Order:

- (1) Directing Issuance of Pacific Mercantile Bancorp Stock to the Receiver and Authorizing the Receiver to Sell Stock; and**
- (2) Granting Relief from Local Rule 66-5 Pertaining to Notice to Creditors;**

Memorandum of Points and Authorities;

Declaration of Gary Owen Caris in Support Thereof

Filed March 9, 2016

1 BART K. LARSEN (Nev. SBN 008538)
 blarsen@klnevada.com
 2 SHLOMO S. SHERMAN (Nev. SBN 009688)
 ssherman@klnevada.com
 3 KOLESAR & LEATHAM, CHTD.
 400 South Rampart Boulevard, Suite 400
 4 Las Vegas, NV 89145
 Telephone: (702) 362-7800
 5 Direct: (702) 889-7752
 Facsimile: (702) 362-9472
 6

7 GARY OWEN CARIS
 gary.caris@dentons.com
 LESLEY ANNE HAWES
 8 lesley.hawes@dentons.com
 DENTONS US LLP
 9 300 South Grand Avenue, 14th Floor
 Los Angeles, California 90071, United States
 10 Telephone: 213.688.1000
 Facsimile: 213.243.6330
 11

12 Attorneys for Receiver
**ROBB EVANS OF ROBB EVANS &
 ASSOCIATES LLC**
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14 **UNITED STATES DISTRICT COURT**
 15 **DISTRICT OF NEVADA**
 16

17 FEDERAL TRADE COMMISSION,
 18 Plaintiff,
 19 v.
 20 JEREMY JOHNSON, individually, as officer
 of Defendants I Works, Inc., etc., et al.,
 21 Defendants.
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Case No. 2:10-CV-02203-MMD-GWF

**NOTICE OF MOTION AND MOTION
 FOR ORDER: (1) DIRECTING
 ISSUANCE OF PACIFIC MERCANTILE
 BANCORP STOCK TO THE RECEIVER
 AND AUTHORIZING RECEIVER TO
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27 PLEASE TAKE NOTICE that Robb Evans of Robb Evans & Associates LLC
 28 (“Receiver”), the Receiver pursuant to the Court’s Preliminary Injunction Order issued February

1 10, 2011, hereby moves the Court for the following relief:

2 1. An order directing that Pacific Mercantile Bancorp ("PMB") forthwith issue the
3 shares of common stock being held for the benefit of Jeremy Johnson ("Johnson"), based on the
4 5,000 Preferred Class A shares held by Johnson as of the commencement of the receivership that
5 have been converted to common stock (the "PMB Shares"), estimated to be 79,739 shares, with
6 the PMB Shares to be registered on the books of PMB and issued in the name of "Robb Evans of
7 Robb Evans & Associates LLC as Receiver for I Works, Inc., the other Corporate Defendants,
8 their subsidiaries, affiliates, successors and assigns, and over the assets of Jeremy Johnson" and
9 transferred to the Receiver for disposition as set forth herein, and to take the foregoing actions
10 without requirement of a lost certificate bond or other form of security as Johnson has not tendered
11 the Preferred Class A share certificate to the Receiver;

12 2. An order authorizing the Receiver to liquidate the PMB Shares, after they are
13 transferred to the Receiver on behalf of the receivership estate, in a commercially reasonable
14 manner on the NASDAQ stock exchange where such shares are publicly traded at such times, in
15 such amounts and in such manner as the Receiver may deem reasonable and appropriate in its
16 discretion and business judgment;

17 3. An order authorizing the Receiver to execute all documents and instruments
18 necessary or convenient to complete, implement, and effectuate the transfer of the PMB Shares to
19 the Receiver on behalf of the estate and to liquidate the PMB Shares for the benefit of the estate;

20 4. An order authorizing the Receiver to permit and/or cause to be paid in connection
21 with the liquidation of the PMB Shares all reasonable and necessary brokerage fees, brokerage
22 commissions and related sales expenses to effectuate and complete the liquidation of the PMB
23 shares in a commercially reasonable manner, as determined in the discretion and business
24 judgment of the Receiver; and

25 5. An order deeming notice of this Motion to be sufficient under Local Civil Rule 66-
26 5 based on the service of a notice of the filing of this Motion and the Motion on all parties and
27 service of a notice of the filing of the Motion on all known non-consumer creditors of the estate
28 and on all known taxing authorities with a potential claim in the receivership estate concurrent

1 with the filing of this Motion with the Court, but not on the tens of thousands of potential
2 consumer creditors.

