

**ONTARIO  
SUPERIOR COURT OF JUSTICE  
(COMMERCIAL LIST)**

B E T W E E N:

GARY STEVENS, LINDA STEVENS and 1174365 ALBERTA LTD.

Applicants

– and –

SANDY HUTCHENS, also known as SANDY CRAIG HUTCHENS, also known as S. CRAIG HUTCHENS, also known as CRAIG HUTCHENS, also known as MOISHE ALEXANDER BEN AVROHOM, also known as MOISHE ALEXANDER BEN AVRAHAM, also known as MOSHE ALEXANDER BEN AVROHOM, also known as FRED HAYES, also known as FRED MERCHANT, also known as ALEXANDER MACDONALD, also known as MATHEW KOVCE, also known as ED RYAN, and TANYA HUTCHENS, also known as TATIANA HUTCHENS, also known as TATIANA BRIK, also known as TANYA BRIK-HUTCHENS

Respondents

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**SUPPLEMENTARY MOTION RECORD  
OF THE APPLICANTS**

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February 25, 2019

**NECPAL LITIGATION  
PROFESSIONAL CORPORATION**  
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Lawyers for the Applicants

**TO:** Mr. Sandy Hutchens  
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**AND TO:** Ms. Tanya Hutchens  
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Thornhill, ON L4J 8E2

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Court File No. CV-18-608271-00CL

**ONTARIO  
SUPERIOR COURT OF JUSTICE  
COMMERCIAL LIST**

BETWEEN:

GARY STEVENS, LINDA STEVENS and 1174365 ALBERTA LTD.

Applicants

– and –

SANDY HUTCHENS, also known as SANDY CRAIG HUTCHENS, also known as S. CRAIG HUTCHENS, also known as CRAIG HUTCHENS, also known as MOISHE ALEXANDER BEN AVROHOM, also known as MOISHE ALEXANDER BEN AVRAHAM, also known as MOSHE ALEXANDER BEN AVROHOM, also known as FRED HAYES, also known as FRED MERCHANT, also known as ALEXANDER MACDONALD, also known as MATHEW KOVCE, also known as ED RYAN, and TANYA HUTCHENS, also known as TATIANA HUTCHENS, also known as TATIANA BRIK, also known as TANYA BRIK-HUTCHENS

Respondents

**AFFIDAVIT OF HOWARD LANGER  
(sworn February 25, 2019)**

I, Howard Langer, of the City of Philadelphia, in the State of Pennsylvania, MAKE OATH AND SAY:

1. I am an attorney and founding partner at Langer, Grogan & Diver P.C, a law firm in Philadelphia, Pennsylvania. I am the Applicants' counsel in proceedings against the Respondents in the State of Pennsylvania, both before the Pennsylvania Court of Common Pleas (the "Pennsylvania State Court") and before the United States District Court for the Eastern District of Pennsylvania (the "Federal Court"). As such, I have personal knowledge of the matters contained in this affidavit, except where facts are stated to be based on information and belief, in which case I have identified the source of my information and believe the information to be true.



2. I make this affidavit in support of the Applicants' motion for a receivership order, and to update the Court on developments that have occurred since I swore my previous affidavit on January 8, 2019, and for no other or improper purpose.

**A. The Respondents' Attempts to Appeal the U.S. Judgments**

3. As set out in my previous affidavit, the United States District Court for the Eastern District of Pennsylvania (the "**Federal Court**") entered judgments against Tanya Hutchens and Sandy Hutchens on October 11, 2018 and December 19, 2018 respectively (collectively, the "**U.S. Judgments**"). As set out in my previous affidavit, Tanya Hutchens did serve a Notice of Appeal; however, it was not filed within the time set out in the Federal Court Rules.

4. Since my previous affidavit, the Applicants asked the Federal Court to require Tanya Hutchens to post a bond to secure the costs of her appeal in the amount of US\$45,000. The Federal Court granted that motion in part on January 28, 2019, ordering Tanya Hutchens to post a bond, but reducing the amount to US\$15,000, and ordering that it be posted no later than February 11, 2019. The Federal Court held that Tanya Hutchens' appeal "is likely futile" and that the standard on appeal is whether the lower court engaged in "an abuse of discretion" and such appeals are only granted "in limited circumstances". A copy of the Federal Court's decision in this regard is attached hereto as **Exhibit "A"**. This bond is a bond for costs only. It is not a *supersedeas* bond that would stay enforcement of the judgment. Neither Sandy Hutchens nor Tanya Hutchens have requested a stay of execution or suggested they would post a *supersedeas* bond. As of today, Tanya Hutchens has failed to post the bond that the Federal Court ordered be paid by February 11.

5. Following that decision, the Applicants brought another motion before the Federal Court asking that Sandy Hutchens be required to post a bond to secure the costs of his appeal in the amount of US\$15,000. The Federal Court granted that motion on February 13, 2019 and ordered that the bond be posted no later than February 27, 2019. A copy of the Federal Court's decision in this regard is attached hereto as **Exhibit "B"**. In granting the motion, the Federal Court held that:

- (a) “There is a substantial risk that Mr. Hutchens will not pay the costs if he loses his appeal. Mr. Hutchens has repeatedly defied this Court and the litigation process, to the extent that I entered default judgment against him.”
- (b) “When Mr. Hutchens did choose to participate, he submitted pleadings replete with falsehoods and forgeries.”
- (c) “Significantly, there is a standing contempt order against Mr. Hutchens for failure to pay costs in another proceeding.”

6. The Federal Court noted that “[a]lthough Mr. Hutchens disputes his ability to post a bond, he presents no supporting evidence.” In rejecting Hutchens’ assertion that he could not afford to post a bond, the Federal Court held that “[g]iven Mr. Hutchens’ repeated lies and dishonest efforts to delay these proceedings and manipulate the litigation process, I will not credit his uncorroborated assertions of penury.”

7. With respect to the merits of Mr. Hutchens’ appeal, the Federal Court noted that “Mr. Hutchens’ appeal is likely futile” and that “Mr. Hutchens’ appeal is likely time-barred”. The Federal Court considered and rejected his motion to extend the deadline to file his appeal.

