

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
PADUCAH DIVISION
CIVIL ACTION NO. 5:98CV-108-R

CONWOOD COMPANY, L.P. and
CONWOOD SALES COMPANY, L.P.

PLAINTIFFS,

v.

UNITED STATES TOBACCO COMPANY,
UNITED STATES TOBACCO SALES AND
MARKETING COMPANY INC., UNITED
STATES TOBACCO MANUFACTURING
COMPANY INC., and UST INC.

DEFENDANTS.

MEMORANDUM OPINION

This case is before the Court on Defendants' Motion to Authorize a Supersedeas Bond and Other Conditions for Security of the Judgment and Proposed Order (Dok. #376).

Defendants request authorization to forgo the bonding of the entire judgment amount pending the Court's ruling on Defendants' post-trial motions and the outcome of future appeals by Defendants. Defendants ask the Court to waive the bond altogether or to allow the posting of a reduced supersedeas bond in the amount of \$350 million. To protect Plaintiffs' rights to the unbonded portion of the judgment award, Defendants propose a set of measures they assert will ensure the protection of Plaintiffs' interest. Plaintiffs object to the motion and request bonding of the full judgment award.

DISCUSSION

Pursuant to Fed.R.Civ.P. 62(d), a party may obtain a stay on the judgment by posting a supersedeas bond during a pending appeal. This entitles an appellant to a stay pending appeal as a matter of right. *See American Manufacturers Mutual Insurance Co. v. American Broadcasting-Paramount Theatres, Inc.*, 87 S.Ct. 1, 3, 17 L.Ed.2d 37 (1966). "However, this

right is expressly contingent upon the posting of a court approved supersedeas bond. Thus, ‘Rule 62 establishes the general rule that losing parties in the district court can obtain a stay pending appeal only by giving a supersedeas bond.’” *Hamlin v. Charter Township of Flint*, 181 F.R.D. 348 (E.D.Mich. 1998)(quoting *Enserch Corp. v. Shand Morahan and Co.*, 918 F.2d 462 (5th Cir.1990)). It does not, however, mean that a bond must be posted. Rather, if a party chooses not to post a full bond, he risks the district judge’s deciding to deny a stay. *See Olympia v. Equip. Leasing Co. v. Western Union Telegraph Co.*, 786 F.2d 794 (7th Cir. 1986).

Because the purpose of a supersedeas bond is to preserve the status quo while securing the appellee from loss resulting from the stay of execution, courts normally require a full supersedeas bond. *See Poplar Grove Planting & Refining Co. v. Bache Halsey Suart, Inc.*, 600 F.2d 1189 (5th Cir. 1979). However, district courts have inherent discretionary authority in setting supersedeas bonds and may provide for a form and amount of security which differs from a full supersedeas bond. *See Trans World Airlines, Inc. v. Hughes*, 515 F.2d 173 (2d Cir. 1975). The burden to objectively demonstrate the reasons to depart from a full bond rests on the appellant (UST).

Courts have fashioned alternatives to the posting of a full supersedeas bond in several circumstances including those where a party has objectively demonstrated an ability to easily respond to the money judgment and presented an alternative financially secure plan to maintain that same degree of solvency during the period of an appeal; that other means are available to fully protect the judgment creditor and that posting a full bond would impose an undue financial burden on the debtor; or that the danger other creditors might suffer unnecessarily if the court required the debtor to post a full bond. *See Poplar*, 600 F.2d at 1191; *Olympia Equip. Leasing*

Co. v. Western Union Telegraph Co., 786 F.2d 794 (7th Cir. 1986).

The mechanics of an antitrust award present unusual circumstances for the purposes of fashioning supersedeas bond requirements. In antitrust cases like this one, a jury determines damages. At the conclusion of the trial, the Court trebles damages pursuant to Congressional mandate. As such, only 1/3 of the award represents the damages the jury determined the creditor actually suffered. The remaining 2/3 is, in a sense, a windfall to the plaintiff, as its principal purpose is to deter antitrust violators rather than to compensate victims. *See Olympia*, 786 F.2d at 797. Whether part of the actual or trebled portion of the damages, Plaintiffs are entitled to the judgment. If, however, Defendants' assets are drained by other creditors in bankruptcy before the full portion of the trebled damages has been satisfied, the punishment Defendants suffer is no less. If satisfying debts along with the treble money damage judgment forces Defendants into bankruptcy, they have suffered the ultimate punishment for their actions. In fact, there is authority to disallow punitive damages (similar in nature to treble damages) in bankruptcy where necessary to allow other creditors to be paid in full so that the result of punitive damages is not to make innocent creditors bear the burden of the debtor's wrongdoing. *See id.*

Defendants in this case request that the Court require a bonding of only \$350 million, so long as the Defendants meet a list of other requirements designed to insure the security of Plaintiffs' money judgment. This amount equals the damages found against Defendants before the Court trebled the damages pursuant to Congressional mandate. By doing this, Defendants assure Plaintiffs that they will receive the actual damages the jury determined they suffered. Rather than provide bond security for the remaining damages, Defendants offer alternative measures that they assert would prevent Defendants from suffering irreparable harm while

assuring Plaintiffs' security in their money judgment.

