IN THE UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF PENNSYLVANIA

IN RE: SHOP-VAC MARKETING AND SALES PRACTICES LITIGATION	MDL No. 2380 Civil Action No. 4:12-md-02380-YK
THIS DOCUMENT RELATES TO: All Cases	(Chief Judge Yvette Kane)

CLASS PLAINTIFFS' MEMORANDUM IN SUPPORT OF THEIR MOTION TO COMPEL OBJECTOR-APPELLANT MICHELLE W. VULLINGS TO POST AN APPEAL BOND, PURSUANT TO FED. R. APP. P. 7

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I. INTRODUCTION

Michelle W. Vullings, one of only three objectors in this Court to the valuable nationwide settlement of this class action case, has appealed the Court's grant (ECF Nos. 211, 212) of final settlement approval and other requested relief. ECF No. 213 (notice of appeal). Ms. Vullings is a serial objector to class action settlements, and her counsel, her husband Brent F. Vullings, is himself a serial objector counsel. In other cases, the Vullings have repeatedly asserted some of the same failed, boilerplate objections that they offered here, though most of those objections have no relevance to this settlement. In at least two of those other cases, Mr. Vullings has represented his wife as an objector. Another District Court recently stated that Mr. Vullings's "suspicious" tactics call for his objections to be "viewed with a modicum of skepticism." *Khoday v. Symantec Corp*., No. 11-cv-180 (JRT/TNL), 2016 U.S. Dist. LEXIS 55543, at *39-40 (D. Minn. April 4, 2016).

The Vullings's objections never succeed.[1] Indeed, this Court resoundingly rejected their objections here, repeatedly finding them "meritless" or "lack[ing]

[1] Among the many cases in which Mr. Vullings represented objectors are *Rougvie v. Ascena Retail Group*, No. 15-724, 2016 U.S. Dist. LEXIS 99235 (E.D. Pa. July 29, 2016); *Khoday*, 2016 U.S. Dist. LEXIS 55543; *In re MI Windows & Doors Prods. Liab. Litig.*, No. 12-mn-00001-DCN, 2015 U.S. Dist. LEXIS 95889 (D.S.C. July 23, 2015); *McDonough v. Toys "R" Us, Inc.*, 80 F. Supp. 3d 626 (E.D. Pa. 2015); and *Kolinek v. Walgreen Co.*, 311 F.R.D. 483 (N.D. Ill. 2015). In

merit." ECF No. 211 at 7 n.7, 13 n.11, 20. Nonetheless, the Vullings object and then file a baseless appeal. Their appeal delays implementation of the settlement, a delay that the Vullings hope will lead the parties to pay them to go away.

Other courts have noted that such a strategy amounts to "an attempt at legalized extortion in the guise of an objection." *In re Rent-Way Sec. Litig.*, 305 F. Supp. 2d 491, 520 n.12 (W.D. Pa. 2003); *see also Rougvie v. Ascena Retail Grp., Inc.*, No. 15-724, 2016 U.S. Dist. LEXIS 142404, at *2-3 (E.D. Pa. Oct. 14, 2016) (noting that serial objectors such as the Vullings "file appeals challenging established legal issues hoping the delay may coerce the settling parties to pay them a premium from the Settlement Fund").[2]

As discussed *infra*, the Vullings's appeal of the rejection of their groundless objections imposes significant costs on the parties and the Class by delaying implementation of a valuable settlement and raising administrative expenses. Fed. R. App. P. 7 empowers District Courts to require appellants to post an appeal bond, in order to protect appellees from those costs. An appeal bond is especially necessary in a case such as this, where (a) the appeal is groundless, and (b) Ms.

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two of those cases, his client was his wife, as here. *Rougvie*, 2016 U.S. Dist. LEXIS 99235, at *43; *MI Windows*, 2015 U.S. Dist. LEXIS 95889, at *11 n.2.