8. The Court of Appeal for the Third Circuit, which hears appeals from the Federal Court, has issued separate letters to Tanya and Sandy Hutchens regarding their separate appeals. The letters advise them that both appeals were not timely filed, that the failure to file a timely appeal is a jurisdictional defect that cannot be cured by the Court of Appeals, and that their appeals have been submitted to a panel of judges for possible dismissal because the Notices of Appeal were not filed within the time required. Both were advised that they had twenty days to make any submissions they wished to the panels. Neither has. Copies of the Court of Appeal’s letters are attached hereto as **Exhibit “C”** and **Exhibit “D”**.

9. The letters also advised them that the Federal Rules provided that they could move the District Court to extend the date for filing an appeal provided they could show excusable neglect or good cause. Such a motion had to be filed within thirty days of the expiration of the original appeal period. Tanya Hutchens filed no such motion. Sandy Hutchens asked the Federal Court to construe his response to the motion for a bond, discussed above, as a motion to extend the date.

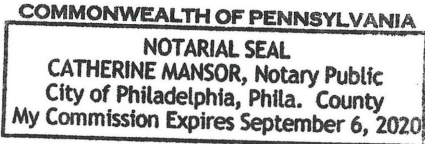
The Federal Court held in its February 13<sup>th</sup> Order (Exhibit "B"), discussed above, that Mr. Hutchens had failed to show excusable neglect or good cause.

10. The effect of the February 13<sup>th</sup> Order, coupled with the workings of the time limitations of the Federal Rules of Appellate Procedure, is that the Appeals are virtually terminated. The Court of Appeals panels will almost certainly dismiss both appeals as the failure to file timely notices of appeal is a basic jurisdictional defect which, as the Clerk of the Court of Appeals advised both Hutchenses in the letters, the Court of Appeals lacks the power to cure.

Sworn before me at Philadelphia, in the State of Pennsylvania, on February 25<sup>th</sup>, 2019.

Catherine Mansor  
Commissioner for Taking Affidavits  
(or as may be)

Feb 25  
Howard Langer



Court File No. CV-18-608271-00CL

GARY STEVENS et al. v. SANDY HUTCHENS et al.  
Applicants Respondents

**ONTARIO  
SUPERIOR COURT OF JUSTICE  
COMMERCIAL LIST**

Proceeding commenced at TORONTO

**AFFIDAVIT OF HOWARD LANGER  
(SWORN FEBRUARY , 2019)**

**NECPAL LITIGATION PROFESSIONAL  
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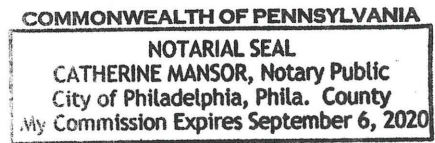
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Lawyers for the Applicants

This is **Exhibit A** referred to in the  
Affidavit of Howard Langer, sworn before me,  
this 25<sup>th</sup> day of February, 2019

Catherine Mansor

Commissioner for Taking Affidavits (or as may be)



**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

<b>GARY STEVENS, et al.,</b>	:	
<b>Plaintiffs,</b>	:	
	:	
<b>v.</b>	:	<b>Civ. No. 18-692</b>
	:	
<b>WESTMORELAND EQUITY FUND, LLC,</b>	:	
<b>et al.,</b>	:	
<b>Defendants.</b>	:	

**ORDER**

On October 11, 2018, I entered a default judgment against Defendant Tanya Hutchens and in favor of Plaintiffs Linda and Gary Stevens after Mrs. Hutchens failed to appear or otherwise defend against Plaintiffs’ Complaint alleging her involvement in a RICO conspiracy. (Doc. Nos. 124, 125.) On October 22, 2018, Mrs. Hutchens asked me to vacate the Judgment against her; I denied her request. (Doc. Nos. 133, 139.) On November 21, 2018, Mrs. Hutchens sought relief from her Judgment under Rule 60(b); on November 29, 2018, I denied her request. (Doc. Nos. 147, 150.) On January 2, 2019, Mrs. Hutchens filed a Notice of Appeal regarding my November 29, 2018 Order denying her Rule 60(b) Motion. (Doc. No. 160.) Plaintiffs now ask me to order Defendant Tanya Hutchens to post a \$45,000 bond to secure the costs of appeal. (Doc. No. 161); Fed. R. App. P. 7. Mrs. Hutchens has not responded. I will grant Plaintiffs’ Motion in part.

**I. LEGAL STANDARDS**

Under Appellate Rule 7, I may “require an appellant to file a bond or provide other security in any form and amount necessary to ensure payment of costs on appeal.” A bond is intended to “ensure against nonpayment by the appellant of the costs of the appeal should the appeal prove unsuccessful.” Glaberson v. Comcast Corp., No. 03-6604, 2015 WL 7887788, at \*1 (E.D. Pa. Dec. 3, 2015) (citing Adsani v. Miller, 139 F.3d 67, 79 (2d Cir. 1998)). Both “[t]he need for an

appeal bond and the amount of the bond” are within my discretion. Id.

In determining whether a bond is needed, I may consider, *inter alia*: “(1) the risk that the appellant will not pay the costs if [s]he loses the appeal; (2) the appellant’s financial ability to post the bond; and (3) whether the bond requirement will effectively preclude pursuit of the appeal.” Id. at \*2 (internal citations omitted); see also Newberg on Class Actions § 14:15 (5th ed.) (listing factors such as (1) “appellant’s financial ability to post the bond”; (2) “merits or frivolousness of the appeal”; (3) “risk of nonpayment”; and (4) “[w]hether the appellants have shown bad faith or vexatious conduct.”). Additionally, the Third Circuit has endorsed the consideration of whether the appellant’s case is meritless. See In re Nutella Mktg. & Sales Practices Litig., 589 F. App’x 53, 61 (3d Cir. 2014) (district court properly considered that appellants’ case was likely meritless because they did not respond in substance to plaintiffs’ arguments and were serial litigators); see also Adsani, 139 F.3d at 79 (“A district court, familiar with the contours of the case appealed, has the discretion to impose a bond which reflects its determination of the likely outcome of the appeal.”); Skolnick v. Harlow, 820 F.2d 13, 15 (1st Cir. 1987) (upholding district court’s judgment that appeal was frivolous in decision to impose appeal bond). But see In re Diet Drugs Products Liability Litig., Civ. A. 99-20593, 2000 WL 1665134, at \*5 (E.D. Pa. Nov. 6, 2000) (“Rule 7 was not intended to be used as a means of discouraging appeals, even if perceived to be frivolous.”).

