UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FEDERAL TRADE COMMISSION,	*	
Plaintiff/Appellee,	*	No. 13-15822
	*	
v.	*	
	*	PRELIMINARY
	*	INJUNCTION
ALPHA YANKEE, LLC, ET AL.	*	APPEAL
Appellants.	*	
	*	
*	*	*

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)

ANSWERING BRIEF OF PLAINTIFF/APPELLEE FEDERAL TRADE COMMISSION

JONATHAN E. NUECHTERLEIN
General Counsel

Of Counsel:

JOHN F. DALY
Deputy General Counsel for Litigation

COLLOT GUERARD
Attorney
BUREAU OF CONSUMER PROTECTION

JOHN ANDREW SINGER
Attorney
OFFICE OF THE GENERAL COUNSEL
FEDERAL TRADE COMMISSION
600 Pennsylvania Avenue, NW
Washington, DC 20580
(202) 326-3234 (Singer)

Gary Owen Caris
Lesley Anne Hawes
McKenna Long & Aldridge
300 South Grand Ave. – 14th Floor
Los Angeles, CA 90071
(213) 688-1000
Attorneys for Appellee/Receiver Robb Evans of Robb Evans & Associates LLC

Michael K. Wall
Joseph S. Kistler
Jacob A. Reynolds
Hutchison & Steffen
10080 West Alta Drive – Suite 200
Las Vegas, NV 89145
(702) 385-2500
Attorneys for Appellants

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

CASES **PAGE**

FEDERAL STATUTES

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 this appeal under 28 U.S.C. §§ 1292(a)(1) and (2), as it is an appeal 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 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 the Receiver's Motion for Order Clarifying Preliminary

Injunction Order, filed responses to the Motion and submitted 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 (1) the assets are 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.

The Commission commenced this action by filing a Complaint in the District of Nevada on December 21, 2010 (DCDE 1).[1] The Complaint alleges that the Defendants, Jeremy Johnson, nine other individuals, and 61 corporations, all 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 consumers' knowledge or authorization.

[1] 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 Appellants' Record Excerpts, they are contained in the Commission's Supplemental Record Excerpts.

On January 13, 2011 (DCDE 44), the district court entered a Temporary Restraining Order that, *inter alia*, appointed a temporary Receiver over the named 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 – a term that comprises the assets of Jeremy Johnson, as well as the named Corporate Defendants and "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). Appellants expressly disclaim any challenge to the provisions of Preliminary Injunction itself. (Appellants' Brief ("Vowell Br.") at 4).

Following his appointment, the Receiver conducted an extensive investigation into Jeremy Johnson and the Receivership Defendants and their financial affairs and assets, and filed two reports analyzing these affairs and assets. (DCDE 127-1 (Feb. 8, 2011) (26 pages with 80 pages of

documentary evidence as exhibits) and DCDE 464 (Feb. 3, 2012) (79 pages with 831 pages of documentary evidence as exhibits). These reports, especially the Second Report, painstakingly document the lines of control and the flow of funds and assets between Jeremy Johnson and the named Corporate Defendants and the Appellants. On the basis of the evidence developed by this investigation, 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 Clarification Motion did not, as Appellants contend, seek "to expand the reach of the Preliminary Injunction." (Vowell Br. at 5, 27 and 30).

On March 25, 2013, following the submission of responses to the Clarification Motion, and the submission of evidence of each respondent's choice, and a hearing, the district court issued an Order clarifying the scope of the Preliminary Injunction ("Clarification Order") (DCDE 900). Among other things, based on the substantial evidence submitted by the Receiver, the district court found that the receivership estate included 59 entities that, while nominally owned by Todd Vowell and his associates (including his wife, Sheree Vowell, and his brother, Receivership Defendant Jason Vowell), were in fact controlled and beneficially owned by Jeremy Johnson or other named Corporate Defendants. The district court also confirmed that

the assets in the possession of those entities, and any assets titled to Todd Vowell, Sheree Vowell, and Jason Vowell, are part of the receivership estate because they, too, are controlled and beneficially owned by Jeremy Johnson or the other named Corporate Defendants. (DCDE 900 at ¶ 3 and Exh. A thereto).

On April 24, 2013, Appellants noticed this appeal of the Clarification Order (DCDE 969), docketed as No. 13-15822. The Appellants in this appeal are Todd Vowell, Sheree Vowell, and 44 entities (the "entity Appellants") in which the Vowells, directly or indirectly, have nominal ownership interests.[2] On April 30, 2013, the Court issued a Show Cause Order as to why this appeal should not be dismissed for lack of appellate

[2] The 44 entities participating in the appeals are: Alpha Yankee, LLC; C2 Holdings, LLC; Capital Energy Corp.; Cerberus Management, LLC; Chateau Circle, LLC; Choker Block, LLC; Commerce Financial, LLC; Digital Currency, LLC; Dreamland Capital, LLC; ePayment Solutions, LLC; Executive Service Center, LLC; Fishhook Partners, LLC; Flatline Investments, LP; Flying High Enterprises, LLC; IC Development, LLC; KATTS, LLC; Kingfish Management, LLC; Kombi Capital, LLC; Liahona Holdings, LP; Market Mastery Trading, LLC; Mastery Merchant, LLC; Money Master for Life; Omaha Eight, LLC; Online Weight Loss; Paydirt Capital, Inc.; Paydirt Management, Inc.; Paydirt Properties, LLC; Paydirt, LP; Powder Monkeys, LLC; Scud Runner, LLC; Silvernix Holdings, LLC; SRLA Association, LLC; SRLA, LLC; Summerset Ranch, LLC; Taggart Management, LLC; TJJ Properties, LLC; TLV Enterprises, Inc.; Treadstone Partners, LP; Triple Play Group, LLC; Triple Seven, Inc.; Triple Seven, LLC; Triple Seven, LP; T. Vowell Sole Proprietorship Capital Holding; and Woodsview Holdings, LLC.

jurisdiction and stayed all briefing. Following submissions by all parties, on May 29, 2013, the Court discharged the Order to Show Cause and issued a new briefing schedule.[3]

Appellants do not contest the factual determinations made in the Order on appeal beyond "categorically" denying their accuracy. Instead, they focus on supposed flaws in the district court's assertion of jurisdiction and in the procedures it employed. But the district court had ample authority to exercise jurisdiction over the Appellants and the assets in their possession once it found, on the basis of overwhelming evidence, that they were controlled and beneficially owned by Defendant Jeremy Johnson and the named Corporate Defendants. Contrary to Appellants' suggestion, the district court did not relieve the Receiver of his burden of proving control or beneficial ownership; instead, it found that he had easily established a *prima facie* case and that Appellants had produced no meaningful rebuttal evidence. The procedural protections afforded Appellants were more than

[3] Two other appeals of the Clarification Order were filed, docketed as Nos. 13-15768 (by Relief Defendants Sharla Johnson, Orange Cat Investments, LLC, Zibby, LLC, and Zibby Flight Service, LLC) and 13-15778 (by Defendants Duane Fielding, Anthon Holdings Inc., and Network Agenda Inc., and nonparties iPrerogative, LLC, Rotortrends, LLC, SLI, LLC, and Trigger, LLC). Those appeals were consolidated for briefing. The Court directed that all three appeals of the Clarification Order be calendared together for argument.

sufficient, particularly in light of the preliminary nature of the proceedings, which only determined immediate possession of assets and not their ultimate disposition.

