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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH

MICHAEL E. ANDERER, Plaintiff, -vs- **INAURA, INC.**; **PETER BOOKMAN**; **RODNEY A. RASMUSSEN**; **DAVID M. MOCK**; **DAVID G. TURCOTTE; ROBERT DELARM; PACELINE RB, LLC; PACELINE II, LLC; GMG UPSIDE FUND, LP; SPECIAL PURPOSE, LLC** and **V3 SYSTEMS, INC.**, Defendants.	**MOTION FOR PRELIMINARY INJUNCTION, TEMPORARY RESTRAINING ORDER AND APPOINTMENT OF RECEIVER** Case No.2:13-cv-00111-TC Honorable Tena Campbell

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Plaintiff Michael E. Anderer ("Anderer"), by and through his counsel of record, and pursuant to FED. R. CIV. P. 65, FED. R. CIV.P. 66, and DUCivR 7-1(a) respectfully submits this Motion for Preliminary Injunction, Temporary Restraining Order and Appointment Receiver. This Motion is supported by the pleadings on file with the Court and the declarations of Michael E. Anderer, Mark R. Anderson and David Scofield filed concurrently herewith.

STATEMENT OF PRECISE RELIEF SOUGHT AND GROUNDS FOR THE MOTION

Anderer seeks an order from this Court (1) enjoining defendants, and each of them, from despoiling the assets of V3 Systems, Inc. ("V3") to the detriment of Anderer; and (2) appointing a receiver to manage V3 in order to prevent defendants from looting V3's assets pending the outcome of this litigation.

INTRODUCTION

V3 was started with assets stolen from Inaura. Defendants Bookman, Rasmussen and Mock, in concert with other principals of V3, breached their fiduciary duties to both Inaura, Inc. and Anderer by fraudulently transferring substantially all of the assets of Inaura to V3, while deceiving and lulling the other principals of Inaura, particularly Anderer, regarding their conduct.

Anderer now asks the Court to exercise its expansive equitable powers and issue a temporary restraining order and preliminary injunction against defendants, and to appoint a receiver for V3 in order to prevent defendants from looting V3's assets prior to resolution of this case on the merits. Although injunctive relief and receivership are

extraordinary remedies, they are warranted in cases of fraud, such as this, where there is no hope of recovery through ordinary proceedings.

STATEMENT OF FACTS

Factual Allegations of the First Amended Complaint

1. Anderer and defendant Bookman formed Inaura Holding, LLC ("Holding") on or about August 31, 2007. Anderer was recruited to serve as Holding's Chief Technology Officer in order to help Holding successfully develop its products. This included development of products for defendant Inaura Inc. ("Inaura"), a closely-held, non-public corporation controlled by defendants Rasmussen, Bookman and Mock. Not only was Anderer not paid for his services, but Anderer also provided funding to Inaura of over $300,000.00 and funding to Bookman directly, when Inaura ran out of funds and Bookman was unwilling to provide or raise any other funds. *See* First Amended Complaint ("Compl.") at ¶¶ 2, 14, 15, 19, 20 & 21.

2. Inaura has accrued but not paid over $300,000 in unpaid salary obligations to Anderer. Compl. at ¶¶ 21.

3. On or about December 2, 2008, and without Anderer's then-present knowledge or consent, Bookman, as Holding's registered agent, failed to make necessary annual report filings and allowed Holding to be administratively dissolved by the Utah Division of Corporations. As the registered agent, Bookman received the notice of such dissolution but failed to inform Anderer of the State of Utah's action. Compl. at ¶ 32.

4. In or about, 2009, Anderer was owed substantial funds for unpaid salary by Inaura, but Rasmussen, as Chairman of the Board was nevertheless demanding that Anderer perform substantial work for Inaura. Out of frustration, Anderer said that he would resign as the CTO of Inaura. Compl. at ¶ 33.

5. Bookman met with Rasmussen wherein in was agreed between those two, Bookman and Rasmussen, that Inaura would re-impose the "clawback" provision of the SRA despite the earlier agreement that the benchmarks/milestones were abandoned in consideration of retaining Anderer's and Bookman's services. It was further agreed between Bookman and Rasmussen to falsely assert that significant portions of the benchmarks had not been met, to cause Inaura to issue a Note to Bookman and Anderer for the clawback shares and to agree that Rasmussen would agree to purchase at least a portion of Bookman's retained shares for $30,000.00, all in order to provide funds to Bookman to help him meet his financial needs. Compl. at ¶ 40.

6. On or about August 4, 2010, a Board of Directors meeting was held among Rasmussen, Bookman, Mock, and Turcotte (the "August 4 Meeting"). Anderer received no notice and was not present. Thus, pursuant to the Bylaws, no quorum was present and no lawful business could be or should have been attempted to be conducted. Compl. at ¶ 41.

7. Rasmussen, Bookman, Mock, Turcotte, and DeLarm at an earlier point in 2010 and likely prior to refusing to turn corporate records over to Board Members Lee and Lassiter, entered into an agreement to steal at least part of, if not the entire, V3

Systems concept from Inaura and to set up a separate corporation to commercialize and profit from those stolen assets. Compl. at ¶ 42.

8. Rasmussen, with the knowledge and consent of the other defendants herein, had already regularly hidden material facts concerning the number of shares entitled to vote at meetings and the company's capitalization table, utilizing lulling schemes, while producing one half of the equation, to justify his failure to produce the other half. Compl. at ¶ 43.

9. Now, however, these conspirators (Rasmussen, Bookman, Mock, Turcotte and DeLarm) each agreed to commit one or more unlawful overt acts in furtherance of their conspiracy to loot the assets and business opportunities of Inaura and to instead enrich themselves at the expense of Anderer through the commercialization and development of products and execution of all or part of Inaura's business plan through V3, in which all of them were founders and equity holders but in which Anderer had been left out and in the dark. In fact, they even chose the name V3 Systems to avoid placing Anderer on suspicion, since the internal Inauara business plan had been referred to as V3. Compl. at ¶ 44.

