

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION**

In re:	)	
	)	
ASCEND PERFORMANCE MATERIALS HOLDINGS, INC., <i>et al.</i>,	)	Chapter 11
	)	
Debtors.¹	)	Case No. 25-90127 (CML)
	)	(Jointly Administered)
	)	
	)	

**MASTEC INDUSTRIAL CORPORATION’S
REPLY IN SUPPORT OF EMERGENCY MOTION FOR RELIEF
FROM THE AUTOMATIC STAY TO ENFORCE CONTRACT RIGHTS
REGARDING THE LETTER OF CREDIT PROCEEDS
(Relates to ECF No. 760)**

MasTec Industrial Corporation f/k/a MasTec Power Corp. (“MasTec”) submits this Reply in Support of its Emergency Motion for Relief from the Automatic Stay to Enforce Contract Rights Regarding the Letter of Credit Proceeds. In support thereof, MasTec would respectfully show the Court as follows:

INTRODUCTION

MasTec’s emergency motion (the “Motion,” ECF No. 760) seeks relief from the automatic stay—an order permitting MasTec to exercise its rights under Section 7.7 of the EPC Contract² to substitute a bond for the proceeds that Ascend Performance Materials Operations LLC, *et al.*

¹ A complete list of each of the Debtors in these Chapter 11 cases may be obtained on the website of the Debtors’ proposed claims and noticing agent at <https://dm.epiq11.com/Ascend>. The location of Debtor Ascend Performance Materials Holdings Inc.’s principal place of business is 1010 Travis St., Suite 900, Houston, Texas 77002.

² The “EPC Contract” refers to the *Lump Sum Turnkey Agreement for the Engineering, Procurement and Construction of the Ascend Cogeneration Facility*, which was filed under seal (excluding exhibits) as Exhibit A to the Emergency Motion of MasTec Industrial Corporation for Relief from the Automatic Stay to Enforce Contract Rights Regarding the Letter of Credit Proceeds, ECF No. 760-2.

(“Ascend” or “Debtors”) drew on MasTec’s Letter of Credit (“LOC”). Such relief would have a neutral effect on Ascend’s estate; it would simply involve substituting one form of security (a bond) for another (the LOC proceeds). In its Objection,³ Ascend raises several meritless counterarguments:

First, Ascend argues that MasTec wrongly raises merits questions, *i.e.*, “various allegations of Ascend’s ‘wrongful’ conduct, including [MasTec’s] assertion that Ascend drew on the Letter of Credit improperly and in bad faith.” Objection ¶ 33. Not so. Section 7.7 permits MasTec to substitute a bond for LOC proceeds regardless of the *propriety* of Ascend’s draw. The Court can grant MasTec the relief it requests without deciding whether Ascend’s draw was proper.

Second, Ascend argues that granting relief from the stay would harm Ascend by compelling Ascend to litigate “claims already set for determination in the Adversary Proceeding.” Objection ¶ 31. This is incorrect. Again, Section 7.7 of the EPC Contract allows MasTec to substitute a bond for the LOC proceeds regardless of whether Ascend properly drew on the LOC. The Court need not reach the merits of the parties’ disputes to grant MasTec the relief it requests.

Third, Ascend argues that MasTec’s requested relief would offend the parties’ stipulation regarding disbursement of the LOC proceeds. Objection ¶ 10. But MasTec seeks only to substitute one form of security for another. If Ascend ultimately prevails on the merits, then Ascend can draw on a bond just as easily as it could withdraw the LOC proceeds from the Registry.

Fourth, Ascend says MasTec’s Motion violates the local rules by “combining [a] request for relief from the automatic stay with other requests for relief.” Objection ¶ 25. But Ascend does

³ “Objection” refers to Debtors’ Objection to the Emergency Motion of MasTec Industrial Corporation for Relief from the Automatic Stay to Enforce Contract Rights Regarding the Letter of Credit Proceeds, ECF No. 812.

not identify these “other requests for relief.” MasTec seeks only one thing: relief from the automatic stay so it can exercise its contractual right to substitute one form of security for another.

Fifth, Ascend argues that the EPC Contract is executory, and that Ascend will reject it. Objection ¶¶ 21–23, 26–27. MasTec disputes those contentions and reserves its right to litigate them in due course, but the Court need not address them here because Ascend has *not* sought to reject the EPC Contract. Ascend is improperly attempting (1) to use a threat of rejection to nullify MasTec’s contractual rights, and at the same time, (2) to avoid *actually* rejecting the Contract—in an attempt to preserve Contract provisions favorable to Ascend. The Bankruptcy Code does not permit Ascend to have its cake and eat it, too. *Matter of Provider Meds, L.L.C.*, 907 F.3d 845, 851 (5th Cir. 2018) (“An executory contract must be assumed or rejected in its entirety[.]”). Unless and until Ascend actually rejects the EPC Contract, MasTec’s rights under Section 7.7 remain intact.

