IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ELOUISE PEPION COBELL, et al.,	)	
	)	
Plaintiffs,	)	
	)	Civil Action
v.	)	No. I:96 CV 01285 (TFH)
	)	
KEN SALAZAR, et al.,	)	
	)	
Defendants.	)	
	)	
	)	
	)	

AFFIDAVIT OF DENNIS M. GINGOLD

1. My name is Dennis M. Gingold. I am a member of the Bar of this Court and I am lead counsel for Plaintiffs in this action.
2. I make this affidavit in response to this Court's Memorandum Opinion, dated October 5, 2011 [Dkt. No. 3881].
3. As lead counsel, I am responsible for Plaintiffs' filings in this Court, including Plaintiffs' three motions, which requested this Court to order appellants to post appeal bonds, and the reply related thereto ("Rule 7 Requests"). Dkt. Nos. 3856 ("First Motion"), 3859 ("Second Motion"), 3865 ("Reply"), and 3869 ("Third Motion").
4. In its October 5, 2011 Memorandum Opinion, the Court expressed concern and requested information regarding certain representations made in Plaintiffs' Rule 7 Requests. The Court raises four primary categories of concern: (a) Plaintiffs claiming without support that this Circuit or Court has established certain "practices;" (b) Plaintiffs' stating that *In re Am. President Lines, Inc.*, 779 F.2d 714, 716 (D.C. Cir. 1985) ("*APL*"), has been

recognized by this Circuit and Court to not be binding precedent; (c) Plaintiffs contending without support that this Circuit "construes" Fed. R. App. P. 7 in a certain way; and, (d) Plaintiffs citing cases for propositions the cases did not support. Memorandum Opinion at 10-16. These categories of concern will be addressed in the order set forth by the Court.

5. To provide true and correct responses, I have reviewed drafts of the Motions and the Reply, authorities cited therein, and supporting authority that had been considered, but which, for various reasons, is not cited or referenced in the briefs. I also have discussed relevant issues with litigation team members, including those who reviewed and modified drafts and those who reviewed the October 5, 2011 Memorandum Opinion as well as drafts of this affidavit.

6. Based upon my review of Plaintiffs' papers, discussions with litigation team members, and this Court's October 5, 2011 Memorandum Opinion, I agree that criticisms expressed by this Court are justified because authority cited in support of certain contentions should not have been cited for the principles asserted. Further, I believe that this Court fairly characterized the motions as aggressive, indeed, where noted, overly aggressive and oversimplified. Class Counsel failed to put all our arguments in proper context. It is also true that errors occurred because briefs were revised, edited, and redrafted repeatedly within a relatively short period of time by a number of attorneys. Through the redrafting and revision process, sentences and paragraphs were modified and moved and certain terms were substituted or deleted without reconfirming that each cited authority remained relevant to, and supportive of, the revised or edited text.

7. I respectfully emphasize that the following discussion is in no way whatsoever intended to reargue the issues or to question the Court's conclusions. My sole purpose is to set forth how the lapses pointed out by the Court arose, and to assure the Court that while they may have reflected mistakes or regrettable oversight, they entailed no effort to mislead anyone.
8. This is the first time that we have so erred in more than fifteen years of intense litigation. With the utmost respect, it will not happen again.

Plaintiffs' claim of "practice"

9. I have reviewed this Court's comment with respect to our use of the word "practice" in arguing that this Court is in accord with other jurisdictions wherein substantial bonds are commonly imposed. *See e.g.*, Opinion at 11. This Court is correct that there is only one other case in this district where a substantial bond (*i.e*., a Rule 7 bond in excess of Rule 39 costs) was ordered. *In re Dep't of Veterans Affairs (VA) Data Theft Litig.*, No. 06-mc-00506, Dkt. No. 83. What we should have said in our Motions and Reply and, in my view, what was more in keeping with the argument we were attempting to craft would have been: Since its publication in 1985, *APL* has not been cited to limit appeal bonds in a decision from this Circuit or Court.
10. Instead of arguing that *APL* has not been cited and relied on by this Court or the Circuit and instead of arguing for what the practice should be, we presented the 2009 decision in *In re Dep't of Veterans Affairs (VA) Data Theft Litig.* as if it was the practice in this Court. We were wrong to characterize something as a "practice" where there is only a 2009 unpublished decision that supports the characterization. I believe it was due to overzealous advocacy for which I apologize to the Court.

