

1 LAW OFFICE OF DANIEL MARKS
2 DANIEL MARKS, ESQ.
3 Nevada State Bar No. 002003
4 NICOLE M. YOUNG, ESQ.
5 Nevada State Bar No. 12659
6 610 South Ninth Street
7 Las Vegas, Nevada 89101
8 (702) 386-0536; FAX (702) 386-6812
9 Attorneys for Appellant

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Elizabeth A. Brown
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12 **IN THE SUPREME COURT OF THE STATE OF NEVADA**

13 DENNIS KOGOD,

Case No. 71147

14 Appellant,

15 vs.

16 GABRIELLE CIOFFI-KOGOD,

17 Respondent.
18 _____/

19 **REPLY IN SUPPORT OF MOTION FOR A STAY PENDING APPEAL**

20 COMES NOW the Appellant DENNIS KOGOD, by and through his
21 counsel, Daniel Marks, Esq., and Nicole M. Young, Esq., of the Law Office of
22 Daniel Marks, and submits his Reply in Support of Motion for a Stay Pending
23 Appeal. The grounds for Appellant's reply are set forth in the following
24 memorandum of points and authorities.

25 DATED this 15 day of November, 2016.

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Nevada State Bar No. 002003
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610 South Ninth Street
Las Vegas, Nevada 89101
Attorneys for Appellant

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. FACTUAL BACKGROUND**

3 The facts, as previously stated in Appellant Dennis Kogod's Motion for a
4 Stay Pending Appeal, which was filed on October 25, 2016, are hereby
5 incorporated by reference.

6 **II. LEGAL ARGUMENT**

7 **A. The district court abused its discretion when it failed to properly**
8 **consider the factors set forth under *Nelson v. Heer*.**

9 The district court is required to consider the following factors when
10 determining whether alternate security is appropriate, for purposes of a stay
11 requested under NRCP 62:

- 12 (1) the complexity of the collection process;
13 (2) the amount of time required to obtain a judgment
14 (3) the degree of confidence that the district court has
15 (4) whether the defendant's ability to pay the judgment;
16 (5) whether the defendant is in such a precarious
17 financial situation that the requirement to post a
18 bond would place other creditors of the defendant
19 in an insecure position.

19 *Id.* at 836 (cited in list format).

20 In her response, Gabrielle failed to show that the district court actually
21 considered the above factors. Instead, she asserts that Dennis failed to argue these
22 factors to the district court. This is simply inaccurate. Dennis argued these factors
23 in both his moving papers and through argument by counsel at the hearing for that
24 motion. Gabrielle is simply attempting to confuse the issue.

25 The focus, for purposes of the instant motion, is on the district court's
26 findings in support of its denial of Dennis' request for a stay secured by alternate
27 security. The only comment made by the district court regarding this issue is that it
28 did not think that Gabrielle would dissipate the assets at issue pending the appeal.

1 No other comments or findings were made. That is not the proper analysis.

2 The alternative security proposed by Dennis will streamline the collection
3 process once this appeal is completed. The district court should have considered
4 the adequacy of the proposed alternative security requested. *Nelson v. Heer*, 121
5 Nev. 832, 836, 122 P.3d 1252 (2005). The fact that the district court failed to make
6 any findings regarding the adequacy of such proposed security is an abuse of
7 discretion. *Id.* If the district had considered the adequacy of Dennis' proposed
8 security, then it likely would have granted his request for alternative security.

9 The community estate in this case was worth approximately \$40 million.
10 Gabrielle was awarded approximately \$26 million from the community, which is
11 approximately 65% of the community.

12 The district court abused its discretion when it failed to actually consider the
13 *Nelson* factors, including the adequacy of the security proposed by Dennis. The
14 district court should have focused on "what security will maintain the status quo
15 and protect the judgment creditor pending an appeal." *Nelson*, 121 Nev. at 835-
16 836. Instead, the district court focused on whether Gabrielle has a penchant for
17 saving money. That is not the proper analysis.

