

1 **IN THE SUPREME COURT OF THE STATE OF NEVADA**

2 TRP INTERNATIONAL, INC., a
3 Delaware corporation,

4 Appellant,

5 vs.

6 PROIMTU MMI LLC, a Nevada
7 limited liability company,

8 Respondent.

Case No. 71398

District Ct Case No. CV-2016-47

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Tracie K. Lindeman
Clerk of Supreme Court

9 **RESPONSE TO EMERGENCY MOTION UNDER NRCP 27(e) and**
10 **NRAP 8(a)(2) REQUESTING CLARIFICATION IF THE MATTER IS**
11 **STAYED PENDING RESOLUTION OF APPEAL, OR IN THE**
12 **ALTERNATIVE, A TEMPORARY STAY**

13 Proimtu MMI LLC ("Proimtu") hereby submits this Response to
14 Emergency Motion Under NRCP 27(e) and NRAP 8(a)(2) Requesting
15 Clarification if the Matter is Stayed Pending Resolution of Appeal, or in the
16 Alternative, a Temporary Stay (the "Response") filed by Appellant on
17 October 7, 2016. This Response is supported by the following memorandum
18 of points and authorities, the Declaration of Christopher H. Byrd and the
19 exhibits attached to the Declaration.

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 TRP's emergency motion is untimely and procedurally improper.
4 TRP must first seek a stay from the district court. TRP failed to seek relief
5 from the district court, despite knowing about Judge Elliott's decision to
6 proceed with the case and require an answer from TRP since June 21, 2016.
7 NRAP 27(e)(1) permits this Court to summarily deny any emergency
8 motion that is not filed at the earliest possible time. Finally, TRP has not
9 provided any analysis of the amount of bond that would be required to delay
10 the case from proceeding on the merits. Thus, TRP's Motion should be
11 denied.

12 **II. PROCEDURAL HISTORY/STATEMENT OF FACTS**

13 1. Proimtu's claims against TRP arise from services provided to TRP
14 in connection with the Crescent Dunes Solar Plant in Tonopah, Nevada. The
15 contract between the parties was for the assembly and erection of heliostats
16 (mirrors) on the project. The contract was entered into in October of 2012.

17 2. In the Amended Complaint, filed July 10, 2015, Proimtu seeks
18 damages of more than \$5,022,826.

19 3. TRP filed a Motion to Dismiss that was originally granted.

1 Subsequently, Judge Elliott reconsidered. He denied TRP's motion to
2 dismiss and ordered TRP to answer. See Order Granting Proimtu's Motion
3 to Amend Judgment or Alternatively For Reconsideration Exhibit "A"
4 ("Order"). Judge Stephen Elliott heard the motion to reconsider on June 21,
5 2016, and granted the motion from the bench.

6 4. On August 9, 2016, the Order was submitted to counsel for
7 TRP International Inc. for review and counsel for TRP approved the Order
8 as to form and content the same day. Exhibit "B".

9 5. On August 10, 2016 the Order was sent to Judge Elliott for
10 signature and counsel for TRP was copied with the letter. Exhibit "C".

11 6. Judge Elliott signed the Order on September 12, 2016,
12 although it is dated September 13, 2016. Written notice of entry of that
13 Order was personally served on counsel for TRP on September 12, 2016.
14 Exhibit "A".

15 7. TRP filed a Notice of Appeal from the Order on or about
16 September 20, 2016 and served it by mail on counsel for Proimtu.

17 8. On October 5, 2016, Proimtu personally served counsel for
18 TRP with a Notice of Intent to Take Default, which required TRP to answer
19 no later than October 10, 2016 or risk a default. Exhibit "D".

1 9. No motion for stay was presented to the district court before
2 TRP filed its emergency Motion.

3 10. Throughout the litigation in the district court, Proimtu
4 employed a delivery service to file papers with the clerk of the Fifth Judicial
5 District Court in Parhump, Nevada. The delivery service was able to file the
6 pleadings on the same day the service picked up the pleadings.

7 **III. LEGAL ARGUMENT**

8 **A. Legal Standard**

9 **1. TRP failed to seek relief in the district court.**

10 Emergency motions for stay require the moving party to satisfy
11 certain requirements. NRAP 8(a)(1) requires that a stay be first sought with
12 the district court. NRAP 27(e) also requires the moving party to
13 demonstrate why it did not advance its arguments for relief in the district
14 court, if the relief sought was available. TRP could have sought a stay from
15 the district court. TRP's Motion, however, fails to provide any legitimate
16 reason for its failure to ask the district court for a stay either at the hearing
17 on June 21, 2016, when Judge Elliott decided to allow the case to proceed,
18 or at any time thereafter.