11. Class Counsel also incorrectly relied upon *Hayhurst v. Calabrese*, 1992 WL 118296 (D.D.C.) for the erroneous proposition that "the practice of this Court is in accord with sister jurisdictions that impose substantial appeal bonds on non-party objectors who appeal final approval of class action settlements." First Motion at 3-4. This was an oversight.

12. Class Counsel correctly rely on *Hayhurst* for the proposition that the imposition of a bond is a matter of discretion for the district court. *See, e.g.*, First Motion at 3. However, at some point in the drafting process, this was mistakenly grafted onto the argument that the practice in this Court is to impose substantial appeal bonds. *Id*. at 3-4, 11. Put another way, this error occurred as a result of multiple draftsmen and editors and a failure to notice the problematic modification at the end of the drafting process.

Plaintiffs' treatment of *APL* and discussion of Rule 7

13. Before filing the First Motion, our litigation team spent a great deal of time assessing the nature and scope of this Court's discretion under Rule 7. Ultimately, we viewed Rule 7 as the linchpin of our argument regarding the nature and scope of "costs" that this Court – a United States District Court – may include in its calculation of an adequate appeal bond.

14. Class Counsel's view was that no rule of this Court or the D.C. Circuit limits this Court's discretion to determine appropriate appellate costs under Rule 7. We used the term "rule" in our Motions and Reply in reference to Federal Rules of Civil Procedure, Federal Rules of Appellate Procedure, Rules of the United States District Court for the District of Columbia, and Rules of the United States Court of Appeals for the D.C. Circuit – as

opposed to a "rule of decision" that is created by interpretation. To the extent that we did not make that point sufficiently clear, we erred and I apologize for this imprecision.

15. It was Class Counsel's understanding that when a rule is limited, qualified, and defined by, or is subject to, another rule or statute, such limitation or qualification, if not expressly stated therein, is incorporated by reference in either the qualified or qualifying rule. *See, e.g.,* Rule 8(c) ("Rule 38 of the Federal Rules of Criminal Procedure governs a stay in a criminal case.").

16. Respectfully, it was also Class Counsel's view at the time we prepared Plaintiffs' Motions and Reply that if Rule 39 were to apply to Rule 7, or if the draftsmen of Rule 7 wanted to limit this Court's discretion to the calculation of nominal taxable costs under Rule 39, they would have done so in one or both rules, expressly or through incorporation by reference. But, they did not do so.

17. We wanted to convey four principal points in Plaintiffs' Motions and Reply that we believed supported our argument that attorneys' fees, expenses, and other costs may be included in the calculation of an appellate bond: (a) that Rule 7 is the governing rule on appeal bonds; (b) that Rule 7, by its terms, does not limit this Court's discretion; (c) that no other rule, by its terms, limits the discretion of this Court under Rule 7; and, (d) there is no authoritative and conclusive definition of "costs" in any rule that binds this Court in deciding an adequate appeal bond. For example, in *Hayhurst v. Calabrese*, 1992 WL 118296 (D.D.C. 1992), this Court, in denying a Rule 7 motion for an appeal bond seven years after the Circuit decided *APL*, referenced no rule of limitation or other authority in holding that "[t]he imposition of a bond is a matter of discretion for the district court." *Id.* at *1.