Rule 7 “costs” are those which may be “taxed against the appellant” under Rule 39 if she is unsuccessful. See Fed. R. App. P. 39. These include costs associated with “(1) the preparation and transmission of the record; (2) the reporter’s transcript, if needed to determine the appeal; (3) premiums paid for a bond or other security to preserve rights pending appeal; and (4) the fee for filing the notice of appeal.” Id. at 39(e).

Courts are split on whether attorneys' fees may be included as part of the appeal bond. Compare In re Am. President Lines, Inc., 779 F.2d at 716, 717 (D.C. Cir. 1985) (attorneys' fees may not be included in appeal bond because Rule 39 does not include them as "costs" assessed on appeal) with Azizian v. Federated Dep't Stores, Inc., 499 F.3d 950, 958 (9th Cir. 2007) ("[T]he term 'costs on appeal' in Rule 7 includes all expenses defined as 'costs' by an applicable fee-shifting statute, including attorney's fees."); In re Cardizem CD Antitrust Litig., 391 F.3d 812, 817 (6th Cir. 2004) (same); Pedraza v. United Guar. Corp., 313 F.3d 1323, 1332 (11th Cir. 2002) (same); Adsani, 139 F.3d at 79 (where "a federal statute includes attorney's fees 'as part of the costs' which may be taxed upon appeal, the district court may factor these fees into its imposition of the bond for costs").

A Third Circuit Panel concluded that Rule 7 did not allow the inclusion of estimated attorneys' fees in setting a bond, apparently basing its decision on the underlying statute's failure to authorize the collection of counsels' fees. See Hirschensohm v. Lawyers Title Ins. Corp., No. 96-7312, 1997 WL 307777, at \*2-3 (3d Cir. June 10, 1997) (underlying Virgin Island statute did not include attorneys' fees as part of costs allowed to prevailing party on appeal). Members of this Court have generally included attorneys' fees where the underlying statute includes them as a part of "costs." See, e.g., In re Am. Inv'rs Life Ins. Co. Annuity Mktg. & Sales Practices Litig., 695 F. Supp. 2d 157, 165 (E.D. Pa. 2010) ("A plaintiff found injured because of a RICO violation may recover the attorneys' fees amassed during an appeal."); O'Keefe v. Mercedes-Benz USA, LLC, No. 01-cv-2902, 2003 WL 22097451, at \*2 (E.D. Pa. June 4, 2003) ("[T]he district court should look to the statute underlying the plaintiff's cause of action for definition of costs."). But see In re Diet Drugs Products Liability Litig., 2000 WL 1665134, at \*5 ("[T]he court concludes that for purposes of the instant case, "costs" under Rule 7 are limited to the costs enumerated"



under Rules 7 and 39).

## II. DISCUSSION

Plaintiffs argue that Mrs. Hutchens must post an appeals bond because: (1) she has been untruthful in her submissions to this Court; (2) she “has been found in contempt for failing to have paid costs awarded in other proceedings”; and (3) her appeal is untimely and meritless because her arguments “were based on falsehoods” and “plain errors of law.” (Mot. Bond 2–3, Doc. No. 161.)

An appeals bond is appropriate in this case. There is a substantial risk that Mrs. Hutchens will not pay the costs if she loses her appeal. Mrs. Hutchens has defied this court and the litigation process. She failed to appear or otherwise defend until well after a default judgment was entered in Plaintiffs’ favor. Moreover, once she chose belatedly to participate, the pleadings she submitted were replete with falsehoods. (See Doc. Nos. 139, 150.) Significantly, there is a standing contempt order against Mrs. Hutchens for failure to pay costs in another proceeding. (See Order on Motion for Sanctions, Doc. No. 935, CGC Holding Company, LLC v. Hutchens, No. 11-cv-01012 (D. Colo. Oct. 12, 2018).)

I may assume that Mrs. Hutchens has the ability to post a bond in the absence of any evidence presented by her that suggests otherwise. See, e.g., Adsani, 139 F.3d 67 (“[W]ithout any showing of her financial hardship, the bond imposed on [appellant] is not an impermissible barrier to appeal.”); In re Initial Public Officer Security Litig., 728 F. Supp. 2d 289, 293 (S.D.N.Y. 2010) (presuming ability of appellants to post bond where they did not present evidence to the contrary). Mrs. Hutchens has presented no evidence disputing her ability to post a bond. Indeed, she has not responded to Plaintiffs’ Motion.

Moreover, Mrs. Hutchens’ appeal is likely futile. The Order she seeks to appeal is a denial of relief from judgment pursuant to 60(b), which is reviewed under an abuse of discretion standard

and is available only in limited circumstances. See Fed. R. Civ. P. 55(c); *id.* 60(b)(1), (6); Tozer v. Charles A. Krause Mill. Co., 189 F.2d 242, 244 (3d Cir. 1951).

Plaintiffs argue that Mrs. Hutchens' appeal is time-barred, but they incorrectly characterize her appeal as based on my October 11, 2018 Judgment against her. (See Mot. Bond 2.) Rather, her appeal is based on my November 29, 2018 Order. (See Notice of Appeal ("Notice is hereby given that Tanya Hutchens, Defendant in the above entitled case hereby appeals to the United States Court of Appeals for the Third Circuit from the final Judgment (Document 150) entered on the twenty-ninth day of November 2018.")) Rule 4 requires that notice of appeal "be filed with the district clerk within 30 days after entry of the judgment or order appealed from." Fed. R. App. P. 4. As Mrs. Hutchens filed her Notice with the district clerk on January 2, 2019, her appeal is just outside of the thirty-day time limit. Accordingly, regardless of its merits, her appeal may well be procedurally barred. See United States v. Robinson, 361 U.S. 220, 224 (1960) (filing timely notice of appeal is "mandatory and jurisdictional").

In these circumstances, given that her appeal seems meritless and is likely to cause Plaintiffs to incur unreimbursed costs, it is appropriate for me to require Mrs. Hutchens to post a bond.

Plaintiffs aver that a normal response to a RICO action appeal would "require hundreds of hours of legal time" and estimate their attorney time at seventy-five hours "because the issues raised by Mrs. Hutchens involve clearly established law and facts." (Mot. Bond 6.) Plaintiffs include in their estimate the "considerable time" required to prepare the record, given that Mrs. Hutchens is proceeding *pro se* and likely will collaborate in that effort. (Id.) Accordingly, Plaintiffs ask for a bond of \$45,000, which was calculated using a billing rate of \$600 per hour ("which is below the actual hourly rates of [P]laintiffs' counsel"). (Id.) Plaintiffs have not broken

down the \$45,000 to indicate what is attorneys' fees and what (if any) is the cost of preparing and transmitting the record. Fed. R. App. P. 39(e)(1).