STATEMENT OF RELEVANT FACTS

Introduction

The substance of the underlying case – the Internet-based scam the 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 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 addition to his scam, Jeremy Johnson took in substantial revenue by providing payment processing for online poker companies. Initially, Johnson did this through entities in his enterprise that he directly owned and controlled. But, on February 19, 2010, the Commission put Johnson on notice that he and his iWorks enterprise were under investigation, and it

requested that they preserve their assets by "refrain[ing] from liquidating, converting, encumbering, pledging, selling, dissipating, disbursing, granting a lien or security [in] . . . or otherwise disposing" of any assets "outside the ordinary course of business." (DCDE 465, Tab 1; *see also* DCDE 464 at 5 and 7). Johnson ignored this written request by the Commission and continued –indeed accelerated – his transfer of assets and revenues related to both online poker and the underlying scam, and pledged other assets as security interests, to entities that Todd Vowell and his associates nominally owned. In total, Johnson sought to conceal approximately $46 million of poker processing payment revenues.

This appeal involves only the March 25, 2013, Order Clarifying the Scope of the Preliminary Injunction ("Clarification Order") (DCDE 900) – the Preliminary Injunction Order itself is not on appeal. The Clarification Order "clarifies and confirms" that the receivership estate encompasses all assets controlled or beneficially owned by Jeremy Johnson or the other Receivership Defendants, and it makes findings that a number of specific assets fall within this definition. It provides, in relevant part:

> that the receivership estate includes as property of the receivership estate ("Receivership Property"): (a) the entities listed on Exhibit A hereto as Receivership Defendants under the Preliminary Injunction Order and the assets held by those entities; [and] (b) the assets of

> Todd Vowell, Sheree Vowell and Jason Vowell,[4] because the Court has found said assets are nominally titled to those individuals but are held for and/or are beneficially owned by Jeremy Johnson or the other Receivership Defendants.

DCDE 900 at ¶ 3.

Proceedings in the Court Below

The Commission filed its Complaint in the District of Nevada on December 21, 2010. (DCDE 1). 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 & Associates 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 Receiver reported that Defendants' Internet-based scam 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.

[4] Jason Vowell did not appeal the Clarification Order.

(*Id*.). 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 the Preliminary Injunction described above, making the receivership permanent and defining the assets and entities covered by it. (DCDE 130. *See* p. 6, *supra*). 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 authorizes the Receiver to take possession of those assets only 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 continued his investigation into the activities of the named Defendants. He conducted extensive discovery, including taking depositions, serving and obtaining responses to more than 150 document subpoenas, and obtaining public records. The Receiver also reviewed the discovery taken by the Commission, including the approximately 5,000 documents produced by the Appellants in response to the Commission's subpoenas *duces tecum*, served on March 3, 2011. (DCDE 641-1, Exh. 3 at ¶ 6). 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, 2012, 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, among which are the 44 entities nominally owned by the Todd and Sheree Vowell and their associates. Many of the 44 entity Appellants were formed after February 2010, when the Commission gave notice to Jeremy Johnson that he and his enterprise were under investigation.

On March 5, 2012, the Receiver served a written demand on the Vowells, as required by the Preliminary Injunction. The demand directed them to turn over to the Receiver the assets in the Vowells' possession that, based upon his investigation, the Receiver concluded were controlled and beneficially owned by Jeremy Johnson or the other Receivership Defendants. The Vowells refused to comply with the demand. (DCDE 582, ¶ 16 and Exhs. 6 and 7 thereto).

On May 30, 2012, based on the evidence uncovered by his investigation, 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; it sought judicial guidance only 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 the assets titled to Appellants Todd Vowell and Sheree Vowell, and the numerous entities of which they are the nominal owners (and the assets in the entities' possession), are assets of the receivership estate because they are controlled by or held for the benefit of Jeremy Johnson or the named Corporate Defendants.

Todd Vowell, Sheree Vowell, and the entities that they nominally owned filed an opposition to the Clarification Motion (DCDE 638), supplemented by documentary evidence. (DCDE 639-49). Jason Vowell submitted an opposition on behalf of himself and 15 entities. (DCDE 637). The district court conducted a lengthy hearing on March 19, 2013, at which the court permitted additional argument by all interested parties, including the Appellants.

Considering all of these submissions, the district court entered its Clarification Order on March 25, 2013. (DCDE 900).[5] The court granted the Clarification Motion in its entirety, finding that the assets of Appellants Todd Vowell and Sheree Vowell and all of the entity Appellants (and the assets in their possession) are within the scope of the Preliminary Injunction and its definition of Receivership Defendants. (DCDE 900 at ¶ 3). The Order also clarified and confirmed that, generally, the receivership estate includes "all other entities and assets owned or 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*.).

As noted above, the Preliminary Injunction determines only interim possession of receivership estate assets. The Clarification Order provides two methods for the Appellants to resolve any continuing disputes concerning the Receiver's interim possession of assets. First, they could informally provide the Receiver with supplemental evidence demonstrating

[5] 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).

that a specific asset is not part of the receivership estate or need not be under the control of the Receiver. (DCDE 900 at ¶ 3.D.). Second, they could file a motion with the district court and attempt to demonstrate why a specific asset should not be part of the receivership estate or at least not in the possession and under the control of the Receiver. (DCDE 900, ¶ 3.B). They have pursued neither course.

The Appellants filed their Notice of Appeal of the Clarification Order on April 23, 2013. (DCDE 969).

The Appellants and Other Significant Individuals and Entities

In the court below, the Receiver supported his Clarification Motion with extensive evidence falling into two categories, which together made a strong *prima facie* case that the assets in question are in reality those of Jeremy Johnson and the other Defendants. First, there is substantial evidence that Jeremy Johnson continued to control the online poker and scam-related payment processing assets even after their purported transfer to entities nominally owned by the Vowells. Second, there is substantial evidence that Jeremy Johnson controlled the disposition of the more than $46 million in fees that came after the nominally Vowell-owned entities took over the payment processing operations. In particular, those entities used these fees to purchase various assets for Johnson's benefit (such as real

estate, aircraft, brokerage accounts, and precious metals), to make investments titled to Johnson (real estate and an interest in an energy company), to pay off Johnson's gambling debts at Las Vegas casinos, and to make payments to his parents. The following facts set out Johnson's control and beneficial ownership of the payment processing operations, the significant fees that they generated, and the assets purchased with those fees.

Appellant **Todd Vowell** is an accountant by training. (Vowell Br. at 14-15, n.3). Through a complex web of interrelated entities, mostly created after Jeremy Johnson was notified that he was under investigation by the Commission in February 2010, Vowell has nominal ownership interests in 43 of the 44 entity Appellants (all except Chateau Circle LLC, in which Sheree Vowell has a nominal ownership interest). (*See* DCDE 464 at 49; Vowell Br. at ii-iii). Todd Vowell refused to appear to be deposed by the Receiver, stating he would assert the Fifth Amendment privilege against self-incrimination in response to all questions. (DCDE 582, ¶ 7). However, he submitted a four page declaration in the court below in opposition to the Receiver's Clarification Motion. (DCDE 644-1, Exh. 7).[6] That declaration provided no concrete rebuttal to the Receiver's *prima facie* case in support

[6] This appeal does not raise the issue whether Todd Vowell's submission of his declaration waived his Fifth Amendment privilege.

of his motion. Instead, it essentially did no more than summarily deny that Jeremy Johnson was a partner in or owner of three of the entity Appellants: Capital Energy Corp.; Paydirt LP; and Paydirt Properties, LLC.[7] Tellingly, the declaration did *not* deny that Johnson controlled or beneficially owned the other 41 entity Appellants, nor did it address any aspects of these entities. While the Vowell Brief suggests that Todd Vowell is a successful businessman in no need of financial support or favors from anyone (Vowell Br. at 14-15, n.3), that suggestion is difficult to square with the fact that the residence that he shares with his wife, Sheree Vowell, was in foreclosure in the Spring of 2010. (DCDE 581, ¶¶ 70-71; DCDE 655-2, ¶ 4).