10. Although Mock was appointed as a director of Inaura by his co-conspirators at this meeting, he had regularly attended prior Board of Directors' meetings of Inaura and so had been privy to all information discussed at such meetings. And, since on information and belief he was compelled under his agreement with Rasmussen to vote his shares with Rasmussen, Mock's presence was as an adjunct to that of Rasmussen and, if Rasmussen made any representation or omitted to disclose information material to Anderer during any such Board meeting, Mock had an

equal duty to correct the misinformation or omission since he was voting with Rasmussen's true intent, known to Mock. Compl. at ¶ 47.

11. Lacking a quorum as defined in Inaura's Bylaws, all of the purported actions taken at the August 4 Meeting were null and void. Compl. at ¶ 50.

12. The SRA did not provide that the shares of Inaura owned by Holding would be subject to a clawback based upon a total points awarded under all benchmarks. For each benchmark receiving a score of "5" or better, Holding was entitled to retain one-fifteenth of its issued shares. Compl. at ¶ 52.

13. On or about August 19, 2010, Rasmussen sent ostensible notice to Holding that Inaura had determined that a "Triggering Event" had occurred as defined in the SRA, and that Inaura was exercising "its option the repurchase all 1,604,262 of such Shares (the "Repurchased Shares") pursuant to Section 1(a) of the Agreement and hereby immediately repurchases such Shares." Each of Mock, Rasmussen and Bookman, as directors of Inaura, authorized the making of the materially false and misleading statement that a "Triggering Event" had occurred in order to justify the theft, through this ostensible offer, of Inaura's repurchase of Holding's shares. Each of them also, at that time, omitted to reveal that they had collectively agreed to freeze-out Anderer from the V3 Systems opportunity. Compl. at ¶ 56.

14. On or about August 27, 2010, as part of the offer by Mock, Bookman and Rasmussen to cause Inaura to repurchase Holding's shares, Inaura issued a promissory note to Holding in the amount of $941,040 bearing interest at the rate of 0.55%, supposedly to facilitate the winding up of the affairs of Holding and to pay Holding for its shareholder interest in Inaura. At this time, Rasmussen and Bookman

were aware that Holding had been administratively dissolved by the State of Utah and was no longer an entity authorized to do business in Utah, but Anderer was not. The same material omissions were made at the time such Note was offered in exchange for the shares. Compl. at ¶ 54.

15. Mock, Bookman, Rasmussen and Turcotte caused Inaura to re-issue a Note to offer to Anderer, directly, for $470,520 allegedly for his one-half share of the Inaura stock allocated to Holding and that was allegedly subject to the clawback provision of the SRA. The Note was backdated to August 27, 2010 and was signed by Rasmussen as the Chairman and CFO of Inaura. Again, in making such offer on Inaura's behalf, Mock, Rasmussen, Bookman and Turcotte omitted to disclose the material facts of the conspiracy and the plan to freeze-out Anderer from the V3 Systems opportunity. Compl. at ¶ 56.

16. At the time of the issuance of the Note, Inaura was in fact insolvent. Mock, Bookman, Rasmussen and Turcotte knew that Inaura was insolvent at the time they caused the offer to be made to Anderer, through the Note, to have Inaura repurchase Anderer's shares. Yet each of them, under a duty to disclose such material information, failed to do so and Inaura therefore alleged to repurchase the shares through the issuance of a Note that it, too, knew was worthless. Compl. at ¶ 59.

17. No payment has ever been made to Anderer by Inaura under the terms of the Note. Compl. at ¶ 60.

18. Before September 3, 2010, Inauara had, with the Fusion settlement funds that Rasmussen, Mock, Bookman and Turcotte had promised to pay Inauara's debts, completed both the V3 Systems development and the creation of logos for V3 and

Tensor, a name that was to be attached to the reseller and maintenance business associated with Inaura's V3 business opportunity. Compl. at ¶ 62.

19. Upon information and belief, all or most of the V3 Systems projects that had been developed at Inaura, using Inaura funds, were transferred to V3.

20. On information and belief, the day after V3 was incorporated it attended a trade show in San Francisco, California under the guise of being the V3 Systems project so as to lull Anderer into believing that all of the V3 Systems project at Inaura was in fact what was presented at the show. In fact, marketing materials were designed under a contract with Inaura that, on information and belief, were used or infringed on by materials that were used, at the trade show. Compl. at ¶ 66.

21. In the words of V3's press release, the VDA was "a 1U-high rack-mounted appliance that serves as a virtual desktop accelerator" that allowed for virtual desktop performance form a cloud-based environment." The VDA was one of the products developed by Inaura. Compl. at ¶ 67.

22. On or about February 10, 2011, Rasmussen, Bookman and Turcotte appeared in person and Mock and DeLarm appeared by telephone for an alleged Board of Director's meeting of Inaura. Therein, the Board purportedly authorized conducting an emergency shareholders' meeting. Compl. at ¶ 68.

23. The telephonic "emergency shareholders' meeting" was conducted on February 11, 2011. At that meeting, Anderer was told that Inaura had "forgotten" to pay payroll taxes from the time Anderer left the Board and that the IRS was demanding payment of $35,000 and that Inaura had no money. The only "shareholders" on the

telephone call were Anderer, Mock and DeLarm, a friend of Rasmussen, who also was an investor in Inaura. Compl. at ¶ 69.

24. During the course of the conversation, Anderer asked how V3 was doing. Anderer believes that it may have been Turcotte who said that "Inaura ha[d] nothing to do with V3." This was the first inkling that Anderer had that anyone claimed that the unveiled V3 presentation at the trade show was anything different from the V3 Systems project belonging to Inaura that he had worked on at Inaura for the previous three to four years. Compl. at ¶ 71.

