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FILED

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7
8 **IN THE SUPREME COURT OF THE STATE OF NEVADA**

9 G7P&T, a Nevada General Partnership,
10 Plaintiff/Appellant,

Docket No.: 45195

11 v.

**OPPOSITION TO RESPONDENTS'
MOTION TO REQUIRE APPELLANT
TO POST A SUPERSEDEAS BOND**

12 DOUGLAS R. JOHNSON; DEBRA A.
JOHNSON; PHILLIP J. ANDREWS;
13 JOHNSON INVESTMENT, LLC; and DOES
1-20 inclusive,

14 Defendants/Respondents.

15
16 COMES NOW Appellant G7P&T, by and through its attorneys of record, Harrison,
17 Kemp & Jones, LLP, and hereby submits its Opposition to Respondents' Motion to Require
18 Appellant to Post Supersedeas Bond. This Opposition is based upon the attached Memorandum
19 of Points and Authorities, the pleadings and papers on file herein, and any oral argument which
20 this Court may entertain at the hearing on this matter.

21 DATED this 26th day of September, 2005.

22 HARRISON, KEMP & JONES, LLP

23
24 *[Signature]*
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1 MEMORANDUM OF POINTS AND AUTHORITIES

2 I.

3 INTRODUCTION

4 This appeal stems from Appellant’s suit for specific performance of a land sale contract.
5 When Respondents (“Sellers”) refused to permit Appellant G7P&T (“Buyer”) to deposit the
6 purchase price and close on the property, Buyer sued for specific performance and filed a lis
7 pendens against the property. Sellers successfully moved for summary judgment and the lis
8 pendens was expunged. Buyer appealed.

9 With summary judgment in their favor and no lis pendens or stay in place, there is no
10 court order or judgment preventing Sellers from exercising their property rights. Nevertheless,
11 and on the legally unsupported theory that the stigma of this appeal creates a *de facto* stay of their
12 favorable judgment, Sellers ask this Court to force Buyer to post a \$25 million supersedeas bond
13 just to pursue its appellate rights.

14 This motion is Sellers’ second attempt to find a court willing to read new requirements
15 into established rules of appellate procedure. Presiding Civil Judge Elizabeth Gonzalez
16 considered and denied this motion on July 25, 2005. Buyer requests that this Court now do the
17 same because:

- 18
- 19 ● The law does not support a supersedeas bond requirement to appeal the
20 dismissal of a claim for equitable relief;
- 21 ● The District Court did not abuse its discretion in denying this motion in
22 the first instance; and
- 23 ● Application of the supersedeas bond requirement as urged by Sellers
24 would place an impermissible financial burden on worthy appellants and
25 chill appellate rights.

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II.
ARGUMENT

A. **Nevada Law Does Not Support a Supersedeas Bond Requirement in This Case.**

An appellant may obtain a stay pending appeal by posting a supersedeas bond. *See* NRCP 62; NRAP 8. The rules do not, however, authorize a respondent to move the Court to require an appellant to post a supersedeas bond merely to pursue an appeal.¹ Loosely relying upon *In re Wymer*² and *McCulloch v. Jeakins*³, Sellers contend that NRAP 8 and NRCP 62 empower this Court to order Buyer to post a bond of at least \$25 million in order to appeal the dismissal of its specific performance action. Not only do these cases not support this proposition, they explain why no supersedeas bond can be required in this case and support the immediate denial of Sellers' motion.

1. ***A Supersedeas Bond is Only Required to Stay a Money Judgment.***

The law generally recognizes three types of post-judgment stays: 1) matter-of-right, 2) discretionary, and 3) a hybrid of the two. *See Wymer*, 5 B.R. at 804.⁴ "The matter-of-right stay is confined largely to money judgments and is often known as the supersedeas stay because of reference to the supersedeas bond in FRCP 62(d)." *Id.* at 804; *Hovey v. McDonald*, 109 U.S. 150 (1883) ("a true supersedeas operates only as to a money judgment from which a writ of execution can issue."⁵ A supersedeas bond is part and parcel of a supersedeas stay, because once a court

¹ NRAP 7 requires an appealing litigant to post a \$250.00 *cost* bond as its ticket to the appellate court. *See* NRAP 7. Appellant timely posted its cost bond in accordance with NRAP 7.

² 5 BR 802, 806 (9th Cir. 1980).

³ 99 Nev. 122, 123, 659 P.2d 302, 303 (1983).

⁴ Buyer acknowledges that *In re Wymer* is a Ninth Circuit case interpreting the Federal Rules of Civil and Appellate Procedure. When analyzing motions like this one, this Court considers federal cases interpreting federal rules "strong persuasive authority, because the Nevada Rules of Civil Procedure are based in large part upon their federal counterparts." *Las Vegas Novelty v. Fernandez*, 106 Nev. 113, 119, 787 P.2d 772, 776 (1990).

