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7 JB COLLISION SERVICES, INC. dba  
J&M AUTOBODY dba EL DORADO  
8 COLLISION; JJT, INC. dba JOHN'S  
9 COLLISION CENTER; and JOHN TYCZKI

10 UNITED STATES DISTRICT COURT  
11 SOUTHERN DISTRICT OF CALIFORNIA

12 THE SHERWIN-WILLIAMS )  
13 COMPANY, f/k/a SHERWIN-WILLIAMS )  
AUTOMOTIVE FINISHES CORP., )

14 Plaintiff,

15 vs.

16 JB COLLISION SERVICES, INC., dba )  
17 J&M AUTOBODY, and d/b/a EL )  
18 DORADO COLLISION; and DOES 1 )  
through 10, inclusive, )

19 Defendants.

20 AND RELATED CROSS-ACTIONS

21 THE SHERWIN-WILLIAMS )  
22 COMPANY, d/b/a SHERWIN- )  
WILLIAMS AUTOMOTIVE FINISHES, )

23 Plaintiff,

24 vs.

25 JJT, INC. d/b/a JOHN'S COLLISION )  
26 CENTER; JOHN TYCZKI, and individual; )  
and DOES 1 through 10, inclusive, )

27 Defendants.

28 AND RELATED CROSS-ACTIONS

Case No.: 13-CV-1946 LAB (WVG)  
**Consolidated with:**  
Case No.: 13-CV-1947 LAB (WVG)

**DEFENDANTS' EX PARTE  
APPLICATION FOR STAY OF  
EXECUTION**

Hearing Date: N/A  
Time: N/A  
Courtroom: 14A  
Judge: Hon. Larry A. Burns

1 In light of Plaintiff, Counter-Defendant THE SHERWIN-WILLIAMS  
2 COMPANY, f/k/a SHERWIN-WILLIAMS AUTOMOTIVE FINISHES CORP.'s  
3 ("Plaintiff") statements in its Reply in Support of its' *Ex Parte* Application to Stay  
4 Execution ("Reply") [Dkt. 290], Defendants, Counter-Claimants JB COLLISION  
5 SERVICES, INC. dba J&M AUTOBODY dba EL DORADO COLLISION; JJT, INC.  
6 dba JOHN'S COLLISION CENTER; and JOHN TYCZKI ("Defendants") are forced to  
7 file the instant *Ex Parte* Application to affirmatively seek relief from Plaintiff's  
8 anticipated attempts to execute on the partial judgment in its favor pending post-trial  
9 motions and appeals. Importantly, Defendants' only request this relief in the event that  
10 the Court grants Plaintiff's *Ex Parte* Application for Stay of Execution [Dkt. 286].

11 Plaintiff comments in its Reply that Defendants have not requested a stay of  
12 execution or sought relief from the bond requirement. Indeed, because the net judgment  
13 is in Defendants' favor in the amount of \$2,875,551.40, Defendants respectfully contend  
14 this exercise is unnecessary, as stated in Defendants' Opposition to Plaintiff's *Ex Parte*  
15 Application. [See Dkt. 288 at pp.1:17-2:10.] However, in an abundance of caution,  
16 Defendants seek this affirmative relief at this time, because it appears that Sherwin-  
17 Williams wants to ignore the fact of the net judgment (\$2,875.551.40) in Defendants'  
18 favor and execute on the \$374,448.60 portion of the verdict.

19 Federal Rule of Civil Procedure 54 allows for only one winner, even in mixed  
20 judgment cases. *See Shum v. Intel Corp.*, 629 F.3d 1360, 1367 (Fed. Cir. 2010). Because  
21 the net judgment is in Defendant's favor by \$2,875,551.40, Defendants are the prevailing  
22 party. Therefore, Sherwin-Williams should not be permitted to execute upon the portion  
23 of the judgment which is entirely negated by the \$3.25 million Judgment in Defendants'  
24 favor. As a result, Defendants should not be required to post a bond pending *Plaintiff's*  
25 appeal of the Judgment.

26 If the Court grants Plaintiff's request to stay execution of the Judgment,  
27 Defendants similarly seek a stay of execution of the partial judgment in Plaintiff's favor  
28 against Defendants pending resolution of *Plaintiff's* post-trial motion and anticipated

1 appeal. The factors weighed in determining whether to grant a stay are in Defendants'  
2 favor<sup>1</sup>:

3 “(1) whether the stay applicant has made a strong showing that he is likely to  
4 succeed on the merits”—Plaintiff has the burden of proof on its post-trial motions and  
5 potential appeal, and the great weight of the evidence is in Defendants’ favor;

6 “(2) whether the applicant will be irreparably injured absent a stay”—absent a stay  
7 (if the Court deems it necessary), Defendants will be forced to pay a fraction of the  
8 Judgment, which is offset by the majority of the Judgment in Defendants’ favor, pending  
9 Plaintiff’s post-trial motions and appeals. Defendants cannot afford to pay the partial  
10 Judgment, and this is part of Plaintiff’s continued tactics to bankrupt Defendants and  
11 attempt to make an example of Defendants;

12 “(3) whether issuance of the stay will substantially injure the other parties  
13 interested in the proceedings” – If Plaintiff is permitted to execute on the partial judgment  
14 at this time, this will interfere with Defendants’ ability to pay for legal services rendered,  
15 and to be incurred in responding to Plaintiff’s continuing legal maneuvers, and to  
16 continue to operate its business while waiting for Sherwin-Williams to pay the Judgment;  
17 and

18 “(4) where the public interest lies.”—The public has an interest in ensuring that  
19 those who are victorious in the court of law are not punished by delay and procedural  
20 tactics of their opponents. Here, Defendants are clearly the prevailing parties, and the net  
21 judgment is greatly in their favor.

