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9 **UNITED STATES DISTRICT COURT**
 10 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**

11 CONSUMER FINANCIAL
 12 PROTECTION BUREAU,
 13
 14 Plaintiff,

15 v.

16 NATIONWIDE BIWEEKLY
 17 ADMINISTRATION, INC., LOAN
 18 PAYMENT ADMINISTRATION
 19 LLC, AND DANIEL S. LIPSKY,
 20
 21 Defendants.

Case No. 3:15-cv-02106-RS

**PLAINTIFF’S RESPONSE IN OPPOSITION
 TO DEFENDANTS’ MOTION TO STAY
 EXECUTION OF JUDGMENT WITHOUT
 POSTING OF A BOND**

Hon. Richard Seeborg

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 23 NATIONWIDE BIWEEKLY
 24 ADMINISTRATION, INC.,
 25
 26 Counter-claimant,

27 v.

28 CONSUMER FINANCIAL
 PROTECTION BUREAU,
 Counter-defendant.

1 I. Introduction

2 The gravamen of Defendants' motion is that execution on the Bureau's judgment for civil
3 money penalties will make it impossible to resume operation of their Interest Minimizer
4 Program. That, however, is not enough, and there is plainly no support under these circumstances
5 to stay execution on the judgment without the posting of a bond. Although Defendants contend
6 that they are financially distressed and cannot afford to obtain a bond, they have not established
7 that a waiver of the bond requirement is appropriate in this case, nor have they made a persuasive
8 showing that their alternative form of security is sufficient to guarantee the Bureau's interest
9 here. For the reasons discussed in this response, the Court should deny Defendants' motion.

10 II. Standard

11 Rule 62(b) provides that "[o]n appropriate terms for the opposing party's security," the
12 court may stay the execution of a judgment pending disposition of various post-trial motions.
13 Fed. R. Civ. P. 62(b). This rule "usually requires a bond" sufficient to fully satisfy the judgment
14 and interest thereon. *Fredianelli v. Jenkins*, No. 11-CV-3232, 2013 WL 5934988, at *1 (N.D.
15 Cal. Nov. 4, 2013). The district court may only stay execution of the judgment pending the
16 disposition of certain post-trial motions or appeal if the court provides for the security of the
17 judgment creditor. *Peacock v. Thomas*, 516 U.S. 349, 359 n. 8 (1996) (citing Fed. R. Civ. P.
18 62(b)). The posting of a bond is intended to preserve the status quo and is "a privilege extended
19 the judgment debtor as a price of interdicting the validity of an order to pay money." *Poplar*
20 *Grove Planting & Refining Co. v. Bache Halsey Stuart, Inc.*, 600 F.2d 1189, 1191 (5th Cir. 1979)
21 (discussing appeal bond requirements).¹

22 When a party seeks to waive the bond requirement, courts examine the following criteria
23 in determining whether a waiver of the general bond requirement is warranted:

24 _____
25 ¹ The Court issued an order on November 13, 2017, that temporarily extended the stay of
26 execution on the judgment until the Court rules on Defendants' present motion seeking a waiver
27 of the bond requirement under Fed. R. Civ. P. 62(b). Dkt. No. 335. If the Court grants
28 Defendants' motion, the stay will be extended until disposition of the post-trial motions. *Id.* If the
motion is denied, the temporary stay will terminate. *Id.*

1 (1) the complexity of the collection process; (2) the amount of time
2 required to obtain a judgment after it is affirmed on appeal; (3) the
3 degree of confidence that the district court has in the availability of
4 funds to pay the judgment; (4) whether the defendant's ability to
5 pay the judgment is so plain that the cost of a bond would be a
6 waste of money; and (5) whether the defendant is in such a
7 precarious financial situation that the requirement to post a bond
8 would place other creditors of the defendant in an insecure
9 position.

10 *Dillon v. City of Chicago*, 866 F.2d 902, 904–905 (7th Cir. 1988) (internal citations and
11 quotation marks omitted); *United States v. Moyer*, No. C 07–00510 SBA, 2008 WL 3478063, at
12 *12 (N.D. Cal. Aug. 12, 2008) (noting that district courts within the Ninth Circuit “regularly use
13 these factors” in determining whether security should be required under Rule 62(b)).