18. Our view that the discretion conferred in this Court pursuant to Rule 7 and the absence of a uniform definition of appellate "costs" or "costs on appeal" that limited this Court's discretion were the principal reasons for our argument that this Court may calculate an appeal bond based on the estimated cost of the defense of the settlement on appeal.
19. After analyzing the plain language of Rule 7 and performing Westlaw database searches, *APL* was examined carefully and discussed by and among Class Counsel in the preparation of the First Motion. A discussion of *APL* was included in two early drafts in the text, and as a footnote. However, the more time we spent reviewing, analyzing and discussing it, the more strongly we thought – albeit incorrectly as it turns out – that *APL* should not be cited in Plaintiffs' Motions.
20. The Court criticizes Class Counsel for asserting that the Circuit and this Court "have recognized" that *APL* is not binding precedent. Memorandum Opinion at 12, n. 5. Once again, our statement was incorrect and, plainly, we failed to properly explain our argument that *APL* is of questionable authoritative value in this Court and in this Circuit.
21. At the time, we thought it significant that neither the Circuit nor this Court had relied on *APL* in any published opinion to limit an appeal bond. Class Counsel repeatedly searched Westlaw databases, but found no decision that cited the case as authority or precedent. Given that the *APL* was decided 26 years ago, we construed the absence of such reliance on the case and its holdings as support for our assessment of its authoritative value. Albeit, I acknowledge that the failure of this Court or the Circuit to cite *APL* as authority does not excuse our failure to cite it and accord it due consideration in our motions.
22. Moreover, we also viewed the Circuit's decision in *Montgomery & Assocs. v. CFTC*, 816

F.2d 783 (D.C. Cir. 1987), as significant. *Montgomery* is a cost case that was decided two years after *APL*, which denied as untimely appellee's request for costs under Rule 39, including attorneys' fees. We construed *Montgomery* as rejecting Rule 39 as a standard for determining appellate costs because the rule does not enumerate appellate "costs." *Id.* at 784. Class Counsel understood the fee-shifting statute, 7 U.S.C 18(e), that underlies *Montgomery* to mean that attorneys' fees may be "taxed and collected" as part of appellee's costs, provided that appellee prevails on appeal. We interpreted *Montgomery* as support for our conclusion that Rule 39 does not limit this Court's discretion and that appellate costs or "costs on appeal" may include attorneys' fees where there is an underlying fee-shifting statute or other good and sound authority to do so. Finally, in contrast to *APL*, *Montgomery* is cited as authority on cost issues, *see, e.g.*, *Singer v. Shannon & Luchs Co.*, 868 F.2d 1306 (D.C. Cir. 1989), which influenced our thinking that *APL*'s authoritative value is questionable.

23. At the time, we viewed *APL* as a very different case than *Cobell*. Our view was that the circumstances of this litigation are materially distinct from those present in *APL*, thereby rendering *APL* distinguishable even if construed as authoritative. For example, in *APL*, since there was no stay of the judgment there, the Circuit did not need to be concerned about the costs associated with a delay in the enforcement of the judgment, where, as here, the judgment is automatically stayed, necessarily raising concerns about the cost of delay in enforcing the judgment. Also, *APL* did not consider, let alone involve, an underlying fee-shifting statute, rule, or other appropriate authority that may justify the calculation of appellate costs beyond nominal costs that are construed as taxable under Rule 39. We viewed the factual and legal issues present in this litigation as presenting

important variables that were not addressed by *APL*, resulting in our argument that the determinations made by the *APL* panel do not extend to this litigation.

24. In hindsight, regardless of Class Counsel's understanding of the law, regardless of why Class Counsel did not believe that it applied squarely to this case, regardless of the absence of reliance on *APL* as authority by this Court and the Circuit, and regardless of Class Counsel's view of which arguments were better or more defensible, we should have discussed *APL* in Plaintiffs' Motions, not simply in the Reply, because *APL* is a decision of the Circuit that addresses appeal bonds.