But even assuming *arguendo* that Ascend can and does reject the EPC Contract—issues the Court need not address at this time—Ascend’s rejection would not impair MasTec’s contractual rights. Under blackletter law from the Supreme Court, Ascend’s rejection of the EPC Contract would constitute a mere prepetition breach. That rejection (breach) would relieve Ascend from performing its contractual *obligations* but would leave MasTec’s contractual *rights* intact; Accordingly, even if Ascend were to reject the EPC Contract, MasTec could still exercise contractual rights that do not require Ascend to perform any contractual obligations.

Here, MasTec seeks to exercise its contractual right under Section 7.7 to substitute a bond for the LOC proceeds. Those LOC proceeds, in turn, are not in Ascend’s bank account. Rather, they are in the District Court’s Registry. As a result, MasTec can exercise its contractual rights under Section 7.7—and substitute a bond for the LOC proceeds—without requiring Ascend write

a check, send a wire transfer, or do anything at all. Ascend would not even need to approve MasTec's bond, as the Court can determine that the bond is reasonable as a matter of law. The Court, therefore, should enter an order authorizing MasTec to substitute a bond for the LOC proceeds that are in the District Court's Registry.

ARGUMENT

I. *Tempnology* is clear: a debtor's rejection of an executory contract constitutes only a prepetition breach—not a termination—of the contract, and as a result, the counterparty's rights under that contract remain “intact.”

Assuming *arguendo* that the EPC Contract is executory and subject to rejection, Ascend has not rejected it. Unless and until Ascend does so, MasTec is entitled to enforce its contractual rights, including its right under Section 7.7 to substitute a bond for the LOC proceeds.

Moreover, MasTec's rights would remain intact even if Ascend *did* reject the Contract. In *Mission Product Holdings, Inc. v. Tempnology, LLC*, 587 U.S. 370 (2019), the Supreme Court held that “a debtor's rejection of an executory contract in bankruptcy has the same effect as a breach outside bankruptcy.” *Id.* at 381. Rejection of a contract is only a prepetition breach—it “does not terminate the contract.” *Id.*

The debtor's rejection (breach) of an executory contract has different consequences for each party. Rejecting the contract allows “the debtor [to] escape all of its future contract obligations.” *Id.* at 386. Thus, after rejection, the debtor is no longer required to perform, and the creditor has an unsecured damages claim for the debtor's nonperformance. *Id.* at 374.

To determine what effect the debtor's breach has on the *creditor's rights* under the contract, courts consult state contract-law principles. *Id.* at 384 n.2.⁴ Under Texas law, which governs the EPC Contract (ECF No. 760-2 § 21.9), when one party breaches, the other party has an election:

⁴ *Accord Stewart Title Guar. Co. v. Old Republic Nat. Title Ins. Co.*, 83 F.3d 735, 741 (5th Cir. 1996) (“[S]tate law governs the rights stemming from the breach.”).

it can “terminate the agreement” or “treat [it] as continuing.” *Long Trusts v. Griffin*, 222 S.W.3d 412, 415–16 (Tex. 2006). *Tempnology* recognizes this general state-law rule, stating that “‘when a contract is breached in the course of performance, the injured party may elect to continue the contract or refuse to perform further.’” 578 U.S. at 380 (quoting 13 R. Lord, *Williston on Contracts* § 39:32, pp. 701–02 (4th ed. 2013)).

If the creditor elects to treat the contract as continuing, then the election “leaves intact the rights the [creditor] has received under the contract.” *Id.* at 378–79. As this Court has recognized, “post-rejection, a counterparty retains those contract rights that would survive a breach under applicable non-bankruptcy law.” *In re Sanchez Energy Corp.*, 631 B.R. 847, 859 (Bankr. S.D. Tex. 2021). In short, if the debtor rejects the contract, and the creditor elects to treat the contract as continuing, then the debtor is no longer required to perform its obligations, but the creditor’s rights under the contract remain “intact.” *Tempnology*, 587 U.S. at 378–79.