⁵ It is well-established that Rule 62(d) contemplates a monetary judgment. *NLRB v. Westphal*, 859 F.2d 818, 819 (9th Cir. 1988); *see also Fallowfield Dev. Corp. v. Strunk*, 1995 WL 93438 (E.D. Pa. 1995) (posting of supersedeas bond is only required in cases where the judgment appealed from is for a

1 approves the bond, the stay follows as a matter of right. When a money judgment is involved,
2 the court also has the option of granting a “hybrid” stay and reducing or dispensing with the
3 supersedeas bond requirement. *Id.* at 806-807. *McCulloch* represents this Court’s
4 acknowledgment that a supersedeas bond is only required to stay execution on a money
5 judgment. *See McCulloch*, 99 Nev. at 124.

6 Critically, Buyer never asked for a stay of the judgment in this case.⁶ This simple point
7 risks being overlooked in the midst of Sellers’ arguments. Sellers repeatedly contend that
8 *McCulloch* requires G7P&T to post a supersedeas bond under NRC 62⁷, but in *McCulloch* the
9 appellant asked to stay the judgment. If no stay had been requested, no bond would have been
10 required. As *McCulloch* involves an entirely different kind of judgment and an entirely different
11 kind of relief than the instant case, Sellers’ reliance upon this case is heavily misplaced.
12 *McCulloch* does not support a supersedeas bond requirement for this appeal.

13
14 **2. The Court’s Discretionary Power Also Fails to Support a Supersedeas Bond Requirement in This Case.**

15 As there is no money judgment to trigger a supersedeas bond requirement for Buyer in
16 this case, Sellers can only rely on the Court’s discretionary authority to stay equitable judgments
17 under extraordinary circumstances. Unfortunately for these movants, the Court’s discretionary
18 power affords no relief because it does not authorize a supersedeas bond requirement. Moreover,

19 _____
20 specific sum of money); *Donovan v. Fall River Foundry Co., Inc.*, 696 F.2d 524, 526 (7th Cir. 1982)
21 (framers would have limited the right to cases where judgment appealed was a money judgment); *US v.*
22 *US Fishing Vessel Maylin*, 130 F.R.D. 684, 686 (S.D Fla. 1990) (stay as a matter of right lies where the
23 judgment is monetary); *Yankton Sioux Tribe v. Southern Missouri Waste Mgmt. Dist.*, 926 F.Supp. 888,
24 889 (D. S.D. 1996) (stay upon supersedeas where appeal taken from monetary judgment); *Government*
25 *Guar. Fund of Fin. v. Hyatt Corp.*, 167 F.R.D. 399, 400 (D. V.I. 1996) (courts to address it have limited
26 the applicability of Rule 62(d) to appeals from money judgments); *Lundeen v. Canadian Pacific Railway*
27 *Co.*, 2005 WL 775742 (D. Minn. 2005) (granting a stay pending appeal in cases involving non-monetary
28 judgments has proven an ill-suited remedy).

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⁶ “The stay of an equitable order is an extraordinary device which should be sparingly granted.”
U.S. v. Texas, 523 F. Supp. 703, 729 (D.C. Tex. 1981). Denial of specific performance is an equitable
order. Recognizing that this is not a money judgment case and equitable stays are an extraordinary
remedy, Buyer did not seek a stay of this judgment.

⁷ Respondents’ Mtn. at 11, ln. 15; 12, ln. 7.

1 as Sellers' request was denied in the first instance by the District Court, it is reviewed by this
2 Court for abuse of discretion – a standard which Sellers have not satisfied.

3 a. *No Supersedeas Bond Available for Discretionary Stay.*

4 A discretionary stay may be available for non-money judgments such as those involving
5 injunctions and equitable remedies. Discretionary stays, however, do not trigger a supersedeas
6 bond requirement.⁸ Although the Court's discretionary stay power is broad, "this power should
7 be sparingly employed and reserved for the exceptional situation" where the movant has
8 demonstrated the likelihood of success on the merits, irreparable injury in the absence of a stay,
9 and no substantial harm to the non-movant or the public interest.⁹

10 Sellers' failure to grasp the distinction between supersedeas stays of money judgments
11 and discretionary stays of equitable judgments explains why their motion cobbles discretionary
12 language from *Wymer*¹⁰ with supersedeas bond language from *McCulloch*¹¹ to reach a conclusion
13 neither case supports.¹²

14 A supersedeas bond is simply not required to appeal an order denying equitable relief.
15 The law only requires an appellant to post a supersedeas bond to stay execution upon a money
16 judgment. As there is no money judgment in this case and no stay, Sellers' attempt to apply
17 money judgment authority to support a bond requirement in this case is wholly unsupported

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19

⁸ See *Wymer*, 5 B.R. at 806.

