UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

DAVID KARDONICK, JOHN DAVID, and MICHAEL CLEMINS, individually and on behalf of all others similarly situated, Plaintiffs, v. JPMORGAN CHASE & CO. and CHASE BANK USA, N.A. Defendants.	C. A. No. 1-10-cv-23235-WMH

PLAINTIFFS' MOTION TO DIRECT OBJECTORS TO POST APPEAL BOND AND INCORPORATED MEMORANDUM OF LAW IN SUPPORT

I. INTRODUCTION

Lead Plaintiffs David Kardonick, John David, and Michael Clemins, on behalf of the certified Class (collectively, "Plaintiffs"), respectfully submit this motion and memorandum of law in support, pursuant to Rule 7 of the Federal Rules of Appellate Procedure, for an order requiring objectors Thomas Blanchard, September Katje, Carla Victoria Diaz, Laura Fortman, Trevor Grant, Clark Hampe, William McWhorter, Douglas Paluczak, Chris Schulte, Steven Miller, Katie Sibley (a/k/a Mary Hiatt), and Margaret Wheeler (collectively "Objectors") to collectively post an appeal bond in the amount of $35,000 to cover a portion of the anticipated costs and attorneys' fees to be incurred in connection with Objectors' appeals of this Court's Final Judgment and Order of Dismissal ("Final Judgment and Order").

More specifically, on September 16, 2011, this Court entered its Final Judgment and Order finding, among other things, as follows: (1) "the Settlement Agreement is the product of arm's length settlement negotiations," (2) "the Notice was disseminated to members of the

Settlement Class in accordance with the terms set forth in the Settlement Agreement, that the Long-Form Notice was disseminated to all members of the Settlement Class who requested such notice, that the Publication Notice was published in accordance with the terms set forth in the Settlement Agreement, and that the Notice, Long-[Form] Notice, and the Publication Notice, and their dissemination were in compliance with this Court's Preliminary Approval Order," (3) "the Notice, the Long-Form Notice, the Publication Notice, the Claims Forms, and the notice and claims submission procedures set forth in Section VIII of the Settlement Agreement fully satisfy Rule 23 of the Federal Rules of Civil Procedure and the requirements of due process, were the best notice practicable under the circumstances, provided individual notice to all members of the Settlement Class who could be identified through reasonable effort," and (4) "The Court finally approves the Settlement Agreement and the Settlement contemplated thereby, and finds that the terms constitute, in all respects, a fair, reasonable, and adequate settlement as to all Settlement Class Members in accordance with Rule 23 of the Federal Rules of Civil Procedure . . . ." *See* Final Judgment and Order dated Sept. 16, 2011, Doc. 384, ¶¶ 8-10, and 14. In so finding, the Court "considered and overruled all objections to the Settlement." *Id.* at ¶ 12.

Notwithstanding, Objectors filed nine separate appeals objecting to the Court's Final Judgment and Order. It is anticipated that each appeal will raise the exact same arguments considered and rejected by this Court. Taking into consideration that Objectors make the same meritless arguments that others have repeatedly and unsuccessfully made in objecting to other class action settlements, Plaintiffs submit that it is very unlikely that the Eleventh Circuit Court of Appeals will conclude that this Court abused its discretion in overruling Objectors' objections and approving the Settlement. [1] Nevertheless, defending an appeal, even a frivolous one, is both

[1] *See United States v. Alabama*., 271 Fed. Appx. 896, 899 (11th Cir. 2008)("We review for abuse of discretion a district court's approval of a class action settlement agreement. Our limited review

time-consuming and expensive. Indeed, the pendency of this appeal will obligate Plaintiffs and Defendants to spend considerable additional (and, at least with respect to Plaintiffs, uncompensated) time and money. What is more, distribution of the settlement proceeds to Class members will be delayed for months, if not years, by this appeal, resulting in substantial monthly expenses incurred by the Settlement and claims administrator. Consequently, it is appropriate to require Objectors to post an appeal bond to secure at least a portion of the costs of the appeals. Moreover, the reasonableness of Plaintiffs' request is further underscored by the fact that the Objectors include professional objectors and are disbursed throughout the United States, making the risk of non-payment significant. Accordingly, Plaintiffs request this Court enter an order requiring Objectors to collectively post a $35,000 appeal bond.