3 This Motion is made pursuant to 28 U.S.C. § 2001 and 2004 and Local Civil Rules 66-5
4 and 66-10 and other applicable law and is based upon this Notice of Motion and Motion, the
5 separate Notice of Filing of the Motion served concurrently herewith, the accompanying
6 Memorandum of Points and Authorities, the Declaration of Gary Owen Caris filed in support
7 hereof, any reply, on all pleadings, records and files of the Court in this action of which the
8 Receiver requests judicial notice, and upon all other evidence and arguments of counsel as may be
9 presented to the Court by the Receiver in support of this Motion.

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11 DATED: March 9, 2016

BART K. LARSEN
SHLOMO S. SHERMAN
KOLESAR & LEATHAM, CHTD.

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DENTONS US LLP
GARY OWEN CARIS
LESLEY ANNE HAWES

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By: /s/ Gary Owen Caris

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Gary Owen Caris
Lesley Anne Hawes

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Attorneys for Receiver
**ROBB EVANS OF ROBB EVANS &
ASSOCIATES LLC**

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION AND SUMMARY OF RELEVANT FACTS**

3 On January 13, 2011, the Receiver was appointed Temporary Receiver over I Works, Inc.
4 ("I Works"), numerous other Corporate Defendants as defined in the Temporary Restraining Order
5 and over the assets of defendant Jeremy Johnson (collectively the "Receivership Defendants").
6 Pursuant to the Preliminary Injunction Order entered February 10, 2011, the Receiver has been
7 appointed permanent Receiver over the Receivership Defendants. On March 25, 2013, the Court
8 entered its Order granting the Receiver's Motion for Order Clarifying Preliminary Injunction
9 Order and for Further Instructions Regarding Scope of Receivership Defendants under Preliminary
10 Injunction Order and Report of Receiver's Financial Reconstruction and Granting Relief from
11 Local Rule 66-5 Pertaining to Notice to Creditors ("Clarifying Order") pursuant to which the
12 Court confirmed the status of numerous entities and properties as assets of the receivership estate.

13 Under the Preliminary Injunction Order, the Receiver is directed to maintain and preserve
14 assets of the receivership estate. Prel. Inj. (Doc. 130), Section XV.E. In order to preserve the
15 value of the assets for the benefit of consumers and creditors, on May 27, 2011, the Receiver filed
16 his first motion seeking authorization from the Court to list and market for sale various real
17 properties and personal properties of the receivership estate. That motion was granted, and the
18 Receiver has since filed a number of other motions requesting authorization to list, market and sell
19 assets of the receivership estate in order to preserve their value and avoid potential deterioration of
20 their value and administrative expenses associated with their management.

21 One of the assets of the receivership estate are shares of stock in Pacific Mercantile
22 Bancorp ("PMB") held in the name of Jeremy Johnson. Jeremy Johnson's shares in PMB
23 originally consisted of 5,000 Preferred Series A shares, Stock Certificate No. A-32. A copy of the
24 stock certificate is attached as Exhibit 1 to the Declaration of Gary Owen Caris in support of this
25 Motion.¹ Subsequently, all Preferred Series A shares were converted by PMB to common stock,
26 including those held by Johnson. (The common stock in Jeremy Johnson's name is hereinafter

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28 ¹ The original stock certificate was not turned over to the Receiver by Johnson.

1 referred to as the "PMB Shares.") The Receiver has been advised that there are 79,739 PMB
2 Shares. While the PMB Shares have been converted to common stock, the new common stock
3 share certificate has not yet been issued by PMB.

4 The Receiver through counsel has conferred with PMB regarding the conversion, the PMB
5 Shares, and the steps needed to cause the PMB Shares to be issued in the name of the receivership
6 estate. PMB's common stock is publicly traded on the NASDAQ stock exchange. The Receiver is
7 advised that PMB is prepared to issue a stock certificate for the PMB Shares in the name of the
8 Receiver on behalf of the estate (Robb Evans of Robb Evans & Associates as Receiver for I
9 Works, Inc., the other Corporate Defendants, their subsidiaries, affiliates, successors and assigns,
10 and over the assets of Jeremy Johnson) and will transfer the PMB Shares on PMB's books and
11 records to the name of the Receiver, upon issuance of a Court order directing such issuance. As
12 set forth in the accompanying declaration of Gary Owen Caris, Robert E. Sjogren, the Chief
13 Operating Officer and General Counsel of PMB and Pacific Mercantile Bank, the wholly owned
14 subsidiary of PMB, has reviewed the Motion and proposed order filed herewith, and PMB
15 supports the relief sought in the Motion and supports issuance of the proposed order granting the
16 Motion. The Receiver's counsel has confirmed that the PMB Shares can be liquidated through the
17 NASDAQ stock exchange once issued and transferred to the Receiver. The NASDAQ is a public
18 exchange ensuring that the sale will be for market value. The current price for which PMB stock
19 has been trading on the NASDAQ is around \$7 per share. If that market value is maintained, the
20 recovery to the estate from liquidation would exceed \$500,000.

