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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

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Merchant Transaction Systems, Inc.,)

No. 02-1954-PHX-MHM

10

Plaintiff,)

ORDER

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vs.)

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Necela, Inc., et al.,)

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Defendants.)

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And Related Counterclaims, Cross-Claims,
and Third Party Claims.)

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This Court is in possession of the POST Parties’ Application for Temporary Restraining Order Without Notice and Preliminary Injunction, (Dkt. #829), and accompanying declaration and exhibits. After reviewing the pleading, and determining that oral argument is unnecessary, the Court issues the following Order.

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I. Background

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On September 2, 2009, a jury returned a verdict in this case, resulting in , among other things, a \$3,145,797 judgement for the POST Parties against Lenoard Campagna. In its instant motion, the POST Parties allege that shortly before and after this verdict, Mr. Campagna illegally divested himself of assets in an effort to thwart the POST Parties’ ability to collect on the judgement. Specifically, they allege, and have submitted evidence showing, that on February 6, 2008, after Phase 1 of the trial, Mr. Campagna deeded his Scottsdale, Arizona, to a “Qualified Personal Residence Trust” for which his daughter is the trustee and

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1 he and his wife are the beneficiaries. On November 6, 2009, after the Second Phase of the
2 trial, the POST Parties have submitted evidence showing Mr. Campagna transferred title of
3 his unencumbered Mercedes Benz to his daughter. Consequently, the POST Parties fear
4 further depletion of Mr. Campagna's remaining assets, and are particularly concerned that
5 he will accelerate his alleged efforts to make himself judgement proof should he learn about
6 their decision to request a Temporary Restraining Order ("TRO"). Accordingly, they have
7 requested that this Court issue an ex parte TRO and schedule a show-cause hearing where
8 Mr. Campagna can explain why a Preliminary Injunction should not be entered.

9 **II. Discussion**

10 **A. Rule 65(b)**

11 **1. Legal Standard**

12 The POST Parties have requested a TRO without notice. Accordingly, before this
13 Court can consider the appropriateness of granting a TRO, it must necessarily determine
14 whether issuance without notice is proper. Rule 65(b) of the Federal Rules of Civil
15 Procedure authorize this Court to grant a Temporary Restraining Order ("TRO") without
16 notice to an adverse party when: (1) "specific facts in an affidavit or a verified complaint
17 clearly show that immediate and irreparable injury, loss, or damage will result to the movant
18 before the adverse party can be heard in opposition;" and (2) "the movant's attorney certifies
19 in writing any efforts made to give notice and the reasons why it should not be required."
20 The Ninth Circuit has cautioned district courts against issuing a TRO without notice to the
21 adverse party, stating that the "[c]ircumstances justifying the issuance of an ex parte order
22 are extremely limited." Reno Air Racing Ass'n, Inc. v. McCord, 452 F.3d 1126, 1131 (9th
23 Cir. 2006) (citing Granny Goose Foods, Inc. v. Teamsters, 415 U.S. 423 (1974)). Their
24 issuance is "restricted to serving their underlying purpose of preserving the status quo and
25 preventing irreparable harm just so long as is necessary to hold a hearing, and no longer." Id.
26 (quoting Granny Goose Foods, 415 U.S. at 439). The limited nature of this remedy
27 "reflect[s] the fact that our entire jurisprudence runs counter to the notion of court action
28 taken before reasonable notice and an opportunity to be heard has been granted both sides

1 of a dispute.” Id. (quoting Granny Goose Foods, 415 U.S. at 438–39).

2 **2. An Ex Parte TRO is warranted**

3 The POST Parties have satisfied the procedural requirements of Rule 65(b) by
4 submitting both a Certificate of Counsel in Support of Temporary Restraining Order and
5 Deceleration Robert H. McKirgan, each explaining why notice has not been given to Mr.
6 Campagna and why it should not be required. The dispositive issue before this Court, then,
7 is whether their Motion and accompanying exhibits contain facts showing that good cause
8 exists to find that irreparable and immediate harm will result if Mr. Campagna is prior to this
9 Court holding a hearing concerning the POST Parties’ request for an injunction.