Plaintiffs' statements about what this Circuit had "construed"

25. As indicated by the Court, Class Counsel incorrectly stated that this Circuit had "construed" certain legal principles that it had not, in fact, so construed. Errors were made during the editing process and resulted in the assertion of principles unsupported by case law. For example, the Court points out that on page 9 of our Motion, it asserts that "[t]his Circuit as well as other courts have construed Rule 7 costs to include attorneys' fees…" and that no supporting citation follows that statement. Memorandum Opinion at 13. Also, on page 13 of our Reply, we assert that "[t]his circuit, as well as other courts, has construed Rule 7 costs to include attorneys' fees for the preparation of opposition briefs, as well as the increased cost of the claims administrator and post judgment interest on the settlement amount." *Id.* As the Court noted in its Order, these statements are not accurate.

26. Both of these errors were unintentional and the result of a review and editing process during which the same error was committed in the Reply brief as was committed in the Motion – two originally correct and accurate sentences were combined and the resulting

merged sentence was not supported by case law. Again, this was unintentional.

Plaintiffs' citations

27. The Court also criticizes Class Counsel for citing cases for propositions, which they do not support. Memorandum Opinion at 13-14. We originally intended to make three points with regard to this issue identified by the Court: (a) appeal bonds are not uncommon in litigation; (b) appeal bonds are used in the class action context; and, (c) the facts of this case warrant the imposition of an adequate appeal bond.
28. As described above, during the editing process portions of the draft brief were moved, removed, and revised and in some cases inadvertently were included to support principles that were no longer supported by all of the corresponding case citations.
29. For example, *Adsani v. Miller*, 139 F.3d 67 (2nd. Cir. 1998), supported the initial statement in an earlier draft of our Motion that appeal bonds are not uncommon in litigation. During the editing process, upon combining the statement concerning the general availability of appeal bonds with the secondary principle that such bonds are not extraordinary in the class action context, the resulting sentence included case citations not supportive of the resulting combined statement. *Adsani* did not stand for the principle asserted. Upon combining sentences during the editing process, the *Adsani* case no longer supported the resulting merged statement.
30. As the Court noted, *O'Keefe v. Mercedes–Benz United States*, LLC, 214 F.R.D. 266, 295 n. 26 (E.D.Pa. 2003), stands for a different proposition than asserted on page 9 of the Motion. *O'Keefe* contains the statement that some federal courts are wary of appeals brought by professional objectors. The *O'Keefe* case should not have been included in the string citation as it stands for the third principle Class Counsel intended to make more

clearly – that the facts of this case warrant the imposition of an appeal bond.

31. Finally, while the *In re Countrywide Financial Corp. Customer Data Sec. Breach Litig.*, Slip Copy, 2010 WL 5147222, *3 (W.D. Ky. 2010), case did not involve a court imposing an appeal bond, we intended to point out that the consideration of appeal bonds in the class action context is not extraordinary, *i.e.* the second principle. The Court correctly points out that it is inappropriate to cite *In re Countrywide* for the point that appeal bonds are commonly granted in class action cases because the appeal bond was denied in that case.

32. I have also reviewed this Court's comments with respect to our reliance upon *International Floor Crafts*, 420 Fed. Appx. 6, 2011 WL 1499857, at *17 (1st Cir. 2011); specifically, the statement that "*International Floor Crafts* does not stand for the oversimplified proposition that attorneys' fees may be a part of a Fed. R. App. P. 7 appeal bond if the underlying statute contains a fee shifting provision . . . .[it] also must define attorneys' fees to be part of 'costs.'" Memorandum Opinion at 14. I agree and the full citation should have been provided.