14 III. Argument

15 Defendants contend that the Court should waive the bond requirement for three reasons.
16 Taking each of Defendants' arguments in turn, the Court should deny Defendants' motion. First,
17 Defendants argue that the *Dillon* factors weigh in their favor and warrant a departure from the
18 general rule requiring the posting of bond. But those factors actually favor imposing a bond after
19 taking into account Defendants' purported financial condition, inability to pay the judgment, and
20 complexity involved to collect it. Second, as an alternative to the bond requirement, Defendants
21 propose not to sell Nationwide's building or Lipsky's personal residence until after all appeals
22 are final in this case. This alternate proposal, however, does not sufficiently protect the Bureau's
23 interest and thus cannot be substituted for the assurances of a bond. Finally, Defendants contend
24 that the Court should waive the bond requirement altogether because civil money penalties are at
25 issue. That fact that the judgment is for civil money penalties is of no consequence—Rule 62
26 plainly applies to judgments and it does not matter that the source of the judgment is civil money
27 penalties.

1 judgment without the posting of a bond. *See Aerospace Marketing, Inc. v. Ballistic Recovery*
2 *Systems, Inc.*, 2005 WL 2057404, at *1 (M.D. Fla. Aug. 23, 2005).

3 That is precisely the case here. Defendants’ purported financial condition plainly
4 indicates a present and future inability to pay the judgment, and thus further underscores the need
5 for an appropriate bond requirement now to protect the Bureau. *See Allied Erecting &*
6 *Dismantling Co., Inc. v. United States Steel Corp.*, 2016 WL 1106854, at *16-17 (N.D. Ohio
7 Mar. 21, 2016) (holding that possibility of bankruptcy if judgment proceeds is “exactly” the type
8 of injury that a bond is designed to protect, i.e. the possibility that a judgment may later be
9 uncollectible); *Aerospace Marketing, Inc.*, 2005 WL 2057404, at *1 (rejecting debtor’s request to
10 stay execution of judgment to “preserve its ongoing business operations” and upholding bond
11 requirement due to debtor’s inability to fulfill present and future financial obligations).² For these
12 reasons, Defendants have not satisfied the second, third, and fourth *Dillon* factors.

13 b. Because collection of the judgment is likely to be complex, the first *Dillon* factor
14 favours imposing a bond.

15 The first *Dillon* factor (complexity of the collection process) also favors imposition of the
16 bond. In a case like this, where the judgment debtors purportedly have limited cash on hand and
17 inadequate assets to satisfy the judgment, collection is likely to be complex, and the court should
18 therefore require a bond. *See AngioScore, Inc. v. TriReme Medical, Inc.*, 2015 WL 13387576, at
19 *2 (N.D. Cal. Oct. 23, 2015) (“[D]efendants’ representations—that they have limited cash on

20 ² Defendants contend they will resume operating the IM Program upon disposition of anticipated
21 post-trial motions. Dkt. No. 332-1, at ¶ 4. However, there is no certainty that Nationwide can
22 resume the IM Program and, more importantly, Defendants present no evidence of a present or
23 future ability to pay the judgment. Defendants point to prior profitability of the company without
24 noting that these profits were obtained when consumers were being deceived into signing up for
25 the IM Program. Defendants present no evidence supporting their claims that the business, even
26 if it is able to resume, will return to the same level of enrollment and profitability given the
27 injunctive provisions that now prohibit Defendants from making the widespread deceptive
28 misrepresentations underlying those earlier profits. Even under his speculative plan, Lipsky has
failed to account for the financial outlays required to hire and train personnel and the time
needed to reestablish banking partners that are essential to provide the service. On this point,
Defendants have not shown that they are even likely to obtain such banking relationships. In any
event, all of these factors strongly counsel against Defendants’ request for an unsecured stay.

1 hand and inadequate assets to serve as collateral for obtaining a supersedeas bond from a
2 lender—suggest the collection process may be arduous and the availability of sufficient funds in
3 future years, in light of the other creditors referenced, is questionable.”).

