UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

MM STEEL, LP,	§	
	§	
Plaintiff,	§	
	§	
v.	§	C.A. No. 4:12-CV-01227
	§	
RELIANCE STEEL & ALUMINUM CO., CHAPEL STEEL CORP., AMERICAN ALLOY STEEL, INC., ARTHUR J. MOORE, JSW STEEL (USA) INC., AND NUCOR CORP.,	§	
	§	
Defendants.	§	

PLAINTIFF MM STEEL'S RESPONSE TO JSW'S MOTION TO SET AMOUNT OF SUPERSEDEAS BOND AT $25 MILLION UNDER TEXAS LAW

In Texas federal courts, judgment debtors like JSW and the other defendants cannot use Texas state law to limit the amount of a supersedeas bond. The reason for this is simple—this is federal court and there is no basis for state law to govern the issue. Neither Rule 62(f) nor Rule 69(a) make state supersedeas law available here for simple reasons. Rule 62(f) does not apply because it only allows a judgment debtor to rely on state law when a judgment is a lien under state law. But judgments are not liens in Texas. And Rule 69(a) has no application whatsoever with respect to bonding.

I. Texas Law Does Not Govern Bonding Requirements In This Case.

A. *Rule 62(f) Does Not Permit JSW, AA, and Moore To Rely on Texas State Law Governing Supersedeas Bonds.*

Courts "are to 'give the Federal Rules of Civil Procedure their plain meaning.'" *Yesh Music v. Lakewood Church*, 727 F.3d 356, 359 (5th Cir. 2013) (quoting *Business Guides, Inc. v.*

Chromatic Commc'ns Enters., Inc., 498 U.S. 533, 540–41 (1991)). A court's "inquiry is complete if we find the text of the Rule[s] to be clear and unambiguous." *Id.*

The plain language of rule 62(f) makes clear that JSW and the other judgment debtors are not entitled to limit their bonding requirements through Texas law. Rule 62(f) states: "*If a judgment is a lien* on the judgment debtor's property under the law of the state where the court is located, the judgment debtor is entitled to the same stay of execution the state court would give." FED. R. CIV. P. 62(f) (emphasis added). "Put plainly, if a judgment is not 'in and of itself' a lien on property, Rule 62(f) is inoperable." *United States v. O'Callaghan*, 805 F.Supp.2d 1321, 1329 (M.D. Fla. 2011) (quoting *Elias Bros. Restaurants, Inc. v. Acorn Enters., Inc.*, 931 F.Supp. 930, 939 (D. Mass. 1996)).

But it is well-settled under Texas law that a judgment is not a lien, nor does the judgment itself create a lien. *See White v. FDIC*, 19 F.3d 249, 251 n.5 (5th Cir. 1994) ("Under Texas law, no lien is created by the mere rendition of judgment").[1] Rather, to create a lien "the judgment creditor must comply with the statutory mechanisms providing for the creation of judgment liens to acquire a lien on real property owned by the judgment debtor. The judgment creditor's first step in creating a judicial lien is to obtain an abstract of the judgment." *Citicorp Real Estate*, 747 S.W.2d at 929.[2]

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[1] *TST Impreso, Inc. v. Asia Pulp & Paper Trading (USA), Inc.*, 2014 WL 348535, at *4 (Tex. App.—Dallas 2014, pet. filed); *Schumann v. Breedlove & Bensey*, 983 S.W.2d 333, 334 (Tex. App.—Houston [1st Dist.] 1998, no pet.); *Citicorp Real Estate, Inc. v. Banque Arabe Internationale D'Investissement*, 747 S.W.2d 926, 929 (Tex. App.—Dallas 1988, writ denied); *Day v. Day*, 610 S.W.2d 195, 197-98 (Tex. Civ. App.—Tyler 1980, writ ref'd n.r.e.); *C.I.T. Corp. v. Haynie*, 135 S.W.2d 618, 622 (Tex. Civ. App.—Eastland 1939, no writ); *Burton Lingo Co. v. Warren*, 45 S.W. 2d 750, 751-52 (Tex. Civ. App.—Eastland 1931, writ ref'd).

