IN THE SUPREME COURT OF THE STATE OF NEVADA

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MEI-GSR HOLDINGS, LLC, AM-GSR HOLDINGS, LLC, and GAGE VILLAGE COMMERCIAL DEVELOPMENT, LLC, Appellants, v. ALBERT THOMAS, *et al.,* Respondents.	Case Nos. 85915 86092 86985 87243 87303 87566 87567

APPELLANTS' MOTION TO MAINTAIN OR REINSTATE STAYS PENDING PANEL REHEARING AND EN BANC RECONSIDERATION OF DECEMBER 29, 2023 ORDER

Jordan T. Smith, Esq., Bar No. 12097
Brianna Smith, Esq., Bar No. 11795
Daniel R. Brady, Esq., Bar No. 15508
PISANELLI BICE PLLC
400 South 7th Street, Suite 300
Las Vegas, Nevada 89101

Attorneys for Appellants
MEI-GSR Holdings, LLC; Gage Village Commercial Development, LLC; and AM-GSR Holdings, LLC

I. INTRODUCTION

On December 29, 2023, the Court resolved a number of pending issues in the above-captioned docket numbers, including two pending orders to show cause. (*See* Order Resolving Motions, Dismiss and Consolidating Appeals, and Reinstating Briefing at, Dec. 29, 2023) ("the Order"). The Court ruled that only certain issues are jurisdictionally before the Court because of a belated NRCP 54(b) certification while the Court lacks jurisdiction over other issues because, according to the Panel, there is no final, appealable judgment below. As a result of this conclusion, the Panel denied two emergency motions to stay as moot. (Order at 26) ("Thus, the January and March orders may not be considered in the context of this appeal from the amended judgment on the damages claims, and we deny as moot appellants' emergency motion for stay. In light of this order, we vacate our May 8, 2023, temporary stay."); (*id.* at 28) ("Accordingly, we dismiss these appeals and deny as moot the emergency motion for stay filed in Docket No. 87243.").

As the forthcoming petition for rehearing explains, the Panel's Order made at least two novel holdings based on misapprehending or overlooking recent Nevada authority. *See* NRAP 40(a)(2). Alternatively, if the Panel did not overlook or misapprehend Nevada cases, then there is a conflict in this Court's cases on a significant public policy issue involving receiverships that warrants the En Banc Court's attention. *See* NRAP 40A(a). Accordingly, Appellants intend to seek panel rehearing and, if necessary, en banc reconsideration. However, Appellants will be effectively denied their

appellate rights if the stays are lifted and millions and millions of dollars are turned over to the Receiver and Respondents/Plaintiffs before the appellate process has run its course. Therefore, Appellants respectfully request that the Court maintain or reinstate the previously requested stays in Docket Nos. 86092 and 87243.

II. ARGUMENT

The Court may maintain[1] or reinstate the stays in Docket Nos. 86092 and 87243 pending panel rehearing and en banc reconsideration. NRAP 8(a). For stays, the Court considers whether the party seeking a stay has presented a substantial case on the merits, whether the object of the appeal will be defeated without a stay, and whether the parties will suffer irreparable harm. NRAP 8(c); *Mikohn Gaming Corp. v. McCrea*, 120 Nev. 248, 251, 89 P.3d 36, 38 (2004); *Hansen v. Eighth Jud. Dist. Ct.*, 116 Nev. 650, 659, 6 P.3d 982, 987 (2000).

1. Appellants have a substantial case for panel rehearing and en banc reconsideration on at least two issues. First, the Order held that a receivership may continue after resolution of the substantive claims for which it was imposed even though this Court has repeatedly held that a receivership is an interim, provisional remedy that must be tied to underlying claims. (Order at 23) ("Although a final judgment on the damages claims may end the need for a receivership, the district court here intentionally and expressly maintained the receivership post-judgment"). The

[1] It is questionable whether the stay in Docket No. 86092 is yet lifted before the period to seek rehearing is expired.

Panel cited just two Nevada cases from 1911 and 1961, one of which contained acknowledged "dictum." (Order at 23) (citing *Martin Co. v. Kirby*, 24 Nev. 205, 117 P.2d 2 (1911); *Alper v. Posin*, 77 Nev. 328, 363 P.2d 502 (1961) (describing relevant part of *Kirby* as dictum)).

