United States District Court
Southern District of Texas
Houston Division

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| MM Steel, LP,<br><br>Plaintiff,<br><br>v.<br><br>Reliance Steel & Aluminum Co., Chapel Steel Corp., American Alloy Steel, Inc., Arthur J. Moore, JSW Steel (USA) Inc., & Nucor Corp.,<br><br>Defendants. | §<br>§<br>§<br>§<br>§<br>§<br>§<br>§<br>§<br>§<br>§ | Case No. 4:12-CV-01227 |

**DEFENDANT JSW STEEL (USA) INC.'S REPLY IN SUPPORT OF MOTION TO SET AMOUNT OF SUPERSEDEAS BOND AT $25 MILLION**

To the Honorable Court:

Defendants JSW Steel (USA) Inc. has filed a motion asking the Court to set a supersedeas bond of $25 million for the entire judgment or, alternatively, $25 million for JSW individually. [Dkt. No. 553.] Plaintiff MM Steel, LP has filed a response. [Dkt. No. 617.] JSW now files this reply in support of its motion.

**1. Under Rule 62(f), Texas law governs the bonding requirements.**

**A. There is nothing unusual about a federal court applying state rules of decision.**

MM Steel asserts that there is *no basis* for state law ever to govern in federal court. [Dt. 617 at 1.] That categorical assertion is incorrect — there is a basis since Rule 62(f) adopts state law as the governing law for supersedeas bonds. Fed. R. Civ. P. 62(f). Another example of the federal rules adopting state law is Rule 69(a). Fed. R. Civ. P. 69(a). There is nothing unusual about federal courts applying state law as the governing law. Contrary to MM Steel's assertion, there is certainly no categorical prohibition against it.

The Fifth Circuit has explained why the forum state supplies the governing law for setting a supersedeas bond — because judgment debtors are entitled to receive "what they would otherwise receive in their state forum." *Castillo v. Montelepre, Inc.*, 999 F.2d 931, 942 (5th Cir. 1993. (*See also* cases cited in Dkt. No. 553 at 6-7.) Indeed, the Fifth Circuit has said that it affords great deference to the legislature of the forum state with respect to bonding rules. *Castillo*, 99 F.2d at 942. (*See also* cases cited in Dkt. No. 553 at 7-8.)

As shown in the cases cited in JSW's motion, federal courts routinely adopt state law supersedeas rules as the governing rules of decision. [Dkt. No. 553 at 6-10.] JSW respectfully requests that this Court do the same.

**B. The Fifth Circuit does not require that the judgment itself be a lien.**

MM Steel claims that Fifth Circuit law provides that Rule 62(f) applies state supersedeas rules only when the judgment, in and of itself, is a lien. But MM Steel is misreading the Fifth Circuit law. The genesis of this misreading is MM Steel's assertion that in both Mississippi and Louisiana, a judgment is, by itself, a lien. [Dkt. No. 617 at 3.]

As the Fifth Circuit described in *Castillo*, Louisiana law does not make the judgment, by itself, a lien. *Castillo*, 999 F.2d at 942 n.10, Rather, the judgment must be filed with the recorder of mortgages. *Id* (citing La. Civ. Code art. 3300).[1] Thus, in Louisiana, action must be taken to create a judicial lien.

Similarly, a judgment lien does not automatically arise in Mississippi. Rather, a judgment becomes a lien only when the clerk "enrolls" the judgment by recording it on "The Judgment Roll." Miss. Code Ann. §§ 11-7-189, 11-7-191; *see Whitehead vs. K Mart Corp.*, 202 F. Supp.

[1] Louisiana Civil Code art. 3300 states that "A judicial mortgage is created by filing a judgment with the recorder of mortgages."

2d 525, 528 n.6, 531-32 (S.D. Miss. 1999) (citing Miss. Code Ann. § 11-7-191), *aff'd sub nom.*, *Whitehead v. Food Max of Miss., Inc.*, 332 F.3d 796 (5th Cir. 2003) (en banc).[2]

Thus, contrary to MM Steel's assertion, judgment liens in Louisiana and Mississippi do not automatically arise. Instead, steps must be taken to create the lien. Despite the need for such steps, the rule in the Fifth Circuit is that Rule 62(f) requires application of state supersedeas rules in Louisiana and Mississippi. [*See* cases cited in Dkt. No. 553 at 6-7, 9.]