25. Anderer also indicated that he had emails in his possession dating back to February 2010 about the appliance that became "VDA" and that Rasmussen had reserved the "V3 Systems" name on or about April 1, 2010 while with Inaura. Compl. at ¶ 73.

26. At no time prior to V3's formation had any of the individual defendants advised Anderer that V3 had been launched or even that it was contemplated. At no time had any of the individual defendants advised Anderer of any conflict of interest between their duties as officers and directors of Inaura. At no time had any of the individual defendants advised Anderer that Inaura's products and intellectual property were being diverted to or being seized by V3. At no time had the opportunity represented by the formation of V3 been offered to Inaura or voted on by disinterested directors. Compl. at ¶ 75.

27. At this meeting, it was finally admitted by the defendants and acknowledged that approximately seventy per cent (70%) of the settlement funds that Inaura had received from Fusion had actually been used to pay employees and

contractors on behalf of V3, rather than for the purposes that had been represented to be intended. These funds had been used prior to paying Anderer the salary due to him or to reimburse to him any other monies he had loaned to Inaura. Compl. at ¶ 77.

28. Through improper self-dealing, defendants, on behalf of V3, agreed to provide Inaura a note for $700,000, and further to provide Inaura with a 10% ownership interest in V3. Anderer never agreed to this allocation of shares or compensation. Holding never agreed to this allocation of shares or compensation. The offer of a note and shares in V3 was done after-the-fact in an effort to cover up the theft of Inaura's assets, intellectual property, trade secrets, and patent rights. Compl. at ¶ 78.

29. Upon information and belief, V3 successfully raised millions of dollars from investors to continue to pursue the business of V3. At no time, however, did V3 or its officers or directors disclose to those investors (a) the liabilities owed by V3 to Inaura, (b) the liabilities of V3 to Anderer, (c) Anderer's ownership interest in Inaura, (d) Inaura's ownership interest in V3, or (e) Inaura's products having been diverted by one or more of the individual defendants to V3. Compl. at ¶ 79.

30. The acts, transactions and occurrences complained of herein affect interstate commerce by, among other things, multiple uses of the United States mails and interstate wires (including telephone and internet email service), and affecting and attempting to affect the interstate transaction of business, including without limitation sales of securities, the interstate transfer of funds. The individual defendants have conspired with one another to obtain the funds, resources and assets of Anderer, Holding, and Inaura without paying fair value for the same; to violate fiduciary duties, to steal corporate opportunities, and to obtain new funds from investors for the benefit of

V3 and its officers and directors, by falsely overstating the value of V3 System's assets and by concealing the sources of such assets and the significant liabilities owed. One or more of the individual defendants have engaged in similar tactics and engaged in similar practices in the past. Anderer, Inaura, and others have been injured by the conduct described in the Complaint. Compl. at ¶ 82.

31. Plaintiff is informed, and therefore believes, that Mock, Rasmussen, Bookman and Turcotte have conspired and engaged in a pattern of wrongful acts by which they have enriched themselves at the expense of others in other start-up companies, whose assets have been stripped by them to the detriment of shareholders, members, owners, investors and/or holders of intellectual property. Plaintiff is informed and therefore believes that such other situations also involved the conduct of an enterprise that affected commerce, through the use of the United States mails and hundreds of uses of the interstate wires, the transport of money in commerce and other acts, the investigation of which may lead to the proof of other claims against them. Compl. at ¶ 83.

32. Inaura was a closely-held corporation as to which Anderer at all times was a minority shareholder. As such, each shareholder acting in a controlling group, each director and each officer of Inaura owed a fiduciary duty to Anderer and to Inaura. Such fiduciary duties included, without limitation, the duty to disclose material information that would adversely affect Anderer’s investment in comparison to control group shareholders, to act in accordance with the requirements of law, to act fairly towards Anderer and not unjustly, unfairly or oppressively, to not take any action that would unjustifiably impair the value of his investment or enhance the value of any other

shareholder's investment at his expense, to refrain from usurping opportunities that the company could acquire to increase the value of Anderer's investment, to act and to cause the company to act lawfully, to refrain from looting the assets of the company and to act with loyalty and fidelity to Inaura and to not usurp any of its corporate opportunities. Compl. at ¶ 85.

Recent Events Since the Filing of the Complaint

33. Recent events relevant to this motion are described in the Declarations of Michael E. Anderer, Mark R. Anderson and David W. Scofield. True and correct copies of these declarations and their support exhibits are attached hereto and fully incorporated herein by this reference.

ARGUMENT

I. THE COURT SHOULD ISSUE A TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION TO PREVENT DEFENDANTS DESPOILING THE ASSETS OF V3

A. THE UTAH UNIFORM FRAUDULENT TRANSFER ACT PROVIDES A SUBSTANTIVE RIGHT TO INJUNCTIVE RELIEF

The Utah Fraudulent Transfer Act ("UTFA") provides a remedy for creditors when debtors conceal their assets by transferring them to another individual or entity. UTAH CODE ANN. §§ 25-6-1 to -14 (LexisNexis 2014). The UTFA states:

> **25-6-8 Remedies of creditors**.
>
> (1) In an action for relief against a transfer or obligation under this chapter, a creditor, subject to the limitations in Section 25–6–9, may obtain:
>
> (a) avoidance of the transfer or obligation to the extent necessary to satisfy the creditor's claim;
> (b) an attachment or other provisional remedy against the asset transferred or other property of the transferee in accordance with the procedure prescribed by the Utah Rules of Civil Procedure;
> (c) subject to applicable principles of equity and in accordance with applicable rules of civil procedure:
> (i) **an injunction** against further disposition by the debtor or a transferee, or both, of the asset transferred or about the property;
> (ii) **appointment of a receiver** to take charge of the asset transferred or of other property of the transferee; or
> (iii) any other relief the circumstances may require.