II. FACTUAL BACKGROUND

Out of an entire mailing of approximately 15 million notices, 24 objections were filed with the district court. These objections included arguments that: (a) notice of the settlement was insufficient; (b) the attorneys' fees were excessive; and (c) the settlement agreement was unfair, inadequate and unreasonable. After carefully considering the issues raised in these objections, this Court specifically found as follows: (1) "the Settlement Agreement is the product of arm's length settlement negotiations," (2) "the Notice was disseminated to members of the Settlement Class in accordance with the terms set forth in the Settlement Agreement, that the Long-Form Notice was disseminated to all members of the Settlement Class who requested such notice, that the Publication Notice was published in accordance with the terms set forth in the Settlement Agreement, and that the Notice, Long-[Form] Notice, and the Publication Notice, and their dissemination were in compliance with this Court's Preliminary Approval Order," (3) "the

---

reflects a strong judicial policy favoring the resolution of disputes through settlement." (internal citations omitted)).

Notice, the Long-Form Notice, the Publication Notice, the Claims Forms, and the notice and claims submission procedures set forth in Section VIII of the Settlement Agreement fully satisfy Rule 23 of the Federal Rules of Civil Procedure and the requirements of due process, were the best notice practicable under the circumstances, provided individual notice to all members of the Settlement Class who could be identified through reasonable effort," and (4) "The Court finally approves the Settlement Agreement and the Settlement contemplated thereby, and finds that the terms constitute, in all respects, a fair, reasonable, and adequate settlement as to all Settlement Class Members in accordance with Rule 23 of the Federal Rules of Civil Procedure . . . ." *See* Final Judgment and Order dated Sept. 16, 2011, Doc. 384, ¶¶ 8-10, and 14. Consequently, this Court "overruled all objections to the Settlement." *Id.* at ¶ 12.

Notwithstanding this Court's well reasoned opinion, Objectors filed nine separate appeals. In order to ensure that the costs of the appeal are recoverable, Plaintiffs simply ask that Objectors file an appeal bond with the Court.

III. LEGAL ANALYSIS

A. The Court Has Broad Discretion to Require an Appeal Bond

Rule 7 of the Federal Rules of Appellate Procedure authorizes district courts, in civil cases, to "require an appellant to file a bond or provide other security in any form and amount necessary to ensure payment of costs on appeal." Fed. R. App. P. 7.[2] As such, a district court has

[2] There is no constitutional right to an appeal. *Heike v. United States*, 217 U.S. 423, 428 (1910) ("The appellate jurisdiction in the Federal system of procedure is purely statutory"); *Adsani v. Miller*, 139 F.3d 67, 76-77 (2nd Cir. 1998) ("The right to appellate review in federal court is conferred by statute alone."). Therefore, the requirement that Objectors post a bond pursuant to Rule 7, which ensures that they compensate the parties and their respective counsel promptly on affirmance for all costs they incur in connection with the appeal, is not an impermissible condition to appeal. *See Adsani*, 139 F.3d at 77 (recognizing that requiring "the posting of security for expenses, including counsel fees, which may be incurred on appeal" does not offend "principles of Equal Protection or Due Process fairness." (internal quotations omitted)).

broad discretion in considering whether to require an appellant to post an appeal bond. *See Young v. New Porcess Stell, LP*, 419 F.3d 1201, 1208 (11th Cir. 2005) (noting "The requirement of an appeal bond under Appellate Rule 7 is left to the discretion of the district court.").

