UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF ILLINOIS

EASTERN DIVISION

LAWRENCE E. JAFFE PENSION PLAN, On Behalf of Itself and All Others Similarly Situated, Plaintiff, vs. HOUSEHOLD INTERNATIONAL, INC., et al., Defendants.	Lead Case No. 02-C-5893 (Consolidated) CLASS ACTION Judge Ronald A. Guzman

PLAINTIFFS' OBJECTION TO THE FORM OF SUPERSEDEAS BOND

[REDACTED VERSION]

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I. INTRODUCTION

Plaintiffs file this objection to the form of the Supersedeas Bond filed with the Clerk on November 12, 2013 (the "Bond"). The form of the Bond is deficient in four respects: (1) the bond misstates the date of the judgment; (2) the Bond does not bind three of the four defendants, William Aldinger, David Schoenholz and Gary Gilmer (the "Individual Defendants") as principals and obligors, but instead lists only the corporate defendant, Household International, Inc. ("Household") as principal and obligor; (3) the Sureties' successors in interest are not explicitly bound by the Bond[1] and (4) the "Promise to Pay" provision of the Bond is impermissibly vague.

Counsel for plaintiffs identified to defense counsel the defects in the Bond before it was filed with the Clerk of the Court, and provided proposed edits to the Bond remedying the deficiencies and clarifying the ambiguities. Defendants did not incorporate any of plaintiffs' proposed changes, but instead filed the Bond with the Clerk without making any edits. By way of explanation, defendants simply stated that in their view the proposed changes were not legally necessary. However, as explained below, the Bond is deficient. In its current form, the Bond is insufficient to trigger a stay pursuant to Fed. R. Civ. P. 62(d) and Local Rules 62.1 and 65.1. If defendants wish to stay execution of the judgment against them, they should be required to remedy the deficiencies and within seven days execute a supersedeas bond in the form of the document attached as Exhibit A hereto.

[1] The Sureties are [redacted]

II. ARGUMENT

A. The Bond Should Be Amended to Reflect the Correct Date that Judgment Was Entered

The Bond incorrectly states that the judgment was entered on October 18, 2013; however, the judgment was actually entered on October 17, 2013. *See* Dkt. No. 1898. Plaintiffs highlighted this error to defendants during a phone conference on November 8, 2013 and subsequently provided edits to defendants' proposed bond that included the correct date; however, defendants refused to correct the error and chose to maintain the incorrect October 18, 2013 date in the executed Bond. This error should be corrected.

B. Each of the Defendants Must Be a Principal to the Bond and Sign the Bond

The Bond is deficient because the Individual Defendants are not Principals under the Bond even though they are bound and obligated to pay the judgment.[2] Furthermore, the Individual Defendants did not sign the Bond and therefore are not parties to the agreement. Instead, Household International, Inc. is the only defendant that signed the Bond and the only defendant that has undertaken a promise to pay plaintiffs under the Bond. Ex. B at 1, 3, 6 [redacted]

At least one court has held that a supersedeas bond was defective because the defendants who were bound by the judgment were not parties to the bond. *Zebrowski v. Evonik Degussa Corp. Admin. Comm.*, No. 10-542, 2013 U.S. Dist. LEXIS 9118, at *11-*12 (E.D. Pa. Jan. 23, 2013). In *Zebrowski*, "the bond [did] not list the defendants . . . who are parties bound by the judgment and

[2] Defendants Household, Aldinger and Schoenholz are jointly and severally liable for the entire judgment. *See* Dkt. No. 1898. Defendant Gilmer is severally liable for 10% of the judgment. *Id.*

taking the appeal." *Id*. at *8. Instead, the principal obligor was a non-party which defendants argued was an appropriate principal because, "as a practical matter, it will pay any judgment." *Id.* at *11-*12. The court held that "[w]hether or not as a practical matter Evonik," the non-party Principal obligor, "were to become the ultimate payor of the entire judgment does not cure the bond's defects. Evonik is not liable for the judgment, and this defect alone renders the bond a nullity as security for the supersedeas." *Id*. at *12. This was so because the "'surety's . . . liability to the obligee is coextensive with the primary liability of the principal,'" and the "'duties of the principal obligor . . . are the underlying obligation' — here, the order and judgment." *Id.* (quoting *In re F.B.F. Indus.*, 165 B.R. 544, 548 (Bankr. E.D. Pa. 1994) and Restatement (Third) of Suretyship and Guaranty, §§1, 2, 3) (West 2012).

Because the Sureties' liability to plaintiffs "is coextensive with the primary liability of the principal," the Individual Defendants must be listed in the Bond as principals. Otherwise, pursuant to the reasoning in *Zebrowski*, the Sureties may be directly liable only for Household's obligations under the judgment, but not those of the Individual Defendants.

C. The Bond Must Explicitly Bind the Sureties' Successors in Interest

The Bond does not contain language expressly binding the Sureties' successors in interest. The fundamental purpose of a supersedeas bond is to protect and provide the judgment holders with full security for the judgment amount and to ensure that they will not suffer any loss due to the delay of the appeal proceedings. *Fort v. Nance*, No. 3:00-cv-228, 2005 U.S. Dist. LEXIS 10626, at *4-*5 (N.D. Ind. May 25, 2005). That purpose would be undermined if the Sureties could evade their obligations by transferring assets, changing corporate form, or engaging in other corporate maneuvering. Accordingly, the Bond should bind the Sureties' respective heirs, executors, administrators, successors and assigns, as is customary. *See, e.g.*, Exhibit C (sample of supersedeas bonds from courts around the country binding successors in interest). Inclusion of this protection is

especially important in this case given the size of each Surety's potential liability under the Bond (as high as [redacted]), and because the Sureties have inserted language expressly disclaiming joint liability and limiting each of their obligations to a percentage of the judgment.