33. Class Counsel took the position that attorneys' fees may be included in an appeal bond. We, in part, relied on *In re Cardizem CD Antitrust Litigation*, 391 F.3d 812 (6th Cir. 2004), in making the argument that attorneys' fees may be included in a Rule 7 bond where there is an underlying fee-shifting statute that provides for the recovery of fees. Specifically, *Cardizem* rejected the contention that since the underlying "…statute distinguishes between 'costs' and 'attorneys fees,' attorney's fees cannot be included as 'costs' if the statute is to define the term under Fed. R.App. P. 7." *Cardizem*, 391 F.3d 812, 818 n.4. We interpreted *Cardizem*'s pronouncement on the Supreme Court case

Marek v. Chesny, 473 U.S. 1, (1985), as supportive of our argument for including attorneys' fees in a Rule 7 bond in accordance with our understanding of this Court's discretion under Rule 7 and EAJA. Class Counsel viewed as significant the statement in *Cardizem* that "*Marek* does not require that the underlying statute provide a definition for 'costs.' Rather, *Marek* requires a court to determine which sums are 'properly awardable' under the underlying statute, and to include those sums as 'costs' under the procedural rule." *Cardizem*, at 818 n.4 (internal citations omitted).

34. Our view of the potential inclusion of appellate attorneys' fees within a Rule 7 appeal bond was informed by *Cardizem* and *Marek*, which we interpreted as providing a basis for the Court to decide what sums are "properly awardable" pursuant to the underlying statute and to include those sums as "costs" under the appropriate procedural rule.

35. In turn, Class Counsel cited to the Equal Access to Justice Act, which provides the prevailing party with "Costs and Fees." 28 U.S.C. § 2412. Accordingly, while we were remiss in not providing a complete quotation to *International Floor Crafts*, Class Counsel took the position that the deleted phrase was superfluous based on our interpretation of the holdings in *Cardizem* and *Marek* and the fact that EAJA is an underlying fee-shifting statute that provides for recovery by a prevailing party of its fees, costs, and other expenses, which may only be prohibited if done expressly by statute. Regardless of Class Counsel's rationale for omitting the language, it should not have been omitted.

36. Our argument regarding the inclusion of post-judgment interest and the costs of administrative delay is based on the fundamental contention that the district court has the unique authority and discretion under Rule 7 to include those items in an appeal bond. In support of the argument that an appeal bond should include administrative costs due to

delay and post-judgment interest, we provided supporting citations. In addition, Class Counsel expressly declined to seek inclusion of Rule 38 damages in the requested appeal bond. Pls.' Reply Br. 3. We stated so in light of the Circuit precedent reserving consideration of Rule 38 frivolousness for the appellate court rather than the district court.

37. However, the Court's Opinion correctly noted that in three cases cited in support of our statement, *In re Compact Disc Minimum Advertised Price Antitrust Litig.*, No. MDL 1361, 2003 WL 22417252, *1 (D. Me. 2003), *In re Pharm. Indus. Average Wholesale Price Litig.*, 520 F. Supp.2d 274, 279 (D. Mass. 2007), and *In re Wal-Mart Wage & Hour Emp't Practices Litig.*, No. MDL 1735, 2010 WL 786513, *2 (D. Nev. 2010), the opinions listed therein determined that the appeals were frivolous and identified that conclusion as a basis for including administrative delay costs in a Rule 7 appeal bond.

38. In making this argument for including those amounts in an appeal bond, Class Counsel attempted to build upon their initial argument – that Rule 7 provides the Court with the discretion to award "costs on appeal" and that *APL* is either distinguishable or not authoritative – as a foundation for including administrative costs due to delay and post-judgment interest. We intended to use these cases to demonstrate that adding these costs to a Rule 7 appeal bond is not without precedent.

39. Class Counsel failed to adequately and clearly argue that while Rule 38 was a basis for inclusion of those items in an appeal bond in the three above described cases, such a foundation would be unnecessary under our theory of the case, *i.e.* that Rule 7 provides the necessary discretion for the Court to include these costs in an appeal bond regardless and independent of any potential basis to include these costs pursuant to Rule 38. We

regret the lack of clarity in making this argument and assure the Court it will not happen again.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on November 11, 2011

/s/ Dennis M. Gingold
Dennis M. Gingold