21 The Receiver seeks authorization to consult with a stockbroker to assist the Receiver in
22 effectuating the liquidation of the PMB Shares in a commercially reasonable manner and to
23 maximize value, while limiting the risk to the estate from value fluctuations inherent in the stock
24 market. The Receiver further seeks approval of the Court to pay any reasonable and necessary
25 brokerage fees, brokerage commissions and related sales expenses in connection with the
26 liquidation of the PMB Shares through a registered stockbroker.

27 The stock market is inherently volatile with valuations changing at intermittent and
28 unpredictable times. When steps to issue and transfer the PMB Shares are completed, the

1 Receiver will seek to liquidate the PMB Shares expeditiously to avoid the effects of such volatility
2 and market fluctuations, although the Receiver anticipates that the PMB Shares will need to be
3 liquidated over a period of weeks or months to avoid flooding the market and adversely affecting
4 the value. If the Motion is granted, the Receiver will consult with a registered stockbroker and
5 other resources to develop an appropriate liquidation plan, guided by the broker and the Receiver's
6 discretion and business judgment.

7 **II. SALE OF THE PMB SHARES ON A PUBLICLY TRADED COMMERCIAL**
8 **MARKET SHOULD BE APPROVED UNDER 28 U.S.C. §§ 2001 AND 2004 AND**
9 **RECEIVERSHIP LAW**

10 Title 28 U.S.C. § 2001 sets forth the procedures pertaining to the sale of real property.
11 Subsection (a) pertains to procedures for the public sale of real property and provides for the sale
12 of real property by public sale at the courthouse where the Receiver was first appointed, at the
13 courthouse where most of the property is located or at such other premises as the Court directs. 28
14 U.S.C. § 2001(a). Section § 2001(b) of title 28 pertains to the sale of real property at private sale
15 and among other things provides for a private sale of real property after notice and a hearing if the
16 Court finds that it is in the best interests of the estate and sets a minimum price of two-thirds of the
17 appraised value for confirmation of a sale of real property by private sale. 28 U.S.C. § 2001(b).
18 As to sales of personal property, section 2004 of Title 28 provides that “Any personal property
19 sold under order or decree of any court of the United States shall be sold in accordance with
20 Section 2001 of this title, unless the court orders otherwise.”

21 The District Court has wide latitude in adopting a procedure for the sale of property and
22 except in cases where abuse is shown, appellate courts will not disturb the exercise of the District
23 Court’s discretion in setting the terms and conditions for a judicial sale or the confirmation
24 thereof. *See United States v. Branch Coal Corp.*, 390 F.2d 7 (3rd Cir. 1968) *cert. den. Sun*
25 *Protection Co. v. U.S.*, 391 U.S. 966, 88 S.Ct. 2034, 20 L.Ed. 2d 878 (1968). The discretion
26 granted in connection with sales of assets is consistent with the broad discretion accorded to the
27 Court sitting in equity in receivership proceedings to make orders concerning the administration
28 and supervision of the estate that will promote equity, efficiency and cost-effectiveness in the

1 estate's administration. *See generally Securities and Exchange Commission v. Hardy*, 803 F.2d
2 1034 (9th Cir. 1986); *Securities and Exchange Commission v. Black*, 163 F.3d 188, 199 (3rd Cir.
3 1998); *Securities and Exchange Commission v. Elliot*, 953 F.2d 1560 (11th Cir. 1992).

4 Compliance with the sale procedures of section 2001(b) for the PMB Shares would neither
5 be appropriate nor beneficial to the estate. The goal and purposes of the sale procedures set forth
6 in section 2001 are to ensure a minimum threshold percentage of the market value of the property
7 is obtained through the sale and that notice is given to the market of potentially interested buyers
8 before the sale is completed. Those goals are met through the proposed liquidation of the PMB
9 Shares on the NASDAQ public stock exchange. Appointment of appraisers to value the stock
10 would be wasteful and of no utility given the publicly established market value of the shares
11 through NASDAQ, that the shares are required to be sold through that exchange as publicly traded
12 stock, and that interested buyers have notice of the opportunity to bid on and purchase the shares
13 through sales on the NASDAQ. The sale on the NASDAQ through a registered stockbroker as
14 proposed herein is inherently commercially reasonable and will yield a fair market value sale for
15 the stock since the fair market value for the shares is set in the open trading market. The Receiver
16 does not intend to flood the market by immediately liquidating all PMB Shares but will use his
17 business judgment, discretion and professional guidance to sell the shares in a manner to promote
18 maximizing the recovery for the estate while limiting the risk to the estate of losses as the market
19 fluctuates.

