UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO

In re: Polyurethane Foam Antitrust Litig.,	)	**No. 1:10-md-02196-JZ**

OPPOSITION TO INDIRECT PURCHASER CLASS' MOTION FOR ORDER REQUIRING POSTING OF APPEAL BOND

Appellant-Objector Sean Cochran hereby opposes the Indirect Purchaser Class' request for an illegal appeal bond that would only prolong the resolution of this case. Sean Cochran does not oppose an appeal bond for amounts authorized under FRAP 39(e). Each of the additional amounts requested by the Class is not permitted by Sixth Circuit law, and is not shifted to the losing party pursuant to any statute material to Cochran's appeal.

I. The Sixth Circuit Does Not Permit an Appeal Bond for Attorney's Fees, Delay Costs or Administrative Costs.

In their Memorandum of Law, Class Counsel cite to a hodgepodge of cases from all over the country, without regard for the significant variation between Circuits in the area of appeal bonds. For example, the First Circuit is the only circuit to permit a district court to include appellate attorney's fees in an appeal bond. Most egregiously, Class Counsel incorrectly cite a leading case for the *precise opposite* of its holding. *Azizian v. Federated Dep't Stores, Inc.*, 499 F.3d 950, 959-60 (9th Cir. 2007), did not *uphold* a bond including security for appellate attorney's fees. Instead, it did the precise opposite, *reversing* an appellate bond that included attorney's fees because the Clayton Act does not contain a symmetrical fee-shifting provision. "We therefore hold that the district court erred when it included anticipated appellate attorney's fees in its calculation of the amount of the Rule 7 Bond." *Id*. at 959. "Thus, a district court can order only a losing

defendant – the party that has violated antitrust laws – to pay attorney's fees under Section 4." *Id*. at 960.

On the issue of whether a district court may bond appellate attorney's fees based upon the district court's assessment of whether the appeal is frivolous, the Ninth Circuit stated:

> Award of appellate attorney's fees for frivolousness under Rule 38 is highly exceptional, making it difficult to gauge prospectively, and without the benefit of a fully developed appellate record, whether such an award is likely.... [T]he question of whether, or how, to deter frivolous appeals is best left to the court of appeals, which may dispose of the appeal at the outset through a screening process, grant an appellee's motion to dismiss, of impose sanctions including attorney's fees under Rule 38....Allowing district courts to impose high Rule 7 bonds where the appeals *might* be found to be frivolous risks "impermissibly encumbering" appellants' right to appeal and "effectively preempting this court's prerogative" to make its own frivolousness determination.

Id. at 960-961.

The Sixth Circuit follows the same rule as the Ninth Circuit. In *In re Cardizem CD Antitrust Litig.*, 391 F.3d 812 (6th Cir. 2004), the appeal bond was based on the unique "loser pays" language found in the Tennessee statute at issue there. *Id*. at 817-18. In contrast to *Cardizem*, here, none of the California statutes under which Mr. Cochran's claims arise contains a symmetrical loser pays provision like the one described in *Cardizem*, nor has the Class attempted to identify any statute that would shift attorney's fees, delay costs or administrative costs to a losing plaintiff. Therefore, consistent with Sixth Circuit law, there is no basis for an appeal bond that includes anything other than the briefing costs enumerated in FRAP 39.

Similarly, no circuit permits the inclusion of delay costs in a FRAP 7 bond, as opposed to a FRAP 8 bond. *See e.g., Vaughn v. American Honda Motor Co. , Inc.*, 507

F.3d 295 (5th Cir. 2007); *Tennille v. Western Union Fin. Svcs. Inc.*, 774 F.3d 1249 (10th Cir. 2014).

> What Plaintiffs really appear to be seeking is an appeal bond that includes damages due to the delay Objectors' merits appeals might cause. But that is not the purpose of a *Rule 7* bond.