10 The POST Parties have alleged and introduced evidence tending to show that Mr.
11 Campagna has attempted to dissipate his assets. Exhibits attached as part of the Declaration
12 of Mary L. Gerds demonstrate that shortly after suffering an adverse verdict in the Phase 1
13 trial in this matter, on February 6, 2008, Mr. Campagna deeded his Scottsdale, Arizona,
14 home to a Qualified Personal Residence Trust that named his daughter as trustee and himself
15 and Helga Terry Campagna as beneficiaries, for \$10.00 and other unnamed valuable
16 consideration. They also show that after suffering an adverse verdict in Phase 2 trial in this
17 matter, Mr. Campagna transferred his Mercedes Benz automobile to his daughter. Assuming,
18 for the moment, the truth of the POST Parties allegations, the Court finds that the POST
19 Parties have demonstrated irreparable harm. See In re Estate of Ferdinand Marcos, Human
20 Rights Litig., 25 F.3d 1467, 1480 (9th Cir. 1994) (“We join the majority of circuits in
21 concluding that a district court has authority to issue a preliminary injunction where the
22 plaintiffs can establish . . . that defendant has engaged in a pattern of secreting or dissipating
23 assets to avoid judgment.”) see also Nastro v. D’Onofrio, 263 F.Supp.2d 446, 460 (D. Conn.
24 2003) (“The possibility that [the judgment debtor] could take further action to void [the]
25 judgment, and could possibly dissipate his assets beyond the reach of this court, constitutes
26 irreparable harm.”).

27 Because, however, this is an application for an ex-parte TRO, the harm in question
28 must be immediate, as well as irreparable. The POST Parties argue that based on his past

1 actions, Mr. Campagna will attempt to dissipate his remaining assets if given notice of these
2 proceedings. It is impossible to know exactly what Mr. Campagna will do should he learn
3 about the POST Parties' attempt to secure a TRO. Accordingly, the Ninth Circuit teaches
4 that immediacy may be demonstrated by allegations supported by evidence showing that the
5 adverse party has a history of engaging in the activity likely to cause the irreparable harm.
6 See Reno Air Racing Ass'n, Inc. v. McCord, 452 F.3d 1126, 1131 (9th Cir. 2006). In Reno,
7 a party preparing to bring a trademark infringement case sought an ex parte TRO because it
8 feared that the adverse party would destroy evidence of infringement should it be given
9 notice. In discussing the appropriate standard, the Court stated that “an ex parte TRO
10 applicant “must support . . . assertions [of irreparable immediate harm] by showing that the
11 adverse party has a history of disposing of evidence or violating court orders or that persons
12 similar to the adverse party have such a history.” Id. (quoting First Tech. Safety Sys., Inc.
13 v. Depinet, 11 F.3d 641, 650 (6th Cir.1993)). In the instant case, the POST Parties have
14 made more than mere accusations concerning Mr. Campagna's actions; they have provided
15 this court with evidence showing that Mr. Campagna has transferred approximately two
16 million dollars in assets since the trial's first phase ended. This disposal of assets is akin,
17 then, to destruction of evidence, as both of these actions, if successful, significantly hinder
18 the ability of one side to a dispute to be made whole in a court of law. The immediacy of the
19 irreparable harm is also demonstrated by the fact that Mr. Campagna's asset transfers
20 occurred in response to negative outcomes at this Court. It is not a stretch to conclude that
21 the specter of another unfavorable decision—the issuance of a TRO—could spur Mr.
22 Campagna to take further steps to dispose of his remaining assets. Accordingly, based on
23 the evidence they have put before this Court, the POST Parties have demonstrated a history
24 of secreting assets based on which this Court can determine the threat of harm will be
25 immediate absent an ex parte order. See also S.E.C. v. Private Equity Mgmt. Group, LLC,
26 2009 WL 1310984, *1 (C.D. Cal. April 27, 2009) (granting an a TRO without notice where
27 the applicant demonstrated a “the possibility of dissipation of assets”).

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1 **B. Temporary Restraining Order**

2 Having concluded that an ex-parte TRO is appropriate in this matter, the Court must
3 determine if the POST Parties have satisfied the substantive requirements for a TRO. The
4 standard for issuing a TRO is the same as that for issuing a preliminary injunction. See
5 Brown Jordan Int'l, Inc. v. The Mind's Eye Interiors, Inc., 236 F.Supp.2d 1152, 1154
6 (D.Haw.2007). Accordingly, a TRO is appropriate where the moving party establishes “that
7 he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence
8 of preliminary relief, that the balance of equities tips in his favor, and that an injunction is
9 in the public interest.” American Trucking Associations, Inc. v. City of Los Angeles, 559
10 F.3d 1046, 1052 (9th Cir. 2009). The purpose of injunctive relief is to preserve the status
11 quo and prevent the irreparable loss of rights. Textile Unlimited, Inc. v. A.BMH and Co.,
12 Inc., 240 F.3d 781, 786 (9th Cir. 2001).

