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25 UNITED STATES DISTRICT COURT
26 EASTERN DISTRICT OF CALIFORNIA

27 BRIAN DAWE; FLAT IRON
28 MOUNTAIN ASSOCIATES, LLC,
formerly known as Flat Iron Mountain
Associates, a Partnership,

Plaintiffs,

vs.

CORRECTIONS USA, a California
Corporation; et al.,

Defendants.

Case No. 2:07-cv-01790-LKK-EFB
[CONSOLIDATED MASTER CASE]

**DEFENDANTS' REPLY IN SUPPORT OF
MOTION TO ALLOW POSTING OF
ALTERNATIVE SECURITY**

(Declaration of David A. Sanders filed
concurrently herewith.)

Date: August 29, 2011
Time: 10:00 a.m.
Courtroom: 4
Judge: Hon. Lawrence K. Karlton

AND RELATED COUNTERCLAIMS
AND CROSS-COMPLAINTS

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I. INTRODUCTION

Plaintiffs lead off their Opposition by asserting that CCPOA is “a financial behemoth” and “one of the richest and most powerful unions in California.” (Opp., p. 1.) They continue at length with evidence of a revenue stream of “\$29.88 million per year” and other elements of “financial strength” (*Id.*) -- all of which begs the question: if this is the case, what do Plaintiffs have to worry about? By their own admission, Plaintiffs have no basis for any concern about collecting on their judgment. If the judgment is upheld on appeal, CCPOA can and will pay it. And if it does not, Plaintiffs themselves have established that they would then have an abundant well to draw from and multiple avenues of collection.

The premise of Plaintiffs’ Opposition, therefore, fails. The real property that CCPOA seeks to put up in lieu of a bond provides Plaintiffs with an *added* measure of security -- which they do not really even need and to which they are by no means limited. In the event of non-payment, Plaintiffs are not required to proceed against the real property security. If that alternative is as distasteful to them as they rather over-dramatically claim, they have every right to forego that option and collect from CCPOA’s revenues or other resources.

Nothing in Plaintiffs’ Opposition changes the fact that, notwithstanding its revenue stream of member dues, CCPOA, despite its efforts to obtain one, cannot qualify for a 125% supersedeas bond. Sureties have strict liquidity requirements and CCPOA’s revenues and property are not “liquid assets.” CCPOA, therefore, has proposed the only viable alternative that maintains the status quo and strikes the necessary balance of safeguarding Plaintiffs’ interests in collection without irreparably damaging CCPOA in the process. While Plaintiffs may have every desire to irreparably damage CCPOA, that is not a legitimate basis for opposing this Motion.

The Court is to be guided by equitable principles in exercising its wide discretion to set appropriate security. CCPOA has proposed an equitable and workable solution. CCPOA is “not going anywhere” and Plaintiffs do not face a real risk of non-collection. On the other hand, denial of this Motion entirely subverts the equities and the status quo. If CCPOA is not permitted to post the security available to it and the stay is lifted, Plaintiffs could then begin collecting on

1 the judgment -- and if CCPOA should ultimately prevail on appeal, it would never be able to get
2 that money back.

3 **II. ARGUMENT**

4 In its moving papers, CCPOA demonstrated that (1) the Court has wide discretion to allow
5 security in a lower percentage of the judgment or different form of security; (2) CCPOA has
6 contacted multiple bonding institutions to obtain a bond and has been rejected by all of them
7 because CCPOA has insufficient liquid assets; and (3) the only viable alternative available is for
8 CCPOA to post its properties as security, that these properties have been appraised at 125% of the
9 judgment and, as such, provide Plaintiffs with adequate additional security.