The main purpose of an appeal bond "is to protect an appellee against the risk of nonpayment by an unsuccessful appellant." *In re: Initial Pub. Offering Sec. Litig.*, 728 F. Supp. 2d 289, 292 (S.D.N.Y. 2010); *see also Adsani*, 139 F.3d at 75 (recognizing the purpose of Rule 7 is to protect appellees brought into appeals courts from the risk of nonpayment); *Page v. A.H. Robins Co., Inc.*, 85 F.R.D. 139, 139-40 (E.D.Va.1980) ("[T]he purpose[ ] of an appeal bond is to provide an appellee security for the payment of such costs as may be awarded to him in the event that the appellant is unsuccessful in his appeal."). As such, numerous courts have held that appeal bonds are appropriate to ensure payment of costs of the appeal, especially when the appeal bears indicia of frivolousness or appellants have engaged in a course of vexatious or bad faith conduct during the litigation. *Int'l Floor Crafts, Inc. v. Dziemit, 420 Fed. Appx*. 6, 19 (1st Cir. 2011) (affirming district court's order requiring a $10,000 appeal bond); *Tri-Star Pictures, Inc. v. Unger*, 32 F.Supp. 2d 144, 148 (S.D.N.Y. 1999) (ordering $50,000 bond); *see In re: NASDAQ Mkt-Makers Antitrust Litig.*, 187 F.R.D. 124, 128 (S.D.N.Y. 1999) (primary purpose of appeal bond is to "guarantee that the appellee can recover from the appellant the damages caused by the delay incident to the appeal."). Accordingly, this Court, the court that is most familiar with the fairness and adequacy of the Settlement, has broad discretion to compel Objectors to post an appeal bond to ensure that Appellees' costs are paid promptly in the event the Objectors' appeals fail.[3]

[3] Failure to execute an appeal bond is grounds for dismissal of the appeal. *See* Fed. R. App. P. 3(a)(2) ("An appellant's failure to take any step other than the timely filing of a notice of appeal does not affect the validity of the appeal, but is ground only for the court of appeals to act as it considers appropriate, including dismissing the appeal."); *In re Cardizem CD Antitrust Litig.*,

B. Appeal Bonds are Routine in Class Actions and Serve an Important Function

As noted above, this Court has broad authority to require an appeal bond to secure costs on appeal. In determining whether an appeal bond is warranted, a district court may consider the following factors, which are not exhaustive: (a) the appellant's financial ability to post a bond; (b) the risk that the appellant would not pay appellee's costs if the appeal fails; (c) the merits of the appeal; and (d) whether the appellant has shown any bad faith or vexatious conduct. *See, e.g., In re: Initial Pub. Offering Sec. Litig.*, 728 F. Supp.2d at 292; *Watson v. E.S. Sutton, Inc.*, No. 02 Civ. 2739 (KMW), 2006 U.S. Dist. LEXIS 88415, at *6-7 (S.D.N.Y. Dec. 6, 2006). Consideration of these factors weighs in favor of an appeal bond in class actions where, as here, the appeal is frivolous and has the effect of delaying and/or disrupting the settlement administration. *See In re Cardizem CD Antitrust Litig.*, 391 F.3d 812, 815 (6th Cir. 2004) (including $123,429 in the appeal bond for "incremental administration costs" due to a projected six-month delay); *In re Compact Disc Minimum Advertised Price Antitrust Litig.*, No. MDL 1361, 2003 U.S. Dist. LEXIS 25788, at *5-7 (D. Me. Oct.7, 2003) (concluding that costs of delay or disruption of settlement may be included in a Rule 7 bond and granting $35,000 appeal bond); *In re Pharmaceutical Indus. Average Wholesale Price Litig.*, 520 F. Supp. 2d 274, (D. Mass. 2007) (recognizing that requiring an appeal bond ensures that a class "will not be injured or held up by spoilers" and imposing appeal bond of $61,000 for costs attributable to delay in distribution); *In re NASDAQ*, 187 F.R.D. at 128-29 (imposing appeal bond of $101,500 for costs including damages resulting from the delay and/or disruption of settlement administration); *In re Wal-Mart Wage and Hour Employment Practices Litig.*, 2010 U.S. Dist. LEXIS 21466, at *18-

391 F.3d 812, 815 (6th Cir. 2004) (stating "[a] litigant cannot ignore an order setting an appeal bond without consequences to her appeal" and dismissing the appeal for appellant's failure to timely post an appeal bond).