Tempnology provides a hypothetical to show how these principles operate. In the Court’s hypothetical, “[a] dealer leases a photocopier to a law firm,” and the dealer then “files a Chapter 11 petition and decides to reject its agreement.” *Id.* at 380. Once the dealer rejects the contract, the dealer is no longer required to perform; it can “stop servicing the copier.” *Id.* The law firm, in turn, “has an option about how to respond—continue the contract or walk away[.]” *Id.* But “assuming the law firm wants to keep using the copier, the dealer cannot take it back.” *Id.* at 380–81. This is because the law firm “retains the rights it has received under the agreement,” including the right to use the copier. *Id.* at 381.

Of course, in some instances, the creditor’s contractual rights may correspond to the debtor’s contractual obligations, for example, when a creditor has a right to demand money from the debtor. Following *Tempnology*, courts have held that the creditor may exercise contractual

rights that do not require performance from the debtor, but if the creditor’s contractual right would require the debtor to perform, then the creditor is relegated to an unsecured damages claim. The next section addresses those cases.

II. Courts applying *Tempnology* hold that, once the debtor rejects a contract, a creditor may continue to exercise contractual rights that do not require the debtor to perform.

In *Nine Point Energy Holdings*, the debtors—oil and gas production companies—rejected a midstream agreement that (1) obligated them to transport produced minerals through the creditor’s pipeline, and (2) gave the creditor an exclusive right to transport the produced minerals. *In re Nine Point Energy Holdings, Inc.*, 633 B.R. 124, 134 (D. Del. 2021). When the debtors rejected the contract, the creditor cited *Tempnology* for the proposition that the debtors’ rejection left intact the creditor’s exclusive right to transport the produced minerals. *Id.* at 135–36. The court disagreed. *Id.* It reasoned that the creditor’s right to transport the produced minerals necessarily required the debtors to perform by sending the minerals to the creditor’s pipeline. *Id.* Because the creditor’s right would require performance by the debtors, the creditor could enforce the right only by an unsecured damages claim. *Id.*

By contrast, in *Lager*, a contract prohibited the debtor from disparaging the creditor’s business. *In re Lager*, No. 22-30072-MVL-11, 2022 WL 3330421, at *2 (Bankr. N.D. Tex. Aug. 11, 2022). When the debtor rejected the contract, the creditor cited *Tempnology* for the proposition that its rights under the non-disparagement provision survived the rejection. *Id.* at *10. The court agreed. It reasoned that enforcing the non-disparagement provision was appropriate because it would not “require[] affirmative action on the part of” the debtor. *Id.* Rather, the provision “simply require[s] [the debtor] to *refrain* from disparaging the [creditor].” *Id.* (emphasis in original). The court emphasized that “[c]ompliance [with the non-disparagement provision] imposes no affirmative duties on and requires no services to be rendered by the [debtor]” and “does not require

the [debtor] to spend money.” *Id.* Because the creditor’s right did not require any affirmative action by the debtor, the creditor could enforce its right.

The court in *Avianca Holdings* applied similar reasoning. *In re Avianca Holdings S.A.*, 618 B.R. 684 (Bankr. S.D.N.Y. 2020). There, an airline had a contract with credit card processors; airline customers would use credit cards to purchase tickets, and the processors would remit the payments to the airline. *Id.* at 690. The airline then entered into a second contract whereby it assigned its receivables from the processors to a third party, USAV. *Id.* The second contract, therefore, gave USAV a right to receive payments from the credit card processors. *Id.* When the airline entered bankruptcy and rejected the second contract, USAV cited *Tempnology* in arguing that it retained its right to receive the payments from the processors. *Id.* at 704–07. The court agreed, reasoning that rejection of the second contract “d[id] not terminate USAV’s right to receive payment.” *Id.* After all, the payment would come from the third-party processors—not the airline.

As shown below, this case is like *Avianca Holdings* and *Lager*. MasTec can exercise its rights under Section 7.7 of the EPC Contract without requiring Ascend to perform any contract obligations.

III. Here, MasTec’s exercise of contractual right under Section 7.7 does not require Ascend to perform, so under *Tempnology*, MasTec may exercise that right.

In its Objection, Ascend argues that MasTec is asking the Court to “compel Ascend to release the [LOC] proceeds to MasTec.” Objection ¶ 1. Not so. The LOC proceeds are not in Ascend’s bank account. Rather, they are held by a third party—*i.e.*, the District Court in its Registry. *See Avianca Holdings*, 618 B.R. at 704–07 (post-rejection, creditor retains right to payment by third parties). Thus, MasTec is not seeking to “compel Ascend to release” anything. Instead, MasTec seeks an order from this Court permitting MasTec to withdraw the LOC proceeds from the District Court Registry. This relief does not require Ascend to do anything at all.