[2] *See also TST Impreso*, 2014 WL 348535, at *4 (explaining that judgments "are nothing more than adjudications that [t]he judgment debtor owes money to the judgment plaintiffs and that "[t]o establish a lien on real property, a judgment creditor must comply with the statutory requirements for abstracting and recording the judgment in any county where the judgment debtor has real property" and "[w]ith regard to personal property . . . a judgment does not give rise to a lien until a valid levy of execution against the personal property occurs"); *Day*, 610 S.W.2d at 197-98 ("Consequently, before a money judgment can

JSW, however, attempts to obscure what Rule 62(f) expressly requires by noting that the Fifth Circuit stated in *Castillo v. Montelpre, Inc.*, 999 F.2d 941 (5th Cir. 1993) that "[t]he obvious purpose behind this rule is to allow appealing judgment debtors to receive in the federal forum what they would otherwise receive in their state forum." JSW Mot. at 6. But JSW omits *Castillo*'s next sentence that makes clear that the purpose of rule 62(f) does not override the limits imposed by rule 62(f)'s plain text: "This purpose, however, is qualified by the requirement that the state forum treat judgments as a lien, or encumbrance, on the property of judgment debtors." *Castillo*, 999 F.2d at 942. Thus, the Fifth Circuit has expressly acknowledged that rule 62(f) allows debtors to rely on state law only when the state forum would treat judgments as a lien on a judgment debtor's property. Texas does not and thus rule 62(f) does not apply.

Moreover, JSW incorrectly suggests that the Fifth Circuit has recognized that with respect to superseding a judgment, judgment debtors in federal court should always be on the same footing as in state court. This is simply wrong. As noted above, the Fifth Circuit in *Castillo* expressly noted that this is true only when judgments are liens in the state where the court is located. The general statements that JSW cites, however, all came from Louisiana and Mississippi cases where it was undisputed that the judgments created liens under the law of those states.[3]

But the Fifth Circuit has not yet determined whether a judgment rendered by a Texas federal court is a lien on the judgment debtor's property within the meaning of Rule 62(f). Four Texas federal courts have addressed this question. The two most recent cases extensively

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ripen into a lien, the abstract of judgment must be recorded and indexed in the proper county, as required by statute."); *Warren*, 45 S.W.2d at 752 (stating that "the recording and indexing of an abstract of judgment is not merely to give notice of a pre-existing lien, but such are the statutory means by which a lien, having no previous existence, comes into being").

[3] *Harvey v. Baton Rouge Marine Contractors*, 2009 WL 166802, at *1 (5th Cir. Jan. 26, 2009) (per curiam); *Whitehead v. Food Max of Mississippi, Inc.*, 332 F.3d 796, 801 (5th Cir. 2003); *State Bank & Trust Co. of Golden Meadow v. "D.J. Griffin" Boat*, 926 F.2d 449, 450 (5th Cir. 1991).

analyzed the issue and concluded that a federal court judgment is *not a lien* for purposes of rule 62(f) because judgments are not liens in Texas and a judgment creditor must create and record a proper abstract of judgment in order to create a lien. *EEOC v. Service Temps, Inc.*, 782 F.Supp.2d 288, 290-92 (N.D. Tex. 2011); *El Paso Indep. Sch. Dist. v. Richard R.*, 599 F.Supp.2d 759, 763 (W.D. Tex. 2008). Two earlier decisions, however, reached a contrary conclusion. *See Umbrella Bank, FSB v. Jamison*, 341 B.R. 835, 842 (W.D. Tex. 2006); *Euromed, Inc. v. Gaylor*, 1999 WL 46222, at *1 (N.D. Tex. 1999).

Service Temps and *El Paso* both correctly apply the plain meaning of rule 62(f) and should be followed here. *El Paso* and *Service Temps* both explain that under Texas law a judgment is not a lien and that a judgment creditor must take steps to create a lien. *Service Temps*, 782 F.Supp.2d at 292; *El Paso ISD*, 599 F.Supp.2d at 764. And both of them explain why *Jamison* is incorrect. *Jamison* held that a judgment is a lien for purposes of rule 62(f) because the abstracting requirement under Texas law is merely "ministerial" and thus comparable to what Louisiana law required to create a judgment lien. 341 B.R. at 842. But *El Paso* and *Service Temps* both explain why this is incorrect. In *Castillo*, the judgment creditor was not required to create an abstract in order to create a lien. All it had to do was file the court's judgment itself to create a lien. *Castillo*, 999 F.2d at 942 n.10. *El Paso* explained that this is significantly different than in Texas, where an abstract that complies with stringent statutory requirements has to be created and complied with in order to create a lien. 599 F.Supp.2d at 764. As *Service Temps* explained:

> A judgment is not automatically a lien under Texas law, and the acts of making it a lien are not merely ministerial. Unlike the Louisiana statute, which only requires a filing of the judgment with the recorder of mortgages, *see* La. Civ. Code art. 3300, the Texas statutes place greater responsibilities on the creditor to file a technically compliant abstract, and Texas courts have refused to recognize liens

> for failure to abide by these requirements, as detailed in § 52.003 of the Texas Property Code.