[2] Indeed, these tactics are the subject of an action filed against other serial objector counsel, which asserts that they constitute violations of the Racketeer Influenced and Corrupt Organizations Act. *Edelson PC v. The Bandas Law Firm PC, et al.*, No. 1:16-cv-11057 (N.D. Ill.). A true copy of the Complaint in that case is attached to the accompanying Declaration of James J. Rodgers as Exhibit A.

Vullings has already flouted an Order of this Court regarding discovery, and therefore cannot be relied upon to pay the costs if appellees win the appeal.

Accordingly, Plaintiffs respectfully request that this Court require Ms. Vullings to post an appeal bond in the amount of $32,000, to cover costs taxable under Fed. R. App. P. 39(e), as well as the administrative expenses that will accrue while the appeal proceeds. The Third Circuit, in its most recent decision regarding appeal bonds, has approved the inclusion of both types of costs in an appeal bond. *In re Nutella Mktg. & Sales Practices Litig*., 589 F. App'x 53 (3d Cir. 2014). *See also Rougvie*, 2016 U.S. Dist. LEXIS 142404, at *3 ("When we view an appeal as a coercive tactic with little merit, we may grant a motion requiring the appealing objector to post a bond to cover the class' costs and demonstrated administrative expenses incurred on appeal.").

II. ARGUMENT

A. The Court has "wide discretion" in imposing an appeal bond under Fed. R. App. P. 7

Rule 7 of the Federal Rules of Appellate Procedure states that "the district court may require an appellant to file a bond or provide other security in any form and amount necessary to ensure payment of costs on appeal." *Nutella*, 589 F. App'x at 60 (Rule 7 "authorizes a district court to order an appellant to post a bond covering the costs of appeal"). "Such a bond is often termed a 'cost bond' or an 'appeal bond.'" *Id.* "The purpose of the bond is to ensure against nonpayment by

the appellant of the costs of the appeal should the appeal prove unsuccessful." *Glaberson v. Comcast Corp.*, No. 03-6604, 2015 U.S. Dist. LEXIS 162710, at *5 (E.D. Pa. Dec. 3, 2015) (citing *Adsani v. Miller*, 139 F.3d 67, 79 (2d Cir. 1998)).

"The Court has wide discretion to determine whether an appeal bond under Rule 7 will be issued, and in what amount it will be issued." *Rossi v. The Proctor & Gamble Co.*, No. 11-7238, 2014 U.S. Dist. LEXIS 34180, at *7 (D.N.J. Mar. 17, 2014) (citing *In re Ins. Brokerage Antitrust Litig.*, No. 04-5184, 2007 U.S. Dist. LEXIS 47659, at *40 (D.N.J. July 2, 2007)); *see also Nutella*, 589 F. App'x at 60 (Third Circuit "review[s] the imposition of an appeal bond under Federal Rule of Appellate Procedure 7 for abuse of discretion.") (citing Fed. R. App. P. 7, 1979 Advisory Committee note (other citations omitted)).

B. The Court should impose an appeal bond because it assures adequate security against the objector's failure to pay costs from her meritless appeal

When determining whether an appeal bond is necessary, a District Court should consider:

(1) whether a bond "is necessary to assure adequate security";

(2) the risk that appellant will not pay costs if she loses the appeal;

(3) appellant's ability to post the bond;

(4) "whether the bond will effectively preclude pursuit of the appeal"; and

(5) "the merits or frivolousness of the appeal."

Rougvie, 2016 U.S. Dist. LEXIS 142404. at *8-9 (quoting *In re Certainteed Fiber Cement Siding Litig.*, MDL No. 2270, 2014 U.S. Dist. LEXIS 71702, at *6 n.2 (E.D. Pa. May 27, 2014), and *Glaberson*, 2015 U.S. Dist. LEXIS 162710, at *6). All of these factors weigh strongly in favor of requiring Ms. Vullings to post a bond.

