UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO.: 16-cv-21301-GAYLES

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

v.

ARIEL QUIROS, *et al.*

_____/

RECEIVER'S MOTION TO REQUIRE POSTING OF APPEAL BOND BY APPELLANT ARIEL QUIROS; INCORPORATED MEMORANDUM OF LAW

Michael I. Goldberg, as the court-appointed receiver (the "Receiver"), moves for an order requiring Ariel Quiros ("Mr. Quiros") to post an appeal bond in connection with his appeal of this Court's Final Order (I) Approving Settlement Among Receiver, Putative Class Plaintiffs, and MSK; and (II) Barring, Restraining, and Enjoining Claims against MSK [D.E. 690] (the "Final Order").

I. INTRODUCTION

By appealing the Court's Final Order overruling his objection to the settlement, Mr. Quiros—the mastermind of this fraud—continues his baseless attempts to interfere with a $32.5 million settlement that will put literally millions of dollars, and $20 million in very short order, in his victims' pockets. To be clear, his objection was frivolous. [D.E. 672]. Binding 11th Circuit precedent confirms that Mr. Quiros has no interest in MSK's insurance policy merely because he filed an arbitration against the firm, and the Receiver certainly had no obligation to invite Mr. Quiros to participate in settlement discussions that would have depleted funds for the defrauded victims. The Court thus properly rejected Mr. Quiros's arguments and overruled his objection (the "Objection") as part of the settlement's final approval. [D.E. 690 at ¶ 1].

For the same reasons, Mr. Quiros's appeal is baseless. With that appeal, Mr. Quiros seeks to delay the settlement as leverage to secure funds for himself on claims that are specious at best and that are, in any event, ***specifically excluded from the bar order***. Accordingly, the Receiver requests that the Court enter an order requiring Mr. Quiros to post an appeal bond under Rules 7 and 8 of the Federal Rules of Appellate Procedure. As the following facts and authorities demonstrate, the Court should require an appeal bond of at least $250,000 to account for appellate costs and fees (in the approximate amount of $203,200) and interest to preserve the *status quo* and account for lost use of the settlement funds during the duration of the appeal (in the approximate amount of $46,800).

II. BACKGROUND

On June 4, 2021, the Receiver filed his Motion for (i) Approval of Settlement among Receiver, Putative Class Plaintiffs, and Mitchell Silberberg & Knupp, LLP (including, but not limited to, as successor-in-interest to Richardson & Patel LLP), David B. Gordon, and David B. Gordon, a Professional Corporation; (ii) Approval of Form, Content, and Manner of Notice of Settlement and Bar Order; (iii) Entry of Bar Order; and (iv) Scheduling a Hearing; with Incorporated Memorandum of Law [ECF No. 667]. The motion sought approval of a $32.5 million settlement among the Receiver, Mitchell Silberberg & Knupp, LLP (including, but not limited to, as successor-in-interest to Richardson & Patel LLP), David B. Gordon, and David B. Gordon, a Professional Corporation (collectively, "MSK"), and the putative class, and settled the litigation in the United States District Court for the District of Vermont captioned *Qureshi, et al. v. People's United Bank, N.A.*, *Mitchell Silberberg & Knupp, LLP, et al.*, Case No. 2:18-cv-163 (the "Putative Class Action") and the Receiver's action captioned *Michael I. Goldberg, not individually, but*

solely in his capacity as Receiver v. Mitchell Silberberg & Knupp, LLP, et al., Case No. 19-cv-21862-MGC (S.D. Fla.) (the "Receiver Action").

Not a single investor objected to the Settlement. The only two objectors were former principals of the Receivership Entities: William Stenger, who almost immediately stipulated to the withdrawal of his objection [D.E. 686], and Mr. Quiros [D.E. 672], the admitted mastermind of the fraud who is awaiting criminal sentencing.

The Court carefully reviewed the filings related to the Settlement, including the Receiver's motion, Mr. Quiros's Objection, the Receiver's reply, the SEC's Reply, the Putative Class Plaintiffs' joinder in the Receiver's and the SEC's replies, MSK's Reply, and Mr. Quiros's unauthorized sur-reply. On July 29, 2021, the Court held a Final Approval hearing, at which all parties and Mr. Quiros were given the opportunity to appear and address the Court. Mr. Quiros appeared through his counsel and argued for over 90 minutes.