As Appellants repeatedly highlighted, this Court's recent cases hold that a receivership is a remedy that lasts only until the substantive claims are resolved—in other words, recognizing that a receivership is not a standalone claim or cause of action. Nor is a receivership relief for its own sake. Therefore, a receivership terminates upon entry of a judgment resolving the substantive claims. *See, e.g.*, *Direct Grading & Paving, LLC v. Eighth Jud. Dist. Ct.*, 137 Nev. 320, 324, 491 P.3d 13, 17 (2021) ("[a] provisional remedy is '[a] ***temporary remedy awarded before judgment and pending the action's disposition, such as*** a temporary restraining order, a preliminary injunction, ***a prejudgment receivership***, or an attachment,' that 'is intended to maintain the status quo by protecting a person's safety or preserving property.'") (emphasis added); *Johnson v. Steel, Inc.*, 100 Nev. 181, 183, 678 P.2d 676, 678 (1984) (a "receiver *pendente lite* is an ancillary remedy used to preserve the value of assets ***pending outcome of the principal case***.") (emphasis added); *N5HYG, LLC v. Iglesias*, No. 83425, 2022 WL 2196855, at *1 (Nev. June 17, 2022) (parenthetically quoting 75 C.J.S. *Receivers* § 5 (2022) ("***generally the appointment of a receiver 'is not the final or ultimate relief. ... It is merely an ancillary remedy, or it is merely an auxiliary, incidental, and provisional remedy***.'"); *see also Bowler v. Leonard*, 70 Nev. 370, 384, 269 P.2d 833, 840

(1954) ("Receivership is generally regarded as a *remedy* of last resort.") (emphasis added); *Hines v. Plante*, 99 Nev. 259, 261, 661 P.2d 880, 881-82 (1983) ("The appointment of a receiver *pendente lite* is a harsh and extreme *remedy* which should be used sparingly and only when the securing of ultimate justice requires it.") (emphasis added).

The Panel's Order does not cite, address, distinguish, or reconcile these more recent Nevada cases. Instead, the Order relies on a number of other older cases from outside Nevada that neither party cited or discussed. (Order at 23-24, 25-26.) Setting aside the principle of party presentation,[2] any survey of receivership cases should have included those from the United States Supreme Court (also cited by Appellants) holding that a receivership is "*auxiliary to some primary relief which is sought*" and "is only a means to reach some legitimate end sought through the exercise of the power of a court of equity. *It is not an end in itself.*" *Kelleam v. Maryland Cas. Co. of Baltimore, Md.*, 312 U.S. 377, 381 (1941) (emphasis added).

The Order string-cites California, New York, and Texas authority but does not consider cases from those same jurisdictions that Appellants emphasized. *Compare* Order at 23-24 *with Carpenson v. Najarian*, 62 Cal. Rptr. 687, 692 (Ct. App. 1967) ("***It is the rule that a receivership 'pendente lite' terminates with the rendition of the***

[2] *See Lee v. Patin*, No. 83213, 2023 WL 2436323, at *8 (Nev. 2023) (unpublished disposition) (Cadish, J., dissenting) (explaining that the Court "follow[s] the principle of party presentation," which means the court "rel[ies] on the parties to frame the issues for decisions and assign[s] to courts the role of neutral arbiter of matters the parties present").

judgment . . . .") (emphasis added); *Mayo v. Mayo*, 63 P.2d 822, 823 (Cal. 1936) ("In 22 California Jurisprudence, 476, § 61, it is stated that 'a receivership pendente lite terminates with the rendition of judgment; thereafter any questions as to the propriety of an appointment are moot, and will not be reviewed.'"); *Stier v. Don Mar Operating Co.*, 305 N.Y.S.2d 397, 398 (N.Y. App. Div. 1969) ("Since an order was not obtained to continue the receivership, ***it was terminated upon final judgment and respondent now lacks standing to maintain an action for rents***.") (emphasis added); *McMurrey v. McMurrey*, 168 S.W.2d 944, 945 (Tex. Civ. App. 1943) ("By implication, if not expressly, ***the receivership was terminated, as was the temporary injunction, by the entry of the final judgment, hence the appeal as to that phase of the case has become moot***.") (emphasis added).