A bond here is "necessary to assure adequate security to protect the interests of the settlement class." *Certainteed*, 2014 U.S. Dist. LEXIS 71702, at *2 (citation omitted). The Vullings' appeal has already delayed, and will continue to delay, the implementation of the settlement, whose value the Court's final approval opinion found "approximates $174,250,000." ECF No. 211, at 24; *see Rougvie*, 2016 U.S. Dist. LEXIS 142404, at *9 (finding an appeal bond "necessary to assure adequate security because the Appellants are delaying Settlement Fund relief" to the other class members); *see also In re NASDAQ Market–Makers Antitrust Litig.*, 184 F.R.D. 506, 514 (S.D.N.Y. 1999) (citation omitted) (finding that the actions of appellants in "jeopardizing a settlement agreement cause[ ] prejudice to the existing parties to a lawsuit").

There is no evidence in the record that Ms. Vullings would be unable to post an appeal bond, or that a bond would preclude pursuit of the appeal. But absent a bond, there is a significant risk that the Class will not be reimbursed for winning the appeal. Ms. Vullings has already demonstrated her unwillingness to comply

with her legal obligations when she failed to provide discovery as the Court's preliminary approval order, ECF No. 165, required. *See id*. at 4 (containing that requirement); ECF No. 201, at 1 (letter to the Court from class counsel, demonstrating that Ms. Vullings had failed to respond to Plaintiffs' discovery requests). To this very date, Ms. Vullings remains in default of her discovery obligation.

The Court elected not to preclude Ms. Vullings from objecting based on her refusal to provide discovery. ECF No. 211, at 4 n.5. But given Ms. Vullings's demonstration that she will not comply with her legal obligations, the Class is entitled to seek this Court's protection by requiring Ms. Vullings to post an appeal bond before she can proceed with her appeal. A bond will insure against the risk that she fails to pay the appeal costs in the likely event that she loses her appeal. *Glaberson*, 2015 U.S. Dist. LEXIS 162710, at *5 (finding that "the risk" that the appellant "will not pay the costs if he loses the appeal" weighs in favor of requiring a bond).

Moreover, there is no doubt that Ms. Vullings's appeal is groundless. This Court soundly rejected every one of her objections, finding that many of them "lack[ed] merit" or were "meritless." ECF No. 211, at7 n.7, 13 n.11, 20. The Court repeatedly observed that Ms. Vullings's positions were expressly contradicted by the Settlement's actual terms, and then anticipated and debunked

by Plaintiffs' papers, which Ms. Vullings and her husband apparently did not read before asserting their objections. *See*, *e.g.*, ECF No. 211, at 7 n.7 (noting Ms. Vullings's questions about what the Named Plaintiffs had done to earn incentive awards and stating that "Named Plaintiffs addressed Vullings' questions in their sworn declarations"); *id*.at 13 (finding Ms. Vullings' objections to the adequacy of notice "unavailing in light of Cameron Azari's [a "nationally recognized notice expert," *id*. at 12 n.9] three declarations").

Finally, the Court carefully addressed Ms. Vullings's legal arguments, none of which Ms. Vullings had supported with any authority. The Court rejected them by citing well-founded caselaw and other authorities. *See*, *e.g.*, ECF No. 211, at 7-8 (rejecting objection to amount of incentive awards to Named Plaintiffs, and citing numerous comparable awards from within the Third Circuit); *id*. at 13 n.11 (rejecting objection that requiring exclusion requests to be mailed was "unreasonably burdensome," and citing cases that had rebuffed that very argument);[3] *id*. at 13 n.12, 14-15 (rejecting objection that notice was insufficient

[3] One of the cases that the Court cited was *McDonough*, 80 F. Supp. 3d 626, in which Mr. Vullings, representing a different objector, "argue[d] that the opt-out process was unreasonably burdensome because a class member had to mail his or her exclusion request rather than complete the process online." *Id*. at 641 n.14. The court concluded that "[m]ailing a request is not unreasonably burdensome." *Id*. In addition to the cases cited by this Court, in *Rougvie*, where Ms. Vullings was an objector, she asserted that same argument, again "fail[ing] to support this contention with case law," and that court rejected her contention. 2016 U.S. Dist. LEXIS 99235, at *43. Mr. and Mrs. Vullings thus make the same canned

because it did not "indicate the size of the settlement class," and citing rules and Third Circuit authority showing that notice was sufficient despite that); *id*. at 20 n.17 (rejecting objection that settlement was inadequate because persons who had discarded their vacuums could not get warranty extension, and citing caselaw recognizing that settlement is a compromise).