4 Though Defendants contend that the collection process is not complex and that funds will
5 be available for collection at some point in the future, this is based exclusively on their
6 speculation that Nationwide will resume operating the IM Program and that the profits from this
7 future operation will make collection “unnecessary.” Dkt. No. 332, at 8. The reality, however, is
8 much different. Based on Defendants’ representations of illiquid assets and inadequate levels of
9 cash to satisfy the judgment, collection will likely be complex and involve restraining a variety
10 of Lipsky’s personal assets, ownership interests, and real property, as well as business assets
11 belonging to Nationwide. And, as the Court found, Lipsky received over \$33 million in
12 disbursements from these companies. Given that Lipsky maintains he now has an inability to pay
13 \$7.93 million, the Bureau anticipates needing fulsome discovery regarding how those assets have
14 been dissipated. If it appears any of those assets were fraudulently transferred or moved offshore,
15 additional proceedings may be necessary to recover those funds. For these reasons, the first
16 *Dillon* factor weighs in the Bureau’s favor.

17 c. The fifth *Dillon* factor is inapplicable here.

18 With respect to the fifth *Dillon* factor, Defendants assert that they are in such a precarious
19 financial situation that other creditors will be harmed if the Court requires the posting of a bond.
20 However, this factor is moot since Defendants concede they cannot obtain a bond due to their
21 current financial position. A court in a similar case declined to stay a judgment pending appeal
22 without posting a bond where, among other reasons, this factor was “moot” because the
23 judgment debtor went “on record that it cannot obtain a supersedeas bond due to its weak
24 financial position.” *See AAT Bioquest, Inc.*, 2016 WL 5791359 at *2 (the question of whether
25 a bond would risk the position of other creditors was “academic”).

26 In addition, Defendants have not identified any other creditors that would be harmed if
27 required to post the bond. Defendants instead assert that, if the Court does not waive the bond

1 requirement, the Bureau will collect on its judgment, and thus put at risk Defendants' ability to
2 pay business expenses, like employee salary and rent. Dkt. No. 332, at 9. That collection of a
3 judgment may endanger Defendants' ability to pay current business expenses is inapposite and
4 thus does not militate in Defendants' favor. *See Moore*, 2017 WL 4326537 at *3 (noting that the
5 first four *Dillon* factors are specifically addressed to the paramount concern of Rule 62(d) to
6 protect the interests of the judgment creditor and that the fifth factor, which is intended to protect
7 the judgment debtor's *other* creditors, is therefore "a weak reed on which to premise an argument
8 that the bond requirement should be waived...."). Finally, Defendants' suggestion that
9 consumers essentially would be harmed if the Court does not stay execution of judgment is
10 unfounded and not relevant to the Rule 62(b) analysis. Consumers are not the type of creditors
11 addressed under the *Dillon* factors. In any event, Defendants' ability to resume the IM Program
12 remains speculative.

13 2. Defendants' proposed alternative fails to protect the Bureau.

14 As the alternative to a complete waiver of the bond requirement, Defendants have offered
15 not to sell Nationwide's business building or Lipsky's personal residence pending the disposition
16 of anticipated post-trial motions and appeal. Dkt. No. 332, at 11. However, Defendants' proposal
17 is inadequate and does not protect the Bureau's judgment. The Court should reject it.

18 If the judgment debtor's present financial condition is such that the posting of a full bond
19 would impose an undue financial burden, the court similarly is free to exercise discretion to
20 fashion some other arrangement for substitute security through an appropriate restraint on the
21 judgment debtor's financial dealings, *which would furnish equal protection to the judgment*
22 *creditor. Poplar Grove Planting & Refining Co.*, 600 F.2d at 1191 (emphasis added); *see*
23 *Parenteau v. Prescott Unified School District*, 2009 WL 10673615, at *3 (D. Ariz. Nov. 6, 2009)
24 (rejecting alternative offer of bond less than full amount of the judgment and finding debtor's
25 "assurances...not [to] divest any assets [or] do anything to jeopardize the judgment debt" as
26 insufficient under Rule 62). When evaluating whether such an alternative is warranted, a court
27 should be cognizant of the purpose of the bond, which is to protect the creditor "from a loss

1 resulting from the stay of execution.” *Holzhauser v. Golden Gate Bridge Highway &*
2 *Transportation District*, 2017 WL 3388319, at *1 (N.D. Cal. Aug. 7, 2017) (citation omitted);
3 *see also NLRB v. Westphal*, 859 F.2d 818, 819 (9th Cir. 1988) (in context of appellate bond
4 procedures, court noted the purpose of a supersedeas bond is to protect the prevailing plaintiff
5 from the risk of a later uncollectible judgment and to compensate for the delay in the entry of
6 final judgment).