782 F. Supp.2d at 291-292. Thus, *Service Temps* and *El Paso* both held correctly that because a judgment is not a lien in Texas, rule 62(f) did not permit judgment debtors in Texas federal courts to take advantage of Texas state law governing supersedeas bonds.[4]

Federal courts in other jurisdictions have similarly recognized that in states where a judgment itself is not a lien, rule 62(f) does not permit federal court judgment debtors to look to state law governing supersedeas bonds. *See, e.g., Cotton ex rel. McClure v. City of Eureka, Cal.*, 860 F.Supp.2d 999, 1025-26 (N.D. Cal. 2012); *O'Callaghan*, 805 F.Supp.2d at 1329; *Marandino v. D'Elia*, 151 F.R.D. 227, 229 (D. Conn. 1993) (prepar[ing] a judgment lien certificate and fil[ing] such certificate in the specific land records where the debtor's property is located," is more than a "ministerial act"), *aff'd*, 7 F.3d 221 (2d Cir. 1993). JSW cites cases from various other jurisdictions to suggest state law applies via rule 62(f) "where state law provides that the judgment is or can become a lien." JSW Mot at 9-10 (citing cases). But in the cases JSW cites, the judgment itself is a lien once filed. Unlike Texas, they do not require a judgment creditor to create new documents governed by detailed and stringent requirements in order to create a lien. Moreover, JSW's own statement of how it interprets rule 62(f), which suggests it is enough if the judgment "can become a lien," is contrary to the plain text of rule 62(f), which requires that the judgment "is a lien."

B. *Rule 69(a) Does Not Make State Law Applicable to Supersedeas Bonds.*

JSW also states in a single paragraph that Texas state law should govern the supersedeas bond in this case because it is "consistent with" Rule 69(a)(1), which states that the "procedure

[4] *Gaylor* is wrong for a much simpler reason. *Gaylor* is a one-page opinion that is based on the premise that a judgment is a lien under Texas law. 1999 WL 46224, at *1. As explained above, *Gaylor*'s premise is wrong.

on execution . . . must accord with the procedure of the state where the court is located" where no federal statute applies. JSW Mot. at 11 (quoting FED. R. CIV. P. 69(a)(1)). From this, JSW makes the leap that since Texas post-judgment execution procedure controls, that this would also include Texas law governing supersedeas bonds. But this leap is misplaced and wrong. "Rule 69(a) merely addresses the manner of execution of a judgment; it does not address whether the posting of a supersedeas bond pending an appeal is required." *Lamon v. City of Shawnee, Kan.*, 758 F.Supp. 654, 656 (D. Kan. 1991) (rejecting argument that rule 69(a)(1) permitted a judgment debtor to rely on Kansas law governing supersedeas bonds). *Lamon*'s conclusion is unsurprising given that the title of rule 62 is "Stay of Proceedings to Enforce a Judgment," while rule 69 is titled "Execution." Moreover, such a broad reading of rule 69(a)(1) is nonsensical because it would effectively make rule 62(f)'s limitations on the right to seek a stay of execution under state law a nullity, because even where judgments are not liens, judgment debtors could get the same relief under rule 69(a). It is hard to believe that the drafters of the rules would create a limited right in rule 62(f) whose limits would always be overridden by rule 69.

JSW also notes that this Court once approved a bond in an amount consistent with the amount the bond would be under Texas law. JSW Mot. at 11. But this Court's order did not state what law governed the bond amount in that case or if state law applied, why it did. *See* JSW Ex. B at 1. JSW presumes that this Court relied on rule 69(a) to apply Texas law because that was the basis set forth in the motion in that case. JSW Mot. at 11 n.6. But what JSW fails to mention is that no opposition was filed to the motion seeking to approve the bond in that case. *See* Docket Sheet in No. 4:12-CV-3454, *Waste Mgmt. of Wash., Inc. v. Kattler*, in the United States District Court for the Southern District of Texas, Houston Division. Thus, this Court had

no basis to decide whether the grounds stated in the motion were correct, because the motion was unopposed.