22 Additionally, the Court should not require Defendants to post a bond pending  
23 *Plaintiff’s* post-trial motions and appeal. Waiver of the bond requirement is appropriate if  
24 the “requirement would put the [judgment debtor’s] other creditors in undue jeopardy.”  
25 *E.g. Waine-Golston v. Time Warner Entm’t-Advance/New House P’ship*, No. 11cv1057-

26 \_\_\_\_\_  
27 <sup>1</sup> The factors are set forth in *Dish Network, L.L.C. v. Sonicview USA, Inc.*, No. 09-cv-  
28 1553-L(WVG), 2012 U.S. Dist. LEXIS 86304, at \*2 (S.D. Cal. June 21, 2012) (quoting  
*Hilton v. Braunskill*, 481 U.S. 770, 776 (1987)).

1 GPB(RBB), 2013 U.S. Dist. LEXIS 65118, at \*4 (S.D. Cal. May 7, 2013). If Defendants  
2 are required to post a bond pending the outcome of *Plaintiff's* post-trial motions and  
3 appeals to the net judgment in Defendants' favor, all of Defendants' other creditors  
4 would be in jeopardy. Defendants must be able to continue to do business, pay  
5 employees, pay business expenses, and maintain lines of credit with other vendors in the  
6 course of business. If Plaintiff is permitted to execute on the smaller partial judgment in  
7 its favor, and ignore the net judgment against it, even though this amount is offset by the  
8 \$3.25 million judgment amount in favor of Defendants, then this would disrupt the  
9 Defendants' business and cause prejudice to Defendants as discussed above.

10 Therefore, for all of the foregoing reasons, in the event that the Court grants  
11 Plaintiff's Ex Parte Application to Stay Execution and permits Plaintiff to seek execution  
12 on the smaller partial judgment in its favor pending post-trial motions and appeal,  
13 Defendants respectfully request that the Court stay the execution of the partial judgment  
14 in Plaintiff's favor and waive the bond requirement as to Defendants given the net  
15 judgment rendered in favor of Defendants, or alternatively to find that the net judgment is  
16 in Defendants' favor in the amount of \$2,875,551.40, and that Sherwin-Williams may not  
17 execute upon the portion of the Judgment in its favor given this net judgment amount in  
18 favor of Defendants.

19  
20  
21 DATED: January 25, 2016

JACKSON LEWIS P.C.

22  
23 By: /s/ Paul F. Sorrentino

Paul F. Sorrentino, Esq.

John P. Nordlund, Esq.

Attorneys for Defendants, Counter-  
Claimants

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26 JB COLLISION SERVICES, INC. dba  
27 J&M AUTOBODY dba EL DORADO  
28 COLLISION; JJT, INC. dba JOHN'S  
COLLISION CENTER; and JOHN  
TYCZKI

1 **UNITED STATES DISTRICT COURT, SOUTHERN DIST. OF CALIFORNIA**

2 **CASE NAME:** *Sherwin-Williams v. JB Collision*

3 **CASE NUMBER:** 13-CV-1946 LAB (WVG)

4 **Consolidated with**

5 **CASE NAME:** *Sherwin-Williams v. JJT, Inc.*

6 **CASE NUMBER:** 13-CV-1947 LAB (WVG)

7 **PROOF OF SERVICE**

8 I am employed in the County of San Diego, State of California. I am over the age  
9 of 18 and not a party to the within action; my business address is 225 Broadway, Suite  
2000, San Diego, California 92101.

10 On January 25, 2016, I served following document described as:

11 **DEFENDANT'S EX PARTE APPLICATION FOR STAY OF EXECUTION**

12 on the parties in this action listed below in the manner designated below:

14 **Attorneys for Plaintiff**

15 Michael K. Murray, Esq.  
16 LANAK & HANNA  
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21  **BY NOTICE OF ELECTRONIC FILING.** The above-listed counsel have  
22 consented to electronic service and have been automatically served by the Notice of  
23 Electronic Filing, which is automatically generated by CM/ECF at the time said  
document was filed, and which constitutes service pursuant to FRCP 5(b)(2)(D).

24  **BY ELECTRONIC MAIL** by transmitting via electronic notification the  
25 document(s) listed above to the electronic address set forth above on this date.

26  **BY U.S. MAIL** by placing the document(s) listed above in a sealed envelope with  
27 postage thereon fully prepaid, in United States mail in the State of California at San  
28 Diego, addressed as set forth above.

1  **BY OVERNIGHT MAIL** by depositing said document(s) in a box or other  
2 facility regularly maintained by the express service carrier providing overnight delivery,  
3 addressed as set forth above.

4  **BY PERSONAL SERVICE** by caused said documents to be hand-delivered to the  
5 addressee on January 25, 2016, via First Legal Services, pursuant to code.

6  **FEDERAL** I declare under penalty of perjury under the laws of the United States  
7 that the foregoing is true and correct, and that I am employed in the office of a member of  
8 the bar of this Court at whose direction the service was made.

9 Executed on January 25, 2016, at San Diego, California.

10  
11 /s/ Gloria Daviston  
12 Gloria Daviston  
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