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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

PAUL GRONDAL, a Washington resident; and THE MILL BAY MEMBERS ASSOCIATION, INC., a Washington Non-Profit Corporation,

Plaintiffs,

vs.

UNITED STATES OF AMERICA, et al.,

Defendants.

No. 09-CV-00018-RMP

FEDERAL DEFENDANTS' RESPONSE TO PLAINTIFF'S MOTION TO STAY EXECUTION OF JUDGMENT PENDING APPEAL (EFC NO. 508)

WITHOUT ORAL ARGUMENT

August 4, 2020

I. Mill Bay is Not Entitled to a Stay of Execution as a Matter of Right

"A stay is not a matter of right, even if irreparable injury might otherwise result. It is instead 'an exercise of judicial discretion,' and 'the propriety of its issue is dependent upon the circumstances of the particular case.'" *Al Otro Lado v. Wolf*, 952 F.3d 999, 1006 (9th Cir. 2020) (citations omitted) "The party requesting a stay bears the burden of showing that the circumstances justify an exercise of that discretion." *Id.*

In deciding a motion to stay an order pending appeal, the Court must consider: "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies."

Id. "The first two factors ... are the most critical"; the last two are reached only "[o]nce an applicant satisfies the first two factors." *Id.* And "when the government is a party, these last two factors merge. *Drakes Bay Oyster Co. v. Jewell*, 747 F.3d 1073, 1092 (9th Cir. 2014).

In the Ninth Circuit, a motion for stay pending appeal is subject to the same "sliding scale" approach that applies to a motion for a preliminary injunction. *Al Otro Lado v. Wolf*, 952 F.3d 999, 1007 (9th Cir. 2020). Pursuant to that approach, "a stronger showing of one element may offset a weaker showing of another." *Id.* (quoting *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131 (9th Cir. 2011)).

A. Mill Bay has no likelihood of success on the merits

Mill Bay does not make *a showing*, let alone a strong showing, that they can succeed on the merits. Mill Bay does not provide any explanation on how it thinks the Court erred. Mill Bay doesn't advance any new arguments.

In the case Mill Bay relies upon, *Leiva-perez*, the Ninth Circuit held that Plaintiff "must show, *at a minimum*, that [they have] a *substantial* case for relief on the merits." *Leiva-Perez v. Holder*, 640 F.3d 962, 968 (9th Cir. 2011) (emphasis added). Regardless of how many questions Mill Bay raises or how divided the court was in *Washington V. United States*,[1] Mill Bay does not show how their questions correlate to, at a minimum, a substantial case for relief on the merits.

[1] *U.S. v. Washington* is the ongoing fifty-year litigation between numerous Pacific Northwest tribes and the state of Washington concerning off-reservation treaty fishing rights in Puget Sound. Plaintiffs citation to a denial *en banc* of a decision finding that the State's construction of culverts under state roads impeded fish passage and violated treaty rights is inapposite. *See U.S. v. Washington*, 853 F.3d 946 (9th Cir. 2017).

For the reasons explained in the Court's Order granting ejectment (ECF No. 503), Mill Bay's "legal questions" remain without merit.

B. Mill Bay cannot manufacture or self-inflict irreparable harm.

Mill Bay claims members "will lose their permanent homes." ECF No. 508 at p. 10. First, the United States is not taking Mill Bay member's RVs. Mill Bay members will simply have to drive their RV's off of MA-8.

Second, Mill Bay's own "Expanded Membership Rules and Regulations" provide: "No permanent occupancy shall be permitted." Derrig Decl. ¶ 2, Ex. A.

Third, it is clear from Mill Bay's board meeting minutes and website that services and amenities to the park are terminated in October and turned back on in March or April of the following year. Derrig Decl. ¶ 3-5, Exs. B-D (e.g. "Cable Services to be shut off October 31st each year. Cable services to be turned on by March 15th every year" "Park closing (water) – last week of October"; The "park is closed for the season" in October).

Fourth, as the Court noted, Mill Bay is playing fast and loose in this litigation and appears to do so with its recent declarations. For example, Mill Bay argues some (unidentified) members use the RV Park as their "permanent residence" and cites to Ms. Harmeling's declaration which contains Mr. Smith's declaration. ECF 508 at p. 4. Mr. Smith's declaration, however, states some use the RV park for their "residence" and "may have very few options of where else to go *during the summer months*." ECF No. 509 at p. 10. Implicit, in Mr. Smith's declaration is that the RV park members do have options of where to go during the summer, i.e. Mr. Smith can return to Bellevue, and that they live away from the *summer* "residences" during the winter.

It should also not be forgotten that on April 1, 2020, Mill Bay cited the State of Washington's Stay Home Stay Healthy Order (ECF No. 417 ¶ 4), and Mr. Smith signed a declaration while in Bellevue, Washington stating that the United States'

suspicions that RV's were moving to the RV park so that it could later make arguments to stay an ejectment "lacks merit." ECF 418 (Smith Decl. ¶ 3). But that is exactly what has happened.

Mill Bay also now submits the Washington State Governor's *February 29, 2020* proclamation prohibited evictions in certain circumstances and Mr. Smith submits a declaration signed in Mason, Washington (which abuts MA-8) claiming members have very few options of where else to go. ECF No. 509 at p. 10. In short, Mill Bay argues that because they have now traveled to the RV Park during the pandemic they should not be made to leave during the pandemic.