20 **III. NOTICE OF THIS MOTION IS SUFFICIENT UNDER THE**
21 **CIRCUMSTANCES AND SHOULD BE APPROVED**

22 Local Civil Rule 66-5 provides for service of notice of the hearing on various motions by a
23 Receiver concerning the administration of the estate. That rule provides for service of the notice
24 of hearing on such motions on all creditors of the receivership estate. No hearing has been set on
25 this Motion and the provisions of Local Civil Rule 66-5 do not specifically apply. Nevertheless,
26 the Receiver has served a notice of filing of the Motion on the parties and on all known non-
27 consumer creditors of the estate and on known taxing authorities with a potential claim in the
28 receivership estate ("Notice Parties"), to provide them notice and an opportunity to be heard

1 concerning the Motion. This notice is consistent with notice previously approved by the Court in
2 this case.

3 There are believed to be an extremely large number of potential consumer creditors who
4 may have claims against the Receivership Defendants arising out of the business operations of the
5 Receivership Defendants prior to the Receiver's appointment, although the precise number,
6 identity and location of such consumer creditors have not been determined by the Receiver at this
7 time. Given the Receiver's determination that more than \$332.5 million² in sales revenues were
8 generated by I Works and the related and affiliated entities, the number of consumer creditors is
9 likely in the tens of thousands. It is not realistically possible or beneficial to the estate and its
10 creditors for the Receiver to attempt to identify and serve the potential consumer creditors with
11 notice of this and other similar administrative motions, and the expense and burden on the estate
12 of attempting to effectuate such service would drain the estate's resources and cause undue
13 administrative expense.

14 To the extent that Local Rule 66-5 applies to this Motion, the Receiver seeks an order that
15 notice of this Motion is sufficient if notice of the filing of the Motion is given by serving copies of
16 all motion papers on the parties to the action and the affected lienholders and by serving copies of
17 the notice of filing of the motion on the Notice Parties identified above. The Receiver submits
18 that such service provides sufficient notice and an opportunity for hearing to the interested parties
19 and should be approved as adequate.

20 There is ample authority for approval of the scope and method of notice as set forth above.
21 This Court, as a court of equity supervising the receivership estate, may make appropriate
22 administrative orders governing the receivership, including limitations on and changes in notice
23 and other procedures. *See* F.R.Civ.P. 5(a) and (c) (authorizing the court to modify service
24 procedures when numerous defendants are involved in litigation). In addition, pursuant to Local
25 Rule 66-10, a receiver is directed to administer receivership estates "as nearly as may be in
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27 ² This figure does not include tens of millions of dollars in additional sales revenues addressed by
28 the Receiver in the Report of Receiver's Financial Reconstruction filed on February 3, 2012.

1 accordance with the practice in the administration of estates in Chapter 11 bankruptcy cases.”
2 Orders limiting notice when the Bankruptcy Code or Rules would otherwise require notice to all
3 creditors are routinely granted in bankruptcy cases to promote the expeditious and economical
4 administration of bankruptcy estates. *See In re First Alliance Mortgage Co.*, 269 B.R. 428, 442
5 (C.D. Cal. 2001) (referencing in *dicta* in the court's recitation of facts the bankruptcy court's order
6 limiting notice issued in that case); 11 U.S.C. section 102(1)(A) (defining the phrase "after notice
7 and a hearing" to mean "after such notice as is appropriate in the particular circumstances, and
8 such opportunity for hearing as is appropriate in the particular circumstances"); 11 U.S.C. section
9 105(a) and (d) (granting broad equitable powers to the court to issue orders "necessary or
10 appropriate to carry out the provisions" of title 11 including "prescribing such limitations and
11 conditions as the court deems appropriate to ensure the case is handled expeditiously and
12 economically"); and F.R. Bankr. P. 2002(m) (authorizing the court to enter "orders designating the
13 matters in respect to which, the entity to whom, and the form and manner in which notices shall be
14 sent except as otherwise provided by these rules").

15 **IV. CONCLUSION**

16 For the foregoing reasons, it is respectfully requested that the Court grant relief as
17 requested in the Motion.
18

19 DATED: March 9, 2016

BART K. LARSEN
SHLOMO S. SHERMAN
KOLESAR & LEATHAM, CHTD.