Appellant **Sheree Vowell** is Todd's wife. She has direct or indirect ownership interests in several of the Appellants, including KATTS, LLC. and Chateau Circle, LLC. (Vowell Br. at ii-iii).

Jason Vowell is Todd's brother. The Clarification Order, which made Jason a Receivership Defendant, determined that his assets are part of the receivership estate because they are controlled or beneficially owned by Jeremy Johnson or the other named Corporate Defendants. (DCDE 900, ¶

[7] Todd Vowell's declaration also asserted that Jeremy Johnson had no ownership interest in four entities that are not part of this Appeal: Executive Car Sales, Inc.; Liahona Academy for Youth, Inc.; Twenty Five Main, LLC; and Virgin Properties, LLC.

3). Jason was involved, directly or indirectly, as a nominal owner or manager of a number of the entity Appellants. Neither Jason nor the 15 entities for which he filed an opposition to Clarification Motion filed an appeal of the Clarification Order.

Non-Appellant **John Hafen** worked with Todd Vowell, was employed by Appellant **Liahona Holdings, LP**, and had an income of less than $60,000 per year. (DCDE 464 at 14; DCDE 581, ¶ 61). Hafen, and entities which Hafen nominally owned (Tiburon Enterprises and Lilhaf Holdings), received transfers of approximately $7.9 million from Appellants Triple Seven and Paydirt Capital during the period April through November 2010. These transfers lacked any apparent business purpose, and Hafen refused to explain them. (DCDE 464 at 50; DCDE 581, ¶¶ 61 and 68). The Receiver, Hafen, Lilhaf, and Tiburon resolved the claims asserted in the Clarification Motion prior to the hearing on the Motion. (*See* DCDE 900 at 2).

The entities at the center of the web of the 44 entity Appellants are Appellant **KATTS, LLC**, nominally owned by Todd and Sheree Vowell, and Receivership Defendants Spyglass Enterprises, LLC and Spyglass

Holdings, LLC (collectively "Spyglass").[8] KATTS and Spyglass, directly or through entities in which they are members, have a nominal ownership interest in virtually all of the entity Appellants.[9] KATTS and Spyglass currently appear to have a singular purpose: shielding or hiding assets for Jeremy Johnson by funneling fees received from poker payment processing to other shells. Tellingly, Jason Vowell, one of the nominal members of Spyglass,[10] testified in an unrelated Utah state court matter in, July 2010, that Spyglass was his "holding company" but could not identify any of its assets. (DCDE 464 at 11; DCDE 582, ¶ 8). Todd Vowell did not submit to the court below any evidence demonstrating a legitimate purpose for KATTS; indeed, his declaration did not even reference KATTS. (See

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[8] The Clarification Order determined that both Spyglass entities are part of the receivership estate because they are held or beneficially owned by Jeremy Johnson or the other Receivership Defendants. (DCDE 900, ¶ 3 and Exh. A thereto). The Spyglass entities, which Jason Vowell nominally owns, did not appeal the Clarification Order.

[9] KATTS and Spyglass are the nominal members or partners in Appellants: Digital Currency, LLC; ePayment Solutions; Executive Service Center, LLC; Market Mastery Holdings, LLC; Paydirt Properties, LLC; SRLA Assocs.; SRLA, LLC; Taggart Management; Triple Play Group, LLC; Triple Seven, LP; TJJ Properties; LLC; and Woodsview Holdings, LLC. (*See* Vowell Br. at ii-iii). KATTS is the nominal sole member of Commerce Financial, LLC; Dreamland Capital, LLC; Kingfish Management, LLC; Silvertnix Holdings, LLC; and Summerset Ranch, LLC. (*Id*.).

[10] The other nominal member of Spyglass is John Hafen. (DCDE 464 at 39).

DCDE 644-1, Exh. 7). The Receiver found no business justification as to why KATTS received more than $4.4 million from the Payment Processor Appellants,[11] $4.9 million from the Paydirt Group Appellants, $1.2 million from Appellant ePayment Solutions, and $1.5 million from nine entity Appellants formed in 2010 and which were nominally owned and controlled by Todd Vowell. (DCDE 581, ¶ 64). Nor is there any legitimate explanation as to why KATTS paid out more than $2.4 million to the five Payment Processor Appellants, $2.3 million to the Paydirt Group Appellants, and $3.4 million to 12 entities nominally formed in 2010 and which were nominally owned and controlled by Todd Vowell. (*Id*.).

The Payment Processor Appellants

Processing payments for online poker companies was Jeremy Johnson's personal golden goose, monthly laying golden eggs for him in the form of substantial processing fees. Johnson began migrating the poker payment processing from Defendants iWorks, Elite Debit and Money Harvest (DCDE 1; DCDE 464 at 28-32),[12] to nominally Vowell-owned

[11] The Payment Processor Appellants, addressed in the next section, are: Triple Seven, Mastery Merchant dba Money Master, Powder Monkeys, Flying High, and Cerberus.

entities in approximately November 2009. These entities included Appellants **Triple Seven, Mastery Merchant** dba **Money Master,** and **Powder Monkeys** (collectively the "Primary Payment Processors"). Johnson accelerated this migration after February 2010, once the Commission notified him that he was under investigation. (DCDE 581, ¶ 37).

The three Primary Payment Processing entities all have a single common member, a nominally Vowell-owned entity, Appellant **ePayment Solutions, LLC,**[13] and collectively generated net processing revenues of $46.5 million in approximately one year of operation. (DCDE 464 at 29; DCDE 465, Tab 2; DCDE 581, ¶ 34). In June 2010, after the poker payment processing migrated to the Primary Payment Processors, in state-court testimony, Todd Vowell failed to identify any of these entities as companies

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[12] Jeremy Johnson was the sole owner of iWorks and Elite Debit and controlled Money Harvest, all of which processed payments for on-line poker companies. (DCDE 127-1 at 4-8).

[13] ePayment Solutions' two members are KATTS and Receivership Defendant Spyglass. The Receiver concluded that the sole function of ePayments Solutions was to funnel monies from the Primary Payment Processors to other entities controlled by Jeremy Johnson, but nominally owned by the Vowells. (DCDE 464 at 38 and 45; DCDE 466, Tab 53).

that he owned or in which he had involvement. (DCDE 464 at 9-10; DCDE 582 at ¶¶ 7-8).

The Primary Payment Processors transferred the revenues they received to other nominally Vowell-owned entities to hold, to purchase assets (such as aircraft, real estate, and gold and precious metals), or to invest. This was done intentionally, at Jeremy Johnson's direction, to attempt to shield or hide the payment processing fees (and the assets purchased with them) in the event of a law enforcement action by the Commission.