The second issue is related to the first. The Order upheld the District Court's NRCP 54(b) certification purporting to allow the receivership to continue. But, by its express terms, NRCP 54(b) only applies to bifurcate "claims"—not remedies. "An order with regard to a provisional remedy does not go to an independent claim in a multiple-claim action ***and cannot be given finality for purposes of appeal by Rule 54(b)***." Wright & Miller, 11A Fed. Prac. & Proc. Civ. § 2936 (3d ed.) (emphasis added). Thus, as an interim *remedy*, the receivership is not subject to certification and cannot continue after judgment on the substantive claims.

Respectfully, the Court either misapprehended this authority or overlooked it, causing a conflict within this Court's jurisprudence. The Order states "the final

judgment must wrap up all pending receivership matters." (Order at 23.) But this is exactly backwards. The (Amended) Final Judgment awarding Respondents/Plaintiffs over $20 million dollars in damages on all claims in the operative complaint is a final judgment which wrapped up (read: extinguished) the receivership. The judgment is not non-final because of the receivership; the receivership is final because of the judgment.

The consequence of the final judgment should be that (1) the receivership terminated; (2) the preliminary injunction at issue in Docket No. 85915 merged and dissolved into the judgment, (*compare* Order at 25); (3) the post-judgment contempt orders in Case Nos. 87243 and 87566 are appealable as part of the appeal from the final judgment or as special orders entered after final judgment, (*compare* Order at 27); and (4) the post-receivership/post-judgment orders in Case Nos. 87303, 87567, and 87685 are appealable through the final judgment or as special orders after final judgment, (*compare* Order at 28).

2. Appellants intend to seek panel rehearing and en banc reconsideration. However, the object of rehearing or reconsideration will be defeated, and Appellants will be denied effective appellate relief, if the stays regarding their multimillion-dollar payments are denied in the meantime (Docket Nos. 86092 and 87243). Appellants will also suffer irreparable harm. If the funds are distributed, Appellants will be effectively unable to recover the amounts paid to the Respondents through the Receiver. *See Philip Morris USA Inc. v. Scott*, 561 U.S. 1301, 1304 (2010) (Scalia, J., granting application for stay) (granting stay when expended funds were unrecoverable). The Receiver has posted

no bond. "Normally the mere payment of money is not considered irreparable, but that is because money can usually be recovered from the person to whom it is paid. If expenditures cannot be recouped, the resulting loss may be irreparable." *Id.* (internal citation omitted)). Appellants will suffer irreparable harm and the object of their appellate rights will be defeated without a stay pending rehearing and en banc reconsideration.

3. On the other hand, Respondents/Plaintiffs will suffer no irreparable harm from maintaining the status quo until rehearing or reconsideration is resolved. The order to show cause process began in May 2023 and was just recently finished seven months later. Respondents/Plaintiffs have not incurred any irreparable injury during this time and they will not while Appellants exhaust the remaining appellate avenues. A mere delay in payment is not irreparable harm. *See Mikohn Gaming Corp.*, 120 Nev. at 253, 89 P.3d at 39.

III. CONCLUSION

For these reasons, the Court should enter or maintain the stays in Docket Nos. 86092 and 87243.

DATED this 9th day of January, 2024.

PISANELLI BICE PLLC

By: */s/ Jordan T. Smith*
Jordan T. Smith, Esq., #12097
400 South 7th Street, Suite 300
Las Vegas, Nevada 89101

Attorneys for Appellants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of Pisanelli Bice PLLC, and pursuant to NRAP 25(b) and NEFCR 9, on this 9th day of January, 2024, I electronically filed the foregoing **APPELLANTS' MOTION TO MAINTAIN OR REINSTATE STAYS PENDING PANEL REHEARING AND EN BANC RECONSIDERATION OF DECEMBER 29, 2023 ORDER** with the Clerk of the Court for the Nevada Supreme Court by using the Nevada Supreme Courts E-Filing system (Eflex). Participants in the case who are registered with Eflex as users will be served by the Eflex system.

/s/ Kimberly Peets
An employee of Pisanelli Bice PLLC