

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

KEVIN T. HEEKIN,)
MARY E. ORMOND,)
ESTATE OF MARY A. MOORE)
On behalf of Themselves and all Others)
Similarly Situated,)

Plaintiffs,)

vs.)

ANTHEM, INC.,)
ANTHEM INSURANCE COMPANIES, INC.,)

Defendants.

Case No. 1:05-cv-01908-TWP-TAB

ORDER ON REQUEST FOR APPEAL BOND

This matter is before the Court on Plaintiffs’ Motion to Require Objectors to Post Appeal Bonds (Dkt. 797). On November 16, 2012, the Court approved the Class Settlement in this case (Dkt. 780), which included a \$90 million common fund settlement to be paid out pro rata to the over 707,000 Class Members. On November 20, 2012, the Court granted Plaintiffs’ motion for attorney’s fees and costs (Dkt. 786). On December 10 and 19, 2012, respectively, interested parties and objectors Franklin DeJulius and Edwin Paul filed separate Notices of Appeal to the Seventh Circuit Court of Appeals. Mr. DeJulius is appealing the Court’s Entry for attorneys’ fees, costs and contribution awards (Dkt. 787) and Mr. Paul appeals the final approval of the settlement, the allocation plan, and the attorney fee and representative incentive awards (Dkt. 791). Plaintiffs request an appeal bond in the amount of \$550,000.00 for each objector, or jointly and severally. For the reasons set forth below, the Court **GRANTS, in part,** Plaintiffs’ motion.

I. DISCUSSION

This action arises from Anthem, Inc.'s demutualization of Anthem Insurance and failure to offer stock for sale to the public at a higher IPO price. A thorough background of the facts in this case can be found in the Court's Entries mentioned above (Dkt. 780, 786).

A. Costs Allowed in an Appeal Bond

Federal Rule of Appellate Procedure 7 states: "In 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." Rule 7 exists to protect the rights of appellees by appellants who pose payment risks. *See Adsani v. Miller*, 139 F.3d 67, 75 (2d Cir. 1998). The award and amount of an appeal bond is within the discretion of the district court. Appeal bonds only apply to costs relating to the appeal. The Circuits are split as to whether costs under Rule 7 include all costs or only those available under Federal Rule of Appellate Procedure 39(e).¹ *See Walton v. City of Carmel*, No. 05-902, 2008 WL 2397683, *3 (S.D. Ind. June 10, 2008) (noting split). The Seventh Circuit has not squarely addressed the issue of whether only Rule 39(e) costs can be secured by an appeal bond under Rule 7. *Id.*

As noted by the District Court of Minnesota, "[a]ppel bonds are often required on appeals of class action settlements or attorneys' fee awards because the appeal effectively stays the entry of final judgment, the claims, process, and payment to all class members." *In re Uponor, Inc.*, No. 11-MD-2247ADM/JJK, 2012 WL 3984542, at *2 (D. Minn. Sept. 11, 2012). In class action cases, therefore, bonds are used to cover excess administrative costs that otherwise would not have been incurred. *See, e.g., id.; In re Pharm. Indus. Average Wholesale*

¹ Rule 39 enumerates the taxable costs on appeal. Such costs include the preparation and transmission of the record, the reporter's transcript, premiums paid for a supersedeas bond or other bond to preserve rights pending appeal, and the fee for filing the notice of appeal. The Circuit split deals more specifically with whether attorneys' fees can be secured by an appeal bond, which Plaintiffs do not request in this case. The majority view is espoused by the Ninth Circuit in *Azizian v. Federated Dep't Stores, Inc.*, 499 F.3d 950, 953 (9th Cir. 2007).

Price Litig., 520 F. Supp. 2d 274, 279 (D. Mass. 2007); *Allapattah Servs., Inc. v. Exxon Corp.*, No. 91-0986, 2006 WL 1132371, at *18 (S.D. Fla. Apr. 7, 2006).