20 ⁹ *Id.* (quoting *People v. Emeryville*, 446 P.2d 790, 793 (Cal. 1961)); *Schwartz v. Covington*, 341
21 F.2d 537 (9th Cir. 1965).

22 ¹⁰ See Respondents' Mtn. at 10, ln.12 ("Nev. R. Civ. P. 62(c) and (g) confirm the inherent powers
23 of the courts to make whatever order is necessary to preserve the status quo and to ensure the
effectiveness of final judgment.").

24 ¹¹ See Respondents' Mtn. at 10, ln. 16, block quote from *McCulloch v. Jeakins*, 99 Nev. 122, 123
25 (1983).

26 ¹² Sellers' incomprehension of the difference between a money judgment and an equitable order
27 may also explain why their primary argument curiously concludes with case law warning *against* the
28 remedy they request. See Respondents' Mtn. at 11, ln. 4, citing *U.S. v. Texas* 523 F.Supp. 703, 729 (D.C.
Tex. 1981)("[T]he stay of an equitable order is an extraordinary device which should be sparingly
granted.").

1 and requires the denial of this motion.

2
3 *b. District Judge Gonzalez's Denial of Sellers' Motion
is Reviewed for Abuse of Discretion.*

4 In this case, a discretionary stay is even less warranted because the District Court has
5 already considered and denied this request. When a trial court denies a motion for stay, "the
6 appellate court simply determines whether the trial court *abused its discretion*." *Wymer*, 5 B.R. at
7 807 (emphasis added). "The trial court's discretion is so great that it is sometimes said that the
8 appellate court should not grant a stay of enforcement pending appeal after it has been denied by
9 the trial court." *Id.* (citations omitted). *Wymer* further explains that "appellate courts are
10 reluctant to entertain a request for stay unless it is demonstrated that the trial judge is unavailable
11 or that the request was denied by the trial judge. Nevertheless, only in the former situation does
12 the appellate tribunal normally exercise its own discretion; in other instances (such as where the
13 trial court has denied the stay) the appellate court simply determines whether the trial court
14 abused its discretion." *Wymer* at 807. "Any other rule would distort the delicate balance between
15 trial and appellate levels and deny recognition of their respective roles, all to the detriment of the
16 judicial system and of those it serves." *Id.* at 808.

17 District Judge Gonzalez was not unavailable. Rather, she denied Sellers' motion after
18 full briefing and oral argument. Of course, Sellers do not claim District Judge Gonzalez abused
19 her discretion, they simply ignore this applicable standard because it does not support their
20 argument. Judge Gonzalez exercised – and did not abuse – her discretion, and this Court should
21 defer to her judgment in this regard and likewise deny this motion.

22
23 **B. Sellers Seek to Create a New Appellate Requirement that is Not Supported by
Nevada Law and Would Chill Appellate Rights.**

24 Granting this motion would create either an actual stay (which Sellers claim they do not
25 want) or a new supersedeas bond requirement for appeal. Requiring an appellant to post a
26 supersedeas bond when no stay has been sought contravenes public policy by erecting a
27 substantial obstacle to the appellate court. *See e.g., Matter of Estate of Gray*, 505 N.E.2d 806,
28 811 (Ind. Ct. App. 1987) (noting judicial policy against chilling appellate rights).

1 Sellers accurately characterize their motion as one of first impression because they would
2 like this Court to create both a new requirement for appeal and a new form of stay where no
3 current law, statute, or case supports it. Sellers attempt to justify this unprecedented request by
4 asserting that Buyer's appeal creates a *de facto* stay because the stigma of appeal alone destroys
5 their ability to encumber or alienate this property. Sellers do not proffer a single case to even
6 suggest that *de facto* stays are recognized by courts and not merely figments of Sellers'
7 imaginations. Amazingly, although it is the lynchpin of their motion, Sellers' *de facto* stay
8 theory is not even discussed in their argument. This is a tacit acknowledgment that this Court
9 should recognize Sellers' *de facto* stay argument for what it is – an unsupported attempt to force
10 Buyer to drop its appeal.