RICO—on which Plaintiffs base their claims against Mrs. Hutchens—defines “costs” to include “a reasonable attorney’s fee.” 18 U.S.C. § 1964(c). Because the question of whether counsels’ fees can figure in a bond determination is unsettled in this Circuit, however, I will not order Mrs. Hutchens to post a bond for the full \$45,000. Rather, I will grant Plaintiffs’ Motion in part and require Mrs. Hutchens to post an appeal bond in the amount of \$15,000 to account for the considerable time and effort Plaintiffs anticipate is required to prepare and transmit the record in this case.

**AND NOW**, this 28th day of January, 2019, upon consideration of Plaintiffs’ Motion Pursuant to Fed. R. App. P. 7 For an Order Requiring an Appeal Bond be Posted by Tanya Hutchens to Secure Costs of Appeal (Doc. No. 161), it is hereby **ORDERED** that Plaintiffs’ Motion (Doc. No. 161) is **GRANTED as follows**:

1. Defendant Tanya Hutchens shall **POST** an appeal bond for \$15,000 USD, pursuant to Federal Rule of Appellate Procedure 7 to secure payment of the Plaintiffs’ costs on appeal; and
2. The bond shall be posted **no later than February 11, 2019**.

**AND IT IS SO ORDERED.**

*/s/ Paul S. Diamond*

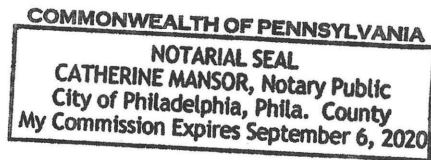
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Paul S. Diamond, J.

This is **Exhibit B** referred to in the  
Affidavit of Howard Langer, sworn before me,  
this 25<sup>th</sup> day of February, 2019

Catherine Mansor

Commissioner for Taking Affidavits (or as may be)



IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

GARY STEVENS, et al.,	:	
Plaintiffs,	:	
	:	
v.	:	Civ. No. 18-692
	:	
WESTMORELAND EQUITY FUND, LLC,	:	
et al.,	:	
Defendants.	:	

ORDER

On December 19, 2018, I entered default judgment against Defendant Sandy Hutchens (and in favor of Plaintiffs Linda and Gary Steven) to sanction Mr. Hutchens for his numerous discovery abuses and violations of my Orders. (Doc. Nos. 158, 159); Fed. R. Civ. P. 7(b)(2)(A), 55(b)(2). On January 22, 2019, Mr. Hutchens filed a Notice of Appeal. (Doc. No. 163.) Plaintiffs now ask me to order Mr. Hutchens to post a \$15,000 bond to secure the costs of appeal. (Doc. No. 165); Fed. R. App. P. 7. Mr. Hutchens responded; Plaintiffs replied. (Doc. Nos. 170, 171.) I will grant Plaintiffs’ Motion.

**I. LEGAL STANDARDS**

Under Appellate Rule 7, I may “require an appellant to file a bond or provide other security in any form and amount necessary to ensure payment of costs on appeal.” A bond is intended to “ensure against nonpayment by the appellant of the costs of the appeal should the appeal prove unsuccessful.” Glaberson v. Comcast Corp., No. 03-6604, 2015 WL 7887788, at \*1 (E.D. Pa. Dec. 3, 2015) (citing Adsani v. Miller, 139 F.3d 67, 79 (2d Cir. 1998)). Both “[t]he need for an appeal bond and the amount of the bond” are within my discretion. Id.

In determining whether a bond is needed, I may consider, *inter alia*: “(1) the risk that the appellant will not pay the costs if he loses the appeal; (2) the appellant’s financial ability to post

the bond; and (3) whether the bond requirement will effectively preclude pursuit of the appeal.” Id. at \*2 (internal citations omitted); see also Newberg on Class Actions § 14:15 (5th ed.) (listing factors such as (1) “appellant’s financial ability to post the bond”; (2) “merits or frivolousness of the appeal”; (3) “risk of nonpayment”; and (4) “[w]hether the appellants have shown bad faith or vexatious conduct”).

The Third Circuit has also endorsed the consideration of whether the appellant’s case is meritless. See In re Nutella Mktg. & Sales Practices Litig., 589 F. App’x 53, 61 (3d Cir. 2014) (district court properly considered that appellants’ case was likely meritless because they did not respond in substance to plaintiffs’ arguments and were serial litigators); see also Adsani, 139 F.3d at 79 (“A district court, familiar with the contours of the case appealed, has the discretion to impose a bond which reflects its determination of the likely outcome of the appeal.”); Skolnick v. Harlow, 820 F.2d 13, 15 (1st Cir. 1987) (upholding district court’s judgment that appeal was frivolous in decision to impose appeal bond). But see In re Diet Drugs Products Liability Litig., Civ. A. 99-20593, 2000 WL 1665134, at \*5 (E.D. Pa. Nov. 6, 2000) (“Rule 7 was not intended to be used as a means of discouraging appeals, even if perceived to be frivolous.”).

Rule 7 “costs” are those which may be “taxed against the appellant” under Rule 39 if he is unsuccessful. See Fed. R. App. P. 39. These include costs associated with “(1) the preparation and transmission of the record; (2) the reporter’s transcript, if needed to determine the appeal; (3) premiums paid for a bond or other security to preserve rights pending appeal; and (4) the fee for filing the notice of appeal.” Id. at 39(e).

## II. DISCUSSION

Plaintiffs argue that Mr. Hutchens must post an appeals bond because: (1) he has been untruthful in his submissions to this Court; (2) “he has defied this Court and the litigation process

by failing to comply” with my Orders and engaging in “bad-faith abuse of discovery”; (3) he “has been found in contempt for failing to have paid costs awarded in other proceedings”; and (4) his appeal is untimely and meritless. (Mot. Bond 2–3, Doc. No. 165.) Mr. Hutchens disputes these arguments. (See generally Resp. Mot. Bond, Doc. No. 170.)

