UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

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DAVID KARDONICK, JOHN DAVID, and MICHAEL CLEMINS, individually and on behalf of all others similarly situated,

Plaintiffs,

v.

JPMORGAN CHASE & CO. and CHASE BANK USA, N.A.,

C.A. No. 1-10-cv-23235-WMH

Defendants.
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OPPOSITION OF OBJECTOR THOMAS BLANCHARD TO PLAINTIFFS' MOTION TO DIRECT OBJECTORS TO POST APPEAL BOND

Introduction

On October 26, 2011, Plaintiffs filed a motion to direct appealing objectors to post an appellate bond on the grounds that the appeals are frivolous, and that there is a strong likelihood that they will not recover their costs after successfully defending an appeal. These statements are undermined by their own pleadings.

To begin with, Plaintiffs state on page two that "it is anticipated that each appeal will raise the exact same arguments considered and rejected by this Court." Mtn. at 2. This, of course, is legally necessary as arguments not raised at the trial court level cannot be raised on appeal. Rather than undermining Appellants' anticipated briefs, Plaintiffs merely state the obvious: that Appellants will be raising those issues the Trial Court has already considered and overruled.

Second, the Trial Court summarily overruled the objections in the final judgment in paragraph 12, stating that it had "considered" the objections, and decided to "overrule" them.

This does not mean that the objections were meritless, as contended by Plaintiffs on page 2. Rather, objector voiced concern (INTER ALIA) over the amount of fees requested being unfair in that the percentage of the settlement amount was too high. Interestingly, while the Court technically overruled all objections, the Court did reduce Plaintiffs' requested fee award from $5 million to $3.5 million. Thus, Blanchard's objection regarding attorneys' fees was at least in some way a consideration in this Court's decision. This fact is in direction contravention to Plaintiffs' contention that the objectors' arguments are meritless.

Third, Plaintiffs assert that an appellate bond is necessary for risk of nonpayment, and then tethers this argument to the fact that the objectors are represented by "professional objector" counsel. This argument is inherently contradictory. If most of the objectors are represented by attorneys who regularly practice in this arena, then the likelihood of nonpayment of costs is in fact significantly reduced. These are established attorneys with established practices, who do have the means to meet cost bills when appropriate. It seems that the true risk of nonpayment would rest with an unrepresented objector. Accordingly, this basis for imposing a bond upon the "professional" objectors, rather than being tied to a reasonable ground such as risk of nonpayment, is instead tied to a punitive purpose: punishment for objecting at all. This is improper and is not a basis upon which an appellate bond can be imposed.

I. THE RISK OF NONPAYMENT IS DE MINIMUS, GIVEN THE STATUS OF THE REPRESENTED OBJECTORS, AND THE ACTUAL REIMBURSABLE COSTS TO BE INCURRED

Plaintiffs cite to Rule 7 of the Federal Rules of Appellate Procedure, which permits, but does not mandate, the Trial Court to impose an appellate bond. A Court may elect to "require an appellant to file a bond or provide other security in any form and amount necessary to ensure payment of costs on appeal." Mtn. at 4. The plain language of this Rule states that its purpose is "to ensure that the appellee will be paid any costs that are awarded to him if the appellant is unsuccessful on appeal."

"The main purpose of an appeal bond 'is to protect an appellee against the risk of nonpayment by an unsuccessful appellant.'" *In re Initial Public Offering Sec. Litig.,* 728 F.Supp.2d 289, 292 (S.D.N.Y. 2010). A district court may not impose a bond in an amount beyond what is necessary to ensure adequate security if to do so would effectively preclude pursuit of an appeal. (*Lindsey v. Normet,* 405 U.S. 56, 77-79 (1972)(a statute conditioning appeal on posting of double bond was unconstitutional under Fourteenth Amendment equal protection clause). Nor may a bond be imposed for the purpose of discouraging exercise of the right to appeal. *Clark v. Universal Builders,* 501 F.2d 324, 341 (7th Cir. 1974). In a recent case in the Ninth Circuit, a bond request for $7,500 in a case with three appellants was reduced to $3,000, which more reasonably represented the actual anticipated reproduction and fee costs. (*See, Hartless v. Clorox,* 06-cv-02705-CAB, Docket No. 131)

Plaintiffs' motion emphasizes that six of the nine appellants are represented by "professional objectors." Mtn. at 9. Plaintiffs fail to state that these represented objectors cannot or will not pay their cost bill in the event that their appeal is unsuccessful. In fact, instead of providing legal authority to explain why the objectors' counselors' identities are even relevant, Plaintiffs blithely state that professional objectors delay distribution of settlements. Mtn. at 9. If the purpose of the appeal bond is to ensure payment of reimbursable costs, as Plaintiffs contend, then the fact that the majority of the objectors are represented undermines their argument that a bond is necessary. This cost bond request smacks of an effort to deter the appellants from pursuing their appeals. This is a patently improper purpose. Accordingly, Plaintiffs have failed to meet their burden to show that an appellate bond is necessary.