Ms. Vullings's very standing to pursue her appeal is also very much in doubt. She failed to identify the model of her vacuum as mandated in the Court's preliminary approval order, and she apparently received a notice of pendency in this case only because she purchased a spare part that would fit a vacuum that is not included in the Class. The implications of her failure to provide her model and serial number are clear (and clearer still if she fails to do so even now), and her inability to provide any proof that she is a Class member dooms her ability to appeal.

The utter lack of merit of Ms. Vullings's objections, her inability to establish her standing to appeal, and the significant costs to the Class as a result of her meritless appeal (for reasons that appear to be improper) all confirm the need for an appeal bond. *Rougvie*, 2016 U.S. Dist. LEXIS 142404, at *12 (granting appeal bond because, among other things, objector's "appellate arguments remain unlikely to succeed"). An appeal bond is unquestionably appropriate here.

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arguments in every case, without authority, and undeterred by the courts' consistent rejection of those arguments.

C. The Court should impose a bond of $32,000

"Factors used to determine the amount of the bond begin with the items that may be taxed as costs under Federal Rule of Appellate Procedure 39(e)." *Glaberson*, 2015 U.S. Dist. LEXIS 162710, at *7. Fed. R. App. P. 39 permits "[t]he following costs on appeal [as] taxable in the district court for the benefit of the party entitled to costs under this rule":

(1) The preparation and transmission of the record;

(2) The reporter's transcript, if needed to determine appeal;

(3) Premiums paid for a *supersedeas* bond or other bond to preserve rights pending appeal; and

(4) The fee for filing the notice of appeal.

See also Nutella, 589 F. App'x at 60–61 (Appellate Rule 39(e) "include[s] the costs of preparation of and transmission of the record, the costs of obtaining any necessary transcripts, printing costs and other copying costs, premiums or costs for *supersedeas* bonds or other bonds to secure rights pending appeal, and fees for filing the notice of appeal.").

Third Circuit Local Appellate Rule 39.3 describes the maximum rate at which the Third Circuit will tax the costs for reproduction. *See Rossi*, 2014 U.S. Dist. LEXIS 34180, at *3 n.1 (citing 3d Cir. L.A.R. 39.3):

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3d Cir. L.A.R. 39.3(1), (2).

In considering these elements, the court in *Insurance Brokerage* "conclude[d] that a $25,000 bond [was] reasonable," and would "'adequately secure recovery of costs should the class prevail but [would] not work a financial hardship on the exercise of the Objectors' rights to appeal.'" *Ins. Brokerage*, 2007 U.S. Dist. LEXIS 47659, at *43 (internal citation omitted); *see also Adsani*, 139 F.3d at 76-78 ($35,000 bond not unconstitutional barrier to appeal where no showing of inability to pay).

The objector in *Insurance Brokerage* contended that $25,000 was an "exorbitant bond, and that it [was] impossible for the costs associated with [the] appeal [to] reach that amount." 2007 U.S. Dist. LEXIS 47659, at *42. The objector further argued that plaintiffs should submit affidavits or a specific list showing the costs for a bond motion. *Id.* The court rejected the objector's arguments, instead ruling that $25,000 was a "reasonable" amount and that the plaintiffs need not have offered affidavits or a specific list of costs. *Id.* at *42-43 (citing *In re Diet Drugs (Phentermine, Fenfluramine, Dexfenfluramine) Prods.*