II. Even if Texas Law Governs the Supersedeas Bond, Each Judgment Debtor Should Be Required to Post a $25 Million Bond.

Even if Texas law governing supersedeas bonds applies in this case—which it does not—JSW is incorrect that under Texas law all of the defendants combined only have to post a bond of $25 million for all defendants. Rather, if Texas law applies, each defendant must post its own bond for $25 million (or less if it establishes a right to a lower amount under Texas Civil Practice & Remedies Code §52.006). As stated by the leading scholar of Texas law governing suspension of judgments, "a plain reading of the statute" confirms that security must be provided "per judgment debtor." Elaine A. Grafton Carlson, Supersedeas, State Bar of Texas, 23rd Annual Advanced Appellate Practice Course (Sept. 10-11, 2009).

Here the relevant statutes are sections 52.001 and 52.006 of the Texas Civil Practice and Remedies Code. Section 52.006 provides that

> (a) Subject to Subsection (b), when a judgment is for money, the amount of security must equal the sum of:
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> (1) the amount of compensatory damages awarded in the judgment;
> (2) interest for the estimated duration of the appeal; and
> (3) costs awarded in the judgment.
>
> (b) Notwithstanding any other law or rule of court, when a judgment is for money, the amount of security must not exceed the lesser of:
>
> (1) 50 percent of the judgment debtor's net worth; or
> (2) $25 million.

TEX. CIV. PRAC. & REM. CODE §52.006(a-b). "Security" is a defined term which means "a bond or deposit posted, as provided by the Texas Rules of Appellate Procedure, by a judgment debtor to suspend execution of the judgment during appeal of the judgment." *Id.* §52.001.

Thus, inserting the relevant portion of the definition of "security" into section 52.006(b), the statute provides that "Notwithstanding any other law or rule of court, when a judgment is for money, the amount of *a bond or deposit posted by a judgment debtor* must not exceed the lesser of 50 percent of the judgment debtor's net worth or $25 million." *See TGS-NOPEC Geophysical Co. v. Combs*, 340 S.W.3d 432, 439 (Tex. 2011) (where statutory text actually defines a term, the court is bound by the definition).

Once the definition of "security" is used in section 52.006, it is clear that this statute applies a limit on the amount of bond that each judgment debtor must post. This is because it governs the amount of a bond or deposit "posted by a judgment debtor." Notably, it refers to judgment debtors in the singular, not plural. The use of the singular "judgment debtor" was not a mistake but is consistent with the purpose of Chapter 52 of the Civil Practice and Remedies Code. The Texas bond limits were enacted in response to the massive bond required in *Pennzoil v. Texaco*. *See Isern v. Ninth Court of Appeals*, 925 S.W.2d 604, 605-06 (Tex. 1996) (orig. proceeding) (describing the Texas Legislature's deliberate decision to permit reduced supersedeas bonds after *Pennzoil v. Texaco*). But the concern the Legislature was responding to was not a concern that judgments were being oversecured. Rather, it was the financial imposition of very large bonds on judgment debtors. Because the statute's underlying purpose is to prevent a judgment debtor from being overburdened, there is no reason why in a case with multiple defendants, the bond limits should apply as an aggregate limit for all defendants combined. Rather, the statute provides the intended protection by allowing each judgment debtor to limit its bond requirement to the lesser of half its net worth or $25 million.

In fact, if the Court were to adopt JSW's reading that the bond limit is an aggregate limit for all defendants, section 52.006 would be made unworkable. This is because the bond limit

itself is based on a defendant-by-defendant basis. Section 52.006(b) states that "the amount of security must not exceed the lesser of (1) 50 percent of the judgment debtor's net worth; or (2) $25 million." On its face, the statute requires the limit be determined on a defendant-by defendant basis. *In re Smith*, 192 S.W.3d 564, 568 (Tex. 2006) (trial court erred when it failed to state with particularity the factual basis for its findings as to each debtor's net worth); *Ramco Oil & Gas v. Anglo Dutch (Tenge) L.L.C.*, 171 S.W.3d 905, 911 (Tex. App.—Houston [14th Dist.] 2005, no pet.) ("[T]he amount of security required of each jointly and severally liable defendant may be different."); *GM Houser, Inc. v. Rogers*, 204 S.W.3d 836, 840 (Tex. App.—Dallas 2006, no pet.) ("In setting the amount of supersedeas security pending appeal, the trial court is required to consider the separate financial condition of each judgment debtor."). How would this work if section 52.006 imposed an aggregate limit for all defendants? What net worth would be used? Rather than contort the statute to try and make this work, the answer is simple. Section 52.006, properly construed, imposes a limit on how much a given judgment debtor is required to bond. It does not impose an aggregate bond limit for all judgment debtors.