A bond is appropriate here. There is a substantial risk that Mr. Hutchens will not pay the costs if he loses his appeal. Mr. Hutchens has repeatedly defied this Court and the litigation process, to the extent that I entered default judgment against him. (See Doc. No. 158.) When Mr. Hutchens did choose to participate, he submitted pleadings replete with falsehoods and forgeries. (See *id.* at 4, 6–7.) Significantly, there is a standing contempt order against Mr. Hutchens for failure to pay costs in another proceeding. (See Order on Motion for Sanctions, Doc. No. 935, CGC Holding Company, LLC v. Hutchens, No. 11-cv-01012 (D. Colo. Oct. 12, 2018).)

I may assume that Mr. Hutchens has the ability to post a bond in the absence of any evidence presented by him that suggests otherwise. See, e.g., Adsani, 139 F.3d at 79 (“[W]ithout any showing of [his] financial hardship, the bond imposed on [appellant] is not an impermissible barrier to appeal.”); In re Initial Public Officer Security Litig., 728 F. Supp. 2d 289, 293 (S.D.N.Y. 2010) (presuming ability of appellants to post bond where they did not present evidence to the contrary).

Although Mr. Hutchens disputes his ability to post a bond, he presents no supporting evidence. (See Resp. Mot. Bond. 2–3, 5–6.) Rather, he alleges that he is unable to post a bond because he is “unemployed, ha[s] numerous creditors and still owe[s] substantial amounts to Tanya Hutchens per [their] Separation Agreement.” (*Id.* at 5–6.) Given Mr. Hutchens’ repeated lies and dishonest efforts to delay these proceedings and manipulate the litigation process, I will not credit his uncorroborated assertions of penury. See, e.g., In re Certaineed Fiber Cement Sliding Litig.,

No. 2270, 2014 WL 2194513, at \*2 (E.D. Pa. May 27, 2014) (“[U]nsupported assertion regarding [objectors’] claimed inability to pay is not sufficient to dissuade [the Court] from finding that an appeal bond is warranted.”). Accordingly, I find that Mr. Hutchens has the ability to post a bond. A bond thus will not effectively preclude Mr. Hutchens’ appeal.

Moreover, Mr. Hutchens’ appeal is likely futile. The Judgment he seeks to appeal is reviewed under an abuse of discretion standard. See Poulis v. State Farm Fire & Casualty Co., 747 F.2d 863, 868 (3d Cir. 1984). Mr. Hutchens argues that his defenses have merit, but he presents no arguments as to why his appeal will succeed. (Resp. Mot. Bond. 4–5.) Instead of explaining how I abused my discretion, Mr. Hutchens offers belated (and unconvincing) arguments respecting his liability for the underlying RICO conspiracy. (Id. at 3–5, 7–9.)

In any event, Mr. Hutchens’ appeal is likely time-barred. See United States v. Robinson, 361 U.S. 220, 224 (1960) (filing timely notice of appeal is “mandatory and jurisdictional”). Rule 4 requires that notice of appeal “be filed with the district clerk within 30 days after entry of the judgment or order appealed from.” Fed. R. App. P. 4. Mr. Hutchens filed his Notice with the district clerk on January 22, 2019, missing his January 18, 2019 deadline by four days. (See Doc. Nos. 158, 163.) Mr. Hutchens now asks me to construe his Response as a motion to extend the time for filing. (Resp. Mot. Bond. 2); Fed. R. App. P 4(a)(5).

I may grant an extension of time to file a notice of appeal if: (1) I am asked to do so within thirty days after the deadline has passed; and (2) if the moving party demonstrates “excusable neglect.” Fed. R. App. P. 4(a)(5)(A)(i); see Consolidated Freightways Corp. of Delaware v. Larson, 827 F.2d 916, 918 (3d Cir. 1987) (“[A] party who files for an extension of the 30 day appeal period after that period has expired must demonstrate ‘excusable neglect’ in order to receive an extension.”). Mr. Hutchens’ February 8, 2019 request for an extension is within the 30-day



expiration period. (Doc. No. 170.) He has not, however, demonstrated excusable neglect for his tardiness in filing or seeking an extension.

In determining whether Mr. Hutchens has demonstrated excusable neglect, I must consider, *inter alia* the following factors:

(1) whether the inadvertence reflects professional incompetence such as ignorance of the rules of procedure; (2) whether the asserted inadvertence reflects an easily manufactured excuse incapable of verification by the court; (3) whether the tardiness results from counsel's failure to provide for a readily foreseeable consequence; (4) whether the inadvertence reflects a complete lack of diligence; and (5) whether the court is satisfied the inadvertence resulted despite counsel's substantial good faith efforts toward compliance.

Consolidated Freightways, 827 F.2d at 919 (internal citations omitted). Moreover, Mr. Hutchens must demonstrate excusable neglect “up to the actual time the motion to extend is filed.” Pedereaux v. Doe, 767 F.2d 50, 51 (3d Cir.1985).

Mr. Hutchens sets out a “timeline” purporting to explain why his Notice of Appeal was filed four days late. (Resp. Mot. Bond 2.) He alleges that he sent the Notice on January 16, 2019 by Canada Post and that “[p]ostage purchased should have resulted in delivery in accord with rules of the Courts.” (Resp. Mot. Bond. 2.) Mr. Hutchens further alleges that the Notice arrived in the United States on January 17, 2019 “but was held up” by U.S. Customs, and then further delayed by the Federal holiday on January 21, 2019 (Martin Luther King Jr. Day). (*Id.*) Once again, Mr. Hutchens offers only words on air. Although he avers that this timeline is proved by an attached “record of mailing,” he has submitted no such document. (*Id.*)

Further, Mr. Hutchens does not explain why he waited until January 16, 2019 to mail his Notice. Nor does he explain why he did not simply file his Notice electronically via ECF, to which he has access. (*See* Doc No. 157.) Finally, Mr. Hutchens does not offer any excuse for why he waited an additional six weeks to seek an extension of time. Rather, according to Mr. Hutchens—

who is well aware of the time delays inherent in international post—he chose to risk mailing his Notice only two days before his deadline.

While the first *Consolidated* factor is inapplicable as Mr. Hutchens is *pro se*, the other four factors all weigh against finding excusable neglect. Mr. Hutchens provides no documentation regarding his “timeline.” The likelihood that he would miss his deadline was obvious. Indeed, over the last year, he has repeatedly phoned my Chambers, asking me to delay ruling on various motions until his filings, which he believed had been held up by slow mail service, arrived from Canada. Moreover, his failure to mail his Notice until two days before the deadline shows a complete lack of diligence. Furthermore, his “asserted inadvertence” undoubtably “reflects an easily manufactured excuse incapable of verification.” Consolidated Freightways, 827 F.2d at 919.