After full consideration of the filings and the presentations at the Final Approval Hearing, the Court entered its Final Order approving the settlement. The Court concluded that the Settlement was "fair, adequate and reasonable, that the interests of all affected persons were fairly and reasonably considered and addressed, and that the Settlement Amount provides a recovery to the Receiver for the benefit of the Receivership Entities and the Investors that is well within the range of reasonableness." Final Order at 8. The Court further found that the Bar Order was a necessary and appropriate order granting ancillary relief in the SEC Action and overruled the Objection. *Id.* at 12-13.

The Court's Approval Order should have put an end to this dispute, allowing the Receiver to expeditiously distribute the benefits of the Settlement to the victims of Mr. Quiros's scheme. The delivery of those benefits, however, has now been delayed by Mr. Quiros's appeal. If Mr.

Quiros wishes to pursue his Objection beyond this point, in the face of this Court's ruling, and in light of his dubious and self-serving motivation (which has been flatly rejected by binding Eleventh Circuit case law), he should be required to bear the costs that his actions will impose on *his* victims.

Good cause exists for the Court to require Mr. Quiros to post an appeal bond, given the high likelihood that this Court's Final Order will be affirmed. An appeal bond will provide the protections typically afforded appellees during the pendency of an appeal — particularly an appeal of questionable merit — and will also discourage Mr. Quiros from further delaying his victims' recovery delay just so he so can try to further line his own pockets. That is, if Mr. Quiros truly believes that his Objection is well-founded, he will post the required bond and proceed. On the other hand, if the appeal is exactly what it appears to be, then requiring a bond will force Mr. Quiros to engage in the cost-benefit analysis he should have engaged in when lodging his Objection and acknowledge that his efforts here will do nothing more than delay his victims from receiving their just compensation and cause the Receivership Estate to needlessly incur additional attorneys' fees.

The amount of the bond should include security for (i) expected appellate fees and costs, and (ii) interest to preserve the status quo and account for the delay in distribution of settlement benefits. Specifically, the Receiver requests that the Court order Mr. Quiros to post an appeal bond totaling $250,000, a nominal amount given that the appeal will tie up receipt of $32.5 million. As set forth below, the amount of this bond is appropriate and reasonable when compared to bonds imposed in similar actions, particularly in light of the meritless nature of Mr. Quiros's appeal.

III. ARGUMENT

A. The Court Should Require Mr. Quiros to Post an Appeal Bond.

Rule 7 of the Federal Rules of Appellate Procedure provides that, "[i]n a civil case, 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." The Eleventh Circuit has held that, under Rule 7, this Court has discretion to require appellants to post a bond. *See Pedraza v. United Guaranty Corp.*, 313 F.3d 1323, 1333 (11th Cir. 2002). In particular, a Rule 7 bond should be imposed where necessary to protect "from the burdens that stem from being forced to defend frivolous lawsuits." *Id.* at 1333. Additionally, "an appellant is less likely to bring a frivolous appeal if he is required to post a sizable bond . . . prior to filing the appeal." *Id.*

Additionally, Rule 8 of the Federal Rules of Appellate Procedure provides for *supersedeas* bonds to cover sums related to the merits of the underlying judgment. *In re Checking Account Overdraft Litig.*, No. 1:08-CV-23323-JLK, 2012 WL 456691, at *2 (S.D. Fla. Feb. 14, 2012). A bond under Rule 8 is appropriate here, even though Mr. Quiros has not sought a stay of the underlying Final Order, because the mere filing of the appeal prevents distribution of the Settlement proceeds as ordered by this Court's Final Order. Thus, the appeal operates as a stay of judgment, which triggers Rule 8 in addition to Rule 7. *See*, *e.g.*, *id.* at *2 ("[B]ecause the filing of this appeal prevents distribution of the Settlement proceeds as ordered by this Court's Final Judgment, it is an actual stay of Judgment and bond [under Rule 8] is appropriate."); *Aboltin v. Jeunesse LLC*, No. 6:17-cv-1624, 2019 WL 1092789, at *3 (M.D. Fla. Feb. 15, 2019) (because the appeal prevents distribution of settlement proceeds, "the appeal operates as a 'stay of judgment,' which triggers Rule 8, as well") (*report and recommendation mooted by withdrawal of appeal*).