19 (D. Nev. March 8, 2010) (imposing a $500,000 appeal bond per objector including administrative delay costs and interest costs).

1. Meritless Arguments, the Risk of Non-Payment, and the Status of Some Objectors as "Professional Objectors" Warrant an Appeal Bond in this Case

The requested appeal bond is warranted here because Objectors' challenges to the fairness of the Settlement are without merit, and this Court acted well within its discretion in overruling all objections to the Settlement. *See Tri-Star*, 32 F.Supp.2d at 150 ($50,000 bond appropriate given that appellants "raise meritless issues on appeal"). Objectors make the same meritless arguments that others, especially those making a career of objecting to class action lawsuits, have repeatedly and unsuccessfully made. Accordingly, the Objectors' arguments will almost certainly be rejected by the Eleventh Circuit Court of Appeals.

More specifically, it is anticipated that Objectors will contend that: (1) notice of class settlement was insufficient; (2) the attorneys' fees are excessive; and (3) the Settlement Agreement was unfair, inadequate and unreasonable. With regard to notice, Objectors will most likely claim that the notice given to class members was somehow insufficient. Contrary to such claims however, considerable efforts have been made in this case to ensure class members are afforded the notice to which they are entitled. Specifically, direct mailings, websites, and publication notices have all been initiated as means to guarantee class members are informed of their options. Thus, as this Court correctly found when rejecting similar arguments: "the Notice, the Long-Form Notice, the Publication Notice, the Claims Forms, and the notice and claims submission procedures set forth in Section VIII of the Settlement Agreement fully satisfy Rule 23 of the Federal Rules of Civil Procedure." Final Judgment and Order at ¶¶10-11.

Objectors may also claim that the attorneys' fees awarded in this case are excessive. However, the attorneys' fees awarded in this case represent 18% of the gross settlement fund, which is well below the standard benchmark of 25%. *See Camden I Condominium Ass'n v. Dunkle*, 946 F.2d 768, 775 (11th Cir. 1991) (noting that awards in common fund cases generally range between 20% to 30%, with a benchmark of 25%). The reasonableness of the awarded attorneys' fees is further underscored by the resources and time Plaintiffs' counsel devoted to the prosecution and settlement of this action, which included an extensive factual investigation, interviewing numerous witnesses, reviewing thousands of documents, a damages analysis, propounding discovery requests, negotiating at arm's length a favorable Settlement for the Class, and engaging in confirmatory discovery. Far from excessive, the awarded attorneys' fees are reasonable and properly awarded, especially when considering that this case involves approximately 15 million class members and a formidable Defendant represented by highly competent counsel. Accordingly, it is clear that the appeals from this Court's Final Judgment and Order, as the previous objections were found to be, are meritless.

In addition to the fact that this appeal bears indicia of frivolousness, there is a substantial risk of nonpayment in the event the Objectors' appeals fail. Indeed, none of the appellants have guaranteed payment of the costs that might be assessed against them. As such, because appellants are dispersed around the country, Class Counsel would be required to institute numerous collection actions to recover the costs incurred during appeal. Accordingly, there is a real risk of nonpayment. *See In re Currency Conversion Fee Antitrust Litig.*, MDL No. 1409, slip op. at 3 (S.D.N.Y. Mar. 3, 2010) (ordering appellants to collectively post an appeal bond of $50,000), attached hereto as Exhibit A.