For example, Johnson controlled the nominally Vowell-owned companies known collectively as "Triple Seven" (Appellant **Triple Seven, LP**, which was formed in October 2009, Appellant **Triple Seven, LLC**, which succeeded Triple Seven, LP in mid-2010). (DCDE 464 at 29; DCDE 581, ¶ 29). Tellingly, Triple Seven's payment processing account with SunFirst Bank was opened in the name of Triple Seven LP dba [Johnson-owned Defendant] Elite Debit. (DCDE 464 at 28; DCDE 465, Tab 31). And Johnson directed Jason Vowell to travel to Europe to open off-shore accounts totaling more than $5.5 million in the names of Triple Seven and Mastery Merchant. (DCDE 464 at 68 and 75; DCDE 468, Tabs 92-94).

Another indication of Jeremy Johnson's control over the Primary Payment Processors is that all of the poker payment processing fees continued to be initially deposited into Johnson-owned Defendant Elite Debit's account at SunFirst Bank and, only then, were passed onto the Primary Payment Processors. (DCDE 582, ¶¶ 10, 11 and 14 and Exh. 4 thereto). Also, SunFirst's charges for payment processing incurred by the Primary Payment Processors were all paid from a reserve account established by Johnson. (*Id.*). After the purported sale of the poker payment processing portfolios to the Primary Payment Processors, Jeremy Johnson: reviewed and approved letters regarding payment processing by the Primary Payment Processors for the online poker companies; negotiated with SunFirst the wire transfer fees the bank charged to the Primary Payment Processors; paid a $20,000 consulting fee to a SunFirst officer subsequently convicted of wire fraud in connection with the online poker payment processing; and provided instructions to SunFirst for the handling of payment processing operations. (DCDE 464 at 27; DCDE 465, Tabs 21-24 and 28-30; DCDE 581, ¶ 29). In October 2009, Triple Seven, LP, Defendant Elite Debit and Jeremy Johnson together entered into a merchant payment processing agreement with SunFirst Bank. (DCDE 646-2). In September 2010, Jeremy Johnson entered into a Merchant Processing Agreement with

SunFirst on behalf of Elite Debit, Triple Seven, LLC, Mastery Merchant and Powder Monkeys. (DCDE 464 at 27; DCDE 465, Tab 27).

Jeremy Johnson also used a $6.5 million Promissory Note – executed on February 28, 2010, just days after he learned he was under investigation by the Commission – to, in effect, transfer to Triple Seven the deeds of trust for several properties and other assets from entities that he directly owned or controlled. The Note was from Johnson and Defendant Elite Debit to Triple Seven, and the Receiver found no legitimate business basis for the debt created by the Note. (DCDE 464 at 22-26; DCDE 581, ¶¶ 15, 23-25). The Note was secured by real properties whose equity was wiped out by the Note: Jeremy Johnson's residence; property in Santa Monica, California; and five parcels of undeveloped land in Utah. (DCDE 464 at 23; DCDE 581, ¶ 22). After purportedly defaulting on the Note, on December 1, 2010,[14] Jeremy Johnson and Elite Debit entered into a settlement agreement with Triple Seven, transferring the deeds of trust for the Santa Monica and Utah properties along with $1.65 million in gold and precious coins to Triple Seven. (DCDE 464 at 25-26).

[14] Though Jeremy Johnson did not have advance knowledge of the date the Commission would file its Complaint, he met with some of the five Commissioners and Commission Staff prior to December 1, 2010, to discuss the status of the investigation. He knew or should have known from these discussions that a law enforcement action against him likely was imminent.

Appellant **Powder Monkeys** was formed in April, 2010. Though it was nominally Vowell-owned, Jeremy Johnson arranged a payment processing agreement for ePayment Solutions dba Powder Monkeys in October 2010. (DCDE 464 at 27-28; DCDE 465, Tabs, 28 and 30). Between June and October 2010, Powder Monkeys paid $1,250,000 for Jeremy Johnson to acquire an investment interest in JMD Energy, Inc. (DCDE 464 at 73; DCDE 468, Tab 102; DCDE 581, ¶ 32). Notices of wire transfers by SunFirst involving Powder Monkeys were sent to Jeremy Johnson at his iWorks email address. (DCDE 581, ¶ 31). Johnson directed that he be paid directly the $99,883 balance remaining on a retainer held by a law firm that had been paid by Powder Monkeys. (DCDE 581, ¶ 33).

Appellant **Mastery Merchant, LLC**, which also did business under the name **Money Master**, was formed in 2007. The Receiver found two contradictory sets of organizational documents regarding the identity of its original members (KATTS and Spyglass or an entity nominally-owned by John Hafen). (DCDE 464 at 29-30; DCDE 465, Tabs, 32-33). More important, Mastery Merchant's application for a merchant account with the National Bank of California listed Jeremy Johnson as guarantor and gave Johnson the authority to control its accounts. (DCDE 464 at 30; DCDE 466, Tab 34; DCDE 581, ¶ 30). Also, notices of wire transfers by SunFirst

involving Mastery Merchant were sent to Jeremy Johnson at his iWorks email address. (DCDE 581, ¶ 31).

Appellant **Flying High, LLC** was formed in March 2010, and Appellant **Cerberus Management, LLC** in May 2010. Without any legitimate explanation, both entities went through multiple changes of membership – all Vowell-related – within their first several months of existence. (DCDE 464 at 38). Eventually, nominally Vowell-owned Appellant **Digital Currency, LLC** became the sole member of both Flying High and Cerberus. (Vowell Br. at ii-iii).[15] In June 2010, Flying High and Cerberus entered into separate contracts to purchase scam-related consumer payment processing portfolios from Defendant iWorks. Flying High paid $200,000 and Cerberus $300,000, respectively. Both amounts are inexplicable and commercially unreasonable for payment processing portfolios that generated multi-million dollar revenues. (DCDE 464 at 19-22; DCDE 581, ¶¶ 38-40).

[15] Digital Currency was formed in October 2010, with KATTS and Spyglass as its members. (DCDE 464 at 38).

Appellants Downstream From the Payment Processor Entities

Appellants Holding Real Properties

Appellant **Kombi Capital LP** was formed in March 2010. The Receiver found two sets of organizational documents with contradictory information about the limited partners. One listed Sharla Johnson (Jeremy Johnson's wife)[16] as a limited partner with a 98% ownership interest while the other listed KATTS and Spyglass as the limited partners, each with a 49% ownership interest. (DCDE 464 at 40). Kombi paid approximately $364,000 to purchase property in Rockville, Utah, titled to Jeremy Johnson. (DCDE 464 at 43; DCDE 581, ¶ 43 and Exh. 9 thereto). *See generally* DCDE 581, ¶¶ 42-44.

Jeremy Johnson formed Appellant **Woodsview Holdings, LLC** in June 2010, as its sole member. (DCDE 464 at 48-49; DCDE 581, ¶ 46). Using funds provided by Triple Seven, Woodsview purchased a residential property for $663,902, executed a promissory note secured by the property in this amount to KATTS and Spyglass, defaulted on the note after approximately one month, and then transferred title to the property to

[16] Sharla Johnson also is a Relief Defendant and an Appellant in a separate appeal of the Clarification Order, No. 13-15768.

KATTS and Spyglass. (DCDE 464 at 48-49; DCDE 467, Tabs 62 and 63; DCDE 581, ¶ 46).