10 In opposition, Plaintiffs do not deny the first point. Although they incorrectly state that a
11 defendant "must" procure a supersedeas bond, they also acknowledge that the Court has wide
12 discretion to permit other arrangements. Contrary to Plaintiffs' assertion, CCPOA is not asking
13 the Court to "relieve it from the requirements of FRCP 62 and Local Rule 151(d)." As
14 established by the authorities discussed in CCPOA's Motion, the posting of alternative security --
15 or indeed *no* security -- is not inconsistent with Rule 62 or Local Rule 151(d), and the security
16 CCPOA proposes is expressly contemplated by Local Rule 151(i). Rule 62 "is a purely
17 procedural mechanism to preserve the status quo during a stay pending appeal. . . ." *Bass v. First*
18 *Pac. Networks, Inc.*, 219 F.3d 1052, 1055 (9th Cir. 2000). Accordingly, the Court, applying
19 "general equitable principles," has wide discretion to set the bond or other security in order to
20 "protect judgment creditors as fully as possible without irreparably injuring judgment debtors."
21 *Texaco v. Penzoil Co.*, 784 F. 2d 1134, 1155 (2d Cir. 1986); see also, *Int'l Telemeter Corp. v.*
22 *Hamilton Intern Corp.* 754 F.2d 1492, 1495 (9th Cir. 1985).

23 It being agreed that the Court is empowered to allow the proposed alternate security,
24 CCPOA will move on to address Plaintiffs' factual arguments with regard to points (2) and (3)
25 above.

26 **A. CCPOA's Inability to Procure a Supersedeas Bond**

27 As to Defendants' unsuccessful efforts to procure a supersedeas bond, Plaintiffs
28 essentially say, "we don't believe you." Although Defendants already provided sworn

1 declarations as to the efforts and inability to procure a bond, in light of Plaintiffs' questioning,
2 they now provide more detail.

3 As further set forth in the Declaration of David A. Sanders in Support of Defendants'
4 Reply ("Sanders Reply Declaration"), although CCPOA believed that, given its long-standing
5 presence in the community and solid relationship with Wells Fargo Bank, it could secure a bond,
6 it was unable to do so. Despite working with Wells Fargo, as well as a number of other entities,
7 CCPOA could not meet the very strict requirements to secure a bond. As detailed in the Sanders
8 Reply Declaration, all of the surety companies required that the bond be fully collateralized, and
9 CCPOA does not have sufficient liquidity to procure a bond. (Sanders Reply Decl., ¶¶ 7-17.)
10 The sureties required CCPOA to have the entire amount of the bond in cash or liquid assets set
11 aside and not accessed while the bond was available. (*Id.*, ¶¶ 10-16.) CCPOA could not and
12 cannot do so. As a non-profit entity, CCPOA needs its available funds to meet its expenses and
13 serve the mission of its members. (*Id.*, ¶¶ 2, 3, 6.) And, although CCPOA has a consistent
14 revenue stream, that revenue does not count toward meeting liquidity requirements. (*Id.*, ¶¶ 2,
15 10-16.)¹

16 Plaintiffs accuse CCPOA of attempting to "shift the risk of [its] illiquidity" onto Plaintiffs,
17 and they pose the question of why, if CCPOA's assets "aren't good enough for a bonding
18 company," they should be good enough for Plaintiffs. The answer is that a financial institution's
19 requirements for issuing a bond are fundamentally different from the added protection needed by
20 a judgment creditor pending appeal. Plaintiffs face no "risk of illiquidity." The bonding
21 companies do not view CCPOA's revenue stream from member dues as "liquid" because CCPOA
22 has corresponding expense items for nearly all of it. By contrast, Plaintiffs would face no such
23 impediment in enforcing a judgment against CCPOA. If CCPOA were to fail to pay a judgment
24 in this case, CCPOA's assets are more than sufficient to satisfy that judgment; that sureties were
25 unwilling to provide a bond based on the same finances is irrelevant.

26 ¹ Plaintiffs incorrectly state that CCPOA "assert[s] that [it] can't even pay for the bond itself."
27 (Opp., p. 6.) CCPOA nowhere claims that it cannot afford to pay the bond premium on a 125%
28 supersedeas bond. It can do so and has sought to do so. Rather the issue, as discussed above, is
that bonding companies will not issue the bond to CCPOA based on liquidity requirements,
which are entirely separate from the ability to pay the premium.