UTAH CODE ANN. § 25-6-8(1)(a)(b)(c)(LexisNexis 2014)(emphases added).

The Utah Fraudulent Transfer Act thus provides that a creditor may obtain "avoidance of the transfer or obligation," "an attachment," or "other provisional remedy against the asset transferred or other property of the transferee." UTAH CODE ANN. §25-6-8(a) & (b). Significantly, the UTFA specifically provides for the imposition of an injunctive relief and the appointment of a receiver to preserve the transferred asset or

other property of the debtor or transferee, as well as "any other relief the circumstances may require." UTAH CODE ANN. § 25-6-8(c)(i)(ii)(iii). This is consistent with the broadly remedial purposes of the UTFA which require the statue to be construed with liberality so as to reach all artifices and evasions designed to rob the statute of its full force and effect in preventing debtors from paying just claims of their creditors. U.C.A. 1953, 25-1-1; *Natl. Loan Investors, L.P. v. Givens*, 952 P.2d 1067, 1069 (Utah 1998) ("The law has long held that transfers of property designed to place a debtor's assets beyond the reach of the debtor's creditors are void as to the creditors")(quoting *Butler v. Wilkinson*, 740 P.2d 1244,1260 (Utah 1987)(citing early common law cases and upholding trial court's imposition of a constructive trust on defendants' assets to satisfy creditor's claims)). Further, "[b]ecause the Fraudulent Transfer Act is remedial in nature, it should be liberally construed." *Id.*

Anderer has a valid claim against defendants under the UFTA. The UFTA defines a claim as follows: "[c]laim" means a right to payment, whether or not the right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured." UTAH CODE ANN. § 25-6-2(3). Anderer's claim against defendants for the fraudulent transfer of Inaura's assets to V3 clearly qualifies as a claim under this definition; as such Anderer is a creditor within the purview of the UFTA. *See* U.C.A. § 25-6-2(4)("Creditor" means a person who has a claim."); U.C.A. § 25-6-2(5)("Debt" means liability on a claim."); U.C.A. § 25-6-2(6)("Debtor" means a person who is liable on a claim.") *See* First Amended Complaint at ¶¶ 128-135.

Moreover, defendants, and each of them, are liable for the fraudulent transfer of Inaura assets to V3 as "insiders" under the UFTA. The term "insider" as it applies to a corporate defendant, such as V3, is defined in UTAH CODE ANN. §25–6–2(7)(b)(i)(ii) and (iii). Under this section of the UFTA, the following persons are defined as insiders: "a director of the debtor," "an officer of the debtor," and "a person in control of the debtor."

Under the UFTA, "[a] debtor is insolvent if the sum of the debtor's debts is greater than all of the debtor's assets at a fair valuation." UTAH CODE ANN. § 25-6-3(1); *Meyer v. General American Corp.*, 569 P.2d 1094, 1096 (Utah 1977) (under the Utah Fraudulent Conveyance Act, the level of insolvency necessary to meet the statutory requirement is not insolvency and bankruptcy sense, but merely showing that the party's assets are not sufficient to meet its liabilities as they become due.) Additionally, a debtor who is generally not paying his debts as they become due is presumed to be insolvent. UTAH CODE ANN. § 25-6-3(2); *Ogden State Bank v. Barker*, 40 P. 765 (Utah 1895).

UTAH CODE ANN. § 25-6-5 states: "a transfer made or obligation incurred by a debtor is fraudulent as to a creditor, whether the creditor's claim arose before or after the transfer was made or the obligation was incurred, if the debtor made the transfer or incurred the obligation ... with actual intent to hinder, delay, or defraud any creditor of the debtor. UTAH CODE ANN. § 25-6-5(1)(a). To determine "actual intent" under subsection (1)(a), consideration may be given, among other factors, to whether: the transfer or obligation was to an insider; the debtor retained possession or control of the property transferred after the transfer; the transfer or obligation was disclosed or concealed; before the transfer was made or obligation was incurred, the debtor had

been sued or threatened with suit; the transfer was of substantially all of the debtor's assets; the debtor removed or concealed assets; and the debtor was insolvent or became insolvent shortly after the transfer was made or the obligation was incurred. *See* UTAH CODE ANN. § 25-6-5(2)(a)(b)(c)(d)(e)(g)(l). Additionally, the transfer made or obligation incurred by a debtor is considered fraudulent as to a creditor whose claim arose before the transfer was made or the obligation was incurred if: (a) the debtor made the transfer or the obligation without receiving a reasonably equivalent value in exchange for the transfer or obligation; and premises (b) the debtor was insolvent at the time or became insolvent as a result of the transfer or obligation. *See* UTAH CODE ANN. § 25-6-56(1)(a)(b).

In this case, defendants, as described in the Statement of Facts herein, engaged in a fraudulent transfer under the UFTA when they looted the assets of Inaura and transfered them to V3. See Statement of Facts ("SOF") at ¶¶ 1-33. At all times relevant hereto, defendants Mock, Bookman, and Rasmussen were insiders of both Inaura and V3 who had control over both Inaura and V3. Since transferring substantially all of Inaura's assets to V3, defendants have, with the assistance of Kesselring, Gfoeller and GMG, essentially run V3 into insolvency as its debts to its creditors exceed its available assets based on any fair valuation of V3. *See* Declaration of Michael E. Anderer ("Anderer Decl.") at ¶¶ 1-8,16 & 31. Furthermore, defendants' conduct in concealing the theft of Inaura's assets from Anderer, and their bad-faith "settlement" negotiations on behalf of V3 from February 2014 through August 14, 2014, make it clear that their intention is to hinder delay and defraud Anderer from being able to collect the debt defendants owe him. Anderer Decl. ¶¶ 1, 2, 11, 12, 13, 14, 17, 18,

19,20, 21, 24, 25, 26 & 28; Declaration of Mark R. Anderson ("Anderson Decl.") at ¶¶ 1-27; Declaration of David W. Scofield ("Scofield Decl.") at ¶¶ 8, 10, 11, 12, 16, 19 &20.