It is true that, pursuant to Section 7.7 of the EPC Contract, the bond that MasTec provides must be “reasonably satisfactory to” Ascend. ECF No. 760-2 § 7.7(iii). But under Texas law (which, again, governs the EPC Contract), the “reasonably satisfactory” standard in Section 7.7 requires objective assessment. *See Lynx Expl. & Prod. Co., Inc. v. 4-Sight Operating Co.*, 891 S.W.2d 785, 787 (Tex. App.—Texarkana 1995, writ denied) (“[A ‘satisfaction’ provision in a contract] is an objective standard which does not seek to find the mental state of satisfaction of that party, but rather whether the performance would satisfy a reasonable person.”). Accordingly, this Court can determine, as a matter of law, that MasTec’s proposed bond is reasonably satisfactory. MasTec has arranged to provide a bond from a reputable, nationally known provider that tracks the contractual requirements of the EPC Contract. Because this Court can determine, as a matter of law, that MasTec’s proposed bond is reasonably satisfactory, the relief that MasTec requests does not require any action by Ascend.

In short, MasTec requests a Court order lifting the stay for the limited purpose of permitting MasTec, upon furnishing the bond, to withdraw the LOC proceeds from the Registry. *Tempnology* authorizes this relief because it does not require Ascend to perform any contract obligations.

IV. MasTec’s Section 7.7 rights would survive termination of the EPC Contract.

While Ascend’s rejection of the EPC Contract would result in a prepetition breach—not termination—of the Contract, the bond-for-LOC substitution right in Section 7.7 would survive even the termination of the Contract. [REDACTED]

[REDACTED] The Contract’s survival provision demonstrates as a matter of law that LOC-related rights and obligations continue while disputes related to the EPC Contract are resolved post-termination.

Because Article 9 survives termination, Sections 7.6 and 7.7 of the EPC Contract survive termination as well, as they contain the operative provisions governing the mechanics of LOC draws and the return of LOC proceeds: Section 7.6 establishes the conditions under which Owner may draw on the LOC, while Section 7.7(iii) creates MasTec's corresponding right to substitute a bond for the LOC proceeds. These provisions are the heart of the LOC security arrangement that Article 9 contemplates.

[REDACTED]

[REDACTED] The LOC substitution provisions in Sections 7.6 and 7.7 inherently contemplate post-termination operation. The right to substitute security makes no commercial sense if it expires upon termination—particularly when disputes about contract performance (and thus the need for security) typically arise at or after project completion. The parties clearly intended these security mechanisms to remain operative through final resolution of any disputes, as evidenced by the Contract's designation of Article 17 (Indemnities), Article 18 (Dispute Resolution), and Article 20 (Limitation of Liability) as surviving termination.

This interpretation aligns with commercial reality and the structure of the Contract as a whole. The LOC serves as security for MasTec's performance and warranty obligations, many of which extend well beyond mechanical completion. It would defeat the entire purpose of the security arrangement if Ascend could draw on the LOC while simultaneously claiming that MasTec's reciprocal right to substitute that security somehow vanished upon termination. The Contract's comprehensive survival provision ensures that both parties' security-related rights remain intact through the resolution of any disputes.

This Court has made clear that rejection “convert[s] a debtor’s unfulfilled obligations to a prepetition damages claim” but “does not terminate the contract or vaporize the counterparty’s rights.” *In re Chesapeake Energy Corp.*, 622 B.R. 274, 281 (Bankr. S.D. Tex. 2020). MasTec’s substitution right is precisely the type of right that survives rejection under *Tempnology*.

CONCLUSION

Ascend has not rejected the EPC Contract, and MasTec is entitled to exercise its contractual right to substitute security. Even if Ascend did reject the EPC Contract, *Tempnology* prevents Ascend from using the automatic stay as both a sword and shield—by drawing on the LOC pursuant to the EPC Contract, and then arguing that its rejection of that Contract deprives MasTec of contractual rights. The stay should be lifted to permit this limited relief.

Respectfully submitted this 10th day of September, 2025.

By: /s/ Caroline A. Talbert
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CERTIFICATE OF SERVICE

I hereby certify that on the 10th day of September, 2025, a copy of the foregoing Reply was served via the Clerk of the Court to the parties registered to receive service via CM/ECF.

/s/ Caroline A. Talbert

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