1 **B. Defendants Have Proposed Adequate Alternate Security; Anything Else Would Pose**
2 **An Undue Burden**

3 Plaintiffs, citing *Bolt v. Merrimack Pharmaceuticals, Inc.*, 2005 U.S. Dist. LEXIS 46591
4 (E.D. Cal. 2005), incorrectly argue that the Eastern District only permits alternate forms of
5 security in two limited instances: where the defendant's ability to pay is obvious, or where the
6 bond requirement would essentially force the defendant into bankruptcy or paralyze the business.
7 (Opp., p. 6.) *Bolt*, however, stands for no such proposition. The court in *Bolt* applied that test to
8 a request for an unsecured stay. *Id.* at *8-*9. Although CCPOA believes its ability to pay the
9 judgment in this case is clear and highly unlikely to change during the appeal, it is not asking for
10 an unsecured stay. As the court in *Bolt* recognized, "the court, in its discretion, certainly could
11 entertain a form of security other than a supersedeas bond" if the defendant had proposed one.
12 *Id.* at *12 (emphasis added).

13 Plaintiffs then argue that CCPOA has made no showing of "undue burden" or "business
14 interruption" if it is required to post a supersedeas bond. To the contrary, CCPOA has
15 demonstrated that it is beyond an undue burden -- because it is a practical *impossibility* -- for
16 CCPOA to procure such a bond. In response, Plaintiffs seem to suggest that CCPOA should
17 have to do something to "increase liquidity" in order to obtain a bond. Any actions that would
18 "increase liquidity" by millions of dollars, however, would both jeopardize CCPOA's ability to
19 serve its members and be inequitable and unjustified under the circumstances.

20 Plaintiffs suggest -- without citing any authority -- that CCPOA should be required to cut
21 its expenses in order to secure a bond. In fact, CCPOA already has already made budget cuts to
22 the extent possible in order to begin setting aside funds for the judgment if it is upheld. (Sanders
23 Reply Decl., ¶¶ 4-6.) Plaintiffs' recitation of CCPOA's budget is both wrong and outdated. The
24 Kings box, for example, which Plaintiffs again mention, has been eliminated. (*Id.*, ¶ 4.)
25 Plaintiffs are also wrong about CCPOA's donation to the National Law Enforcement Museum.
26 (*Id.*, ¶ 5.) Plaintiffs also point, as they frequently do, to CCPOA's PAC spending, as if it is some
27 optional or frivolous side pursuit. To the contrary, representing the collective interests of its
28 members through political action is one of the primary components of CCPOA's mission.

1 (Sanders Reply Decl, ¶ 3.) The remainder of the budget consists of items such as salaries,
2 benefits and the like – items essential to the functioning of the organization. CCPOA should not
3 be required to eviscerate its key services or its staff for a *contingent* liability. See *Olympia*
4 *Equipment Leasing Co., et al. v. Western Union Telegraph Co.*, 786 F. 2d 794, 798 (7th Cir.
5 1986) (“...consider the contingent nature of such a creditor’s claim.... If the judgment is
6 reversed, the claim is invalidated *ab initio*... it would be a painful irony for us to impair and
7 perhaps even destroy the other creditors’ claims merely to remove every element of hazard from a
8 claim that may not survive the process of appeal.”).²

9 Overall, CCPOA has cut budgeted expenses by more than \$3,000,000 since the judgment
10 in this case was rendered. (*Id.*, ¶ 6.) CCPOA cannot make any further cuts and still maintain the
11 services that members pay for and value. And if CCPOA cannot be effective in its mission, it
12 will in turn lose members and revenue -- a vicious cycle that would jeopardize CCPOA’s
13 continued strength. Further, CCPOA is not a corporation that would simply lose profits; CCPOA
14 is a *non-profit*, an organization that thousands of members fund and look to for support of their
15 profession.

16 Thus, obtaining a supersedeas bond is both impracticable and imposes an undue burden on
17 CCPOA. On the other side of the balance, the properties that CCPOA proposes to put up as
18 security have a current aggregate value of \$6,202,500, over 125% of the judgment.³ Plaintiffs’
19 objections based on the “practical ramifications” of the alternate security are overblown and
20 unfounded. Plaintiffs submit a declaration from an appraiser who contacted three individuals
21 regarding costs of re-leasing CCPOA’s headquarters. Putting aside the questionable value of the
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23 ² Likewise, Plaintiffs also suggest that CCPOA should be required to sell or encumber its real
24 properties in order to obtain a bond. Even if this suggestion made mathematical sense, which it
25 does not, it is again inequitable to require CCPOA to take on substantial debt and all its
associated costs and burdens in order to satisfy a *contingent liability*. This is precisely why
putting the properties up as security strikes the right balance here -- the liability is conditional,
and so are the deeds of trust.