Appellants Holding Aircraft

Appellant **SRLA Association, LLC** was formed in 2004 and succeeded in August 2010 by Appellant **SRLA, LLC** (collectively "SRLA"), whose nominal members are KATTS and Spyglass. (DCDE 464 at 7; DCDE 581, ¶ 48). SRLA, formed after Jeremy Johnson received notice of the Commission's investigation, is the sole member in Appellants **Alpha Yankee, LLC, Choker Block, LLC, Scud Runner, LLC,** and **Omaha Eight, LLC** (collectively the "Aircraft Entities") (DCDE 464 at 7, 44 and 70-73; DCDE 581, ¶ 48). Though the Aircraft Entities nominally hold title to several aircraft, various emails and an insurance application for the aircraft listed Jeremy Johnson as an owner of the aircraft. (DCDE 464 at 72). And, when one of the aircraft was sold, the proceeds revealingly went to SRLA and not Appellant **Silvernix Holdings, LLC** (whose single nominal member is KATTS), even though Silvernix provided the funds to purchase the aircraft and held a security interest in it. (DCDE 464 at 70-72).

The Paydirt Group

The "Paydirt Group" consists of Appellants **Paydirt Capital, Inc., Paydirt Management, Inc., Paydirt LP,** and **Paydirt Properties, LLC**.[17] While Paydirt Capital provides accounting services to some third parties (DCDE 464 at 34), since at least sometime in 2010 the Paydirt Group has primarily acted as a conduit for transferring poker payment processing fees at the direction of Jeremy Johnson. Todd Vowell testified that Paydirt Management, Paydirt Properties and Paydirt LP are essentially defunct. (DCDE 464 at 10 and 35-36; DCDE 582,¶ 7). While Paydirt Capital purportedly purchased some payment processing portfolios from iWorks (DCDE 464 at 19; DCDE 465, Tabs 4-6; DCDE 581, ¶ 57), following this purported sale, all of the processing fees generated by these portfolios continued to be paid to iWorks (DCDE 465, Tab 7; DCDE 581, ¶ 57). The Receiver found no plausible explanation why the Paydirt Group had revenue of over $33 million from 2009 through 2011 and transferred approximately $2.8 million to entities directly controlled by Jeremy Johnson (DCDE 581, ¶ 60), paid $690,000 to Las Vegas casinos for gambling debts incurred by Johnson, purchased $551,000 in precious metals for him, (DCDE 464 at 35),

[17] The Paydirt Group has various combinations of Vowells, KATTS, Spyglass and John Hafen as nominal owners/partners/members. (Vowell Br. at ii-iii).

and paid more than $200,000 to Johnson's parents. (DCDE 581, ¶ 60). The Paydirt Group's other revenues flowed to other Appellants, again for no apparent business purposes. (DCDE 466, Tabs 36-39; *see generally* DCDE 581, ¶¶ 56-60). [18]

The remaining entity Appellants – which do no more than hold a variety of assets – are nominally owned by one or more of the Appellants addressed above.[19] Accordingly, they are also under the control and beneficial ownership of Jeremy Johnson and the named corporate Defendants. **Summerset Ranch, LLC** provides an example of how these downstream entities operate. Summerset was formed in June 2010 (after Johnson knew he was under investigation), with KATTS as its sole member.

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[18] The Primary Payment Processors and the Paydirt Group (discussed *infra*) made inexplicable payments to Appellant **Capital Energy Corp.** (DCDE 466 at Tabs 35 and 36).

[19] Footnote 9, *supra*, lists the entities (all LLCs) whose members include KATTS, either by itself or with the Spyglass entities. As to the remaining entities, their relationships to the upstream Appellants are: Appellant Paydirt LP is the nominal member of Appellant **C2 Holdings**; Appellant Taggart Management is the nominal member of Appellant **Fishook Partners** and is a nominal member of Appellants **Flatline Investments** and **Treadstone Partners**; Appellant Paydirt Properties is a nominal member of **IC Development**; and Appellant Mastery Merchant is the nominal member of Appellant **Online Weight Loss**. Appellant Todd Vowell is the nominal owner of Appellants **T. Vowell Sole Proprietorship** and **TLV Enterprises.** Todd Vowell and Receivership Defendant Jason Vowell are the nominal owners of Appellant **Capital Energy**.

(DCDE 581, ¶ 45). It received, through Kombi, a total of $636,295 from two of the Primary Payment Processors, Powder Monkeys and Mastery Merchants. (DCDE 464 at 45; DCDE 466, Tab. 54). Summerset used these funds to purchase property in Virgin, Utah. (DCDE 581, ¶ 45 and Exh 11).

STANDARD OF REVIEW

This Court reviews preliminary injunctions and associated orders (such as this Clarification Order) 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 (9th Cir. 2013), citing *Southwest Voter Registration Educ. Project v. Shelley*, 344 F.3d 914, 918 (9th Cir. 2003) (en banc); *Thalheimer v. City of San Diego*, 645 F.3d 1109, 1115 (9th Cir. 2011). 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 Partners, Ltd.*, 962 F.2d 1402, 1405 (9th Cir. 1992).

SUMMARY OF ARGUMENT

In its consumer protection law enforcement cases, the Commission typically seeks monetary equitable relief for the benefit of consumers injured by defendants' practices. In response (or anticipation), defendants often try to shield their assets by transferring them to persons or entities who are not

defendants and who front as the nominal owners. As a result, courts are often called upon to extend equitable relief against persons who themselves are not themselves accused of any wrongdoing but who (1) have received assets from a party who is accused of wrongdoing and (2) have no legitimate claim to those assets. *E.g.*, *SEC v. Ross*, 504 F.3d 1130 (9th Cir. 2007); *CFTC v. Kimberlynn Creek Ranch, Inc.*, 276 F.3d 187, 192-93 (4th Cir. 2002); *SEC v. Cavanagh*, 155 F.3d 129, 136 (2nd Cir. 1998); *SEC v. Cherif*, 933 F.2d 403, 414 n. 11 (7th Cir. 1991).

Here the district court properly exercised jurisdiction over the entity Appellants and assets in the possession of Todd and Sheree Vowell. 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. Because the court below unquestionably had personal jurisdiction over Johnson and the named Corporate Defendants, it had plenary authority to freeze all assets *they* owned or controlled. The ruling on appeal simply confirms – on the basis of an extensive factual record provided 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 as well as the assets of Todd and Sheree Vowell.

Moreover, the procedural rules are relaxed in receivership proceedings at the preliminary injunction stage, in which a receiver seeks interim possession of assets held by a nonparty pending a final disposition on the merits. In that context, this Court requires only that the nonparty receive (1) actual notice of the motion seeking possession and (2) an opportunity to be heard on the motion prior to the entry of any order affecting the specific assets. Possession can then be determined in a summary proceeding, without needing to add an individual or entity as a relief defendant in the primary action or as a defendant in an ancillary action.

Here, the district court correctly determined – and certainly committed no clear error in determining – that the assets in the possession of the Appellants, as well as the entity Appellants, were controlled by or beneficially owned by Jeremy Johnson and the named Corporate Defendants and that the Appellants have no legitimate claim to those assets. The district court made that finding only after the Receiver submitted overwhelming evidence for his Clarification Motion and the Appellants failed to provide any substantial rebuttal evidence. Contrary to Appellants' argument, the district court never excused the Receiver from carrying his burden of proof; instead, it concluded that the Receiver had presented a compelling *prima*

facie case and that Appellants had offered no meaningful basis for rebutting it.