Id. at 1256. In opposition to these decisions by Courts of Appeals, the Class cites only to two incorrect decisions by lower courts, one of which was later stayed by the Ninth Circuit. *See Exhibit A.*

As with the request for delay damages, the Class can cite to no appellate case law permitting the bonding of administrative costs, instead citing to the stayed appeal bond order entered in *Wal-Mart*. The *Wal-Mart* bond order was completely in violation of *Azizian*, which is why it was stayed by the Ninth Circuit.

II. Appellant Cochran's Appeal Presents Two Discrete Non-Frivolous Issues As to Attorney's Fees Only.

In contrast to some of the other appellants, Appellant Cochran's appeal is not dependent upon proving fraud or perjury on the part of Class Counsel. Appellant Cochran's first issue is one over which Courts of Appeal have split in recent years, namely, whether the award of attorney's fees based on amounts reimbursed as expenses is a violation of the common fund doctrine. *See e.g., Redman v. RadioShack Corp.*, 768 F.3d 622, 630 (7th Cir. 2014)(administrative costs not properly included in the value of settlement to the class, and therefore not properly considered when calculating attorneys' fees); *Pearson v. NBTY, Inc.*, 772 F.3d 778, 781 (7th Cir. 2014)(administrative costs, fees and expenses may not be included in calculation of benefit to class). If the reimbursement of expenses is a benefit to class counsel, rather than to the class, then class members may not be made to pay attorney's fees for the recovery of those expenses

under the common fund doctrine. The Sixth Circuit has yet to address this issue, over which other circuits are divided. This cannot be characterized as a frivolous appellate issue. Second, Appellant Cochran also seeks to challenge the percentage amount of the rest of the fee award.[1]

III. The Class' Bond Motion Threatens to Delay, Rather than Expedite, the Class' Receipt of their Settlement Benefits.

The Class has moved in the Court of Appeals to expedite briefing in these appeals. Appellant Cochran does not necessarily oppose the concept of expedited briefing, although he does not agree with the proposed dates in that motion or the waiver of oral argument. However, the Motion for Order Requiring Posting of Appeal Bond threatens to undermine the benefits of expedited briefing.

If this Court were to enter the unlawful and impermissible appeal bond requested by Class Counsel, the result would be the filing of additional appeals from the bond order, followed by a request for stay of the bond, which would almost certainly be granted. *See Exhibit B.*[2] Such an appeal could not possibly be characterized as frivolous or suitable for expedited treatment, given the conflicting law among circuits and the fact that it would present a question of first impression for the Sixth Circuit. Because the

[1] Nothing about Cochran's appeal seeks to challenge the settlement in any way. The only consequence of Cochran's successful appeal would be to augment the class' recovery and perhaps cause a second distribution. Therefore, Appellant Cochran has no objection to the immediate distribution of the settlement to the claimants.

[2] Courts of Appeal generally stay appeal bond orders when they include elements beyond those that the Circuit has expressly permitted in a prior appeal. Because the only costs approved by the Sixth Circuit in *Cardizem* (the only 6th Circuit case to date construing FRAP 7) were those expressly authorized by a statute, *Cardizem* is not authority for the bond requested by Class Counsel here, and therefore any appeal bond would be stayed for the Sixth Circuit to consider whether there is any authority to bond delay costs, administrative costs and fees.

bond appeal may delay the merits appeal, the request for an illegal appeal bond threatens to undermine any benefits from an expedited merits appeal. The best way to protect class members is to permit the appeals to proceed on an expedited briefing schedule, and then to allow the Court of Appeals to consider sanctions on any appellants whose appeals present frivolous issues.

Respectfully submitted,
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By his attorney,

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CERTIFICATE OF SERVICE

The undersigned certifies that on March 4, 2016 he filed a true copy of the foregoing document through the ECF system for the United States District Court for the Northern District of Ohio, and that as a result a copy of this document was electronically delivered to each counsel of record.

/s/ Edward W. Cochran