D. The Promise to Pay is Impermissibly Vague

The Promise to Pay undertaken by the Principal and Sureties is hopelessly vague:

Exhibit B at 1, 3. This provision contains several ambiguous and undefined terms. First, the Promise to Pay makes multiple references to sums awarded in or following the appeal, but contains no reference at all to the judgment itself despite the clear direction of Local Rule 62.1 that "[t]he bond shall be conditioned for the satisfaction of the judgment in full . . . ." This omission renders the Promise to Pay needlessly ambiguous.[3]

Second, the clause voiding the Promise to Pay [redacted] is so vague as to be meaningless. The obligations to be fulfilled are not expressly defined. In fact, they are not specified anywhere, let alone in the section above.

[3] Plaintiffs have collected a sample of supersedeas bonds from courts around the country. In each instance, the "Promise to Pay" or its equivalent specifically references either the judgment or an amount certain. Exhibit C.

When plaintiffs asked defendants why they phrased the obligations in such oblique terms and why they did not expressly reference the judgment in the Promise to Pay, defendants responded only that their Bond tracks the language in a sample form from the United States Court of Federal Claims. This response is insufficient. Simply "because such language is standard does not mean that it is the appropriate or sufficient language for this case." *Rand-Whitney Containerboard Ltd. P'ship v. Town of Montville*, 245 F.R.D. 65, 68 (D. Conn. 2007) (rejecting argument that bond language should be approved because it is defendant "'Traveler's standard bond for federal appeals, is consistent with federal law and conforms to industry standards'"). *Id.*

Plaintiffs do not know whether the language, as written, could provide grounds to excuse the Sureties from payment of the full judgment in the event that the defendants do not satisfy their obligations following the appeal. However, rather than take a risk, plaintiffs proposed language to defendants in plain English that tracks the requirements of Local Rule 62.1.

> [Defendants-Appellants and the Sureties] each, along with their respective heirs, executors, administrators, successors and assigns, agree to pay to Plaintiffs-Appellees, the judgment creditor above, any part of the Judgment which is not reversed, vacated or otherwise modified on appeal, plus interest, damages and costs which may be awarded against the Principals. If the Principals shall promptly satisfy in full any money judgment obtained and upheld on appeal, including any costs, interest and damages which may be awarded against the Principals, then this Promise to Pay shall be null and void. Otherwise, the requirements herein will remain in full force and effect.

See Exhibit A at 2. Defendants rejected plaintiffs' proposed edits, stating only that they do not believe they are "legally required." However, a "'supersedeas bond is a privilege extended the judgment debtor as a price of interdicting the validity of an order to pay money.'" *Zebrowski*, 2013 U.S. Dist. LEXIS 9118, at *15 (quoting *Poplar Grove Planting & Ref. Co., Inc. v. Bache Halsey Stuart, Inc.*, 600 F.2d 1189, 1191 (5th Cir. 1979)). Plaintiffs have no knowledge of any of the details of the surety arrangements between Household International and the seven entities serving as Sureties pursuant to the Bond. Nor were plaintiffs involved in drafting the proposed language of the

Bond. As a result, plaintiffs' understanding of the terms of that bond is limited to the language on the face of the bond. That language must be examined closely to ensure that plaintiffs' interests are properly protected. *See Werbungs and Commerz Union Austalt v. Collectors' Guild*, 782 F. Supp. 870, 875 (S.D.N.Y. 1991) (there is no federal or civil statute or rule that defines conditions that trigger a surety's obligation; "the extent of the surety's liability is govern[ed] by the bond's specific language"). Here, that language is ambiguous and appears deficient in at least four respects. Each of the deficiencies can be corrected quickly and easily as set forth in plaintiffs' proposed language. Exhibit A.

III. CONCLUSION

For the foregoing reasons, plaintiffs request an order requiring defendants to re-submit a fully executed amended bond in the form proposed by plaintiffs within seven days to stay execution of the judgment.

DATED: November 18, 2013

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DECLARATION OF SERVICE BY ELECTRONIC MAIL AND BY U.S. MAIL

I, the undersigned, declare:

1. That declarant is and was, at all times herein mentioned, a citizen of the United States and employed in the City and County of San Francisco, State of California, over the age of 18 years, and not a party to or interested party in the within action; that declarant's business address is Post Montgomery Center, One Montgomery Street, Suite 1800, San Francisco, California 94104.

2. That on November 18, 2013, declarant caused to be served by electronic mail and by U.S. Mail to the parties the following document:

PLAINTIFFS' OBJECTION TO THE FORM OF SUPERSEDEAS BOND

The parties' e-mail addresses are as follows:

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and by U.S. Mail to:

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Law Offices of Lawrence G. Soicher
110 East 59th Street, 25th Floor
New York, NY 10022

I declare under penalty of perjury that the foregoing is true and correct. Executed this 18th day of November, 2013, at San Francisco, California.

s/Marcy Medeiros
MARCY MEDEIROS