There is also no merit to Appellants' assertions that they were denied due process. Appellants had actual notice of the Receiver's Clarification Motion. In fact, they filed an opposition, submitted evidence in support of their positions, and presented argument at the hearing on the Motion. These proceedings amply satisfied due process requirements.

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 Nominally Held By The Appellants

In *In re San Vicente Medical Partners, Ltd.*, *supra*, this Court addressed the extent of a forum's jurisdiction over a nonparty and assets controlled or beneficially owned by a receivership defendant that are in the possession of a nonparty. That decision 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"); and (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. 962 F.2d at 1407.

FTC v. Productive Mktg., Inc., 136 F. Supp. 2d 1096 (C.D. Cal. 2001), instructively followed this Court's holding in *San Vicente*. *Productive Mktg.* holds 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 forum has personal jurisdiction over the receivership defendant. The court stated that, if the property belongs to the receivership estate, the nonparty's contacts with the forum are irrelevant so long as the nonparty 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, ___ Fed. Appx. ___ (2nd 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 separately need to establish personal jurisdiction over such a nonparty in 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 those Defendants. *Three*, it was shown below that all of the entity Appellants, as well as the assets of Appellants Todd and Sheree Vowell, are under the control of and beneficially owned by Johnson and the named Corporate Defendants. As a result, the district court has jurisdiction, whether characterized as *in rem* or *quasi-in-rem*, over all of the entity Appellants and their assets, as well as over the assets of Todd and Sheree Vowell.

This showing 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 cases on which Appellants rely to challenge the district court's jurisdiction, *SEC v. Ross*, 504 F.3d 1130 (9th Cir. 2007), and *SEC v. Elmas Trading Corp.*, 620 F. Supp. 231 (D. Nev. 1985). In *Ross*, the court found that the appellant, a sales representative, 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 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 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.

In *Elmas Trading*, as here, the receiver filed a motion that sought to confirm his authority to take possession of entities and their assets that he asserted were under the control of the defendants and, therefore, part of the receivership estate. 620 F. Supp. at 233. Appellants seem to suggest that the receiver's motion was unopposed and that the district court still denied it in its entirety. (Vowell Br. at 22-23). In fact, the court in *Elmas Trading* granted the receiver's motion as to most of the nonparty entities in question, based on evidence similar to what the Receiver submitted to the district court here – evidence that carefully and in detail traced the lines of control and the flow of funds.

The *Elmas Trading* court failed to grant the receiver's motion only in three instances, none of which bears any resemblance to this case. In the first, the *Elmas Trading* receiver failed to submit evidence that the corporate

entity over which he wanted to take control even existed, and the defendants submitted rebuttal evidence that they received legitimate services from another company at the same address and that there had been a typographical error on an invoice in the defendants' records. *Id* at 236. In the second, the receiver's only evidence about the entity was that its name made it appear to be a foreign corporation; the receiver had no other information about the entity other than that it received a single wire transfer from a defendant. *Id*. at 238-39. In the third, the only evidence that the receiver submitted was that a defendant's wife was an officer of the company. *Id.* Based on this thin evidence, the district court reasonably concluded that the receiver failed to meet his evidentiary burden.

Appellants expend considerable energy discussing whether the Receiver in this case changed his legal theory after he filed the Clarification Motion from an "alter ego" theory to a "mere custodian" theory. (*E.g.*,

Vowell Br. at 5, 9-10 and 26).[20] This argument, based solely on labels Appellants themselves attach, is invalid for two independent reasons. *First*, it ignores the substance of the proceeding below. Although the receiver did not expressly characterize his argument as a "mere custodian" or nominee theory, that was nevertheless the thrust of his submission to the district court. As to Appellants, the gist of the Clarification Motion was that, after he received notice of the Commission's investigation, Jeremy Johnson, in an effort to hide and shield his assets, used individuals and entities to continue his poker and scam-related payment processing and to keep generating substantial fees. Johnson had these individuals and entities hold nominal title to, and thereby act as the custodians for, the payment processing assets and fees, and the assets purchased with the processing fees, while he continued to control and beneficially own these assets. (DCDE 580 at 9, 13 and 52).

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[20] To be a "mere custodian," one party, without a colorable claim to an asset, holds nominal custody and title to the asset for a second party, who controls and beneficially owns the asset. *Ross*, 504 F.3d at 1142. To be an "alter ego," two nominally separate entities have such a unity of interest and ownership that there ceases to be a distinction between the two entities. Typically this occurs where a shareholder, director or officer of a business entity, or the parent of a subsidiary, wholly dominates a nominally independent business entity. *Doe v. Unocal Corp.*, 248 F.3d 915, 926 (9th Cir. 2001); *Trustees of Const. Industry and Laborers Health and Welfare Trust v. Archie*, 2013 WL 3779649 at *5 (D. Nev. Jul. 17, 2013).

Second, even if the Receiver *had* advanced an alter ego theory as to these Appellants, it would not matter because that is not the legal theory adopted in the order on appeal. Appellants concede that the court below determined that they were mere custodians of the assets that are part of the receivership estate and did not base its determinations on an alter ego theory. (Vowell Br. at 11-13). Indeed, Appellants' Brief states that "the district court eschewed the alter ego theory and adopted [a] custodian approach." (*Id*. at 13).

B. A Nonparty Afforded Notice And An Opportunity To Be Heard Need Not Be Named As A Nominal Or Relief Defendant To Be Bound By An Order Regarding Receivership Property

Appellants contend that they cannot come within the scope of the Preliminary Injunction unless they receive formal service of process, either by being named as relief defendants in the primary Commission 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 where the nonparty, such as each Appellant here, is the mere custodian of assets controlled or beneficially owned by a receivership defendant. This is apparent from this Court's decision in *CFTC v. Topworth Int'l, Ltd.*, 205 F.3d 1107 (9th 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 relief defendant in the primary action or as 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.

SEC v. Wencke, 783 F.2d 829 (9th Cir. 1986), confirms the same point. The receiver there sought disgorgement of receivership assets held by a nonparty. The receiver initially explored two potential avenues for obtaining this relief (1) filing a motion for disgorgement by the nonparty in the primary case and (2) commencing a separate ancillary action against the nonparty. The nonparty was served with both the motion in the primary case and the complaint and a summons in the ancillary case. *Id*. at 832. But the receiver ultimately decided to prosecute only the motion in the primary case, which the district court granted. On appeal, the nonparty objected to the entry of an order 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 (1) actual notice of the motion that may affect his claim to assets in his possession and (2) the opportunity to be heard on the motion. *Id*. at 837-38.

Other decisions are to the same effect. *See, e.g., SEC v. Lewis*, 173 Fed. Appx. 565, 566 (9th Cir. 2006); *SEC v. American Capital Investments, Inc.*, 1996 WL 608527 at *5 (9th 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). Also, though not an issue expressly addressed within the decision, in one of the primary cases relied upon by the Appellants, *Elmas Trading,* numerous nonparties and their assets were brought under the control of the receiver through a simple motion by the receiver in the primary action, without the nonparties being named as relief defendants in the primary action or as defendants in an ancillary action. 620 F. Supp. at 232-33. Thus, Appellants' contention that the procedure used by the Receiver in the court below is "unprecedented" (Vowell Br. at 27) is patently wrong.