B. THE PRELIMINARY INJUNCTION LEGAL STANDARD

FED. R. CIV. P. 65 (a) & (b) provides the Court authority to issue a preliminary injunction and temporary restraining order in to prevent defendants from despoiling the assets of V3 until this case can be resolved on the merits. The purpose of a preliminary injunction is to preserve the status quo and "relative positions of the parties" pending the final outcome of the case. *See, e.g., Summum v. Pleasant Grove City*, 483 F.3d 1044, 1048 (10th Cir. 2007)(internal citations omitted); *Tri-State Generation and Transmission Assoc., Inc. v. Shoshone River Power, Inc.*, 805 F.2d 351, 355 (10th Cir. 1986). "In issuing a preliminary injunction, a court is primarily attempting to preserve the power to render a meaningful decision on the merits." *Id.*

In order to obtain a preliminary injunction under FED. R. CIV. P. 65 the moving party must establish four factors:

> (1)[the movant] will suffer irreparable injury unless the injunction issues; (2) the threatened injury...outweighs whatever damage the proposed injunction may cause the opposing party; (3) the injunction, if issued, would not be adverse to the public interest; and (4) there is a substantial likelihood [of success] on the merits.

Heideman v. S. Salt Lake City, 348 F.3d 1182, 1188 (10th Cir. 2003)(elipses and brackets in original)(citing *RTC v. Cruce*, 972 F.2d 1195, 1198 (10th Cir. 1992) and *Kikumura v. Hurley*, 242 F.3d 950, 955 (10th Cir. 2001)). *See also*, *Summum v. Pleasant Grove City*, 483 F.3d at 1048; *Beltronics USA, Inc. v. Midwest Inventory Distribution, LLC*, 562 F.3de 1067, 1070 (10th Cir. 2009); *Dominion Video Satellite, Inc.*

v. Echostar Satellite Corp., 269 F.3d 1149, 1154 (10th Cir. 2001); *Acceleration Prods. v. Arikota, Inc.*, 2014 U.S. Dist. LEXIS 111550, 2014 WL 3900875 (D.Utah 2014); *Huish Detergents, Inc. v. Orange Glo International, Inc.*, (Memorandum Decision) Wright, Miller & Kane, Federal Practice and Procedure: Civil 3d § 2948 (2013).[1]

Notably, under FED. R. CIV .P. 65 the "substantial likelihood of success on the merits" prong of the preliminary injunction test requires a lesser showing if the other three prongs "tip strongly" in movant's favor. In such situations, the first part of the test is met if movant raises "questions going to the merits . . . so serious, substantial, difficult, and doubtful as to make the issue ripe for litigation and deserving of more deliberate investigation." *Oklahoma v. International Registration Plan, Inc.*, 455 F.3d 1107, 1113 (10th Cir. 2006); *Aid for Women v. Foulston*, 441 F.3d 1101, 1115 (10th Cir. 2006); *Nilson v. JP Morgan Chase Bank, N.A.*, 690 F. Supp. 2d 1231, 1237 (D. Utah 2009).

As demonstrated below, Anderer satisfies each element of this four-part test under Fed R. Civ. P. 65.

C. A TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION ARE NECESSARY TO PREVENT IRREPARABLE INJURY

A temporary restraining order and preliminary injunction against defendants, and each of them, is necessary to prevent irreparable injury to Anderer. As demonstrated in the preceding factual statement, defendants have previously looted substantially all of

[1] The Utah Rules of Civil Procedure and applicalbe Utah case law utilize the same four factor analysis regarding the issuance of preliminary injunctions and/or temporary restraining orders. *See* Utah R. Civ. P. 65(A)(e); *Water & Energy Sys. Tech. Inc. v. Keil*, 1999 UT 16, ¶ 7, 974 P.2d 821.

the assets of Inaura, Inc. (Statement of Facts ["SOF"] at ¶¶ 1-33). Defendants have repeatedly represented to Anderer that V3 is close to insolvent, and that they will drive V3 into bankruptcy if Anderer pursues his claims in this case. (Anderer Decl. ¶¶ 13, 25).

As noted by Wright and Miller, "[...] a risk that the defendant will become insolvent before a judgment can be collected may give rise to the irreparable harm necessary for a preliminary injunction." Wright, Miller & Kane, Federal Practice and Procedure: Civil 3d § 2948.1 (2013). Moreover, where there is a strong indication that defendants will dissipate or conceal assets the risk of insolvency constitutes irreparable harm for purposes of injunctive relief. *Micro Signal Research, Inc. v. Otus*, 417 F3d 28 (1st Cir. 2005); *Brenntag Intern. Chemicals, Inc. v. Bank of India*, 175 F.3d 245 (2d Cir. 1999); *Elliott v. Kiesewetter*, 98 F.3d 47 (3d Cir. 1996).

Defendants' prior looting of Inaura, Inc. and their threats to drive V3 into bankruptcy meet the insolvency criteria for this element and support issuance of a temporary restraining order and preliminary injunction. Further the December 2013 removal of defendants Mock, Bookman and Rasmussen for settlement negotiation purposes was clearly a bad faith ploy to induce Anderer into a settlement that would not be honored by V3. It is now clear that the "looters" of Inaura are back in control of V3 and are engaged in a scheme to defraud Anderer and V3's other creditors while and looting the company. Significantly the only assets of V3 currently is the Sphere stock and the potential earnout. However, it is clear that V3 is in breach of its agreement with

Sphere and that the earnout is no longer viable. Thus, Anderer will certainly suffer irreparable harm if the Court does not issue an injunction against defendants.