In these circumstances, Mr. Hutchens plainly has not made out excusable neglect. See, e.g., In re Genesis Health Ventures, Inc., 248 F. App’x 475, 477 (3d Cir. 2007) (no excusable neglect for *pro se* litigant who chose to mail his notice of appeal at “essentially the eleventh hour” despite “other reasonable options available to him”); Reinsurance Co. of Am., Inc. v. Admin. Asigurarilor de Stat, 808 F.2d 1249, 1252 (7th Cir. 1987) (mailing notice of appeal from New York to Chicago four days before due date during holiday season does not constitute excusable neglect).

In sum, given that his appeal seems meritless and is likely to cause Plaintiffs to incur unreimbursed costs, it is appropriate for me to require Mr. Hutchens to post a bond.

Plaintiffs request an appeal bond of \$15,000, arguing that although I have already ordered Tanya Hutchens—Mr. Hutchens’ wife and co-defendant—to post a bond, the two have independent appeals as to distinct judgments, involving different issues of law and requiring

individual responses. (Mot. Bond 3.) Moreover, Plaintiffs cannot use Tanya's bond to recover the costs of Sandy's appeal.

In these circumstances, I will grant Plaintiffs' Motion and require Mr. Hutchens to post an appeal bond in the amount of \$15,000 to account for the considerable time and effort Plaintiffs anticipate will be required to prepare and transmit the record in this case.

**AND NOW**, this 13th day of February, 2019, upon consideration of Plaintiffs' Motion Pursuant to Fed. R. App. P. 7 For an Order Requiring an Appeal Bond be Posted by Sandy Hutchens to Secure Costs of Appeal (Doc. No. 165), Sandy Hutchens' Response (Doc. No. 170), and Plaintiffs' Reply (Doc. No. 171), it is hereby **ORDERED** that Plaintiffs' Motion (Doc. No. 165) is **GRANTED** as follows:

1. Defendant Sandy Hutchens shall **POST** an appeal bond for \$15,000 USD, pursuant to Federal Rule of Appellate Procedure 7 to secure payment of the Plaintiffs' costs on appeal; and
2. The bond shall be posted **no later than February 27, 2019**.

**AND IT IS SO ORDERED.**

*/s/ Paul S. Diamond*

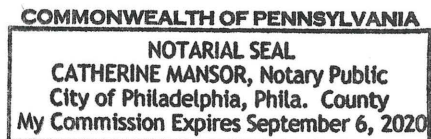
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Paul S. Diamond, J.

This is **Exhibit C** referred to in the  
Affidavit of Howard Langer, sworn before me,  
this 25<sup>th</sup> day of February, 2019

Catherine Mansor

Commissioner for Taking Affidavits (or as may be)



OFFICE OF THE CLERK

PATRICIA S. DODSZUWEIT

CLERK



UNITED STATES COURT OF APPEALS

21400 UNITED STATES COURTHOUSE

601 MARKET STREET

PHILADELPHIA, PA 19106-1790

Website: www.ca3.uscourts.gov

TELEPHONE

215-597-2995

January 18, 2019

Tanya Hutchens  
33 Theodore Place  
Thornhill, Ontario, L4J8E2  
Canada

RE: Gary Stevens, et al v. Westmoreland Equity Fund LLC, et al  
Case Number: 19-1047  
District Court Case Number: 2-18-cv-00692

Dear Ms. Hutchens:

This will advise you that the above-captioned appeal will be submitted to a panel of this Court for possible dismissal due to a jurisdictional defect. It appears that this Court may lack appellate jurisdiction for the following reason(s):

The notice of appeal in your civil case was not filed within the time prescribed by the Federal Rules of Appellate Procedure:

Order entered: 11/29/18Notice of Appeal filed: 1/2/19Period permitted: 30 daysRule XX 4(a)(1)(A) 4(a)(1)(B) 4(a)(3) 13(a)(b)

In the case of an untimely notice of appeal in civil cases, the District Court has discretion to permit an extension of time to file the notice of appeal: (1) where a motion requesting such relief is filed not later than 30 days after the normal appeal period; and (2) where good cause or excusable neglect is shown. See Federal Rules of Appellate Procedure 4(a)(1) and 4(a)(5), attached.

The District Court may reopen the time for appeal when a party entitled to notice of entry of a judgment or order did not receive such notice from the court or any party within 21 days of its entry: (1) upon motion filed within 180 days of entry of the judgment or order or within 14 days of receipt of such notice, whichever is earlier; and (2) upon finding that no party would be prejudiced. See Federal Rule of Appellate Procedure 4(a)(6), attached.

Jurisdictional defects cannot be remedied by the court of appeals. The parties may submit written argument in support of or in opposition to dismissal of the appeal for lack of appellate jurisdiction. Any response regarding jurisdiction must be in proper form (original with certificate of service), and must be filed within 21 days from the date of this letter. Upon expiration of the response period, the case will be submitted to the Court for consideration of the jurisdictional question.

The parties will be advised of any Order issued in this matter.

Very truly yours,

s/ Patricia S. Dodszeit  
Clerk

By:   
Nicole Faust, Administrative Assistant

nf/cc: Edward Diver, Esq.

Howard I. Langer, Esq.

Sandy Hutchens

Bernard Feldman

Lauren N. Schwimmer, Esq.

Hilary P. Flack, Esq.

John P. Quinn, Esq.

Joseph J. Santarone, Jr., Esq.

Peter T. Shapiro, Esq.

Brett A. Datto, Esq.

## RULE 4. APPEAL AS OF RIGHT—WHEN TAKEN

### (a) APPEAL IN A CIVIL CASE.

#### (1) *Time for Filing a Notice of Appeal.*

(A) In a civil case, except as provided in Rules 4(a)(1)(B), 4(a)(4), and 4(c), the notice of appeal required by Rule 3 must be filed with the district clerk within 30 days after entry of the judgment or order appealed from.

(B) The notice of appeal may be filed by any party within 60 days after entry of the judgment or order appealed from if one of the parties is:

(i) the United States;

(ii) a United States agency;

(iii) a United States officer or employee sued in an official capacity; or

(iv) a current or former United States officer or employee sued in an individual capacity for an act or omission occurring in connection with duties performed on the United States' behalf — including all instances in which the United States represents that person when the judgment or order is entered or files the appeal for that person.