Defendants in this case assert that they have the financial capabilities to pay the \$1.05 billion judgment. UST has been in business for over 78 years and has been listed and traded on the New York Stock Exchange since January 1912. UST currently has approximately 162.2 million shares of common stock outstanding. As of April 18, 2000, the shares had a market value of approximately \$2.7 billion. This amount reflects the announcement of the judgment in this case on March 29, 2000. A report of the American Appraisal Associates, Inc., reveals that the current net value of UST's assets, net of liabilities (excluding the judgment) is approximately \$3.9 billion.

UST's annual earnings also reflect an ability to pay. During the last three fiscal years, UST has generated pre-tax earnings of \$763 million, \$784 million and \$704 million, and after-tax earnings of \$469 million, \$455 million and \$439 million. During the next 4-5 years, UST had planned a share repurchase program at a cost of approximately \$1 billion. In order to guarantee the judgment award, UST has suspended this plan. In addition to cash flow, UST can generate substantial cash by the sale of non-cash assets like its winery operations.

UST also argues that posting a full bond will cause irreparable harm. UST's arguments in support are conclusory in nature. UST has failed to demonstrate why any amount above \$350 million would cause greater harm than an amount equal to or less than \$350 million. Rather, it appears that UST has arbitrarily selected this amount. This aside, the Court can easily see how the costly expense of bonding \$1.05 billion could impact UST's ability to operate its business. Because of their strong financial history and ability to satisfy this future, this expense is unnecessary and a reduced bond is appropriate.

Plaintiffs argue that the Court should not waive or reduce the bond requirement. Plaintiffs note that when Courts have waived bond requirements, the debtors have often demonstrated corporate wealth dozens of times greater than the judgment against them. *See Hamlin v. Charter Township of Flint*, 181 F.R.D. 348 (E.D.Mich. 1998). Here, Plaintiffs correctly note that UST's wealth is less. Additionally, Plaintiffs express great concern about tobacco litigation that may drain UST's corporate resources. This Court finds that Defendants have demonstrated sufficient stability and financial resources to overcome these arguments. Plaintiffs have over \$2 billion in excess of the judgment against them and have a long history of financial prosperity and growth.

A supersedeas bond has a dual purpose. It is designed to protect the creditor's interest while at the same time giving Defendant the flexibility to conduct business as usual during an appeal. The instant case involves a large damage award. Bonding the entire amount could cost over \$100 million a year. The Court has high confidence in and finds that UST has demonstrated their ability to pay the money judgment now or in the future without risk to Conwood. When the safeguards that UST has proposed are added, the security becomes greater. Nevertheless, the Court is not waiving UST's bond requirement. The Court also declines to set the bond requirement at \$350 million. UST has not objectively demonstrated that a bond greater than \$350 million would cause irreparable harm. Because the supersedeas bond is a privilege to the debtor, ultimately, the Court must protect the interest of the creditor. As a cautionary measure, this Court feels that a higher bond is appropriate. After careful deliberation, the Court finds that a bond of \$500 million with the additional safeguards proposed by Defendant will accomplish this goal. This will give the Plaintiffs a guaranteed \$500 million and will enact

safety measures that will provide great safety for the balance of the judgment.

This is the ____ day of August, 2000.

Thomas B. Russell, Judge
United States District Court

cc: Counsel

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ORDER

Upon Defendants Motion to Authorize a Supersedeas Bond and Other Conditions for Security of the Judgment and Proposed Order (Dok. #376), and this Court being sufficiently advised,

IT IS ORDERED:

1. The present stay (Dok. #364) of any proceedings to enforce the judgment entered March 29, 2000 (Dok. #363) pending the disposition of the post-trial motions filed by Defendants and the disposition of any appeal by Defendants, shall be subject to the following conditions:
 - a. Within 60 days of the entry of this Order, Defendants shall tender to the Clerk of Court a cash supersedeas bond in the amount of \$500 million consistent with the requirements of LR 65.1.1;
 - b. Defendants shall file with the Court and serve upon counsel for Plaintiffs its financial statement filed with the Securities Exchange Commission on a quarterly basis;
 - c. During the stay imposed by this Order, UST Inc. shall not enter into or conduct any corporate transaction that would jeopardize any security for the judgment

against it in this action;

- d. During the stay imposed by this Order, Defendants shall give notice to the Court and to counsel for Plaintiffs of any planned extraordinary dividend other than regular quarterly dividends; and
 - e. During the stay imposed by this Order, Defendants shall refrain from entering into any share repurchase program.
2. In the event of changed circumstances which lead Plaintiffs to reasonably believe that the judgment against Defendants is not adequately protected, Plaintiffs may by motion ask this Court to increase the cash bond or to impose other conditions necessary to protect and secure their judgment during the stay.
 3. Magistrate Judge Moyer will handle all matters regarding this bond and its requirements. A courtesy copy of any notification or motion filed in this case regarding this Order shall be filed with Magistrate Judge Moyer's office and any calls concerning this Order should be directed to his office.
 4. The terms of this Order shall remain in effect until further order of the Court.

This is the ____ day of August, 2000.

Thomas B. Russell, Judge
United States District Court

cc: Counsel