D. A BALANCING OF HARMS WEIGHS IN FAVOR OF GRANTING THE TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

Anderer has already suffered the loss of substantial sums and business opportunities due to defendants' fraudulent conduct. Defendants had no legal right to engage in the conspiracy to deprive Anderer of his assets and business opportunities throught the fraudulent transfer(s) of Inaura's assets to V3. Moreover, any subsequent transfers by V3 to its shareholders, will further prejudice Anderer by leaving him no effective relief in damages. Moreover, V3 is essentially in liquidation and the defendants are gearing up to distribute V3's assets to the detriment of Anderer's claims. Anderer Decl. at ¶¶ 31, 32; Scofield Decl. ¶¶ 23, 24. In this case, a temporary restraining order and preliminary injunction are the best means to preserve the Court's ability to decide this case at trial and award effective relief; therefore injunctive relief should be granted. Wright, Miller & Kane, Federal Practice and Procedure: Civil 3d § 2948.2 (2013). A balancing of these harms clearly weighs in favor of granting the TRO and Preliminary Injunction. The second element of FED. R. CIV. P. 65 (a) & (b) and UTAH R. CIV. P. 65(A)(e) is therefore satisfied.

E. A TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION ARE NOT ADVERSE TO THE PUBLIC INTEREST

A temporary restraining order and preliminary injunction would not be adverse to the public interest. As previously stated, defendants do not have the legal right to engage in fraud or make fraudulent transfers which are causing harm to Anderer.

There is no public interest in allowing defendants to persist in this fraudulent conduct. The third requirement of FED. R. CIV. P. 65 (a) & (b) and UTAH R. CIV. P. 65(A)(e) is therefore satisfied.

F. ANDERER'S CLAIMS ARE LIKELY TO SUCCEED ON THE MERITS.

Anderer is likely to succeed on the merits in this matter. In order for a preliminary injunction to issue in Plaintiff's favor, it need only show "probable" entitlement to the relief requested. *System Concepts, Inc. V. Dixon*, 669 P.2d 421, 425 (Utah 1984) Moreover, where the three harm factors tip decidedly in favor of the movant, the probability of success factor is relaxed.

> Generally, where the moving party has established that the three "harm" factors tip decidedly in its favor, the "probability of success requirement" is somewhat relaxed and the movant need only show questions going to the merits so serious, substantial, difficult and doubtful as to make them fair ground for litigation.

Nova Health Systems v. Edmondson, 460 F.3d 1295, 1298 n.6 (10th Cir. 2006)(internal quotations omitted).

Count nine of the First Amended Complaint alleges a cause of action for fraudulent transfer against defendants regarding their transfer of Inaura's assets to V3. *See* First Amended Complaint at ¶¶ 128-135. In this case Anderer's probability of success on the merits is very high.

The Utah Uniform Fraudulent Transfer Act ("UFTA") provides a substantive remedy for creditors when debtors conceal assets by transferring them to another individual or entity. *See, generally*, UTAH CODE ANN. §§ 25-6-1 to 14. The UFTA is construed with liberality so as to reach all artifices and evasions designed to the rob the statute of its full force and effect in preventing debtors from paying the just claims of

their creditors. *See, e.g., Macris & Associates, Inc. v. Neways, Inc.*, 2002 UT App 406, ¶ 16, 60 P3d 1176; *National Loan Investors, L.P. v. Givens*, 952 P.2d 1067, 1069 (Utah 1998); *Butler v. Wilkinson*, 740 P.2d 1244, 1260 (Utah 1987) (citing early common law cases); UTAH CODE ANN. § 25-6-11 (principles of law and equity supplement this chapter's provisions).

Anderer clearly qualifies as a "creditor" under the UTFA. *See e.g.*, *Tolle v. Fenley*, 2006 UT App 78, ¶ 13, 132 P.3d 63. (Judgment creditor under the Utah Uniform Fraudulent Transfer Act although her claim had not been reduced to a judgment prior to the debtor's alleged fraudulent transfer, as creditor had made numerous threats of suit and debtor was aware of probable legal action against him). Further the transfer(s) at issue were clearly fraudulent under the Uniform Fraudulent Transfer Act as they were made with the actual intent to hinder, delay or defraud Anderer, and the subject transfer(s) of Inaura's assets to V3, without receiving a reasonably equivalent value in exchange for the transfer, and which left Inaura insolvent after the transfer. *See* UTAH CODE ANN. § 25-6-5(2)(a)(b)(c)(d)(e)(h)(i) (actual intent to hinder, delay or defraud creditors under UTFA is demonstrated by, inter alia, transfers to insiders, transfers where debtor retained control of the asset after the transfer, transfers which are concealed, transfers made where debtor was sued or threatened with suit, transfers of substantially all of the debtor's assets, debtors removal or concealment of assets, no reasonably equivalent value received for transferred asset, and debtor was insolvent or became insolvent shortly after the transfer). Further, the subject transfer of substantially all of Inaura's assets to V3 was made by principals and

insiders of both Inaura and V3. *See* UTAH CODE ANN. § 25-6-6(1) (transfers without receiving reasonably equivalent value and which leave the debtor insolvent as a result of the transfer.); *Tolle v. Fenley*, 2006 UT App 78, 132 P.3d 63 (outlining "badges of fraud" under UTFA; and finding that if the debtor's assets are insufficient to pay his debts, this constitutes insolvency under UTFA).

Significantly, Utah's Uniform Fraudulent Transfer Act specifically provides a substantive right to injunctive relief under these circumstances. *See, e.g.,* UTAH CODE ANN. §25-6-8(c)(I) (providing for injunction against further dispositions of fraudulently transferred assets by both debtors and transferees); *Biliouris v. Sundance Res., Inc.*, 559 F.Supp. 2d 733, 737 2008 U.S. Dist. LEXIS 53625 (N.D. Tex. 2008) ("TUFTA [Texas Uniform Fraudulent Transfer Act] provides unsecured creditors with a substantive right to the prejudgment appointment of a receiver."); *Fisher v. Cooper*, 2009 U.S. Dist. LEXIS 121427 (D. Haw. 2009)(holding a receiver may be appointed to take charge of fraudulently transferred assets, or alternatively, and that a constructive trust may be imposed on the asset to preserve it for creditors).