(C) An appeal from an order granting or denying an application for a writ of error *coram nobis* is an appeal in a civil case for purposes of Rule 4(a).

(2) *Filing Before Entry of Judgment.* A notice of appeal filed after the court announces a decision or order—but before the entry of the judgment or order—is treated as filed on the date of and after the entry.

(3) *Multiple Appeals.* If one party timely files a notice of appeal, any other party may file a notice of appeal within 14 days after the date when the first notice was filed, or within the time otherwise prescribed by this Rule 4(a), whichever period ends later.

#### (4) *Effect of a Motion on a Notice of Appeal.*

(A) If a party timely files in the district court any of the following motions under the Federal Rules of Civil Procedure, the time to file an appeal runs for all parties from the entry of the order disposing of the last such remaining motion:

(i) for judgment under Rule 50(b);

(ii) to amend or make additional factual findings under Rule 52(b), whether or not granting the motion would alter the judgment;

(iii) for attorney's fees under Rule 54 if the district court extends the time to appeal under Rule 58;

(iv) to alter or amend the judgment under Rule 59;

(v) for a new trial under Rule 59; or

(vi) for relief under Rule 60 if the motion is filed no later than 28 days after the judgment is entered.

(B)(i) If a party files a notice of appeal after the court announces or enters a judgment—but before it disposes of any motion listed in Rule 4(a)(4)(A)—the notice becomes effective to appeal a judgment or order, in whole or in part, when the order disposing of the last such remaining motion is entered.

(ii) A party intending to challenge an order disposing of any motion listed in Rule 4(a)(4)(A), or a judgment's alteration or amendment upon such a motion, must file a notice of appeal, or an amended notice of appeal—in compliance with Rule 3(c)—within the time prescribed by this Rule measured from the entry of the order disposing of the last such remaining motion.

(5) *Motion for Extension of Time.*

(A) The district court may extend the time to file a notice of appeal if:

(i) a party so moves no later than 30 days after the time prescribed by this Rule 4(a) expires; and

(ii) regardless of whether its motion is filed before or during the 30 days after the time prescribed by this Rule 4(a) expires, that party shows excusable neglect or good cause.

(B) A motion filed before the expiration of the time prescribed in Rule 4(a)(1) or (3) may be ex parte unless the court requires otherwise. If the motion is filed after the expiration of the prescribed time, notice must be given to the other parties in accordance with local rules.



(C) No extension under this Rule 4(a)(5) may exceed 30 days after the prescribed time or 14 days after the date when the order granting the motion is entered, whichever is later.

(6) *Reopening the Time to File an Appeal.* The district court may reopen the time to file an appeal for a period of 14 days after the date when its order to reopen is entered, but only if all the following conditions are satisfied:

(A) the court finds that the moving party did not receive notice under Federal Rule of Civil Procedure 77 (d) of the entry of the judgment or order sought to be appealed within 21 days after entry;

(B) the motion is filed within 180 days after the judgment or order is entered or within 14 days after the moving party receives notice under Federal Rule of Civil Procedure 77 (d) of the entry, whichever is earlier; and

(C) the court finds that no party would be prejudiced.

(7) *Entry Defined.*

(A) A judgment or order is entered for purposes of this Rule 4(a):

(i) if Federal Rule of Civil Procedure 58 (a) does not require a separate document, when the judgment or order is entered in the civil docket under Federal Rule of Civil Procedure 79 (a); or

(ii) if Federal Rule of Civil Procedure 58 (a) requires a separate document, when the judgment or order is entered in the civil docket under Federal Rule of Civil Procedure 79(a) and when the earlier of these events occurs:

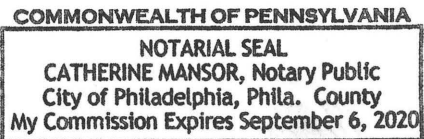
- the judgment or order is set forth on a separate document, or
- 150 days have run from entry of the judgment or order in the civil docket under Federal Rule of Civil Procedure 79 (a).

(B) A failure to set forth a judgment or order on a separate document when required by Federal Rule of Civil Procedure 58 (a) does not affect the validity of an appeal from that judgment or order.

This is **Exhibit D** referred to in the  
Affidavit of Howard Langer, sworn before me,  
this 25<sup>th</sup> day of February, 2019

Catherine Mansor

Commissioner for Taking Affidavits (or as may be)



OFFICE OF THE CLERK

PATRICIA DODSZUWEIT  
CLERK

## UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT  
21400 UNITED STATES COURTHOUSE  
601 MARKET STREET  
PHILADELPHIA, PA 19106-1790  
Website: [www.ca3.uscourts.gov](http://www.ca3.uscourts.gov)TELEPHONE  
215-597-2995

January 31, 2019

Sandy Hutchens  
1779 Cross Street  
Innisfil, Ontario, L9S4L9  
CanadaRE: Gary Stevens, et al v. Westmoreland Equity Fund LLC, et al.  
Case Number: 19-1258  
District Court Case Number: 2-18-cv-00692

Dear Mr. Hutchens:

This will advise you that the above-captioned appeal will be submitted to a panel of this Court for possible dismissal due to a jurisdictional defect. It appears that this Court may lack appellate jurisdiction for the following reason(s):

The notice of appeal in your civil case was not filed within the time prescribed by the Federal Rules of Appellate Procedure:

Order entered: December 19, 2018Notice of Appeal filed: January 22, 2019Period permitted: 30 Days

Rule: 4(a)(1)(A)

In the case of an untimely notice of appeal in civil cases, the District Court has discretion to permit an extension of time to file the notice of appeal: (1) where a motion requesting such relief is filed not later than 30 days after the normal appeal period; and (2) where good cause or excusable neglect is shown. See Federal Rules of Appellate Procedure 4(a)(1) and 4(a)(5), attached.

The District Court may reopen the time for appeal when a party entitled to notice of entry of a judgment or order did not receive such notice from the court or any party within 21 days of its entry: (1) upon motion filed within 180 days of entry of the judgment or order or within 14 days

of receipt of such notice, whichever is earlier; and (2) upon finding that no party would be prejudiced. See Federal Rule of Appellate Procedure 4(a)(6), attached.

Jurisdictional defects cannot be remedied by the court of appeals. The parties may submit written argument in support of or in opposition to dismissal of the appeal for lack of appellate jurisdiction. Any response regarding jurisdiction must be in proper form (original with certificate of service), and must be filed within 21 days from the date of this letter. Upon expiration of the response period, the case will be submitted to the Court for consideration of the jurisdictional question.

