UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

IN RE: BLUE BUFFALO COMPANY, LTD. MARKETING AND SALES PRACTICES LITIGATION	**Case No. 4:14 MD 2562 RWS**

OBJECTOR PAUL LOPEZ'S SUR-REPLY MEMORANDUM IN OPPOSITION TO MOTION FOR APPEAL BOND

Paul Lopez submits this Sur-Reply to correct several misrepresentations of authority by Class Counsel in their reply. As a reminder, Class Counsel seek a $150,309 appeal bond, which, in addition to an inflated $25,000 in potential appeal-related costs,[1] requests a legally

[1] As support for this amount in appeal costs, Class Counsel's supporting memorandum represents that *Tenille v. W. Union Co.*, 968 F. Supp. 2d 1107, 1108 (D. Colo. 2013), "include[ed] $25,000 for direct appeal costs." Memorandum in Support of Motion for Appeal Bond, Doc. 233, at 23. Remarkably, neither their supporting memorandum nor their reply acknowledges that the Tenth Circuit reduced the $25,000 for direct appeal costs to $5,000. *Tennille v. W. Union Co.*, 774 F.3d 1249, 1257 (10th Cir. 2014) (reducing the bond to $5,000 to cover costs of appeal because "Plaintiffs have failed to justify the need for the appeal bond to cover an estimated $25,000 for printing, copying, and record preparation" and "[w]hile an appeal bond request by necessity must be based on an estimate of the costs that a litigant may incur in defending against an appeal, Plaintiffs here made no effort to justify their $25,000 estimate").

untenable $60,000-$80,000 in administrative costs, $13,334 in delay costs/interest, and $51,975 in attorneys' fees.[2]

Inexplicably, Class Counsels' Reply continues to cite *In re Uponor, Inc. F1807 Plumbing Fittings Products Liab. Litig.*, 11-MD-22247 ADM/JJK, 2012 WL 3984542, at *4-6 (D. Minn. Sept. 11, 2012), for its position that an appeal bond under Rule 7 may include delay costs and other costs beyond costs of appeal[3] even though **the Eighth Circuit specifically stayed the bond in *Uponor* to the extent it exceeded appeal costs**. *Uponor, F1807 Plumbing Fittings Products Liab. Litig.*, 716 F.3d 1057, 1062 (8th Cir. 2013) (with respect to the objectors' argument that the bond was excessive, the Eighth Circuit "agreed and entered an order staying 'the requirement that Appellants post an appeal bond in excess of $25,000 [the amount of appeal costs]'"). **The Reply treats *Uponor* as if the Eighth Circuit never stayed the bond**.[4]

This dubious approach allows Class Counsel to suggest that settlement administration costs may be included in an appeal bond in the Eighth Circuit, when they may not. *See Khoday v. Symantec Corp.*, No. 11-180, 2016 WL 4098557, at *1-2 (D. Minn. Jul. 28, 2016) ("declin[ing] to impose a Rule 7 appeal bond that includes class administrative costs[,]" and explaining that "[a]lthough the Eighth Circuit has not yet defined what constitutes 'costs on appeal,' most circuit courts that have addressed the issue have 'linked that phrase to costs

[2]Memorandum in Support of Motion for Appeal Bond, ECF Doc. No. 233, at 22-26.

[3] Reply Memorandum in Further Support of Motion for Appeal Bond, Doc. 251, at 10.

[4] Class Counsel are aware of the Eighth Circuit's stay of the bond. They carefully made reference to it in a footnote on page 22 of their initial Memorandum in Support of Motion for Appeal Bond, Doc. 233, at 22 n.13.

that a successful appellate litigant can recover pursuant to a specific rule or statute'"). The Eighth Circuit has *never* authorized the costs sought by Class Counsel in their Rule 7 appeal bond.

Class Counsel also tout *Uponor*, without reservation, as allowing a district court to determine whether an appeal is frivolous under Federal Rule of Appellate Procedure 38[5] in calculating an appeal bond.[6] This is not an accurate representation of the law in the Eighth Circuit. *Khoday*, No. 11-180, 2016 WL 4098557, at *1-2 ("[m]ultiple circuit courts . . . have rejected this type of argument, and the Court will do the same here" and "[w]hether the objectors' appeals are frivolous under Rule 38 . . . [was a] matter[] for the Eighth Circuit to decide and not factors for [the district court] to consider in calculating a Rule 7 appeal bond"). Otherwise, Class Counsel rely on district court opinions from the Southern District of New York without acknowledging the considerable countervailing circuit court authority.[7]

The Reply also cites *In re Law Office of Jonathan E. Fortman, LLC*, 2013 WL 414476, at *1-2 (E.D. Mo. Feb. 1, 2013) for the assertion that "an objector's (or his or her counsel's) status as a professional or serial objector is a valid consideration in considering whether

[5] Rule 38 provides, "[i]f *a court of appeals* determines that an appeal is frivolous, it may, after a separately filed motion or notice from the court and reasonable opportunity to respond, award just damages and single or double costs to the appellee." FED. R. APP. P. 38 (emphasis added).