13 **1. The POST Parties are likely to succeed on the merits:**

14 Because of Mr. Campagna’s actions, the POST Parties are concerned about their
15 ability to collect on the judgement they have against Mr. Campagna. As part of this effort,
16 the POST Parties clearly expect to seek relief pursuant to the Arizona Fraudulent Transfer
17 Act (AFTA). A.R.S. § 44-1004. A transfer of assets is fraudulent if made “with actual intent
18 to hinder, delay or defraud any creditor of the debtor.” Id. § 44-1004(A)(1). “Actual intent
19 may be shown by direct proof or by circumstantial evidence from which actual intent may
20 be reasonably inferred.” Gerow v. Covill, 192 Ariz. 9, 17 (App. 1998) The AFTA lists a
21 number of factors from actual intent may be inferred, including, but not limited to (1) transfer
22 to an insider; (2) the debtor retained possession of the transferred asset; (3) prior to the
23 transfer, the debtor had been threatened with suit; (4) the asset was transferred shortly before
24 or after the incurrence of a substantial debt. A.R.S § 44-1004(B). These factors are “badges
25 of fraud” from which intent may be inferred, not required elements. Gerow, 192 Ariz. at 17.
26 Under the AFTA, a successful creditor-plaintiff is entitled to one or more remedies, including
27 “[a]n injunction against further disposition by the debtor or a transferee, or both, of the asset
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1 transferred or of other property,” or a “levy execution on the asset transferred or its
2 proceeds.” A.R.S. § 44-1007(A)(4)(a); id. at § 44-1007(B).

3 Defendant’s submissions to this Court demonstrate a likelihood of success under the
4 AFTA. Exhibits attached as part of the Declaration of Mary L. Gerdts show that shortly
5 after suffering an adverse verdict in the Phase 1 trial in this matter, on February 6, 2008, Mr.
6 Campagna deeded his Scottsdale, Arizona, home to a Qualified Personal Residence Trust that
7 named his daughter as trustee and himself and Helga Terry Campagna as beneficiaries, for
8 \$10.00 and other unnamed valuable consideration. They also show that after suffering an
9 adverse verdict in Phase 2 trial in this matter, Mr. Campagna transferred his Mercedes Benz
10 automobile to his daughter. These transactions evidence numerous badges of fraud under
11 AFTA. First, Mr. Campagna made both of the asset transfers identified by the POST Parties
12 to an insider, his daughter. See Gerow, 192 Ariz. at 19 (stating that family members are
13 insiders). Second, the POST Parties allege that Mr. Campagna still resides in the Scottsdale
14 home deeded to the trust, demonstrating he retains possession of that asset. Third, the
15 transfer of the Mercedes Benz occurred shortly after Mr. Campagna incurred a substantial
16 debt in the form of the POST Parties’ judgment. Fourth, both of these transfers occurred
17 after the POST Parties threatened Mr. Campagna with a lawsuit and after Mr. Campagna
18 suffered adverse jury verdicts in this case. Because even a single badge of fraud “may
19 establish and stamp a transaction as fraudulent,” Gerow, 192 Ariz. At 17 (quoting
20 Torosian v. Paulos, 82 Ariz. 304, 312, 313 (1957)), this Court finds that the POST Parties
21 have met their burden and demonstrated a likelihood of success on the merits in an action
22 under AFTA.

23 **2. The POST Parties will suffer irreparable harm**

24 As discussed in Part A, *supra*, this court may issue an injunction when a plaintiff can
25 establish that “money damages will be an inadequate remedy due to impending insolvency
26 of the defendant or that defendant has engaged in a pattern of secreting or dissipating assets
27 to avoid judgment.” See In re Estate of Ferdinand Marcos, Human Rights Litig, 25 F.3d
28 1467, 1480 (9th Cir. 1994); It follows, then, that a judgement debtors dissipation of assets

1 can constitute irreparable harm to the judgment creditor. See Nastro v. D'Onofrio, 263
2 F.Supp.2d 446, 460 (D.Conn. 2003) (“The possibility that [the judgment debtor] could take
3 further action to void [the] judgment, and could possibly dissipate his assets beyond the reach
4 of this court, constitutes irreparable harm.”). The POST Parties have introduced evidence
5 showing Mr. Campagna has engaged in a pattern of conduct meant to dissipate his assets.
6 Accordingly, if Mr. Campagna is not prohibited from continuing this behavior, the POST
7 Parties will suffer irreparable harm, as they will lose out on their right to collect their
8 judgment.

9 **3. A TRO is in the public interest**

10 “When the reach of an injunction is narrow, limited only to the parties, and has no
11 impact on non-parties, the public interest will be ‘at most a neutral factor in the analysis
12 rather than one that favor[s] [granting or] denying the preliminary injunction.’” Stormans,
13 Inc. v. Selecky, 571 F.3d 960, 988 (9th Cir. 2009) (quoting Bernhardt v. L.A. County, 339
14 F.3d 920, 931 (9th Cir.2003)). Here, the requested injunctive relief is narrow and will have
15 no significant impact on non-parties. Additionally, public policy undoubtedly favors the
16 enforceability of judgments. Were it otherwise, lawsuits seeking monetary damages would
17 be rendered ineffective. See, e.g., Thomas, Head and Greisen Employees Trust v. Buster,
18 95 F.3d 1449, 1455 (9th Cir. 1996) (“Process subsequent to judgment is as essential to
19 jurisdiction as process antecedent to judgment, else the judicial power would be incomplete
20 and entirely inadequate to the purposes for which it was conferred by the Constitution.”
21 (quoting Riggs v. Johnson County, 73 U.S. (6 Wall.) 166, 187, 18 L.Ed. 768 (1867))).