Consistency demands the same result in federal cases pending in Texas. Judgments in Texas do not automatically create a lien (just as they don't in Louisiana and Mississippi), but they become a lien upon a routine filing (much like the routine filings in Louisiana and Mississippi). Since Rule 62(f) is triggered in Louisiana and Mississippi, it should be triggered in Texas too. *See Umbrella Bank, FSB v. Jamison*, 341 B.R. 835, 842 (W.D. Tex. 2006) (holding that the "Louisiana process for creating a judicial mortgage is similar to the Texas process for creating a judgment lien . . . . [so] therefore, the ministerial act of recording an abstract of judgment in a Texas county suffices" to trigger Rule 62(f)).

**C. MM Steel's cases fail to follow Fifth Circuit law.**

MM Steel cites two federal district court decisions in Texas, in which the courts ruled that Rule 62(f) was not triggered in Texas. [Dkt. No. 617 at 4-5.] MM Steel relies on those courts' analysis that the process for creating a judgment lien is more onerous in Texas than in Louisiana. [*Id.*] But this is a distinction without a difference. *See Umbrella Bank*, 341 B.R. at

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[2] Mississippi Code section 11-7-189(1) states that the clerk must enroll all final judgments in "The Judgment Roll" within 20 days after the adjournment of each term of court. Mississippi Code section 11-7-191 states that "A judgment so enrolled shall be a lien upon and bind the property of the defendant within the county where so enrolled . . . ." It further states that "A judgment shall not be a lien on any property of the defendant thereto unless the same be enrolled."

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Nothing in Rule 62(f) makes the rule's application dependent on how easy the procedure is in that state. Rather, the point to be taken from the Fifth Circuit cases is that Rule 62(f) is triggered even when some action (besides the mere entry of a judgment by the court) must be taken to create a lien. Something must be done in Louisiana (filing with the recorder of mortgages), something must be done in Mississippi (enrolling the judgment in "The Judgment Roll"), and something must be done in Texas (recording an abstract of judgment).

In all three states, the applicable rule in the Fifth Circuit is that Rule 62(f) is triggered because the judgment can become a lien after steps are taken. To make that rule vary depending on the nature of those steps is to create a distinction that is not reflected in the text of Rule 62(f).

**D. Other federal courts apply the same rule as in the Fifth Circuit.**

MM Steel argues that in all of the cases that JSW cites outside of the Fifth Circuit, Rule 62(f) was triggered only because the judgment automatically becomes a lien. This is not true. In the following cases, a judgment could become a lien only after steps are taken, just as in Mississippi, Louisiana, and Texas: *Hoban v. Washington Metro. Area Transit Auth.*, 841 F.2d 1157, 1158-59 (D.C. Cir. 1988) (District of Columbia law governed since a D.C. judgment is a lien when recorded with the recorder of deeds; *see* D.C. Code § 15-102); *Munoz v. City of Philadelphia*, 537 F. Supp. 2d 749, 750 (E.D. Pa. 2008) (Pennsylvania law governed because a judgment, when recorded in the clerk's office, creates a lien; *see* Pa. Cons. Stat. § 4303(a)); *DeKalb Cnty. Sch. Dist. v. J.W.M.*, 445 F. Supp. 2d 1371, 1377 (N.D. Ga. 2006) (Georgia law applies, since a lien is created when execution issuing on the judgment is entered on the "execution docket"; *see* Ga. Code § 9-12-81); *Nester v. Poston*, No. 3:00 CV 277-H, 2002 WL 32833256, at *11 (E.D.N.C. Oct. 8, 2002) (North Carolina law governed since a judgment is a lien when indexed and recorded on the judgment docket; *see* N.C. Gen. Stat. §§ 1-233, 1-234, 1-