18 **B. The NRAP 8 factors support the issuance of a stay secured by**
19 **alternate security.**

20 This Court must consider the following factors when determining whether
21 to issue a stay:

- 22 (1) whether the object of the appeal or writ petition will be
23 defeated if the stay or injunction is denied;
24 (2) whether appellant/petitioner will suffer irreparable or serious
25 injury if the stay or injunction is denied;
26 (3) whether respondent/real party in interest will suffer irreparable
27 or serious injury if the stay or injunction is granted; and
28 (4) whether appellant/petitioner is likely to prevail on the merits in
the appeal or writ petition.

NRAP 8(c) (cited in list format). When considering the likelihood of success of
the appeal on the merits, this Court looks at whether the appeal appears frivolous

1 or whether appellant filed the motion for stay “purely for dilatory purposes.”

2 *Mikohn Gaming Corp. v. McCrea*, 120 Nev. 248, 253, 89 P.3d 36 (2004).

3 In her response, Gabrielle once again focuses on issues that are not part of
4 this Court’s consideration of the instant motion. Gabrielle wants this Court to
5 consider the merits of the instant appeal even though the present issue before this
6 Court is only whether a stay secured by alternate security should be granted. It
7 does not matter that Dennis previously made multi-millions during the marriage or
8 the type of car that he or the mother of his children drives. The only things this
9 Court may consider are the factors under NRAP 8(c). Under those factors, a stay is
10 warranted.

11 Furthermore, in support of her response, Gabrielle misrepresents Dennis’
12 income. Dennis does not earn \$1 million every month. There is no evidence that
13 he has ever made \$1 million every month. The income that he historically earned
14 was a salary, which is less than \$1 million per year, and other additional benefits,
15 such as bonuses and stock options. The bonuses and stock options were never
16 something that the community relied upon for their monthly income. At trial,
17 Dennis testified that his income was expected to decrease. Additionally, the money
18 that Dennis earned last year was community property for which Gabrielle received
19 her share. That was not income that went directly into Dennis’ pocket.

20 Finally, as Gabrielle admits in her response that the law cited in the district
21 court’s 114 page decision is not based on clear and applicable Nevada precedent in
22 ALL instances. (*See Respondent/Cross-Appellant’s Opposition to Motion for a*
23 *Stay Pending Appeal*, filed on November 7, 2016, at 1:22.) The two (2) main
24 issues on appeal are the district court’s unequal division of community property
25 and award of lump-sum spousal support. The law in Nevada regarding these two
26 (2) issues is not clear. The district court judge even expressed that opinion
27 numerous times during this divorce. This is a unique case that offers a different
28 perspective regarding how those issues must be dealt with when the community’s

1 assets total approximately \$40 million and the parties have been separated for six
2 (6) years. Gabrielle is attempting to pull at this Court's heart-strings by focusing
3 on the merits of the instant appeal instead of the fact that the law in Nevada
4 regarding these two (2) areas is not yet fully developed.

5 Regardless, when considering the final factor, this Court looks at whether
6 the appeal is frivolous or whether the stay is sought for a dilatory purpose.
7 Gabrielle has failed to argue either of those points. As such, this Court can find
8 that this appeal is not frivolous and the stay is not sought for a dilatory purpose.

9 Based on a consideration of each of the NRAP 8(c) factors, this Court
10 should find that a stay with an alternative form of security is warranted.

11 **III. CONCLUSION**

12 For the foregoing reasons, this Court should issue a stay of the enforcement
13 of the judgment, with alternate security, until the issues on appeal are resolved by
14 this Court. Such security should be granted through a blocked, interest-bearing
15 account at UBS of the disputed \$2,043,931.50 in Gabrielle's favor for the unequal
16 division of community property. Security for the \$1,649,792.00 in lump-sum
17 spousal support and sanctions should be in the form of a lien on the Oak Pass
18 property. Gabrielle does not need security in the form of a bond.

19 DATED this 15 day of November, 2016.

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Attorneys for Appellant

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Radford J. Smith, Esq.
Garima Varshney, Esq.
Radford J. Smith, Chartered
2470 St. Rose Parkway, Suite 206
Henderson, Nevada 89074
Counsel for Respondent

An employee of the
LAW OFFICE OF DANIEL MARKS