UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
CIVIL MINUTES—GENERAL

Case No.	**ED CV 18-2104-DMG (PLAx)**	Date	September 9, 2020
Title	***Federal Trade Commission v Jason Cardiff, et al.***	Page	1 of 6

Present: The Honorable DOLLY M. GEE, UNITED STATES DISTRICT JUDGE

KANE TIEN	NOT REPORTED
Deputy Clerk	Court Reporter
Attorneys Present for Appellant(s)	Attorneys Present for Appellee(s)
None Present	None Present

Proceedings: IN CHAMBERS—ORDER RE DEFENDANTS JASON CARDIFF AND EUNJUNG CARDIFF'S *EX PARTE* APPLICATION TO STAY [463]

On August 26, 2020, Defendants Jason Cardiff and Eunjung Cardiff and Intervenor Virus Protection Lab, Inc.'s ("VPL") filed an *Ex Parte* Application to Stay summary judgment and all proceedings in this action pending the U.S. Supreme Court's resolution of a pair of cases: *FTC v. Credit Bureau Center*, 937 F.3d 764 (7th Cir. 2019), *cert. granted*, 2020 WL 3865251 (U.S. July 9, 2020) and *FTC v. AMG Capital Management, LLC*, 910 F.3d 417 (9th Cir. 2018), *cert. granted*, 2020 WL 3865250 (U.S. July 9, 2020) (together, the "Consolidated Appeals"). [Doc. # 463.] The Cardiffs and VPL also seek a stay pending the outcome of Jason Cardiff and VPL's appeal of the Court's grant of a Preliminary Injunction freezing VPL's assets and putting it under receivership [Doc. # 389], docketed in the Ninth Circuit Court of Appeals as Case No. 20-55858 [Doc. # 458]. Plaintiff the Federal Trade Commission ("FTC") and the Temporary Receiver filed oppositions [Doc. ## 473, 474, 475], and the Cardiffs and VPL filed a reply [Doc. # 477].

For the reasons stated below, the Court **DENIES** the *Ex Parte* Application.

I.
BACKGROUND

On October 10, 2018, the FTC filed a Complaint for Permanent Injunction and Other Equitable Relief under Section 13(b) of the FTC Act, 15 U.S.C. § 53(b), against the Cardiff Defendants, among other Defendants, alleging that the Cardiffs "have for years operated a fraudulent multi-pronged scheme that has bilked consumers out of millions of dollars through baseless advertising claims for products that purport to alleviate serious health conditions, while also enrolling consumers in unwanted autoship programs that have resulted in millions of dollars in unauthorized charges." Compl. at ¶ 1 [Doc. # 1]. Section 13(b) provides "[t]hat in proper cases the Commission may seek, and after proper proof, the court may issue, a permanent injunction." 15 U.S.C. § 53(b). That day, the Court issued a Temporary Restraining Order freezing the Cardiff Defendants' assets and appointing a Temporary Receiver. [Doc. # 29.] On November 8, 2018, the Court entered a Preliminary Injunction maintaining the asset freeze and receiver appointment. [Doc. # 59.]

On June 24, 2020, the FTC filed an emergency non-noticed *Ex Parte* Application for a TRO with asset freeze and other equitable relief and for an Order to Show Cause ("OSC") why the assets of VPL, a new company seemingly controlled by Jason Cardiff, are not "Receivership Property" within the meaning of the 2018 Preliminary Injunction. [Doc. # 370.][1] The Court granted the FTC's request for a TRO and asset freeze, appointed the Temporary Receiver over VPL and its assets, and permitted the FTC and the Receiver to obtain information and documents on an expedited basis regarding Cardiff's involvement with and relationship to VPL, the nature and disposition of VPL's assets, and compliance with the TRO. June 24, 2020 TRO at 6. [Doc. # 352.] The Court also issued an OSC why a preliminary injunction should not issue and granted VPL limited intervention to protect its rights in its assets in response to the Court's OSC, to the extent Jason Cardiff is unable to protect VPL's rights. [Doc. # 368.]

