UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
C. A. No. 1-10-cv-23235-WMH

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.**

Defendants.

RESPONSE OF CLASS MEMBER/OBJECTORS DOUGLAS PALUCZAK, CHRIS SCHULTE AND LAURA FORTMAN TO PLAINTIFF'S MOTION TO REQUIRE APPEAL BOND

OBJECTOR/APPELLANTS, DOUGLAS PALUCZAK, CHRIS SCHULTE AND LAURA FORTMAN , by undersigned counsel, responds to Plaintiffs' Motion to Direct Objectors to Post Appeal Bond as follows:

INTRODUCTION

Class Plaintiffs seek to require all objectors to collectively post an appeal bond for costs in the amount of $35,000.00 under Rule 7 Fed.R.App.P., but argue as grounds that *all* the appeals are "frivolous," and that the bond should "cover" Plaintiff's attorney fees that may be incurred on the appeal.

Appellant Objectors PALUCZAK, SCHULTE AND FORTMAN oppose the Motion on the grounds that their appeals are well founded; that the trial court does not have jurisdiction to determine an appeal is frivolous, in that such determination is exclusively in the purview of the appellate court; and that absent a fee shifting contract or statute as the underlying cause, attorney fees are not a bondable appellate cost.

ARGUMENT

Neither the Objections Nor the Appeals of Objectors PALUCZAK, SCHULTE and FORTMAN are frivolous. They raised various objections based upon the amount and fairness of the settlement; the abandonment of the injunctive relief claim and especially the relationship between the settlement and the attorney fees. All the objections were argued and the court even partially agreed with the objectors by reducing the agreed attorney fee for Class Counsel. The fact that a trial court rules against an argument does not render it frivolous. If it did there would be no such thing as an appeal. That is why the trial court cannot rule on whether an appeal is frivolous; only the appellate court may do so. *Vaughn v. American Honda Motor Co., Inc.*, 507 F.3d 295, 299 (5th Cir. 2007); *Cooter & Gell v. Hartmax Corp.,* 496 U.S. 384, 407 (1990); *In re American President Lines, Inc.,* 779 F.2d 714, 717 (D.C. Cir 1985). Only the appellate court has the authority to impose sanctions, such as attorney fees, for a frivolous appeal. *Azizian v. Federated Department Stores, Inc.*, 499 F.3d 950, 960 (9th Cir. 2007); *In re Vasseli,* 5 F.3d 351, 353 (9th Cir 1993) citing *In re American President Lines, Inc.,* 779 F.2d 714, 717 (D.C. Cir. 1985). Moreover, although the imposition of attorney's fees on appeal as a sanction is allowed under Rule 38 Fed.R.App.P., it is only available after an appellate court finds the appeal frivolous, and only upon further motion and hearing. 10 Wright, Miller & Kane, Federal Practice & Procedure, § 2675; 2675.2 (2001); *see also Azizian v. Federated Department Stores, Inc.*, supra.

Bondable Costs Do Not Include Attorneys' Fees. Rule 39(e) Fed.R.App.P. sets the appellate costs that may be assessed. It does not include Plaintiffs' counsels claims for brief printing, "web site maintenance," and preparing "accounting and tax documents." (See Plaintiff's Motion, page 11). Nor does it provide for attorney's fees. The majority rule among the Circuits, including the Eleventh, Circuit, is that a district court may include attorney's fees in a Rule 7 appellate bond **only if** those attorney's fees would be considered recoverable costs under an applicable "prevailing party" fee shifting statute. *See Pedraza v. United Guaranty Corp.*, 313 F.3d 1323, 1329-30 (11th Cir. 2002)*; Azizian*, supra, at 958; *In re Cardizem CD Antitrust Litigation*, 391 F.3d 812, 817-818 (6th Cir. 2004); *Adsani v. Miller*, 139 F.3d 67, 71 (2d Cir.

1998). In order for attorney's fees to be included in a Rule 7 bond, the statute on which the action is based must have a "prevailing party" fee shifting provision, or must expressly define attorney's fees as a category of costs. *See Arencibia v Miami Shores, Inc. ,* 113 F.3d 1212, 1214 (11th Cir. 1997) (statute in issue must define "costs" to include attorney's fees for the district court to have jurisdiction to award fees under procedural rules relating to costs). The instant case has no such fee shifting statute.

The Class Plaintiffs have stated no basis whatever for their calculation of $35,000.00 they want for a bond. They are not the appellants and so do not have an appellate filing fee or supersedeas bond premium, (Rule 39(e) (3,4)); There was no hearing testimony to be transcribed; (Rule 39(e) (2); and the record, if any, consists of a Complaint; an Amended Complaint, and a negotiated settlement. At most their taxable costs will consist of a few dollars in printing expense. Indeed if anything is "frivolous," in this appeal it is Plaintiffs' counsels' apparently arbitrary demand for a $35,000.00 appeal bond.

CONCLUSION

WHEREFORE, Objector/Appellants, **PALUCZAK, SCHULTE and FORTMAN** respectfully submit that any bond imposed may not include attorney fees and may not exceed the actual Rule 39 Costs to be reasonably demonstrated by Class Plaintiffs.

Respectfully submitted this November 14, 2011.

S/ Matt Weinstein

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David Kardonick, et al., Plaintiffs v. J. P. Morgan Chase & Co. , Defendant

Certificate of service

I hereby certify that on November 14, 2011 , I electronically filed the foregoing document with the Clerk of the Court and using CM/ECF. I also certify that the foregoing document is being served this day on all counsel of record via transmission of Notices of Electronic Filing generated by CM/ECF or in some other authorized manner shown below for those counselor parties who are not authorized to receive electronically Notices of Electronic Filing.

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