In this case, the probability of success on the merits is very high. The other three harm factors also tip decidedly in favor of issuing the injunction. The fourth and final requirement of FED. R. CIV. P. 65 (a) & (b) and UTAH R. CIV. P. 65(A)(e) is therefore satisfied. *See, e.g., Caterpillar, Inc. v. Jerryco Footwear*, Inc. 880 F.Supp 578 (C.D. Ill. 1994)(granting preliminary injunction to prevent further fraudulent transfers under Illinois Fraudulent Transfer Act).

II. THIS COURT SHOULD APPOINT A RECEIVER TO PREVENT DEFENDANTS FROM DESPOILING THE ASSETS OF V3

Like injunctive relief, the power to appoint a receiver is an extraordinary equitable remedy within the court's discretion. *Waag v. Hamm*, 10 F.Supp. 2d 1191, 1193 (D. Colo. 1998). A Federal District Court derives that power from its equity jurisdiction, not its subject matter jurisdiction. *Id*. (citing *Burnrite Coal Briquette Co. v. Riggs*, 274 U.S. 208, 212 (1927)). "An equity receiver is a person specially appointed by the courts to take control, custody, or management of property that is involved in or is likely to become involved in litigation for the purpose of preserving the property, receiving rents, issues, or profits, and undertaking any other appropriate action to guard to the property pending its final disposition by the suit." Wright, Miller & Kane, Federal Practice and Procedure: Civil 3d § 2981 (2013). Further, appointment of a receiver by a federal court may be sought by any person or class that has an interest in property that a statute or one of the general principles of equity authorizes the court to protect by this remedy. *Id.* at § 2983. Further, one of the most frequent settings in which federal equity receivers have been employed in recent years is as an incident to a stockholder's suit to prevent impairment of corporate assets. *Id*. (citing *Burnrite Coal Briquette Co. v. Riggs*); See also, Skirvin v. Mesta, 141 F.2d 668, 672 (10th Cir. 1944)("[w]here it is made to appear in an action by a stockholder for fraud, collusion, mismanagement, or intermingling or diversion of funds by officers of a corporation, that there is danger of the property being lost with a resulting dimunition in value of the stock, a United States court has power to appoint a receiver to preserve the property pending determination of the case on its merits.")

Moreover, although appointment of a receiver is considered an extraordinary remedy, and therefore applied with caution, it is an appropriate remedy when the factors supporting such an appointment are met. The factors that courts have considered relevant to establishing the requisite need for receivership include the following: (a) the existence of a valid claim; (b) the probability that fraudulent conduct has occurred or will occur to frustrate that claim; (c) imminent danger the property will be lost, concealed, or diminished in value ; (d) inadequacy of available legal remedies; (e) lack of a less drastic available remedy; and (f) the likelihood that appointment of a receiver will do more harm than good. *Waag v. Hamm*, 10 F.Supp. 2d 1191,1193 (D.Colo 1998); *Aviation Supply Corp. v. R.S.B.I. Aerospace, Inc*., 999 F.2d 314,316 (8th Cir. 1993); *Am. Bank & Trust Co. v. Bond Int'l Ltd.*, 2006 U.S. Dist. LEXIS and 58361; Wright, Miller & Kane, Federal Practice and Procedure: Civil 3d § 2983 (2013). As explained below, each factor weighs heavily for appointing a receiver in this case.

A. ANDERER HAS A VALID CLAIM FOR FRAUDULENT TRANSFER

Anderer's ninth cause of action is for fraudulent transfer of Inaura's assets to V3. As discussed *supra* Utah's Uniform Fraudulent Transfer Act is applicable to the transfer(s) at issue herein. The transfer of Inaura's intellectual property, trade secrets and other assets was made to and by insiders Inaura rendering Inaura insolvent and was done with the actual intent to hinder, delay or defraud Anderer as a creditor. *See* First Amended Complaint at ¶¶ 129-134. As a result, Anderer as a valid claim for fraudulent transfer of Inaura's assets to V3. *See* UTAH CODE ANN. §§ 26-6-6; 26-6-7; *See also, Biliouris v. Sundance Res., Inc.*, 559 F. Supp. 2d 733 (N.D. Tex.

2008)(receiver appointed where defendants were driving the company into insolvency leaving nothing to satisfy defendants' creditors under Uniform Fraudulent Transfer Act).

B. PROBABILITY THAT FRAUDULENT CONDUCT HAS OCCURRED OR WILL OCCUR

Without question, Inaura, Rasmussen, Bookman and Mock, individually and collectively, have engaged in fraudulent conduct by in making material misrepresentations and omissions of presently existing material facts in furtherance of their conspiracy to freeze Anderer out of the V3 opportunity. Furthermore, Inaura, Inc. Mock, Bookman and Rasmussen made representations and omissions of presently existing material facts in furtherance of their conspiracy to induce Anderer to accept the worthless Inaura Note for his shares in Inaura, and ultimately to lull him and to conceal the true state of facts from Anderer as described in the First Amended Complaint. The defendants held illegal board meetings in furtherance of this conspiracy. Moreover, defendants engaged in in self-dealing as Board members of Inaura to the detriment of Inaura and Anderer in connection with the Fusion IO settlement funds and the V3 Systems opportunity, which was largely funded by the Fusion IO assets transferred to V3. Defendants engaged in a lulling scheme in order to prevent Anderer from knowing the true material facts related to Inaura's insolvency at the time he accepted the note in exchange for his shares. *See, generally*, First Amended Complaint at pp 5-25.