Mr. DeJulius argues that courts in this Circuit only give bonds for the cost of copying the briefs and records, but he cites only one case, *In re Starlink Corn Products Liability Litigation*, No. 1403, 01 C 1181, 2002 WL 1291790, at *1 (N.D. Ill. June 11, 2002), to support this position. In *In re Starlink*, Plaintiffs asked for an appeal bond to cover \$2,500.00 for costs of appeal as part of a total \$100,000.00 appeal bond that also included attorney's fees and lost interest. The Court found that \$100,000.00 was excessive and granted only the \$2,500.00 costs of appeal. *Id.* That said, *In re Starlink* is not relevant to the bond before the Court. Unlike *In re Starlink*, here Plaintiffs request their taxable costs on appeal and administrative costs caused by the appeal. These delay costs, as noted above, have been recognized by other courts as appropriate for appeal bonds. The Court concludes that in this case, like those cited above, the excess administrative costs created by the delay incident to the appeal, can be characterized as a "cost of appeal" under Rule 7.

B. Determining Appropriateness of Appeal Bond

While the Seventh Circuit has not enumerated a test for when an appeal bond is appropriate, courts generally consider the following factors in determining whether an appeal bond is appropriate: (1) the appellant's financial ability to post a bond, (2) the risk of nonpayment of appellee's costs if the appeal is unsuccessful, (3) the merits of the appeal, and (4) bad faith or vexatious conduct on the part of the appellants. *In re Uponsor*, 2012 WL 3984542, at *2. As an initial matter, the trial Court recognizes that it is its place to determine whether an appeal is frivolous. However, the merits of an appeal may be relevant to the risk of nonpayment, "in that if the appellant is pursuing a clearly frivolous appeal one might infer that the appellant is

abusing the judicial process and thus has no intention of paying any costs taxed on appeal.” *In re Lawnmower Engine Horsepower Mktg. & Sales Practices Litig.*, MDL No. 08-1999, 2010 WL 4630846, at *1 (E.D. Wis. Nov. 2, 2010).

In this case, the Court finds that a bond is appropriate. First, neither Mr. DeJulius nor Mr. Paul has submitted to the Court that they are unable to financially sustain a bond.

Second, Plaintiffs have supplied the Court with cases from outside this district in which Mr. DeJulius’s counsel and Mr. Paul’s counsel² have been ordered to pay bonds, yet have failed to do so, indicating a risk that appeal costs will likewise not be paid. Moreover, Plaintiffs argue the risk of nonpayment is compounded when Mr. DeJulius and Mr. Paul have insubstantial stakes in the outcome—Mr. DeJulius’s total share of the gross settlement is approximately \$43.20 and Mr. Paul’s share is approximately \$433.80. Both are also geographically dispersed from this Circuit, which would present additional expense to Plaintiffs should collection actions be required. While geographic diversity alone will not sustain an appeal bond, *see In re Lawnmower*, 2010 WL 4630846, at *1, taken with the other factors, there is a risk of nonpayment.

Third, Plaintiffs argue the appeals are frivolous and lack merit. For the purposes of Rule 7, the Court is inclined to agree the appeals lack merit. Plaintiffs point to Mr. Paul’s surface objection to the *cy pres* award and to Mr. DeJulius’s objection to attorney’s fees as meritless. Mr. Paul did not directly respond to Plaintiffs’ contention, and the Court agrees with Plaintiffs that Mr. Paul’s objection did not indicate thorough research or understanding of the applicable law and facts. In Mr. DeJulius’s response, he relies heavily on the argument that the Court was required to apply a mandatory sliding scale when awarding attorneys’ fees. As it found in

² While Mr. Paul ostensibly is representing himself, the Court has reason to believe he has been assisted by counsel, a matter which will be addressed shortly.

previous entries, the Court finds this argument disingenuous and a misapplication of the Seventh Circuit law.³ While the Court does not make a finding the appeals are frivolous, this factor weighs heavily in favor of requiring an appeal bond.

Finally, the Court does find evidence of bad faith or vexatious conduct on the part of appellants. Mr. Paul appears to be represented by an attorney who has not entered an appearance in this case. It is worth noting that attorney Darrell Palmer (“Mr. Palmer”), previously requested leave to appear *pro hac vice* in this case (Dkt. 747). However, this request was withdrawn after the Court scheduled a teleconference to address Mr. Palmer’s motion (Dkt. 754). Despite this, Mr. Palmer is listed as the payor of Mr. Paul’s Notice of Appeal filing fee. Mr. Palmer’s office also emailed Plaintiffs a notice and copy of Mr. Paul’s most recent filing (Dkt. 809-3). Plaintiffs have produced evidence that Mr. Palmer is likely a serial objector and other courts have recognized similar behavior. *See, e.g., In re Uponor*, 2012 WL 3984542, at* 3 (in reference to Mr. Palmer, stating, “the Palmer Objectors appear to be represented by an attorney who has not entered an appearance in this case and who is believed to be a serial objector to other class-action settlements”). As in *In re Uponor*, this Court finds such behavior in bad faith and also potentially violative of local and ethical rules.