The parties will be advised of any Order issued in this matter.

Very truly yours,

s/ Patricia S. Dodszeit  
Clerk

By: 

Stephen Hutchman, Administrative Assistant

cc: Edward Diver, Esq.  
Howard I. Langer, Esq.  
Tanya Hutchens  
Bernard Feldman  
Lauren N. Schwimmer, Esq.  
Hilary P. Flack, Esq.  
John P. Quinn, Esq.  
Joseph J. Santarone, Jr., Esq.  
Peter T. Shapiro, Esq.  
Brett A. Datto, Esq.

## Rule 4. Appeal as of Right—When Taken

### (a) APPEAL IN A CIVIL CASE.

#### (1) *Time for Filing a Notice of Appeal.*

(A) In a civil case, except as provided in Rules 4(a)(1)(B), 4(a)(4), and 4(c), the notice of appeal required by Rule 3 must be filed with the district clerk within 30 days after entry of the judgment or order appealed from.

(B) The notice of appeal may be filed by any party within 60 days after entry of the judgment or order appealed from if one of the parties is:

- (i) the United States;
- (ii) a United States agency;
- (iii) a United States officer or employee sued in an official capacity; or
- (iv) a current or former United States officer or employee sued in an individual capacity for an act or omission occurring in connection with duties performed on the United States' behalf — including all instances in which the United States represents that person when the judgment or order is entered or files the appeal for that person.

(C) An appeal from an order granting or denying an application for a writ of error *coram nobis* is an appeal in a civil case for purposes of Rule 4(a).

**(2) *Filing Before Entry of Judgment.*** A notice of appeal filed after the court announces a decision or order—but before the entry of the judgment or order—is treated as filed on the date of and after the entry.

**(3) *Multiple Appeals.*** If one party timely files a notice of appeal, any other party may file a notice of appeal within 14 days after the date when the first notice was filed, or within the time otherwise prescribed by this Rule 4(a), whichever period ends later.

#### (4) *Effect of a Motion on a Notice of Appeal.*

(A) If a party files in the district court any of the following motions under the Federal Rules of Civil Procedure—and does so within the time allowed by those rules—the time to file an appeal runs for all parties from the entry of the order disposing of the last such remaining motion:

- (i) for judgment under Rule 50(b);
- (ii) to amend or make additional factual findings under Rule 52(b), whether or not granting the motion would alter the judgment;

(iii) for attorney's fees under Rule 54 if the district court extends the time to appeal under Rule 58;

(iv) to alter or amend the judgment under Rule 59;

(v) for a new trial under Rule 59; or

(vi) for relief under Rule 60 if the motion is filed no later than 28 days after the judgment is entered.

(B)(i) If a party files a notice of appeal after the court announces or enters a judgment—but before it disposes of any motion listed in Rule 4(a)(4)(A)—the notice becomes effective to appeal a judgment or order, in whole or in part, when the order disposing of the last such remaining motion is entered.

(ii) A party intending to challenge an order disposing of any motion listed in Rule 4(a)(4)(A), or a judgment's alteration or amendment upon such a motion, must file a notice of appeal, or an amended notice of appeal—in compliance with Rule 3(c)—within the time prescribed by this Rule measured from the entry of the order disposing of the last such remaining motion.

(iii) No additional fee is required to file an amended notice.

**(5) Motion for Extension of Time.**

(A) The district court may extend the time to file a notice of appeal if:

(i) a party so moves no later than 30 days after the time prescribed by this Rule 4(a) expires; and

(ii) regardless of whether its motion is filed before or during the 30 days after the time prescribed by this Rule 4(a) expires, that party shows excusable neglect or good cause.

(B) A motion filed before the expiration of the time prescribed in Rule 4(a)(1) or (3) may be ex parte unless the court requires otherwise. If the motion is filed after the expiration of the prescribed time, notice must be given to the other parties in accordance with local rules.

(C) No extension under this Rule 4(a)(5) may exceed 30 days after the prescribed time or 14 days after the date when the order granting the motion is entered, whichever is later.

**(6) Reopening the Time to File an Appeal.** The district court may reopen the time to file an appeal for a period of 14 days after the date when its order to reopen is entered, but only if all the following conditions are satisfied:

(A) the court finds that the moving party did not receive notice under Federal Rule of Civil Procedure 77 (d) of the entry of the judgment or order sought to be appealed within 21 days after entry;

(B) the motion is filed within 180 days after the judgment or order is entered or within 14 days after the moving party receives notice under Federal Rule of Civil Procedure 77 (d) of the entry, whichever is earlier; and

(C) the court finds that no party would be prejudiced.

**(7) Entry Defined.**

(A) A judgment or order is entered for purposes of this Rule 4(a):

(i) if Federal Rule of Civil Procedure 58 (a) does not require a separate document, when the judgment or order is entered in the civil docket under Federal Rule of Civil Procedure 79 (a); or

(ii) if Federal Rule of Civil Procedure 58 (a) requires a separate document, when the judgment or order is entered in the civil docket under Federal Rule of Civil Procedure 79(a) and when the earlier of these events occurs:

- the judgment or order is set forth on a separate document, or
- 150 days have run from entry of the judgment or order in the civil docket under Federal Rule of Civil Procedure 79 (a).

(B) A failure to set forth a judgment or order on a separate document when required by Federal Rule of Civil Procedure 58 (a) does not affect the validity of an appeal from that judgment or order.

GARY STEVENS, LINDA STEVENS  
and 1174365 ALBERTA LTD.

v. SANDY HUTCHENS et al.

Court File No. CV-18-608271-00CL

Applicants

Respondents

**ONTARIO  
SUPERIOR COURT OF JUSTICE  
COMMERCIAL LIST**

Proceeding commenced at TORONTO

**SUPPLEMENTARY MOTION RECORD OF  
THE APPLICANTS**

**NECPAL LITIGATION  
PROFESSIONAL CORPORATION**  
171 John Street, Suite 101  
Toronto, ON M5T 1X3

**Justin Nepal** (LSO #: 56126J)  
Tel: 416.646.2920  
Fax: 1.866.495.8389  
justin@nepal.com

Lawyers for the Applicants, Gary Stevens,  
Linda Stevens and 1174365 Alberta Ltd.