237); *Bennett v. Smith*, No. 96 C 2422, 2001 WL 717490, at *4 (N.D. Ill. June 26, 2001) (if an appeal was pending, Rule 62(f) would apply Illinois law, under which a judgment recorded with the county recorder operates as a lien; *see* Ill. Code Civ. Pro. § 12-502); *North Am. Specialty Ins. Co. v. Chichester Sch. Dist.*, No. 99-2394, 2001 U.S. Dist. LEXIS 5544, at *3-4 (E.D. Pa. Apr. 5, 2001) (Pennsylvania law governed since a judgment entered of record in the appropriate clerk's office is a lien; *see* Pa. Cons. Stat. § 4303(a)); *Cote Corp. v. Thom's Transp. Co.*, No. 99-169-P, 2000 U.S. Dist. LEXIS 12563, at *3-4 (D. Me. Aug. 24, 2000) (Maine law governed since filing an attested copy of the judgment in the registry of deeds creates a lien; *see* Me. Rev. Stat. § 4151); *Spellman v. Aetna Plywood, Inc*., No. 84 C 5735, 1992 WL 80528, at *1-2 (N.D. Ill. Apr. 8, 1992) (Illinois law governed since a recorded judgment acts as a lien; *see* Ill. Code Civ. Pro. § 12-502); *Smith v. Village of Maywood*, No. 84-2269, 1991 WL 277629, at *1 (N.D. Ill. Dec. 20, 1991) (Illinois law governed since a judgment recorded with the county recorder would be a lien; *see* Ill. Code Civ. Pro. § 12-502); *McDonald v. McCarthy*, No. 89-0319, 1990 WL 165940, at *1 (E.D. Pa. Oct. 22, 1990) (Pennsylvania law governed since a recorded judgment is a lien; *see* Pa. Cons. Stat. § 4303(a)).

In short, many courts recognize the same rule that the Fifth Circuit recognizes. Even if it takes some action to create a judgment lien, Rule 62(f) is triggered so long as a lien can be created. Since one can be created in Texas, Rule 62(f) compels application of Texas supersedeas rules.

**2. The $25 million cap under Texas law applies on a "per judgment" basis.**

MM Steel concedes that there is a $25 million cap under Texas law, but argues that the cap applies on a "per defendant" basis. MM Steel relies on the statutory definition that "security" is a bond posted by "a judgment debtor." Tex. Civ. Prac. & Rem. Code § 52.001. Because the phrase "a judgment debtor" is singular, MM Steel argues that each defendant must post its own

security up to $25 million.

But under the Code Construction Act, "[t]he singular includes the plural and the plural includes the singular." Tex. Gov't Code § 311.012(b). Thus, the phrase "a judgment debtor," includes the plural "judgment debtors." Since it includes the plural, the amount of "security"—that is, the bond posted by the "judgment debtors" — cannot exceed $25 million. *See* Tex. Civ. Prac. & Rem. Code §§ 52.001, 52.006(b). This means that the cap applies on a "per judgment" basis, since the bond cannot exceed $25 million for all "judgment debtors."

MM Steel nevertheless disagrees with the *Huff Energy* case, which holds that the cap applies on a "per judgment" basis. *Huff Energy Fund, L.P. v. Longview Energy Co.*, No. 04-12-00630-CV, 2014 WL 661710, at *4-5 (Tex. App.—San Antonio Feb. 12, 2014, mand. filed). But *Huff Energy* correctly points out that the definition of "security" is "a bond" posted to "suspend execution of *the judgment* …." Tex. Civ. Prac. & Rem. Code §52.001 (emphasis added). Thus, "the bond" to secure "the judgment" cannot exceed $25 million. *Huff Energy*, 2014 WL 661710, at *4. In other words, the statute is correctly read to apply the cap on a "per judgment" basis.

MM Steel then questions how the rest of the statute could be implemented when multiple judgment debtors are subject to the "per judgment" cap. MM Steel tries to make it sound like an insoluble problem. But the answer is easy: The "per judgment" cap is $25 million, but no judgment debtor can be liable for more than its share of that amount, up to 50% of the judgment debtor's net worth. *See* Tex. Civ. Prac. & Rem. Code § 52.006(b). Thus, despite MM Steel's effort to make the problem insoluble, a "per judgment" reading of the cap can be implemented.

**3. Conclusion**

For the reasons stated in the motion [Dkt. No. 553] and this reply, JSW respectfully requests that the Court apply Texas supersedeas rules and approve a joint supersedeas bond of $25 million for all Defendants that are required to post a bond. JSW alternatively requests that

the Court approve an individual bond for JSW in the amount of $25 million.

Dated: May 30, 2014

Respectfully submitted,

*/s/ Hunter M. Barrow*

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## CERTIFICATE OF FILING AND SERVICE

I hereby certify that on May 30, 2014, the foregoing document was transmitted to the Clerk of Court using the ECF System for filing. Based on the records currently on file, the Clerk of Court will transmit a Notice of Electronic Filing for this filing to all registered counsel of record.

*/s/ Hunter M. Barrow*
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