7 Here, Defendants have not established that the proposed alternative would protect the
8 Bureau for the full amount of the judgment, which will continue to accrue interest until paid
9 under 28 U.S.C. § 1961.³ Instead, Defendants have only offered not to sell Nationwide’s building
10 or Lipsky’s personal residence until after the judgment is final following post-trial motions and
11 appellate review. It is clear, however, based on Lipsky’s representations, that Defendants’
12 alternative proposal is facially inadequate to satisfy the judgment and thus does not “furnish
13 equal protection” to the Bureau. As one court explained, “the weight of authority clearly requires
14 more than [a pledge not to dissipate assets] to secure a judgment, *especially* in cases where a
15 defendant’s financial viability or liquidity is in doubt.” *See Slip N’ Slide Records, Inc. v. Teevee*
16 *Toons, Inc.*, 2007 WL 1489810, at *3 (S.D. Fla. May 18, 2007) (emphasis in original); *see also*
17 *LPP Mortgage Ltd. v. J. Gardner and J. Gardner Co.*, No. 02-cv-1331, 2005 WL 2078339, at *2
18 (D. Or. Aug. 16, 2005) (requiring debtor to provide hold property valued at nearly twice the
19 judgment in alternative security); *Dawe v. Corrections USA*, 2011 WL 3875854, at *2 (E.D. Cal.
20 Sept. 1, 2011) (finding that real property offered by defendants and valued at less than judgment,
21 without more, did not provide adequate security to plaintiffs); *Allied Erecting & Dismantling*

22
23 ³ Nothing in the Federal Rules prevents the Bureau from recording an abstract of judgment
24 against Defendants in order to secure its interest and preserve a lien on Defendants’ property. *See*
25 *Yusov v. Yusuf*, 892 F.2d 784, 785 n.1 (9th Cir. 1989) (“Recording of a judgment is generally not
26 held to be prohibited by [Rule] 62(a.)”); *Anastos v. M. J. D. M. Truck Rentals, Inc.*, 521 F.2d
27 1301, 1303 (7th Cir. 1975) (stay did not prevent recording); *In re Vanden Bossche*, 125 B.R. 571,
573–574 (N.D. Cal. 1991) (interpreting “a proceeding to enforce a judgment” to include actions
“taken to convert the judgment into money,” such as foreclosure or attachment, rather than those
merely creating a lien).

1 *Co., Inc.*, 2016 WL 1084136, at *19 (finding alternative security inadequate and noting, as strong
2 evidence in support of rejecting such alternative, that sureties rejected the same as collateral for
3 the bond).⁴ Defendants' pledge not to sell assets is thus insufficient to alter the general
4 requirement to post a bond. For this reason, the Court should decline to exercise its discretion in
5 accepting Defendants' alternative proposal.

6 3. The fact that civil money penalties are at issue here is not a reason to waive
7 Defendants' obligation to post a bond.

8 Finally, Defendants appear to suggest that the bond requirement should not apply here
9 because the Court because the case involves civil money penalties. Dkt. No. 332, at 11-12.
10 However, Defendants point to no statute, rule, or other authority to support this position. Rule 62
11 unambiguously applies to judgments without regard to the underlying nature of the judgment.
12 *See generally* Fed. R. Civ. P. 62. Accordingly, the Court should reject this argument.

13 IV. Conclusion

14 For the reasons discussed above, the Bureau respectfully requests the Court to deny
15 Defendants' motion to stay execution of the Bureau's judgment without the posting of a bond.

16 Date: November 27, 2017

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25 ⁴ Few cases have suggested that a court may grant a stay without requiring any form of security;
26 however, those cases involve circumstances inapposite to the present case. *See, e.g., Federal*
27 *Prescription Service Inc. v. American Pharmaceutical Ass'n.*, 636 F.2d 755 (D.C. Cir. 1980)
(granting unsecured stay where, *inter alia*, the debtor's documented net worth was 47 times
greater than the amount of the judgment).

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CERTIFICATE OF SERVICE

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I hereby certify that a true and correct copy of the foregoing was served on November 27, 2017, via ECF upon counsel of record in this action.

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