On July 7, 2020, the Court issued the Preliminary Injunction to cover VPL, maintaining the asset freeze and the Receiver's control over VPL. [Doc. ## 388, 389.] In subsequent weeks, Jason Cardiff and VPL moved unsuccessfully for the removal of the Receiver's control over VPL. [*See* Doc. # 403.] In addition, on August 6 and 7, 2020, the parties filed cross-motions for summary judgment, in accordance with an extended schedule requested by the Cardiffs and expanded page limits requested by Plaintiff. [*See* Doc. ## 422, 423, 441]. Opposing briefs are due on September 14, 2020.

On August 19, 2020, Jason Cardiff and Intervenor VPL filed a notice of appeal of the Court's Preliminary Injunction as to VPL to the Ninth Circuit. [Doc. # 451.] One week later, on August 26, 2020, Cardiff and VPL filed the instant *Ex Parte* Application for a stay pending the resolution of that appeal and the Consolidated Appeals to the U.S. Supreme Court, which involve a circuit split on whether Section 13(b) of the FTC Act provides for equitable monetary damages.

II.
DISCUSSION

A. *Ex Parte* Relief

As an initial matter, the Cardiffs continue to abuse the *ex parte* procedures in this case. The Supreme Court granted *certiorari* on the Consolidated Appeals on July 9, 2020, after which point the Cardiffs could have filed a properly noticed motion to stay. Similarly, Jason Cardiff and VPL waited five weeks to file their appeal of the Court's July 7, 2020 Preliminary Injunction order, instead of promptly appealing and filing a motion to stay. Instead, Cardiff filed for a specific summary judgment briefing schedule—*ex parte*, of course—and even filed his motion for summary judgment before raising any issues relating to a stay.

[1] Although initially filed sealed and *in camera*, the FTC's *Ex Parte* Application and other moving papers are now publicly filed on the docket. [Doc. ## 348-50, 370-74.]

As the Cardiffs should be well aware, lack of good cause to file *ex parte* is reason enough to deny the application. Initial Standing Order ¶ 10 [Doc. # 319]. Moreover, the Cardiffs do not even attempt to show irreparable prejudice such that they should "go to the head of the line in front of all other litigants and receive special treatment" or that they are "without fault in creating the crisis that requires ex parte relief, or that the crisis occurred as a result of excusable neglect." *Mission Power Eng'g Co. v. Cont'l Cas. Co.*, 883 F. Supp. 488, 492-93 (C.D. Cal. 1995) (discussing proper use of the *ex parte* procedure).

Nevertheless, given that the matter is fully briefed and to promote efficiency and conserve judicial resources, the Court addresses the merits of the Cardiffs' and VPL's argument for a stay pending the resolution of the Consolidated Appeals. Continued abuse of the *ex parte* application process, however, will result in the imposition of sanctions.

B. Stay Pending Decisions on the Consolidated Appeals

Different standards apply to the two different stays that the Cardiffs and VPL's request. The Court first examines their request for a stay of the summary judgment motions pending the U.S. Supreme Court's decisions on the Consolidated Appeals.

"A district court has inherent power to control the disposition of the causes on its docket in a manner which will promote economy of time and effort for itself, for counsel, and for litigants." *Landis v. North Am. Co.*, 299 U.S. 248, 254–55 (1936); *CMAX, Inc. v. Hall*, 300 F.2d 265, 268 (9th Cir. 1962) (same). For this reason, a district court has discretion to stay proceedings pending before it. The Supreme Court has emphasized that "[a] stay is not a matter of right, even if irreparable injury might otherwise result" but "is instead an exercise of judicial discretion." *Nken v. Holder*, 556 U.S. 418, 433–34 (2009). "The party requesting a stay bears the burden of showing that the circumstances justify an exercise of that discretion." *Id.*