Mill Bay has known the lease has been terminated for 11 years and that fact was confirmed again by the Ninth Circuit 9 years ago. The only reasonable expectation Mill Bay could have had since 2009 is that ejectment was very likely, if not certain, given the Master Lease had expired. The decision of Mill Bay members to travel during the pandemic to occupy land they have had no authority to be on for 11 years cannot create irreparable harm.

"Not surprisingly, a party may not satisfy the irreparable harm requirement if the harm complained of is self-inflicted." *See also* 11A Wright, Kane, Miller & Marcus, Federal Practice and Procedure § 2948.1 (2d ed.2011). Because Mill Bay members appear to have inflicted its current predicament upon themselves by traveling to MA-8 during the pandemic, the Court cannot find a likelihood of irreparable injury. *See Otro Lado v. Wolf*, 952 F.3d 999, 1008 (9th Cir. 2020) ("[S]elf-inflicted wounds are not irreparable injury.") (internal quotations omitted).

Similarly, Mill Bay's arguments regarding investments being lost is without merit. The Master Lease required improvements to be left, and money alone is rarely, if ever, irreparable harm. *Sampson v. Murray*, 415 U.S. 61, 61–62, 89–92, 94 (1974) (reversing injunction against firing of probationary government employee because loss of earnings is not irreparable harm).

C. The Equities weigh in favor of denying the stay.

"[W]hen a district court balances the hardships of the public interest against a private interest, the public interest should receive greater weight." *F.T.C. v. World Wide Factors, Ltd.*, 882 F.2d 344, 347 (9th Cir. 1989).

Mill Bay and WHL entered into a settlement in 2004 amongst each other *involving Indian trust land* and did not even ask, let alone acquire, the signature of any representative of the United States. If Mill Bay or WHL had, we would not be here.

Then, once notified the Master Lease was not renewed and with more than two months to renew the Master Lease, WHL did not renew the Master Lease. If it had, we would not be here.

Mill Bay and WHL's *private* interest in protecting the mistakes they previously made that may spawn separate litigation between and amongst them or their counsel in state court does not outweigh the public interest here. The public interest is served by the United States, and by extension the public, honoring the commitments it made to hold MA-8 in trust for the Indian landowners.

Furthermore, given the long history of delay in this case which has clouded MA-8 and the allottees' ability to use their ancestral land as they see fit, the allottees will continue to be deprived of any benefit from MA-8.

II. Stays under Rule 62 should only apply to money judgments.

The purpose of the bond or security is to protect the prevailing party "from the risk of a later uncollectible judgment and [to] compensate[ ] him for delay in the entry of the final judgment." *NLRB v. Westphal*, 859 F.2d 818, 819 (9th Cir. 1988). In *Westpahl*, the Ninth Circuit denied a stay of appeal under Rule 62(b) from an order directing an employer to comply with a subpoena finding that it would be difficult to calculate the size of a bond to compensate the agency for the delay in getting testimony and documents from the employer. *Id.* (*citing Donovan*

v. Fall River, 696 F. 2d 524, 526-27 (1982) (an order authorizing OSHA to inspect a company could not be reduced to a monetary amount and held the bond requirement of Rule 62(b) inapplicable in that instance)). Here, as in *Westphal* and *Donovan*, the Court cannot reduce its order removing Mill Bay from trust land (MA-8) to a monetary judgment and Plaintiff's motion for a stay as a matter of right must be denied.

In fact, Plaintiff's authority cited for its "stay as a matter of right" argument supports the premise that Rule 62(b) only pertains to cases where the court has issued a money judgment. In *Bennett v. Franklin*, four debtors each were assessed individual money judgments by the court, the total combined judgment was $369,045,537.00. *Bennett v. Franklin Res., Inc.*, 360 F. Supp. 3d 972, 974 (N.D. Cal. 2018), *aff'd sub nom. Bennett v. Islamic Republic of Iran*, 778 F. App'x 541 (9th Cir. 2019), *cert. denied sub nom. Melli v. Bennett*, 206 L. Ed. 2d 512 (Mar. 30, 2020). A supersedeas bond under Rule 62(b) for damages assessed in *Bennett* could result in a stay as a matter of right. But that is not the case here where the Court has not assessed damages against Plaintiffs. Mill Bay is not entitled to a stay as a matter of right.

Even if the Court where to assess damages, it is within the Court's discretion to deny a stay of the injunctive portion of an order. See *Hicklin v. Hartford Life & Acc. Ins. Co.*, 2008 WL 638238, at *3 (C.D. Cal. Feb. 28, 2008) (granted stay of enforcement of money judgment but denying stay with respect to injunctive portion of the court's judgment).

CONCLUSION

For the reasons stated herein and the reasons stated in ECF No. 508, the Court should deny Mill Bay's request for a stay pending appeal.

RESPECTFULLY SUBMITTED on this 29rd day of July, 2020.

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s/ Joseph P. Derrig
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CERTIFICATE OF SERVICE

I hereby certify that on July 29, 2020, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following:

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and hereby certify that I will serve the week of July 29 due to COVID-19 restrictions by United States Postal Service mail the document to the following non-CM/ECF participants:

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