Moreover, Mr. DeJulius has shown bad faith and vexatious conduct by insisting upon arguments that mischaracterize and misapply Seventh Circuit case law. In his objection, Mr. DeJulius argued that the Court was required to apply the mandatory sliding scale fee structure discussed in *In re Synthroid Marketing Litig.*, 325 F.3d 974 (7th Cir. 2003). While a sliding scale fee structure was applied in that case, it was not made mandatory for all class action cases. Mr. DeJulius now argues that his position is supported by Chief Judge Easterbrook’s questioning at oral argument in an attorney’s fees case. This shift in argument shows that Mr. DeJulius, on

³ This is discussed in more detail as evidence of bad faith and vexatious conduct below.

some level, acknowledges that he misrepresented the law to the Court and presented a vexatious argument. Furthermore, the Chief Circuit Judge's questions during oral argument are just that, questions, which in no way are determinative or binding on the trial Court. In short, the Court finds that Mr. DeJulius has acted in bad faith.

C. The Amount of the Appeal Bond

Because the factors discussed above heavily favor Plaintiffs, the Court finds an appeal bond is appropriate in this case. Due to the appeal, Plaintiffs estimate they will face \$15,000.00 in taxable costs, \$273,460.00 in excess administrative expenses, and \$300,000.00 to send a supplemental notice to all Class Members about the appeal and delay in the settlement distribution. The total administrative costs are \$573,460.00. However, Plaintiffs request only a total of \$550,000.00 appeal bond.

Plaintiffs have made a request for an amount lower than their actual estimated costs; however, the Court finds that even \$550,000 is a bit excessive. Mr. DeJulius argues that additional notice to the class at a cost of \$300,000.00 is unnecessary. Plaintiffs argue that supplemental notice is proper: class members “have never been informed that the distribution process might be held hostage for two years, and the settlement fund potentially *diminished*, by a meritless appeal.” Dkt. 809 at 9–10. The Court agrees with Plaintiffs that an additional notice to the class would be beneficial, but such notice, especially a mailed notice, is not required. The Court will therefore decrease the amount of the bond by \$300,000. The remaining \$250,000.00 covers much of the administrative costs that will allow the Fund's hotline and website to continue serving Class Members who seek information. This amount is reasonable and is sufficient to protect Plaintiffs against the risk of nonpayment.⁴

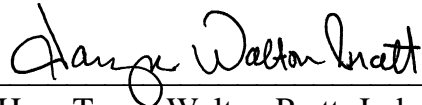
⁴ This amount is also within the range given in other class action cases that include excess administration costs. *See, e.g., In re Cardizem CH Antitrust Litig.*, 391 F.3d 812, 818 (6th Cir. 2004) (affirming \$174,429 bond); *In re*

II. CONCLUSION

For the reasons set forth above, Plaintiff's motion is **GRANTED, in part**. Mr. DeJulius, by and through his attorney John W. Pentz and Mr. Paul, c/o attorney Darrell Palmer, are required to each post a bond, jointly and severally in the amount of \$250,000.00, which is comprised of: (1) \$15,000.00 for the direct taxable costs of the appeal and (2) \$235,000.00 for the administrative costs of the delay caused by the appeal. Mr. DeJulius and Mr. Paul shall file within 10 days of the date of this Order, proof that they have secured the bonds directed by this Order.

SO ORDERED.

Date: 02/27/2013



Hon. Tanya Walton Pratt, Judge
United States District Court
Southern District of Indiana

Uponor, 2012 WL 3984542, at *6 (requiring \$170,000 bond); *In re Checking Account Overdraft Litig.*, No. 1:09-MD-02036-JLK, 2012 WL 456691, at *3 (S.D. Fla. Feb. 14, 2012) (requiring \$616,338 bond); *Allapatah*, 2006 WL 1132371, at *18 (requiring \$13.5 million bond)

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