Courts commonly impose appeal bonds in the analogous class action context, involving delayed relief to victims at the hands of a bad-faith objector. *See In re Cardizem CD Antitrust Litig.*, 391 F.3d 812, 816-17 (6th Cir. 2004) (endorsing the trial court's imposition of a $174,429 appeal bond); *In re Checking Overdraft Litig.*, 2012 WL 456691, at *3 (ordering class action objectors to post $616,338 appeal bond, noting that the "highly detrimental impact of an appeal as to the entire class renders it appropriate for the Court to require any and all Objector-Appellants to post an appeal bond"); *Barnes v. FleetBoston Fin. Corp.*, No. 01-cv-10395, 2006 WL 6916834, at *3 (D. Mass. Aug. 22, 2006) (ordering imposition of $645,111 appeal bond).

When determining if an appeal bond is appropriate, courts consider: (1) the appellant's financial ability to post a bond; (2) the merits of the appeal; (3) whether the appellant has shown any bad faith or vexatious conduct; and (4) the risk that the appellant would not pay appellee's costs if the appeal is unsuccessful. *See In re Checking Overdraft Litigation*, 2012 WL 456691, at *2; *Marty v. Anheuser-Busch Companies, LLC*, No. 13-23656-CIV, 2016 WL 397593, at *1 (S.D. Fla. Feb. 2, 2016). Each of those factors supports imposing an appeal bond here.

1. Mr. Quiros is presumed to have the financial ability to post a bond.

"An objector's ability to post a bond is presumed." *Aboltin*, 2019 WL 1092789, at *3 (quoting *In re Enfamil LIPIL Mktg. & Sales Practices Litig. MDL 2222*, 11-MD-02222, 2012 WL 1189763, at *4 (S.D. Fla. Apr. 9, 2012)). Mr. Quiros is represented by able counsel and the appeal bond requirement should be an expected, additional expense. Unless Mr. Quiros submits evidence establishing that he is financially unable to post an appellate bond, the Court should conclude that he is able to post the bond. *Aboltin,* 2019 WL 1092789, at *3 (finding conclusory declaration stating the appellant lacked financial means to post a bond was "insufficient to overcome the presumption that Ms. Xiong has the ability to post a bond"); *Marty*, 2016 WL 397593, at *1

(requiring objector to post appellate bond where objector's assertions that he does not have the financial means to pay for a bond are "conclusory and unhelpful to the Court's assessment of [the objector's] ability to post a bond").

In any event, Mr. Quiros's ability to post the bond is not decisive by itself because, as explained below, his appeal obviously lacks merit and he does not appear to be pursuing the appeal in good faith. *See Tri-Star Pictures, Inc. v. Unger*, 32 F. Supp. 2d 144, 148 (S.D.N.Y. 1999) (concluding that requiring bond did not deny objector due process despite objector's claimed insolvency because objector was acting in bad faith).

2. The appeal lacks merit.

As the Court has already concluded, Mr. Quiros's Objection, and thus his appeal, are without merit. To prevail on appeal, he will have to show that this Court abused its discretion. *See In re HealthSouth Corp. Securities Litigation*, 572 F.3d 854, 858 (11th Cir. 2009)("This Court reviews the imposition of a settlement bar order for an abuse of discretion."); *see also SEC v. DeYoung*, 850 F.3d 1172, 1182 (10th Cir. 2017) ("In challenging the propriety of the bar order, Intervenors have 'the weighty burden of showing an abuse of discretion.'"). The Settlement was approved after lengthy and careful review, and none of Mr. Quiros's arguments have any reasonable expectation of altering the Final Order based on fact or law.

Indeed, Mr. Quiros's counsel claimed on the record that the appeal would be limited to the insurance issue, and the Eleventh Circuit has already ruled that plaintiffs, merely by bringing claims against a defendant, have no legally recognizable interest in the defendants' insurance policy. *Mt. Hawley Ins. Co. v. Sandy Lake Props., Inc.*, 425 F.3d 1308 1311 (11th Cir. 2005). The appeal thus serves only to delay his victims' receipt of the benefits of the Settlement.

3. Mr. Quiros's motivations warrant imposition of the requested appeal Bond.

Mr. Quiros's actions continue to have real costs, as distributions to his victims will be delayed and the administrative costs will increase as a result of the appeal. Mr. Quiros orchestrated the very fraud that underlies the actions being settled. He now seeks to prevent a settlement that will put $20 million in his victims' pockets in very short order so that he can attempt to secure funds for himself on claims that are expressly carved out of the bar order.