Additionally, defendants' misrepresentations regarding Ric Lindstrom and his authority to negotiate a settlement with and or on behalf of V3 was an attempt by Kesselring to further perpetrate fraud against Anderer. Defendants Rasmussen, Bookman, Mock and Mr. Kesselring is clearly engaged in fraudulent conduct with

respect to Inaura, Anderer and the V3 opportunity. As such Anderer clearly has a valid claim for fraudulent transfer.

C. IMMINENT DANGER THAT PROPERTY WILL BE LOST, CONCEALED, OR DIMINISHED IN VALUE

Defendants have already looted the assets of Inaura through their transfers of substantially all of Inaura's assets (i.e. the Fusion IO settlement funds and Inaura's intellectual property) to V3. V3 has admitted that it is essentially bankrupt and that it cannot obtain further funding (from Sphere 3D) or pay its creditors. Moreover, Anderer's claims in this lawsuit are substantial enough that there is a high likelihood V3's assets will not fully compensate him. Further, defendants' bad faith settlement negotiations, wherein V3 represented to Anderer and his counsel that Ric Lindstrom had authority to negotiate settlement terms with Anderer and then, after months of negotiations and an agreement as to the essential settlement terms, disavowing that Ric Lindstrom (the President, Secretary, Treasurer and Director of V3's successor entity UD Dissolution Corp.) had authority to negotiate such terms and that only Shields and Bill Kesselring had authority to negotiate a binding settlement and present such settlement to the V3 board. Moreover, Nev. Rev. Stat. § 78.590(2) allows Kesselring to use his "business judgment" to make distributions of V3's assets to V3 directors and insiders in such a manner that the valid claims of Anderer and other creditors of V3 will be unpaid. Scofield Decl. at ¶ 24.

Therefore, the prospect of diminishing, losing or removing investor funds is more than imminent -it has already occurred. The likelihood of future harm also increases

every day that Kesselring and Mock remain in control of V3/UD Dissolution Corp. and continues to have the ability to control and/or transfer whatever assets remain.

D. INADEQUACY OF AVAILABLE LEGAL REMEDIES

A money judgment would prove ineffective in this case for several reasons. First, V3 already admits it is insolvent and unable to pay Anderer's claims without infusions of new capital from Sphere 3d. There are no assets sufficient to back the Inaura note provided to Anderer, and V3's statements that it is on the verge of bankruptcy are clear evidence that judgment for damages will not, therefore, provide any relief to Anderer or other V3 creditors.

A receiver, on the other hand, could perform the following functions not available under other legal remedies:

1. Take control of V3/UD Dissolution Corp.;
2. Locate and seize what remains of the company's assets;
3. Bring suit for assets fraudulently transferred to third parties;
4. Notify investors who may have a claim against the assets of V3;
5. Process those claims according to court-approved procedures; and
6. If funds are recovered, make an equitable distribution to Anderer and all other creditors with approved claims.

E. LACK OF A LESS DRASTIC AVAILABLE REMEDY

Given defendants' fraudulent conduct, bad faith settlement negotiations with Anderer and admissions that V3 is insolvent and on the verge of bankruptcy, it is clear that an injunction is necessary to prevent defendants from looting V3 as they did Inaura

to the detriment of V3's creditors. Further, a receiver is necessary to ensure the assets of V3 are made available to creditors with valid claims so that V3 principals and insiders do not distribute substantially all of V3's assets to themselves or entities that they control leaving virtually nothing left to satisfy the claims of V3's creditors. Given their ongoing participation in a fraudulent scheme and documented history of fraudulent transfers, lulling and bad faith settlement negotiations, it is hard to imagine that defendants would comply with an injunction or any other less drastic remedy. Appointing a receiver would at least ensure a freeze of any existing assets and the pursuit of funds diverted to third-parties.

F. LIKELIHOOD THAT A RECEIVER WILL DO MORE HARM THAN GOOD

A receiver could not possibly do more harm than defendants as the principals and officers of Inaura and now V3/UD Dissolution Corp., all of whom have used Inaura and V3 to steal from Anderer and other investors. It is far more likely that defendants will continue to divert or otherwise waste the remaining assets of V3 if a receiver is not appointed and as long as Kesselring and/or Mock remains in control of V3.

WHEREFORE, for all of these reasons, Anderer respectfully requests that the Court grant this motion and issue a temporary restraining order and preliminary injunction preventing V3 its current and former officers, directors, trustees, managers and/or control personnel of any kind from transferring or attempting to transfer, directly or indirectly any of the Sphere stock held, once held or to be potentially held by V3 throughout the remainder of the litigation and the issuer, Sphere, should be authorized to restrain from registering any such transfer on its transfer books. In addition to that

absolute restraint against transfer of stock, the Court should appoint a receiver for V3 and enter a turnover order so the stock and all other assets of V3 are placed with a receiver, who will report to this Court, to protect Anderer's claim against V3, or alternatively, imposing a constructive trust on all of the assets of V3, and for such other and further relief, general, special, at law or in equity, to which Anderer may prove he is entitled.

Dated this 2nd day of September, 2014.

PETERS | SCOFIELD
A Professional Corporation

/s/ David M. Bernstein
DAVID M. BERNSTEIN
Attorneys for Plaintiff

CERTIFICATE OF SERVICE

The undersigned hereby certifies that he caused the foregoing **MOTION FOR PRELIMINARY INJUNCTION, TEMPORARY RESTRAINING ORDER AND APPOINTMENT OF RECEIVER** to be filed with the Court through its CM/ECF system, this 2nd day of September, 2014, which will serve copies hereof electronically on the following:

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and that he caused a genuine copy hereof to be deposited in the United States mail, first class postage prepaid, on the 2nd day of September, 2014, addressed to:

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/s/ David M. Bernstein