UNITED STATES DISTRICT COURT
DISTRICT OF MARYLAND
Baltimore Division

ALBERT SNYDER,	:	
	:	
Plaintiff	:	Civ. No. 1:06-cv-01389-RDB
	:	
FRED PHELPS, et al,	:	
	:	
Defendant.	:	

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION OF DEFENDANTS FRED PHELPS, SR., AND WESTBORO BAPTIST CHURCH FOR STAY PENDING APPEAL

Defendants Fred W. Phelps, Sr. ("Phelps") and Westboro Baptist Church, Inc. ("Westboro") (collectively, "Defendants"), through undersigned counsel, respectfully move the Court to stay the Court's December 11, 2006, Order ("Order") for Defendants to pay $3,150.00 to Plaintiff, pending the resolution of Defendants' appeal of said Order.

The grounds for this Motion follow:

1. On December 20, 2006, Defendants filed a notice of appeal from the Court's Order. The Court received Defendants' filing fee on $455.00.

2. Rule 62(d) of the Federal Rules of Civil Procedure provides for stays of orders to pay money, pending appeal:

> When an appeal is taken the appellant by giving a supersedeas bond may obtain a stay subject to the exceptions contained in subdivision (a) of this rule. The bond may be given at or after the time of filing the notice of appeal or of procuring the order

> allowing the appeal, as the case may be. The stay is effective when the supersedeas bond is approved by the court.

Fed. R. Civ. P. 62(d).

3. The Court's Order being appealed is ripe for appellate review. 28 USCS § 1291. Specifically:

> [W]hen the decree decides the right to the property in contest, and directs it to be delivered up by the defendant to the complainant, or directs it to be sold, or directs the defendant to pay a certain sum of money to the complainant, and the complainant is entitled to have such decree carried immediately into execution, the decree must be regarded as a final one to that extent, and authorizes an appeal to this court, although so much of the bill is retained in the [***10] Circuit Court as is necessary for the purpose of adjusting by a further decree the accounts between the parties pursuant to the decree passed.

F*orgay v. Conrad*, 47 U.S. 201, 406 (1848).

The Supreme Court has "interpreted the term 'final decision' in [28 U.S.C.] § 1291 to permit jurisdiction over appeals from a small category of orders that do not terminate the litigation." *Cunningham v. Hamilton County*, 527 U.S. 198, 204 (1999) (citations omitted). "'That small category includes only decisions that are conclusive, that resolve important questions separate from the merits, and that are effectively unreviewable on appeal from the final judgment in the underlying action.'" *Id.* (quoting *Swint v. Chambers County Comm'n*, 514 U.S. 35, 42 (1995)). *See also Rux v. Republic of Sudan,* 461 F.3d 461,

474-75 (4th Cir. 2006) (confirming that § 1291 permits appeals from a small category of orders that do not terminate the litigation).

In 2006, the Supreme Court explained this collateral order doctrine as follows:

> The collateral order doctrine, identified with *Cohen v. Beneficial Industrial Loan Corp.,* 337 U.S. 541 …(1949), is "best understood not as an exception to the 'final decision' rule laid down by Congress in [28 U.S.C.] § 1291, but as a 'practical construction' of it." *Digital Equipment, supra,* at 867 ... Whereas 28 U.S.C. § 1291 "gives courts of appeals jurisdiction over 'all final decisions' of district courts" that are not directly appealable to us, *Behrens v. Pelletier*, 516 U.S. 299 ...(1996), the collateral order doctrine accommodates a "small class" of rulings, not concluding the litigation, but conclusively resolving "claims of right separable from, and collateral to, rights asserted in the action," *ibid*. (internal quotation marks omitted). The claims are "too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." *Cohen, supra,* at 546...

Will v. Hallock, ___ U.S. ___, 126 S. Ct. 952, 957 (2006).

4. The Fourth Circuit set forth the following criteria for determining whether a trial court's order is an appealable collateral order:

> The Court has thus reserved "collateral order" status only for orders that meet three "stringent" conditions: an order must "[1] conclusively determine the disputed question, [2] resolve an important issue completely separate from the merits of the action, and [3] be effectively unreviewable on appeal from a final judgment." Will, 126 S. Ct. at 957. See also Digital

> Equip. Corp., 511 U.S. at 867. "If the order fails to satisfy any one of these requirements, it is not an immediately appealable collateral order." *Carefirst of Md., Inc. v. Carefirst Urgent Care Ctr.,* 305 F.3d 253, 258 (4th Cir. 2002).