In exercising its discretion, the court must weigh the following competing interests: "possible damage which might result from the granting of the stay, the hardship or inequity which a party may suffer in being required to go forward, and the orderly course of justice measured in terms of the simplifying or complication of issues, proof, and questions of law which could be expected to result from a stay." *Lockyer v. Mirant Corp.*, 398 F.3d 1098, 1110 (9th Cir. 2005) (quoting *CMAX*, 300 F.2d at 268). When "even a fair possibility" of harm may result from a stay, the proponent of the stay "must make out a clear case of hardship or inequity in being required to go forward. . . . Only in rare circumstances will a litigant in one cause be compelled to stand aside while a litigant in another settles the rule of law that will define the rights of both." *Landis*, 299 U.S. at 255.

1. Orderly course of justice

The breadth of Section 13(b) equitable remedies is squarely implicated in this case, in which the FTC is seeking equitable monetary relief of $18.2 million, the total amount that consumers paid to Defendants. Receiver's November 2, 2018 Report with Erratum at 9 [Doc. # 53]; *see* George Decl., Att. 1 [Doc. #381-3]. Under Ninth Circuit precedent, Section 13(b) "gives the federal courts broad authority to fashion appropriate remedies for violations of the Act" and includes the "'authority to grant any ancillary relief necessary to accomplish complete justice,'" including the "power to order restitution." *F.T.C. v. Pantron I Corp.*, 33 F.3d 1088, 1102 (9th Cir. 1994) (quoting *F.T.C. v. H.N. Singer, Inc.*, 668 F.2d 1107, 1113 (9th Cir. 1982)). In *AMG Capital*, one of the Consolidated Appeals, a three-judge panel on the Ninth Circuit held that it was "bound by [its] prior interpretation of § 13(b)" that authorized district courts to award equitable monetary relief in actions under Section 13(b). 910 F.3d at 427. The panel acknowledged, however, that an argument for a narrower reading of Section 13(b), which describes only "injunctions" as a remedy, "has some force." *Id.*at 426. In *Credit Bureau Center*, the Seventh Circuit adopted that narrower reading and held that "section 13(b)'s permanent-injunction provision does not authorize monetary relief," overturning its prior precedent. 937 F.3d at 786. By granting *certiorari* in the Consolidated Appeals, the U.S. Supreme Court is expected to take up the question of whether courts may grant equitable monetary relief under Section 13(b).

The Cardiffs and VPL argue that if the Supreme Court affirms the Seventh Circuit in *Credit Bureau Center* or otherwise narrows the interpretation of "injunction" in Section 13(b) of the FTC Act, the FTC will be unable to win a monetary judgment in this case. *Ex Parte* App. at 12. The Cardiffs and VPL have not met their burden to show that the orderly course of justice favors granting a stay of the motions for summary judgment. The FTC is correct that the Supreme Court's decision does not affect issues of liability currently pending in the parties' cross-motions for summary judgment. Granting the stay therefore would not conserve the Court's and the parties' resources at the summary judgment stage. While a stay of the trial may be appropriate due to uncertainty regarding the breadth and scope of the remedy and the practical likelihood that the pandemic will affect the trial date, that is a bridge that the parties and the Court can cross as the trial date approaches.

Accordingly, the Court finds that "economy of time and effort for [the Court], for counsel, and for litigants" is not best promoted by staying the action until the U.S. Supreme Court renders its decision in the Consolidated Appeals. *Landis*, 299 U.S. at 254–55.

2. Possible damage which might result from granting a stay

No harm will befall the Cardiffs due to a denial of a stay because the merits of the pending cross-motions for summary judgment turn on Defendants' liability and have nothing to do with the monetary remedy.

The FTC argues that a stay would harm the Cardiffs' consumer victims by delaying resolution of this case and permanent injunctive relief. FTC Opp. at 5 [Doc. # 475]. But the FTC does not respond to Cardiff's assertion that Defendant Redwood Scientific Technologies, Inc. has already ceased all alleged misconduct. In any event, the Preliminary Injunction already in place enjoins all of the allegedly harmful activity identified by the FTC. Therefore, a permanent injunction is not necessary to prevent damage to the public pending a decision in the Consolidated Appeals.