22 **4. The balance of hardships favors the POST Parties**

23 “In assessing whether the plaintiffs have met this burden, the district court has a ‘duty
24 ... to balance the interests of all parties and weigh the damage to each.’” Stormans, 571 F.3d
25 at 988-89 (quoting See L.A. Mem'l Coliseum Comm'n v. Nat'l Football League, 634 F.2d
26 1197, 1203 (9th Cir.1980)). On the one hand, entering a temporary restraining order will
27 undoubtedly inconvenience Mr. Campagna. If, however, an injunction is not entered and Mr.
28 Campagna dissipates more of his assets, the POST Parties may be unable to collect on their

1 judgment against him, rendering fruitless nearly eight years of litigation. Additionally, any
2 injunction entered by this Court will not merely work to freeze Mr. Campagna's assets.
3 Instead, it will allow him to make expenditures for household expenses and expenses
4 incurred in the ordinary course of business. Accordingly, the Court finds that Mr.
5 Campagna's potential inconvenience is outweighed by possibility the POST Parties will be
6 unable to collect on their judgment.

7 **III. Conclusion**

8 Therefore, having considered their motion, accompanying declaration, and exhibits,
9 the Court finds that good cause exists to determine that irreparable and immediate injury,
10 loss, and damage will result to the POST Parties in the form of further dissipation of and
11 transfer of Mr. Campagna's assets should he receive notice prior to the entry of a TRO.
12 Additionally, the Court has determined that good causes exists to find that a TRO should
13 issue, as the POST Parties have shown that they are likely to succeed on the merits, they will
14 suffer irreparable harm, the balance of equities tips in their favor, and a TRO is not against
15 public policy. In deciding that an ex parte TRO is appropriate, the Court emphasizes that it
16 does not intend to penalize Mr. Campagna, nor does it believe an injustice will result from
17 its issuance. The forthcoming TRO will not prevent Mr. Campagna from making
18 expenditures necessary as part of the ordinary course of business, or to pay for household
19 expenses. The purpose of the TRO is merely to preserve the status quo as to his remaining
20 assets until such time as Mr. Campagna can be heard in Court concerning the necessity of
21 issuing a Preliminary Injunction.

22 **Accordingly,**

23 **IT IS HEREBY ORDERED** that a temporary restraining order be issued
24 immediately this day of January 21, 2010, restraining Leonard Campagna, his officers,
25 agents, servants, employees, and attorneys and any other person acting in active concert or
26 participation with any of them, from effecting any transfers of Leonard Campagna's assets,
27 or any assets owned by his marital community, to any third party, including any trust, unless
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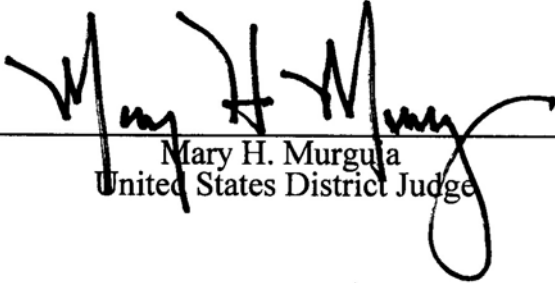
1 such transfer is made in the ordinary course of business or to pay for ordinary household
2 expenditures. (Dkt. #829).

3 **IT IS FURTHER ORDERED** that Leonard Campagna be heard on Thursday,
4 January 28, 2010, at 2:00 PM in this Court, at a hearing held pursuant to Rule 65 of the
5 Federal Rules of Civil Procedure regarding the issuance of a preliminary injunction against
6 Leonard Campagna. Leonard Campagna shall have to and including Tuesday, January 26,
7 2010, at 5:00 p.m. to file and serve any briefs, affidavits, and other evidence to show cause
8 why a preliminary injunction should not issue. The POST Parties shall have to and
9 including, Wednesday, January 27, 2010, at 5:00 p.m. to file any reply briefs or affidavits.

10 **IT IS FURTHER ORDERED** pursuant to Rule 65 of the Federal Rules of Civil
11 Procedure, that the POST Parties are to post a bond in the amount of \$50,000 to make good
12 such damages (not to exceed the amount of the bond stated above) as may be suffered or
13 sustained by any party who was found to be wrongfully restrained. The bond shall be posted
14 within three business days of this Order.

15 DATED this 21st day of January, 2010.

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Mary H. Murgula
United States District Judge