Despite the fact that section 52.006's plain text provides that the bond cap applies on a defendant-per-defendant basis, the two Texas appellate courts to analyze the issue have reached different decisions. The Tyler court of appeals held that the bond cap applies per defendant. *John M. O'Quinn PC v. Wood*, 2009 WL 2367133, at *8 (Tex. App.—Tyler June 10, 2009, pet. dism'd) (statutory "$25,000,000.00 cap applies per judgment debtor and not per judgment"). The San Antonio court of appeals, however, in a 2-1 decision that is now pending before the Texas Supreme Court, disagreed with *Wood* and reached the opposite conclusion. *See Huff Energy Fund L.P. v. Longview Energy Co.*, 2014 WL 661710 (Tex. App.—San Antonio, Feb. 12, 2014, mand. filed).

MM Steel submits that *Wood* properly reads section 52.006 because it takes into account the definition of security in section 52.001, and thus is the correct and proper interpretation. The majority in *Huff*, misread the statute. The *Huff* majority incorrectly concluded that even though "security" is defined as a bond posted by one judgment debtor, that because section 52.006 begins with "[w]hen a judgment is for money . . .," this meant section 52.006 imposed an aggregate limit for all defendants. *Huff Energy Fund L.P.*, 2014 WL 661710, at *4-*5.

Huff is incorrect because it fails to read the statute as a whole. *Mid–Century Ins. Co. of Tex. v. Ademaj*, 243 S.W.3d 618, 621 (Tex. 2007) ("[W]e read the statute as a whole and interpret it to give effect to every part."). Section 52.006(b) states that "when a judgment is for money, the amount of security must not exceed the lesser of. . ." The phrase "when a judgment is for money" simply states the condition that must exist before the statute applies at all. Once that condition is satisfied, then the rest of the statute kicks in, which imposes limits on "the amount of security." As explained above, security is expressly defined as the bond posted "by a judgment debtor." Thus, once there is a money judgment, section 52.006 (reading in the definition in section 52.001) provides that "the amount of *a* [*bond posted by a judgment debtor*] must not exceed the lesser of half the debtor's net worth or $25 million. What is clear is that the limit is a debtor-per-debtor limit.

CONCLUSION AND PRAYER

For the foregoing reasons, Plaintiff respectfully requests that the Court deny JSW's motion (which was joined by American Alloy and Moore).[5]

[5] JSW states that if the Court denies its motion, it will seek a reduced bond under Federal Rule of Civil Procedure 62(d). JSW Mot. at 12. MM Steel takes no position on this issue as JSW has not yet discussed with MM Steel a basis for seeking a reduced bond. If such a motion is filed, MM Steel will respond in due course.

Dated: May 23, 2014

Respectfully submitted,

/s/ *Mo Taherzadeh*
Mo Taherzadeh
TAHERZADEH LAW FIRM
State Bar No. 24028022
1001 West Loop South, Suite 700
Houston, Texas 77027
Telephone: (713) 360-6055
Facsimile: (713) 626-7113
mo@taherzadehlaw.com

Attorney-in-Charge for
Plaintiff MM Steel, LP.

Of Counsel**:**

R. Paul Yetter
pyetter@yettercoleman.com
State Bar No. 22154200
Marc S. Tabolsky
mtabolsky@yettercoleman.com
State Bar No. 24037576
Bryce L. Callahan
bcallahan@yettercoleman.com
State Bar No. 24055248
YETTER COLEMAN LLP
909 Fannin, Suite 3600
Houston, Texas 77010
Telephone: (713) 632-8000
Facsimile: (713) 632-8002

R. Tate Young
tyoung@tateyounglawfirm.com
TATE YOUNG LAW FIRM
State Bar No. 22207100
1001 West Loop South, Suite 700
Houston, Texas 77027
Telephone: (713) 626-7112
Facsimile: (713) 626-7113

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing document was served on all counsel of record this 23rd day of May, 2014, in compliance with the Federal Rules of Civil Procedure via the Court's ECF system for filing.

/s/ *Marc S. Tabolsky*
Marc S. Tabolsky