[6] Reply Memorandum in Further Support of Motion for Appeal Bond, Doc. 251, at 5-7.

[7] *See e.g., Vaughn v. American Honda Motor Co., Inc.*, 507 F.3d 295, 299 (5th Cir. 2007) ("[t]here is no provision in the rules of procedure for a district court to predict that an appellate court will find an appeal frivolous and to set a bond for costs on appeal based on an estimate of what 'just damages' and costs the appellate court *might* award"); *In re American President Lines, Inc.,* 779 F.2d 714, 717 (D.C. Cir 1985); *see also Booth Trust v. Crowley*, 687 F.3d 314, 318 (7th Cir. 2012) ("A district judge ought not try to insulate his decisions from appellate review by preventing a person from acquiring a status essential to that review"); *Azizian v. Federated Dep't Stores, Inc.*, 499 F.3d 950, 961 (9th Cir. 2007) ("[A]ny attempt by a court at preventing an appeal is unwarranted and cannot be tolerated." (*quoting Adsani v. Miller*, 139 F.3d 67, 79 (2d Cir. 1998), *cert denied*, 525 U.S. 875 (1998)).

imposition of an appeal bond is appropriate." Yet, the *Fortman* opinion never even mentions the subject of an appeal bond.

The Reply also complains that Mr. Lopez's bond opposition does not address unpublished opinions in Class Counsels' Omnibus Response to the objections concerning his argument that settlement administration costs should have been deducted before calculating attorneys' fees.[8] In that document, Class Counsel stated that "[i]t is settled law that attorneys' fees are properly calculated as a percentage of the gross settlement fund."[9]

In fact, the Eighth Circuit has never reached the issue, making an appeal particularly salient. Other circuits recognize it is not fair to reward Class Counsel attorneys' fees based on an amount that will never be realized by the class. *See e.g., Redman v. RadioShack Corp.*, 768 F.3d 622, 630 (7th Cir. 2014) ("[T]he ratio that is relevant to assessing the reasonableness of attorneys' fees that the parties agreed to is the ratio of (1) the fee to (2) the fee plus what the class members received"); *see also Pearson*, 772 F.3d 778, 781 (7th Cir. 2014); *Gehrich v. Chase Bank USA, N.A.,* 12 C 5510, 2016 WL 806549, at *14 (N.D. Ill. Mar. 2, 2016) (reducing the common fund by the cy pres, administrative expenses, and incentive awards to determine the amount class members would receive for consideration of attorneys' fees).

The Reply dismisses *In re BankAmerica Corp., et al.*, 4:99-md-01264-CEJ, ECF Doc. No. 575, at 2 n.3 (Oct. 15, 2012), cited by Mr. Lopez from within the Eighth Circuit, which specifically deducted claims administration costs before calculating attorneys' fees.

[8] Plaintiffs' Omnibus Response to the Objections to the Final Approval of the Settlement, Doc. 203, at 2-3.

[9] Plaintiffs' Omnibus Response to the Objections to the Final Approval of the Settlement, Doc. 203, at 18.

According to Class Counsel, this calculation should be disregarded based on its failure to cite authority. Yet, one of the countervailing opinions which Class Counsel complain Mr. Lopez did not address, *Smith v. Questar Capital Corp.*, 2015 WL 9860201, at *7 (D. Minn. Sept. 11, 2015), also cites no authority for its calculation.

This undecided issue, along with other arguments which Mr. Lopez intends to raise on appeal, is ripe to be presented before the Eighth Circuit, and should not be short-circuited by an excessive and legally invalid appeal bond.

CONCLUSION

Objector respectfully requests that this Court deny Class Counsel's motion for an appeal bond. Alternatively, Objector requests that the appeal bond be limited to $5,000 to cover costs of appeal.

DATED: August 25, 2016

Respectfully submitted,

/s/ *Timothy Belz*

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Certificate of Service

The undersigned certifies that today he filed the foregoing on ECF which will send electronic notification to all attorneys registered for ECF thus effectuating service.

DATED: August 25, 2016

/s/ *Timothy Belz*
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