Mr. Quiros has hindered investors' recovery every step of the way. His victims are entitled to this recovery without delay. To protect investors and the Receivership Estate from the delay associated with this conduct, the Court should impose an appeal bond on Mr. Quiros.

4. A risk of nonpayment exists.

The Receiver faces a very real risk of never receiving any of the post-appeal costs to which the estate may be entitled absent a bond. Mr. Quiros entered into an $84 million settlement with the SEC; he also provided an affidavit to the SEC demonstrating the limited assets he had available to satisfy the judgment. Further, Mr. Quiros has pled guilty to criminal charges pending against him in the State of Vermont related to his misdeeds and is awaiting sentencing. Of course, as an admitted felon facing jail time, his options for a legitimate income to fund his appeal are limited. Thus, imposition of a significant bond now will protect the Receiver and the investors from having to pursue their appellate costs when the Eleventh Circuit affirms this Court's Final Order.

B. The Amount Requested Is Reasonable

The district court has substantial discretion to determine the amount of a bond. *Pedraza v. United Guar. Corp.*, 313 F.3d 1323, 1327 (11th Cir. 2002. The Eleventh Circuit has determined that "an appellant is less likely to bring a frivolous appeal if he is required to post a sizable bond...prior to filing the appeal." *In re Checking Account Overdraft Litig.*, , 2012 WL 456691, at

*2 (quoting *Pedraza*, 313 F.3d at 1333). "Courts therefore commonly impose Rule 7 appeal bonds in the class action context where necessary to protect class members "from the burdens that stem from being forced to defend frivolous lawsuits.'" *Id.* "Requiring too small a bond, or no bond at all, may encourage frivolous, time-consuming, harassing appeals." *Page v. AH Robins Co.*, 85 F.R.D. 139, 139-40 (E.D. Va. 1980).

The Receiver requests that the Court order Mr. Quiros to post a bond totaling $250,000.00, representing security for (1) expected appellate costs and attorneys' fees that the Receivership Estate will bear during the appeal; and (2) interest to preserve the status quo and account for the delay in distribution of the settlement.

1. The Court should require a cost bond under Rule 7 of the Federal Rules of Appellate Procedure.

The district court has substantial discretion to determine the amount of a bond necessary to ensure the payment of costs on appeal. *Id*. at 1327. The costs that can be included in a Rule 7 bond are not limited to costs defined by Rule 39. *Pedraza*, 313 F.3d at 1323. The Receiver seeks estimated costs that are included under Rule 39 as well as increased costs of settlement administration.

The first category of costs, under Rule 39, is "routinely included in appeal bonds." *In re Checking Account Overdraft Litig*, 2012 WL 456691, at *2; *see also, e.g.*, *O'Keefe v. Mercedes-Benz-USA, LLC*, No. 01-cv-2902, 2003 U.S. Dist. LEXIS 9838 (E.D. Pa. 2003) (including Rule 39(c) costs of copying, printing, and reproducing documents in an appeal bond); Wright, Miller & Cooper, *Federal Practice & Procedure* § 3953 (3d ed. 1999). The Receiver anticipates incurring costs taxable under Rule 39(e), including the estimated cost for printing and copying briefs and other submissions, in the approximate amount of $3,200.

In addition, federal courts in analogous class action matters frequently include a second category of costs: the increased costs of administration due to the appeal. *Allpattah Services, Inc. v. Exxon Corp.*, No. 91–0986–CIV, 2006 WL 113271, at *18 (S.D. Fla. Apr. 7, 2006) (imposing an appeal bond "in an amount sufficient to cover the damages, costs and interest that the entire class will lose as a result of the appeal"); *In re Netflix Privacy Litig.*, No. 11-cv-00379, 2013 WL 6173772, at *4 (N.D. Cal. Nov. 25, 2013) (including "significant administrative costs" totaling $21,344 in class action appeal bond); *Dennings v. Clearwire Corp.*, 928 F. Supp. 2d 1270 (W.D. Wash. 2013) (including $39,150 in "increased expenses in settlement administration and administrative costs" in class action appeal bond); *Miletak v. Allstate Ins. Co.*, No. 06-03778, 2012 WL 3686785, at *2 (N.D. Cal. Aug. 27, 2012) (same for $60,000 bond); *In re Uponor, Inc., F1807 Plumbing Fittings Products Liability Litigation*, No. 11–MD–2247, 2012 WL 3984542, at *5 (D. Minn. Sept. 11, 2012) (same for $170,000 bond).