Ignoring this abundant precedent, appellants cite a case from outside of this Circuit to assert that they had to be joined as relief defendants in the

primary action or defendants in an ancillary action before they or their assets could have been brought under the receiver's control. *CFTC v. Lake Shore Asset Mgmt., Ltd.*, 2011 WL 3664428 (N.D. Ill. Aug. 19, 2011). (Vowell Br. at 32-34). However, *Lake Shore* is readily distinguishable. First, the district court's ruling in *Lake Shore* rested on an alter ego theory, whereas (as discussed) the district court here relied on a custodian theory. *See Lake Shore*, 2011 WL at *3 ("The court's analysis of the receiver's motion begins and ends with receiver's alter ego argument."). Second, the *Lake Shore* decision itself observed that its Circuit – the Seventh Circuit –requires that nonparties whose assets are being pursued under an alter ego theory must be formally served with process. *Id*. at *6, n. 4. In contrast, courts in the Ninth Circuit have granted a receiver's motion in the primary case for authority to exert control over receivership assets in the possession a nonparty under an alter ego theory. *Private Equity*, 2009 WL 3074604 at **6; *Elmas Trading*, 620 F. Supp. at 233.

The approach consistently applied by this Court and the district courts within this Circuit – under which formal service of process on nonparties is not required – makes abundant sense. The purpose of appointing a receiver in a preliminary injunction is to allow the efficient and quick preservation of available assets, thereby promoting the possibility of full equitable relief at

the conclusion of the action. Especially since a preliminary injunction addresses only interim possession of assets and not their ultimate disposition, actual notice to a nonparty of a receiver's motion concerning such assets, followed by an opportunity to be heard, affords ample protection. And requiring a receiver to commence full-blown ancillary actions against every nonparty in possession of receivership estate assets would be costly and time-consuming as well as 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.

II. THE DISTRICT COURT HAD A PROPER FACTUAL BASIS FOR EXERCISING AUTHORITY OVER THE ENTITY APPELLANTS AND THE ASSETS OF TODD AND SHEREE VOWELL

Appellants argue that the district court improperly assigned the burden of proof to them rather than the Receiver. That is incorrect: as discussed below, the Receiver bore the burden of proof and successfully carried it. In particular, the district court ruled for him because Appellants offered no meaningful basis for disputing the Receiver's overwhelming *prima facie*

evidence of control and beneficial ownership. We briefly review that evidence in order to place Appellants' "burden of proof" claims in context.

The evidence was overwhelming that Jeremy Johnson and the named Corporate Defendants controlled the Payment Processors nominally owned by the Vowells (Triple Seven, Mastery Merchant dba Money Master, Powder Monkeys, Cerberus, and Flying High). Therefore, the fees resulting from the online poker and scam-related payment processing, and all of the assets purchased with these fees, are beneficially owned by Johnson and the named Corporate Defendants. The record is devoid of evidence that the Appellants have any colorable claim to these fees or the resulting assets. The district court, therefore, had a solid basis for the factual determinations that underlie the Clarification Order and it did not commit clear error in making its determinations.

As set out in the Statement of Facts, the Receiver submitted substantial evidence demonstrating that: (1) more than $46 million in fees came in to the Primary Payment Processors (Triple Seven, Powder Monkeys, and Mastery Merchant dba Money Master) and the two much smaller processors (Cerberus and Flying High); (2) Jeremy Johnson and the named Corporate Defendants exercised control over the Payment Processors; and (3) the other nominally Vowell-owned Appellants served no

function other than, at the direction of Jeremy Johnson and the named Corporate Defendants, to purchase assets or invest the funds generated by the Payment Processors.

The accounting records that the Receiver obtained from the Payment Processors are undisputed. They establish that the Payment Processors took in over $46 million in fees for performing payment processing.

The Payment Processors are all single-member LLCs. The Primary Payment Processors' sole member is Appellant ePayment Solutions while Cerberus and Flying High's sole member is Appellant Digital Currency. The two members in both ePayment Solutions and Digital Currency are Appellant KATTS and Receivership Defendant Spyglass. The two members in KATTS are Appellants Todd and Sheree Vowell while the two members of Spyglass are Receivership Defendant Jason Vowell and Vowell associate John Hafen. The Payment Processors (other than Mastery Merchant) were all created on the heels of Jeremy Johnson's being put on notice he was under investigation by the Commission. Moreover, in the space of several months, there were multiple changes in the members of Cerberus and Flying High and there were multiple organization documents for Money Master. While not conclusive by itself as to the control of the entity Appellants, the lack of any apparent business justification for this convoluted ownership

structure strongly suggests that the structure's purpose is to attempt to shield or hide assets.

The evidence of Jeremy Johnson's involvement and control over the Payment Processors is also overwhelming. As set out in detail in the Statement of Facts, even after the migration of the online poker payment processing to the purportedly independent Primary Payment Processors, all of the fees generated from the poker payment processing continued to be paid to Jeremy Johnson-owned Defendant Elite Debit before they were passed onto the Primary Payment Processors. Also, the fees charged to the Payment Processors by the processing bank (SunFirst) were all paid from a reserve account established by Johnson. Additionally, Jeremy Johnson: (1) continued to sign agreements with online poker companies and SunFirst on behalf of the Primary Payment Processors, (2) reviewed and approved letters from the Payment Processors to SunFirst regarding the payment processing; (3) received notice from the banks of wire transfers involving the Payment Processors at his iWorks email address; and (4) was listed on a merchant account application for Mastery Merchant as the guarantor for the account with the authority to act on behalf of Mastery Merchant.

Two other transactions are inexplicable unless Jeremy Johnson controlled the Primary Payment Processors. The first is a February 2010,

$6.5 million Promissory Note from Johnson and Defendant Elite Debit to Triple Seven, entered into just days after Johnson learned of the Commission's investigation and then defaulted upon and "settled" when the Commission law enforcement action was imminent. The Receiver found no debt owed to Triple Seven that would justify the Note. Tellingly, the settlement agreement on the default conveniently transferred the deeds of trust for valuable real property in Santa Monica, California and Utah, as well as $1.65 million in gold and precious coins, from Jeremy Johnson to nominally Vowell-owned Triple Seven. The second inexplicable transaction is Powder Monkeys' payment of $1.25 million for an investment interest in JMD Energy Inc. titled to Jeremy Johnson.

Johnson had similar involvement with Cerberus and Flying High. Also – inexplicably for what were purportedly arm's length transactions – the purchase prices paid by them to the Defendants were commercially unreasonable; they paid just pennies on the dollar relative to the revenues generated by the payment processing portfolios purchased.

The fees taken in by the Payment Processors were funneled on to other entities nominally owned by the Vowells and used to purchase various assets. There were purchases of real estate, for example, by Kombi, Summerset and Woodsview. Some of the real estate ended up being titled in

Jeremy Johnson's name without evidence of any payment of consideration by him, such as property in Rockville, Utah, which was paid for by Kombi but titled to Johnson. Other funds went to purchase aircraft. For example, SRLA paid for aircraft titled in the names of several LLCs in which SRLA was the sole member: Alpha Yankee; Choker Block; Scud Runner; and Omaha Eight. Even with these multiple layers of LLCs, evidence of Jeremy Johnson's control still leaked through. Various emails and insurance applications for the aircraft indicated where their true ownership and control rested, with Johnson listed as an aircraft owner. Nominally Vowell-owned entities in the Paydirt Group paid Jeremy Johnson's gambling debts at Las Vegas casinos, purchased precious metals titled in Johnson's name, and made payments to Johnson's parents, all without any apparent business purpose. These actions are inexplicable unless Jeremy Johnson controlled and beneficially owned these entities.