Second, Plaintiffs request an omnibus $35,000, from a group of nine appellants. This amount far surpasses any printing and reproduction costs they would incur in reproducing the record in this very short case; including only the complaint, amended complaint, motion to dismiss. Ironically, with this dearth of pleadings, the only real cost incurred in reproduction

would be the opt-outs and objections. A more realistic estimate of the total costs includes: the $455 filing fee (which Plaintiffs do not have to pay), reproduction of the short record, and multiple copies of briefs. It is unlikely the reproduction and copying will exceed $2,000 in total, let alone approach $35,000.

II. THE MERITS OF THE APPEAL HAVE ALREADY BEEN PROVED IN THE COURT'S FINAL ORDER

Another factor to be weighed in whether to impose an appeal bond are the merits of the appeal. Mtn. at 6, citing *In re Initial Public Offering Sec. Litig.,* 728 F.Supp.2d 289, 292 (S.D.N.Y. 2010). As stated above, the Court summarily overruled all objections filed in response to the settlement, in paragraph 13 of the Final Order. The attorneys' fees order, however, was reduced by $1.5 million. Without further clarification from the Court, this Appellant is left to assume that the Court considered her objection to the amount of attorneys' fees, and reduced it accordingly. This gives an imprimatur of merit to Blanchard's objections.

The reduction in attorneys' fees, after Blanchard filed an objection to them, is also evidence of the absence of bad faith, or vexatiousness, the final factor to be considered when a Court considers imposition of an appeal bond.

III. IF THE APPEAL IS TRULY FRIVOLOUS, THE COURT OF APPEALS IS IN THE BEST POSITION TO MAKE THAT DETERMINATION, AFTER CONSIDERATION OF THE BRIEFS

While the District Court is in the best position to consider the evidence and arguments presented for its consideration, the same cannot be said about the appeal. While the core issues being appealed remain the same, the appellate briefs have not been written, and an assumption of frivolity is premature and best saved for determination after submission. One case perfectly illustrates this point:

> "The question of whether, or how, to deter frivolous appeals is best left to the courts of appeals, which may dispose of the appeal at the outset through a screening process, grant an appellee's motion to dismiss, or impose sanctions including attorneys' fees under Rule 38. [Citation.] Allowing district courts to impose high Rule 7 bonds on where the appeals *might* be found frivolous risks "impermissibly encumbering"

> appellants' right to appeal and "effectively preempting this court's prerogative" to make its own frivolousness determination." (*In re Am. President Lines,* 779 F.2d 714, 717-18 (D.C.Cir. 1985.) *Azizian v. Federated Dept. Stores, Inc.,* 499 F.3d 950, 961 (9th Cir. 2007)(emphasis in original).

Accordingly, Appellants respectfully request that the Court reserve judgment regarding the merits of the pending appeals and reserve this decision for the Court of Appeals after the submission of the briefs. Appellees will not be without redress, as sanctions and/or costs can be imposed at that level if appropriate.

IV. CONCLUSION

Blanchard's appeal is, and will be, supported by appropriate authority. The simple fact that one of his seventeen objection points (attorneys' fees amount) was apparently considered and approved by the Court gives the stamp of credence to her appeal. This negates the "frivolous" and "bad faith" elements the Court may consider when determining whether to grant a request for an appeal bond. Further, the fact that several objectors are represented by attorneys gives support to the fact that any cost bills levied would be paid by these "professional" counsel, regardless of what state they may hail from. Without meeting these criteria, there is simply no basis for the imposition of a bond at all.

If the Court determines that some bond should be posted, Blanchard's requests that the Court adjust the request downward, to an amount which more reasonably approximates what the true "costs" would approach, an amount which would surely be less than $4-5,000, in total. Perhaps a reasonable approach would be not to make the bond joint and several, as there are several appellants, but individual, in the suggested amount of $1,000 each, if necessary.

Dated: November 10, 2011

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on November 10, 2011, I electronically filed the foregoing with the Clerk of the Court of the United States District Court for the Southern District of Florida by using the USDC CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the USDC CM/ECF system.

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