Equally compelling, it is becoming more commonplace for the same attorneys to represent those objecting to a class action settlement agreement. It is so common, in fact, that courts now refer to these attorneys as "professional objectors." *See In re: Initial Pub. Offering Sec. Litig.*,728 F. Supp.2d 289 (S.D.N.Y. 2010); *Barnes v. Fleetboston Fin. Corp.*, 2006 U.S. Dist. LEXIS 71072, at *3-4 (D. Mass. Aug. 22, 2006). These "professionals" can "make a living simply by filing frivolous appeals," especially if the settlement is sizeable. *Id.*, at *3. In those cases, it becomes more "cost-effective… to pay the objectors rather than suffer the delay of waiting for an appeal to be resolved." *Id*. These professional objectors "undermine the administration of justice by disrupting settlement in the hopes of extorting a greater share of the settlement for themselves and their clients." *In re: Initial Pub. Offering Sec. Litig.*, 728 F. Supp. 2d at 295. They "levy what is effectively a tax on class action settlements, a tax that has no benefit to anyone other than to the objectors." *Barnes*, 2006 U.S. Dist. LEXIS 71072, at *3-4. Objectors Tom Blanchard, September Katje, Laura Fortman, William McWhorter,[4] Douglas Paluczak, and Chris Schulte are all represented by counsel who routinely object to class action settlements.[5] The status of these professional objectors weighs in favor of an appeal bond.

Finally, by delaying the distribution of the Settlement Fund to eligible class members, Objectors jeopardize these class members' recovery. In large settlements like this one, a "delay means more than simply loss of use, or the devaluation of the settlement fund," but it also means that "certain class members would lose the benefit to which they are entitled under the settlement, even if the appeal fails." *Id*. Accordingly, the facts of this case warrant an appeal bond.

[4] Notably, one of the nine objectors required to post the $50,000 appeal bond in *In re Currency* (*see* ex. A) was William McWhorter. This further underscores Plaintiffs' position that the appeal bond in the current case is both necessary and reasonable. Indeed, as discussed further in Section III(B)(2), the requested $35,000 appeal bond in the current case, which is $15,000 less than the appeal bond required of Mr. McWhorter and eight other objectors in *In re Currency* (*see* ex. A), is a conservative estimate of costs of the appeal.

[5] Katie Sibley was represented by Tom Cox who is a professional objector, but now claims to be pro se.

2. The Court Should Order Objectors to Post a $35,000 Appeal Bond

"The nature and amount of the bond is a matter left to the sound discretion of the district court." *Sckolnick v. Harlow*, 820 F.2d 13, 15 (1st Cir. 1987). Importantly, however, the appeal bond should be sufficient to cover and secure the costs of the appeal. *See In re: Wal-Mart Wage and Hour Emplyt Practices Litig.*, 2010 U.S. Dist. LEXIS 21466, at *17-18; *Tri-Star*, 32 F.Supp.2d at 150 ($50,000 bond appropriate).

The Supreme Court defines "costs" to "refer to all costs properly awardable under the relevant substantive statute or other authority." *Marek v. Chesny*, 473 U.S. 1, 9 (1985). Costs for purposes of Rule 7 include all usual taxable costs including printing and producing copies of briefs, appendices, records, court reporter transcripts, or other costs to secure rights pending appeal. *See In re: Diet Drugs Prods. Liab. Litig*, 2000 U.S. Dist. LEXIS 16085, at *11 (E.D. Pa. Nov. 6, 2000) (imposing $25,000 bond for costs including printing and reproduction); *In re: NASDAQ*, 187 F.R.D. at 128 n.6 ("printing costs could easily amount to $1,500").

Costs securable by a Rule 7 appeal bond can also include the "damages and single or double costs to the appellee" awardable under Rule 38 where it is determined that an appeal is frivolous. Fed. R. App. P. 38; *see Barnes*, 2006 U.S. Dist. LEXIS 71072, at *2 (costs secured by appeal bond "include…attorneys' fees, as well as double costs under Fed. R. App. P. 38, and other costs delineated in Fed. R. App. P. 39."); *In re Compact Disc Minimum Advertised Price Antitrust Litig.*, 2003 U.S. Dist. LEXIS 2578, at *5 (appeal bond "*can* cover damages assessed under Fed. R. App. P. 38"). This Circuit has held that, "[t]he advisory committee notes to Fed. R. App. P. 38 clearly indicate that attorney's fees… can be awarded to the appellee..." *Cargill v. Comm'r*, 272 Fed. Appx. 756, 761 (11th Cir. 2008). "Costs" can further include "the costs attendant to the delay associated with an appeal," *i.e.*, the ongoing costs of settlement