26 ³ Plaintiffs state that it is “too coincidental” that the properties are worth almost exactly 125% of
27 the judgment. (*Opp.*, p. 9.) Such a gratuitous insinuation is offensive and without any basis
28 whatsoever. Plaintiffs do not identify a single flaw in any of the appraisals obtained by CCPOA,
all of which were all prepared by independent, professional appraisers.

1 “survey” Plaintiffs submit, it is difficult to imagine how Plaintiffs would ever find themselves in
2 this situation. CCPOA has no motivation to lose ownership of its headquarters to Plaintiffs.
3 There is no indication -- and Plaintiffs provide nothing to suggest -- that CCPOA would ever
4 choose to or be forced to lose its headquarters in foreclosure rather than pay the judgment should
5 it become owing. But if, in theory, that were to occur, there is then no reason to believe that
6 CCPOA would vacate its headquarters, thereby forcing Plaintiffs to find a new tenant. And, *if*
7 that even more unlikely scenario were to occur, Plaintiffs could simple sell the property, and the
8 other three, and take the proceeds.

9 While it may be true that foreclosing on four properties requires somewhat more time and
10 effort than collecting on a cash bond, the reality is that Plaintiffs run no real risk of ever being in
11 that situation. CCPOA is “not going anywhere.” There is no evidence to suggest that its financial
12 situation will be materially different following the appeal and, given CCPOA’s budget cuts and
13 savings plan, there is every indication that it will be in an even *better* position to pay any eventual
14 judgment. Plaintiffs cite *Brooktree* and argue that they are entitled to “concrete assurances that
15 [their] judgment will be collectible.” (Opp., p. 8.) Plaintiffs have those assurances already. The
16 real property security is simply an added safety net.

17 Finally, Plaintiffs argue that if the Court is inclined to allow the posting of alternate
18 security, then CCPOA should be required to post security in an amount of *at least 200%* of the
19 judgment. This request is both baseless and impossible. That another court under different
20 circumstances may have required such security does not make that any sort of “benchmark.”
21 Moreover, Plaintiffs again seem to willfully ignore the immutable financial realities here.
22 CCPOA is already putting up all the property it owns, and it has nowhere near the liquidity
23 required to post a bond for another 75% of the judgment. If it did, there would be no reason for
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1 this Motion in the first place.⁴

2 **III. CONCLUSION**

3 In sum, Plaintiffs are fully protected and not prejudiced in any way by Defendants'
4 posting of alternative security in the form of deeds to real property valued in excess of 125% of
5 the judgment. Accordingly, Defendants respectfully request that this Motion be granted.

6 Dated: August 22, 2011

Respectfully Submitted,

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8 MASTAGNI, HOLSTEDT, AMICK,
MILLER & JOHNSEN

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10 MANATT PHELPS & PHILLIPS, LLP

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12 By: /s/ Dean J. Zipser

Dean J. Zipser

13 Attorneys for Defendants, Corrections USA, CCPOA,
14 James Baiardi, and Donald Joseph Baumann

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25 ⁴ Defendants will, of course, comply with Local Rule 151(j) and submit an affidavit with a
26 preliminary title report, litigation guaranty, or abstract, reflecting any encumbrances on the
27 properties. Defendants previously filed a declaration attesting that the properties were owned free
28 and clear. Given the interim nature of the deposit of the deeds to this point, lodging a third-party
title information was premature. Further, Plaintiffs also question whether CCPOA has complied
with California Corporations Code section 7910 in posting the deeds of trust. Although Section
7910 is only permissive (stating that a trust deed "may" be approved by the board), CCPOA's
board has approved the deeds. (Sanders Reply Decl., ¶ 19.)