19 **2. It was not impracticable for TRP to seek relief in the**

1 **district court.**

2 TRP's two reasons for bypassing its obligation to seek relief in the
3 district court are insufficient for emergency relief by this Court. First, TRP
4 claims that it was impracticable to seek a stay from the district court because
5 TRP is seeking "clarification" from this court whether a stay is warranted.
6 Motion p. 6. This court does not render advisory opinions. *Applebaum v.*
7 *Applebaum*, 97 Nev. 11, 12, 621 P.2d 1110, 1110 (1981). Moreover, even if
8 TRP was uncertain about whether a stay was necessary, the district court
9 could have addressed that issue. Second, TRP claims that it could not seek
10 relief in the district court because there is no e-filing in the Fifth Judicial
11 District and the matter is being heard by a Senior Judge, who is not always
12 available. Motion p. 6. TRP does not explain its failure to seek relief
13 between June 21, 2016, when Judge Elliott ruled from the bench, or at any
14 time thereafter, including September 12, 2016, when TRP was personally
15 served with written notice of the Order. In addition, there was sufficient
16 time between the service of the Notice of Intent to Take Default on October,
17 5, 2016, for TRP to seek relief on an order shortening time before the
18 default date of October 11, 2016. Although there is no e-filing, there is a
19 messenger service that can deliver pleadings to the clerk's office in

1 Parhump in an hour. Furthermore, there is no evidence that Judge Elliott
2 could not have heard this matter on an emergency basis, even though it was
3 TRP's failure to act that created the alleged emergency.

4 **3. TRP's Notice of Appeal does not divest the district court of**
5 **jurisdiction to proceed on the merits.**

6 TRP's failure to seek a stay in the district court is not excused by the
7 Notice of Appeal; nor did the Notice of Appeal make a stay unnecessary.
8 TRP's claim that no stay is necessary is wrong for two reasons. First, on its
9 face, NRAP 8(a)(1)(A) shows that a proper appeal does not divest the
10 district court from jurisdiction to consider a motion for stay and that a stay
11 is necessary. Second, TRP's Notice of Appeal was premature. The Notice
12 of Appeal was premature because the order appealed from was not an
13 appealable judgment or order. NRAP 3A(b) lists the matters from which an
14 appeal may be taken. Judge Elliott's order reconsidering the granting of the
15 motion to dismiss is not among the appealable matters listed in NRAP
16 3A(b). As this Court has made clear, denial of a motion to dismiss is not
17 directly appealable. See, *Buckwalter v. Dist. Ct.*, 126 Nev. 200, 201, 234
18 P.3d 920, 921 (2010). Thus, until there is an appealable order or judgment,
19 TRP's Notice of Appeal is premature and does not divest the district court

1 from jurisdiction to proceed. NRAP(a)(6).

2 TRP's reliance on *Foster v. Dingwall*, 126 Nev. 49, 228 P.3d 453
3 (2010) and *Mack-Manley v. Manley*, 122 Nev. 849, 138 P.3d 525 (2006) is
4 also misplaced. In each of those cases, the district court had entered a final
5 appealable judgment and while an appeal was pending one of the parties had
6 sought additional relief. Here there is no final judgment from which to
7 appeal, nor any order from which an appeal would be allowed. Thus, the
8 district court has continuing jurisdiction to consider the merits of the case or
9 to grant a stay application, if one had been made.

10 **4. Any stay would require a substantial bond.**

11 TRP fails to address the bond requirement for a stay. Even if the
12 Notice of Appeal was timely, NRCP 62(d) requires a bond to obtain a stay.
13 To delay the proceedings in this case further would substantially prejudice
14 Proimtu's efforts to collect for the services it provided to TRP more than
15 two years ago. Even if this Court were inclined to grant a stay, a substantial
16 bond would be required based upon the amount Proimtu seeks to recover
17 and the time value of money. Proimtu's Amended Complaint claims
18 damages in excess of \$ 5,022,826. Each day the prosecution of the claim is
19 delayed results in the loss of use of the potential recovery. Even at the

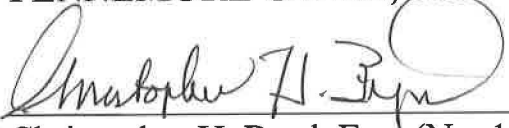
1 prejudgment interest rate applicable to the TRP/Proimtu contract, a stay
2 should require a bond in excess of \$500,000. This amount is calculated
3 based upon a stay for the entire length of an appeal, which is the relief TRP
4 seeks.

5 **IV. CONCLUSION**

6 For the foregoing reasons, Proimtu respectfully request that this Court
7 deny the Motion. Any emergency was created by TRP and TRP has not
8 shown that an application to the district court was impracticable. If the
9 Court believes a stay is appropriate despite TRP's failure to seek relief in
10 the district court, a substantial bond should be required as a condition for
11 such relief.

12 DATED this 10th day of October, 2016.

13 **FENNEMORE CRAIG, P.C.**

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15 Christopher H. Byrd, Esq. (No. 1633)

16 Brenoch Wirthlin (No. 10282)

17 300 S. Fourth Street, Suite 1400

18 Las Vegas, Nevada 89101

19 *Attorneys for Proimtu MMI LLC*

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Becky A. Pintar, Esq.
Bryan L. Albiston, Esq.
PINTAR ALBISTON LLP
6053 S. Fort Apache Road, Suite 120
Las Vegas, NV 89148
*Attorneys for Appellant
TRP International, Inc.*

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