The Receivership Estate, which is already shouldering these expenses, should not bear the *additional* fees and costs associated with a baseless appeal. But for this appeal, the Receivership Estate would not have to bear the fees associated with preparing an answer brief and appendix, expected motion practice, and preparation for oral arguments. This appeal will also require the Receiver's focus and participation, not just his attorneys. The Receiver submits that approximately $200,000 is a reasonable figure for this cost.

2. The Court should require a supersedeas bond under Rule 8 of the Federal Rules of Appellate Procedure.

While Federal Rule of Appellate Procedure 7 permits courts to impose appeal bonds to cover the costs of appeal, Rule 8 independently provides for supersedeas bonds to cover sums related to the merits of the underlying judgment. *In re Checking Account Overdraft Litig.*, 2012 WL 456691, at *3 (citing *Adsani v. Miller*, 139 F.3d 67, 79 (2d Cir. 1998)).

Federal courts have included interest in the appeal bond in order to preserve the status quo and account for lost use of the settlement funds for the duration of the appeal. *See*, *e.g.*, *In re Checking Account Overdraft Litig.*, 2012 WL 456691, at *3 n.6 (requiring an appeal bond of $616,338, which represented two years' compounded interest on $280 million, which was the amount of the settlement minus attorneys' fees, in addition to the $5,000 cost bond under Rule 7); *Allpattah Services, Inc. v. Exxon Corp.,* No. 91–0986–CIV, 2006 WL 1132371, at *18 (S.D. Fla. Apr. 7, 2006) (imposing an appeal bond of $13,500,000 "to cover the damages, costs and interest that the entire class will lose as a result of the appeal"). As discussed above, Mr. Quiros's appeal stays the payment of the settlement amount by MSK (and, as a result, the distribution to investors). It is thus appropriate to require a bond to account for the time these funds will be unavailable.

Here, the estimated net amount to be distributed to investors is approximately $30.25 million (after deducting attorneys' fees awarded by the Court). But none of the $32.5 million Settlement amount will be paid until the Final Order becomes final. Thus, this appeal delays payment of the entire settlement amount. The Receiver requests that the Court include the amount of $46,800 in the appeal bond, representing the estimated loss of use of the settlement funds during the pendency of the appeal. This amount represents two years' compounded interest at the applicable federal post-judgment interest rate (.072%%) on $32.5 million.

A bond in the total amount of $250,000 is therefore supported by the facts and reasonable when compared to the bonds imposed in similar cases. *See, e.g., In re Cardizem CD Antitrust Litig.*, 391 F.3d at 818 (endorsing $174,429 appeal bond); *In re Checking Overdraft Litigation*, 2012 WL 456691 at *3 (ordering class action objectors to post $616,338 appeal bond); *Barnes v. FleetBoston Fin. Corp.*, 2006 WL 6916834 at *3 (ordering imposition of $645,111 appeal bond).

IV. CONCLUSION

For the foregoing reasons, the Receiver requests that the Court enter an order requiring Mr. Quiros to post an appeal bond. The Receiver requests that the Court require Mr. Quiros to post a bond totaling $250,000: (i) $203,200 in estimated Rule 39 costs, and (ii) $46,800 in interest. Given the expected appellate costs, the delay in the investors receiving distributions, and the frivolous nature of Mr. Quiros's appeal, the requested bond amount is reasonable.

RULE 7.1 CERTIFICATION

Pursuant to Local Rule 7.1(a)(3), on August 18, 2021, counsel for the Receiver conferred with counsel for Mr. Quiros, who needed additional time to make a final decision, but who indicated that this motion could be filed and Mr. Quiros would weigh in subsequently. Counsel for the Receiver conferred with counsel for the SEC, who consents to the relief sought herein.

Dated: August 18, 2021

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served on August 18, 2021, via the Court's notice of electronic filing on all CM/ECF registered users entitled to notice in this case.

By: */s/ Stephanie Reed Traband*
STEPHANIE REED TRABAND