Appellants repeatedly assert that, at the Receiver's urging, the court below improperly switched the burden of proof concerning the Clarification Motion to them from the Receiver. (Vowell Br. at 9-10, 12-14, 16-17, 24-

25).[21] This simply is not what happened; the burden of persuasion rested at all times with the Receiver as the movant. Rather, as occurs with all motions, the movant had the initial burden of going forward and submitting evidence establishing a *prima facie* case. Once the movant did this, the burden of going forward shifted to the respondents to submit evidence to rebut the movant's *prima facie* case.

Here the Receiver more than met his initial burden of establishing a *prima facie* case that, "beyond mere speculation," the entity Appellants and their assets and the assets of Jeremy and Sheree Vowell are properly part of the receivership estate as defined in the Preliminary Injunction. *Elmas Trading*, 620 F. Supp. at 233. Having done this, the burden of going forward shifted to the Appellants to attempt to rebut the Receiver's *prima facie* case. This type of burden-shifting is typical procedure for motions in fraud-type actions, *Janvey v. Alguire*, 647 F.3d 588, 599 (5th Cir. 2011); *SEC v. Pension Fund of America*, 396 Fed. Appx. 577, 579 (11th Cir. 2010); *Vassallo*, 2011 WL 3875640 at *3, and for proceedings generally, *United*

[21] The Appellants also suggest the "government" failed to meet its burden with regard to the Clarification Motion. (Vowell Br. at 5-6). Since the Receiver brought the Clarification Motion and the Commission did not join in the Motion, the "government" had no burden with regard to the Motion.

States v. Boulware, 384 F.3d 794, 811 (9th Cir. 2004); *Gonzalez v. Secretary of Dep't of Health and Human Svcs*, 784 F.2d 1417, 1419 (9th Cir. 1986).

The Appellants utterly failed to rebut the Receiver's *prima facie* case. Their rebuttal consisted primarily of a four page declaration submitted by Todd Vowell, which did no more than deny that three of the 44 entities nominally owned by the Vowells and that were the subject of the Clarification Motion ever had Jeremy Johnson as a partner or owner. The declaration did nothing to rebut the Receiver's plentiful evidence (1) concerning the other 41 entities or the assets titled to Todd and Sheree Vowell or (2) that all 44 entities were in fact controlled by Jeremy Johnson, whether or not he was explicitly identified as a partner, member or owner. Nor did the Appellants establish an evidentiary basis for any colorable claim to the assets in their possession. It is hardly surprising, therefore, that the Statement of Facts in the Appellants' Brief is barren of citations to the record.

Appellants also contend that the Receiver should have been required to demonstrate all of the prerequisites to the issuance of a preliminary injunction (likelihood of success on the merits, irreparable harm, and balance of the equities) in order to prevail on the Clarification Motion. (Vowell Br. at 17-18). In making this argument, the Appellants improperly

conflate two distinct issues (1) the need for a Preliminary Injunction and (2) the scope of the receivership estate. The need for a preliminary injunction was demonstrated by the Commission and was resolved by the district court in issuing the Preliminary Injunction. (DCDE 130). The Appellants expressly state they do not challenge the Preliminary Injunction. (Vowell Br. at 4). The only relevant question before the district court, therefore, was whether the entity Appellants and the assets in their possession and the assets of Todd Vowell and Sheree Vowell were within the scope of the receivership as defined by the Preliminary Injunction. Given the strength of the evidence submitted by the Receiver and the paucity of rebuttal evidence submitted by the Appellants, the court below hardly committed clear error in determining that the Appellant entities and the assets in their possession and the assets in the possession of Todd and Sheree Vowell are controlled and beneficially owned by Jeremy Johnson and the named Corporate Defendants.

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

In this Circuit, a district court may use summary proceedings in situations involving nonparties who hold property claimed by a receiver so long as the nonparties receive (1) adequate notice and (2) an opportunity to

be heard. *Topworth*, 205 F.3d at 1113; *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*, 2009 WL 3074604 at *5-*6; *J.K. Publications*, 2009 WL 997421 at *4. The requisite notice here was actual notice of the Clarification Motion. *Wencke*, 783 F.2d at 837-38. Summary proceedings are especially appropriate where – as here – an order determines only possession of assets and not their ultimate disposition. *United States v. Arizona Fuels Corp.*, 739 F.2d 455, 459 (9th 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.

As reflected in the Receiver's Certificate of Service (DCDE 583), the Vowells received actual notice of the Clarification Motion. Based upon this notice, and following a Stipulation and Order, all of the Appellants and, separately, Jason Vowell and 15 other entities (including the Spyglass entities), filed oppositions to that motion.

Appellants have failed to make any showing that the nature of the summary proceedings below prejudiced their ability to protect any legitimate

interests they may have had in the assets in question. In particular, any argument that they had to be afforded the opportunity for discovery (*cf.* Vowell Br. at 4, 8) is specious. As a practical matter, no discovery should be necessary for the Appellants to obtain evidence demonstrating that their assets are neither under the control of nor beneficially owned by Jeremy Johnson and the named Corporate Defendants or that they had a colorable claim to the assets in their possession. As the Receiver commented at the Clarification Motion hearing, presumably every reasonable person knows the source of funds that come through his bank account. This logic equally holds true for how a person came to hold title to property and how that person paid the purchase price for that property. Therefore, if the Appellants could not rebut the Receiver's case through the approximately 5,000 documents that they produced in response to the Commission's subpoena and their Opposition below (including Todd Vowell's declarations and other exhibits), rebuttal evidence simply does not exist.

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. 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.[22]

CONCLUSION

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

DATED: August 7, 2013

/S/ John Andrew Singer

John Andrew Singer
Counsel for Plaintiff/Appellee
Federal Trade Commission

[22] Appellants also ignore that the Clarification Order itself provides two methods for them to attempt to resolve any continuing disputes concerning the Receiver's interim possession of assets (1) by informally providing the Receiver with supplemental evidence demonstrating that a specific asset is not part of the receivership estate or at least need not be in possession and under the control of the Receiver (DCDE 900, ¶ 3.D), and (2) by filing a motion with the district court to the same effect (DCDE 900, ¶ 3.B).

CIRCUIT RULE 28-2.6 STATEMENT OF RELATED CASES

The Court has directed that this case be calendared for argument with two consolidated cases, *FTC v. Sharla Johnson et al.*, No. 13-15768, and . *FTC v. Duane Fielding et al.*, No. 13-15778. 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 10,438 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: August 7, 2013

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

CERTIFICATE OF SERVICE

I hereby certify that on the 7th day of August, 2013, I served electronic copies of the Response Brief of Plaintiff/Appellee Federal Trade Commission and the four volumes of Plaintiff/Appellee's Supplemental Excerpts of Record, via the Ninth Circuit ECF/CM system, on:

Gary Owen Caris
Lesley Anne Hawes
Attorneys for Appellee/Receiver Robb Evans of Robb Evans & Associates LLC

Michael K. Wall
Joseph S. Kistler
Jacob A. Reynolds
Attorneys for Appellants

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

CERTIFICATE FOR BRIEF IN PAPER FORMAT

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

9th Circuit Case Number(s): 13-15822

I, John Andrew Singer , certify that this brief is identical to the version submitted electronically on [date] Aug 7, 2013 .

Date Aug 15, 2013

Signature s/John Andrew Singer

(either manual signature or "s/" plus typed name is acceptable)