11 Sellers' *de facto* stay argument, if accepted, would have implications far beyond this case.
12 The stigma of appeal that Sellers identify would attach to any property – real or personal – that is
13 the subject of an unstayed judgment. If this argument is taken to its logical end, Sellers would
14 require a supersedeas bond from every litigant who appeals a judgment involving property. But
15 Nevada law does not support the adoption of such a burden on the right to appeal. To appeal, an
16 appellant must only file timely notice and post a \$250 cost bond.¹³ The additional burden Sellers
17 seek to impose is not mentioned by the Nevada Rules of Appellate Procedure and would
18 effectively slam the doors of the Nevada Supreme Court to many worthy appellants.

19 This new requirement would also impose an additional burden on the courts. For every
20 appeal involving property, the courts would be forced to establish present and future property
21 value based on unknown circumstances. (Sellers suggest this court consider terrorist attacks and
22 real estate bubbles. They also urge this Court to accept their own expert's self-serving valuation,
23 but these losses are pure speculation and an inadequate basis for establishing a bond amount.)
24 Supersedeas bond jurisprudence does not support such a burdensome requirement.

25 Nor does Sellers' speculation that Buyer is not ready, willing, or able to purchase the
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28 ¹³NEV. R. APP. P. 3, NEV. R. APP. P. 4, NEV. R. APP. P. 7.

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1 property provide any excuse for erecting a \$25 million appeal barrier.¹⁴ Simply because Buyer
2 does not want to post a \$25 million bond does not mean it is unable to purchase the property
3 should it succeed on appeal. Buyer attempted to perform in order to close the deal and remained
4 ready to perform throughout the District Court proceedings. District Judge Gonzalez granted
5 summary judgment not for any inability to perform, but because she disagreed with Buyer's
6 interpretation of the performance date under the contract. Sellers offer no authority to even
7 suggest that readiness to perform in the event of reversal and remand has any bearing on the
8 supersedeas bond requirement.

9 Sellers' final argument that a state may "close its courts . . . if the condition of reasonably
10 security is not met," *Cohen v. Beneficial Loan Corp.*, 337 U.S. 541, 551-52 (1949), is also
11 misleading. Although a "legislature may properly condition the right to appeal upon posting of
12 security sufficient to protect appellee from loss or damage," *see O'Day v. George Arkelian*
13 *Farms, Inc.*, 536 F.2d 856, 860 (9th Cir. 1978), where the legislature has not established an
14 additional security requirement, none may be ordered by the courts. In Nevada, the legislature
15 established NRAP 7 which requires an appellant to post a \$250 cost bond in order to appeal.
16 Sellers proffer no legislative dictate which authorizes the courts to condition the right to appeal
17 upon the posting of a supersedeas bond. Neither the authority proffered by Sellers nor public
18 policy supports a supersedeas bond requirement for the appeal of an unstayed judgment.

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¹⁴ Respondents' Mtn. at 12, ln. 11.

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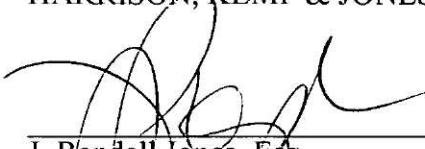
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III.
CONCLUSION

Sellers are in an enviable position on appeal. Buyer's lis pendens was expunged. Judgment was granted in favor of Sellers, and their alienation of this property is now unrestrained by any judgment or court order. But Sellers want more. They want to force Buyers to post a \$25 million supersedeas bond just to pursue this appeal. This begs the question, why would Sellers, whose entire motion rests on purported fears of an imagined stay seek to create an actual stay? The answer is simple: Sellers fear neither an imagined nor actual stay. They only want to force Buyer to drop its legitimate appeal by making it cost-prohibitive to pursue. No rule authorizes, and this Court must not permit, such extortionate use of post judgment remedies.

Nevada law does not require an appellant to post a supersedeas bond merely to appeal an unstayed judgment. The rules only require supersedeas bonds to obtain a court-ordered stay pending appeal of a money judgment. Buyer did not seek a stay and Sellers' property rights are not hindered in any way by the pendency of this appeal. Requiring Buyer to post a supersedeas bond merely to pursue this appeal would chill appellate rights in clear contravention of public policy and extend the rules of this Court far beyond their intended or logical reach. Accordingly, Respondents' Motion to Require Appellant to Post a Supersedeas Bond must be denied.

DATED this 26th day of September, 2005.

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CERTIFICATE OF SERVICE BY U.S. MAIL

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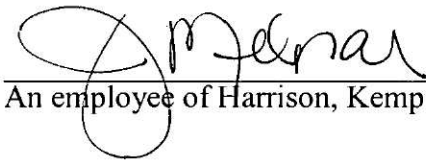
I hereby certify that on the 26th of September, 2005, service of the foregoing

OPPOSITION TO RESPONDENTS' MOTION TO REQUIRE APPELLANT TO POST A

SUPERSEDEAS BOND was made by mailing the same via U.S. Mail to:

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