As for monetary relief, the Ninth Circuit has held that "a delay in . . . monetary recovery" alone, without any injunctive or declaratory relief, would not justify a stay. *Lockyer*, 398 F.3d 1098, 1110 (9th Cir. 2005). It is also not clear that the consumer victims would be harmed by a stay at this juncture, given that their recovery, if any, will inevitably be delayed by appeals and possible trial postponements due to the COVID-19 pandemic.

On balance, the considerations of possible damage are in equipoise and the Court finds that no harm would result from either the grant or denial of a stay at this juncture.

3. Hardship or inequity which a party may suffer in being required to go forward

Cardiff and VPL assert that having to oppose the FTC's summary judgment motion and potentially litigate this case through trial constitutes hardship or inequity because this case would be mooted if the U.S. Supreme Court concludes that the FTC cannot seek equitable monetary relief under Section 13(b). *See Ex Parte* App. at 8.

The Ninth Circuit has determined that "being required to defend a suit does not constitute a 'clear case of hardship or inequity' within the meaning of *Landis*." *Lockyer*, 398 F.3d at 1112. Moreover, Cardiff himself specifically requested the current summary judgment briefing schedule, and the FTC is correct that the resolution of the Consolidated Appeals will affect only the relief in this matter, not the central issue of liability raised in the cross-motions for summary judgment. The FTC also insists that the case will move forward "even if the Consolidated Appeals are resolved on the terms most ideal for the Cardiffs." FTC Opp. at 6.

In sum, Cardiff and VPL have not shown what hardship or inequity they will suffer in being required to go forward with the suit.

C. Stay Pending Appeal of the Preliminary Injunction

The Cardiffs and VPL also seek a stay of the preliminary injunction. A district court may grant a stay pending appeal of a matter upon a party's motion. Fed. R. App. P. 8. The decision to stay an action lies within the district court's sound discretion. *See Leiva-Perez v. Holder*, 640 F.3d

962, 965 (9th Cir. 2011). When determining whether to issue a stay, courts consider the following four factors:

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

Id. at 964 (quoting *Nken v. Holder*, 556 U.S. 418, 426 (2009)). The first two factors "are the most critical." *Lair v. Bullock*, 697 F.3d 1200, 1204 (9th Cir. 2012) (quoting *Nken*, 556 U.S. at 434).

This Court has previously rejected the Cardiffs' and VPL's arguments regarding the effect of *Liu v. S.E.C.*, --- S.Ct. ----, 2020 WL 3405845 (U.S. June 22, 2020) on the equitable relief the FTC may seek in this action and sees no reason to find that this argument is any more likely to succeed in the Ninth Circuit. *See* July 7, 2020 Order Granting Preliminary Injunction at 6-9 [Doc. # 388]. A recent Ninth Circuit case applying *Liu* in the context of an action arising under the Securities and Exchange Act does not alter the Court's conclusion that *Liu*'s holding is directly applicable to SEC actions, but not to FTC actions. *See Ex Parte* App. at 21-22 (citing *S.E.C. v. Yang*, 19-55289 (9th Cir. Aug. 6, 2020)).

The Court also does not find that the Cardiffs or VPL will be irreparably injured absent a stay, given that the parties and the Receiver have recently entered into a joint stipulation that allows VPL to operate legally and potentially profitably while Jason Cardiff receives a salary for his work securing new contracts. [Doc. # 466.] The failure to show likelihood of success on the merits and irreparable harm counsels against granting a stay pending appeal.

IV.
CONCLUSION

In weighing the competing interests, the Court concludes that a stay of the cross-motions for summary judgment and the preliminary injunction relating to VPL is unwarranted and therefore **DENIES** Cardiff and VPL's *Ex Parte* Application for a stay of proceedings. This ruling is without prejudice to a future request to stay the trial, if indeed a trial becomes necessary following the Court's ruling on the cross-motions for summary judgment.

IT IS SO ORDERED.