Liab. Litig., MDL No. 1203, 2000 U.S. Dist. LEXIS 16085, at *19 (E.D. Pa. Nov. 6, 2000) ($25,000 a "reasonable estimate")); *see also In re Am. Investors Life Ins. Co. Annuity Mktg. & Sales Practices Litig*., 695 F. Supp. 2d 157, 166-67 (E.D. Pa. 2010) (also imposing appeal bond of $25,000, citing *Insurance Brokerage* and *Diet Drugs*). Plaintiffs and the Class thus request a bond that includes $25,000 as a reasonable amount to cover the Appellate Rule 39 costs of Ms. Vullings's appeal.[4]

Plaintiffs and the Class also request that the Court include in the appeal bond the extra administrative costs associated with the delay the appeal will cause. In *Nutella*, the Third Circuit expanded what costs could be included in a Rule 7 appeal bond, finding that costs could include not only those listed in Rule 39, but also the costs of administering the settlement funds and claims. *Nutella*, 589 F. App'x at 61 ("The District Court determined … that administrative costs could be secured by a Rule 7 bond. We do not find that determination to be in error."). In accordance with that finding, the Third Circuit in *Nutella* affirmed the District Court's order that included "one year's worth of administrative expenses." *Id*. at 57, 61.

Following *Nutella*, District Courts in the Third Circuit have included administrative costs in the required appeal bond. *In re Merck & Co., Inc.*

[4] The court in *Insurance Brokers* noted that there might be appeals by multiple objectors, resulting in "different issues from different appellants, which may increase the expenses" of the appellees. 2007 U.S. Dist. LEXIS 47659, at *42-43. The same is true here, where the appeal period has not yet run.

Securities, Derivative & "Erisa" Litigation, MDL No. 1658, 2016 U.S. Dist. LEXIS 124726, at *82-84 (D.N.J. Sept. 14, 2016), ordered a $55,000 appeal bond in a class action, in order to include "the administrative costs of delay to the class." The court in *Glaberson* did likewise, explaining that the "*Nutella* decision holds that it is not an abuse of discretion to require an appeal bond that covers the costs to administer the class settlement during the pendency of an appeal." *Glaberson*, 2015 U.S. Dist. LEXIS 162710, at *11. Based on *Nutella*, the *Glaberson* court included in the appeal bond the costs of administering the class settlement during the pendency of the appeal, as "only three claimants decided to opt out of the settlement, and the Court received only three objections." *Id.* at *3; *see also Manuel v. Caliber Home Loans, Inc*., No. 14-5233(SRC), 2015 U.S. Dist. LEXIS 143460, at *2 (D.N.J. Oct. 21, 2015) (rejecting argument that appeal bond cannot include administrative costs, citing *Nutella*, and imposing appeal bond of $38,750).

As in *Merck*, *Glaberson*, and *Manuel*, so too here. Ms. Vullings should not be allowed "to significantly delay receipt by the other Class members of their settlement benefits—while causing [appellees] to incur substantial additional costs without some guarantee that those costs, if taxed, [would] be recoverable." *Glaberson*, 2015 U.S. Dist. LEXIS 162710, at *11-12.

The accompanying Declaration of Richard Bithell, on behalf of the claims administrator, Epiq Systems, states that the costs for maintaining the settlement

website, maintaining the toll-free number system that Settlement Class Members can call to receive information about the settlement, handling ongoing Settlement Class Member communications, and storage costs for correspondence and other documents are anticipated to total $7,000 over the course of a year, the minimum time that Ms. Vullings's appeal would likely consume if it runs its full course. Bithell Decl. at ¶6. Absent an appeal, those costs would not be incurred. *Id*., ¶¶3-4. Thus, in addition to the $25,000 in Rule 39 costs described above, Plaintiffs and the Class request that this Court include in any appeal bond these administrative costs, as the Third Circuit allowed in *Nutella*.

III. CONCLUSION

For the reasons set forth above, Plaintiffs respectfully request that Ms. Vullings be required to post an appeal bond in the total amount of $32,000, which represents Rule 39 costs of $25,000, plus administrative costs during the estimated pendency of her appeal in the amount of $7,000.

Dated: December 22, 2016

Respectfully Submitted,

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