administration while an appeal is pending. *Barnes*, 2006 U.S. Dist. LEXIS at *2; *see In re Cardizem*, 391 F.3d at 815 (including $123,429 in the appeal bond for "incremental administration costs" due to a projected six-month delay); *In re Compact Disc Minimum Advertised Price Antitrust Litig.*, 2003 U.S. Dist. LEXIS 25788, at *5-7 (concluding that costs of delay or disruption of settlement may be included in a Rule 7 bond and granting $35,000 appeal bond); *In re Pharmaceutical Indus.*, 520 F. Supp. 2d 274 (recognizing that requiring an appeal bond ensures that a class "will not be injured or held up by spoilers" and imposing appeal bond of $61,000 for costs attributable to delay in distribution); *In re NASDAQ*, 187 F.R.D. at 128-29 (S.D.N.Y. 1999) (imposing appeal bond of $101,500 for costs including damages resulting from the delay and/or disruption of settlement administration); *In re Wal-Mart Wage and Hour Emplyt Practices Litig.*, 2010 U.S. Dist. LEXIS 21466, at *18-19 (imposing a $500,000 appeal bond per objector including administrative delay costs and interest costs).

In the present case, Plaintiffs (and Defendants) are certain to incur hundreds, if not thousands, of dollars of costs associated with filing briefs to be prepared in multiple copies by a professional appellate printer. *See* FRAP 39(c) (taxation of reproduction costs). Additionally, Plaintiffs will undoubtedly incur increased administrative expenses from the delay caused by Objectors' appeals, which would include, among other expenses, additional expenses necessary to extend website maintenance and to process and respond to written and verbal inquiries about the status of claims processing during the appeal, as well as prepare and serve all necessary accounting and tax documents. Plaintiffs believe that $35,000 is a conservative estimate of the costs to be incurred during the pendency of the appeals, costs which as demonstrated herein they are entitled to security for in the present circumstances.

IV. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that this Court issue an Order, pursuant to Rule 7 of the Federal Rules of Appellate Procedure, requiring Objectors to collectively post a bond of thirty-five thousand dollars ($35,000.00) within five (5) business days.

Dated: October 26, 2011

Respectfully submitted,

/s/ Brian Ku

Brian Ku (FL Bar # 610461)
Louis Mussman (FL Bar # 597155)
M. Ryan Casey (LA Bar #30192)
KU & MUSSMAN, P.A.
12550 Biscayne Blvd., Suite 406
Miami, Florida 33181
Tel: (305) 891-1322
Fax: (305) 891-4512
louis@kumussman.com

J. Allen Carney
Randall K. Pulliam
Tiffany Wyatt Oldham
CARNEY WILLIAMS BATES PULLIAM & BOWMAN LLC
11311 Arcade Drive, Suite 200
Little Rock, AR 72212
Tel: (501) 312-8500
Fax: (501) 312-8505

Richard M. Golomb
Ruben Honik
Kenneth J. Grunfeld
GOLOMB & HONIK, P.C.
1515 Market Street, Suite 1100
Philadelphia, PA 19102
Tel: (215) 985-9177
kgrunfeld@golombhonik.com

Allan Kanner
Conlee S. Whiteley
KANNER & WHITELEY, L.L.C.
701 Camp Street
New Orleans, Louisiana 70130

Tel: (504) 524 -5777
c.whiteley@kanner-law.com

ATTORNEYS FOR PLAINTIFF

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 26th day of October, 2011, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day on all counsel of record or pro se parties in the manner specified, either via transmission of Notices of Electronic Filing generated by CM/ECF or in some other authorized manner for those counsel or parties who are not authorized to receive electronically Notices of Electronic Filing.

/s/ Brian Ku
Brian Ku