S.C. State Bd. of Dentistry v. FTC, 455 F.3d 436 (4th Cir. 2006).

Defendants' appeal is ripe, in that it involves claims that are "'too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated.'" *Will v. Hallock*, 126 S. Ct. at 957 (quoting *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 546 (1949)). For instance, the Order requires payment of a substantial amount of money, and there is no guarantee that Plaintiff will have the money left to return to Defendants if Defendants prevail on the appeal of the Court's Order.

5. The Supreme Court's 1988 *Budinich v. Becton Dickinson* case supports that the type of money payment required by the Court's Order is fully separate from the remainder of this lawsuit, and is, therefore, ripe for appeal:

> As a general matter, at least, we think it indisputable that a claim for attorney's fees is not part of the merits of the action to which the fees pertain. Such an award does not remedy the injury giving rise to the action, and indeed is often available to the party defending against the action. At common law, attorney's fees were regarded as an element of "costs" awarded to the prevailing party, *see* 10 C. Wright, A. Miller, & M. Kane, Federal

> Practice and Procedure: Civil § 2665 (1983), which are not generally treated as part of the merits judgment."

Budinich v. Becton Dickinson & Co., 486 U.S. 196, 200 (1988).

6. Fully on point with Defendants' appeal:

> [W]here fees might not be recoverable by the defendant from the plaintiff if the award were reversed at the end of the litigation, so that refusal of an immediate appeal might inflict irreparable harm on the defendant, the award is appealable immediately as a collateral order. *E.g., People Who Care v. Rockford Board of Education,* 171 F.3d at 1086; *Construction Industry Retirement Fund v. Kasper Trucking, Inc.,* 10 F.3d 465, 468 (7th Cir. 1993); *People Who Care v. Rockford Board of Education*, 921 F.2d 132 at 134-35; *Richardson v. Penfold*, 900 F.2d 116 (7th Cir. 1990); *Palmer v. City of Chicago*, 806 F.2d 1316 (7th Cir. 1986); *Law v. National Collegiate Athletic Ass'n,* 134 F.3d 1025, 1027 (10th Cir. 1998); *Riverhead Savings Bank v. National Mortgage Equity Corp.,* 893 F.2d 1109, 1113-15 (9th Cir. 1990); *Webster v. Sowders*, 846 F.2d 1032, 1035 (6th Cir. 1988); *cf. Walker v. HUD*, 99 F.3d 761, 766 (5th Cir. 1996). For it is final in the practical sense that it may well be the last opportunity the defendant has to obtain relief from the order from the appellate court. That is the situation here. The defendant contends that the plaintiffs' law firm is small and fragile--and the plaintiffs do not contest the contention, and so we accept it as true and proceed to the merits.

People Who Care v. Rockford Bd. of Educ., 272 F.3d 936, 937 (7th Cir. 2001) (emphasis added).

7. Defendants will suffer irreparable harm to be denied the opportunity at this juncture to appeal the Court's Order, and to obtain a stay of the enforcement of payment under the Order, pursuant to Fed. R. Civ. P. 62(d),

in part because it is questionable whether Plaintiff will have the funds to return to Defendants if they prevail on appeal.

Defendants are a preacher and a small church, and $3150 is no small sum for Defendants to lose if Plaintiff is unable to return that sum if they prevail on appeal. Defendants propose a complete stay on payment of this amount pending appeal, or the opportunity to pay a supersedeas bond under Local Rule 110(1).

8. In further support of a stay pending appeal, questions about Plaintiff's ability to repay the funds if Defendants win on appeal are raised by the following: (a) Just four years ago, Plaintiff fell behind on paying child support, apparently related to having lost his job in December 2001 (although he claimed to have gained new employment thereafter). Albert Snyder's Answer to Amended Petition for Contempt in *Albert Snyder v. Julia Snyder*, Carrol County, Maryland, Circ. Ct. Case No. C-2000-32560-DV (attached hereto as Exhibit 1). (b) Plaintiff has posted a website asking for help with his legal expenses (while asserting that his lawyers are working *pro bono). See* www.matthewsnyder.org (checked December 21, 2006).

9. Payment of a supersedeas bond will assure payment of the court-ordered payment should Defendants not prevail in their pending appeal.

WHEREFORE, Defendants Phelps and Westboro move for a stay of the order to pay $3150.00 to Plaintiff.

Respectfully submitted

MARKS & KATZ, L.L.C.

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