DENTONS US LLP
GARY OWEN CARIS
LESLEY ANNE HAWES

24 By: /s/ Gary Owen Caris
25 Gary Owen Caris
26 Lesley Anne Hawes

27 Attorneys for Receiver
**ROBB EVANS OF ROBB EVANS &
ASSOCIATES LLC**

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DECLARATION OF GARY OWEN CARIS

I, Gary Owen Caris, declare:

1. I am an attorney at law duly licensed to practice before all courts of the State of California and I have been admitted to practice *pro hac vice* before the United States District Court for the District of Nevada in the subject litigation. I am a partner in the firm of Dentons US LLP ("Dentons") on July 1, 2015. I am one of the attorneys primarily responsible for representing Robb Evans of Robb Evans & Associates LLC, the Receiver in this matter ("Receiver"). I have personal knowledge of the matters set forth in this declaration and if I were called upon to testify in these matters, I could and would competently testify thereto.

2. This declaration is filed in support of the Receiver's motion for an order directing Pacific Mercantile Bancorp ("PMB") to issue shares held in the name of Jeremy Johnson (the "PMB Shares") to the Receiver and to authorize the Receiver to liquidate the PMB Shares. I have been primarily responsible for addressing the PMB Shares with PMB.

3. The PMB Shares are assets of the receivership estate since all assets of Jeremy Johnson constitute receivership assets under the Preliminary Injunction Order issued February 10, 2011. The Receiver has a copy of a stock certificate issued to Jeremy Johnson by PMB for 5,000 shares of Preferred Series A Shares, Certificate A-32, a copy of which is attached hereto as Exhibit 1. The Receiver does not have possession of the original share certificate because Johnson never turned it over to the Receiver.

4. The PMB Shares were subsequently converted from preferred to common stock. In my discussions with Robert E. Sjogren, the Chief Operating Officer and General Counsel of PMB and Pacific Mercantile Bank, the wholly owned subsidiary of PMB, I was advised that Johnson's preferred shares were converted by PMB to common stock (the "PMB Shares") and that Johnson presently holds 79,739 shares of common stock of PMB. I have further determined and confirmed with Mr. Sjogren that PMB's common stock is publicly traded on the NASDAQ stock exchange. Mr. Sjogren has indicated that PMB will comply with a Court order directing that the PMB Shares be issued in the name of the Receiver on behalf of the receivership estate and will transfer the shares on its books accordingly. Mr. Sjogren has advised me that he has reviewed the subject

EXHIBIT 1

EXHIBIT 1

INCORPORATED UNDER THE LAWS OF THE STATE OF CALIFORNIA

COPY

Number A-32

5,000 Shares

**PACIFIC MERCANTILE BANCORP
SERIES A CONVERTIBLE 10% CUMULATIVE PREFERRED STOCK**

Authorized Capital Stock: 22,000,000 Shares, No. Par Value Per Share

Common Stock Authorized: 20,000,000 Shares
Preferred Stock Authorized: 2,000,000 Shares

Authorized Series A Convertible 10% Cumulative Preferred Stock: 155,000 Shares

THIS CERTIFIES THAT Jeremy Johnson IS THE REGISTERED
HOLDER OF Five Thousand (*5,000*) SHARES OF SERIES A CONVERTIBLE 10% CUMULATIVE PREFERRED STOCK OF
PACIFIC MERCANTILE BANCORP

HEREINAFTER DESIGNATED "THE CORPORATION," TRANSFERABLE ON THE SHARE REGISTER OF THE CORPORATION
UPON SURRENDER OF THIS CERTIFICATE PROPERLY ENDORSED OR ASSIGNED.

A STATEMENT OF THE RIGHTS, PREFERENCES, PRIVILEGES AND RESTRICTIONS GRANTED TO OR
IMPOSED UPON THE RESPECTIVE CLASSES OF SHARES OF STOCK OF THE CORPORATION AND UPON
THE HOLDERS THEREOF MAY BE OBTAINED BY ANY SHAREHOLDER, UPON REQUEST AND WITHOUT
CHARGE, AT THE PRINCIPAL OFFICE OF THE CORPORATION.

THE SHARES REPRESENTED HEREBY ARE RESTRICTED AS TO TRANSFER AS DESCRIBED OR SET FORTH
ON THE REVERSE SIDE HEREOF.

WITNESS the seal of the Corporation, and the signatures of its duly authorized officers this 25th day of June, 2010.

Barbara J. Salame
Secretary

Jeremy Johnson
President