UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF ILLINOIS

EASTERN DIVISION

LAWRENCE E. JAFFE PENSION PLAN, On Behalf of Itself and All Others Similarly Situated,	)	Lead Case No. 02-C-5893 (Consolidated)
Plaintiff,	)	CLASS ACTION
vs.	)	Honorable Jorge L. Alonso
HOUSEHOLD INTERNATIONAL, INC., et al.,	)	
Defendants.	)	

PLAINTIFFS' MOTION AND MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR AN APPEAL BOND

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I. INTRODUCTION

Ignoring the interests of more than 33,000 Class Members who are entitled to share in the historic $1.575 billion recovery following 14 years of hard-fought litigation, unsuccessful objector Kevin McDonald ("McDonald" or "Objector") has filed an appeal challenging this Court's November 10, 2016 orders approving the settlement and awarding Lead Counsel's fee.[1] Objector's meritless appeal will impose millions of dollars in additional, unnecessary costs on the Class, and will delay the distribution of Settlement Funds to thousands of Class Members who have already waited more than 14 years to recover their losses. Therefore, pursuant to Rule 7 of the Federal Rules of Appellate Procedure and the Court's inherent power to protect the Class's interests, Plaintiffs request this Court to require Objector and his counsel John W. Davis and C. Benjamin Nutley ("Objector's Counsel") to post a bond to ensure reimbursement of the substantial, irretrievable costs being forced upon the Class as a result of the meritless appeal.

In view of the unprecedented result achieved for the Class, this Court's detailed findings, the involvement of a highly respected mediator in the settlement negotiations, the precedent contravening Objector's arguments, and the abuse-of-discretion standard facing Objector on appeal, the Seventh Circuit is likely to affirm this Court's rulings. Nonetheless, the Class will be forced to incur substantial additional costs in connection with the appeal and financial losses arising from delay in the use of the money from the judgment. Unless Objector and his counsel post a bond to guarantee payment of these costs, the recovery for eligible Class Members will be unnecessarily and unfairly reduced.

A key axiom underlying this motion is that non-named, absent Class Member McDonald – if indeed he is even a member of the Class – should be limited to appealing on his own behalf. *See Allapattah Servs. v. Exxon Corp.*, No. 91-0986-CV, 2006 WL 1132371, at *17-*18 (S.D. Fla. Apr. 7,

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[1] Pursuant to his Notice of Appeal, Objector has appealed "from the Final Judgment and Order of Dismissal With Prejudice [DE 2267] entered November 10, 2016 and any associated interlocutory or appealable collateral orders including, but not limited to, the Order Awarding Attorneys' Fees and Expenses [DE 2265] entered November 10, 2016, and any *ore tenus* rulings overruling appellant's objections to evidence or precluding appellant from presenting evidence or argument to the trial court." Dkt. No. 2269.

2006) (citing *Devlin v. Scardelletti*, 536 U.S. 1, 6 (2002)).[2] However, if McDonald seeks to press his appeal on behalf of the ***entire*** Class, the required bond should include $500 to secure payment of taxable costs under Rule 39 of the Federal Rules of Appellate Procedure, an additional $30,000 to secure payment of the estimated expense of additional unrecoverable settlement administration and notice costs that will result from the interrupted settlement administration caused by the appeal, and $4,221,000 for delay in the Class's use of money from the judgment. *Id.*; *see also* 28 U.S.C. §1912 ("Where a judgment is affirmed by the Supreme Court or a court of appeals, the court in its discretion may adjudge to the prevailing party just damages for his delay, and single or double costs."); Fed. R. App. P. 38 (appellate court can order the appellant to pay "damages," plus single or double costs for a frivolous appeal). Plaintiffs respectfully request that the Court order McDonald and Objector's Counsel be jointly and severally responsible for posting the bond within 14 calendar days after entry of an order on this motion.

II. OBJECTOR MUST SECURE BY BOND THE COSTS THAT WILL BE INCURRED BY THE CLASS DUE TO HIS APPEAL

Rule 7 of the Federal Rules of Appellate Procedure authorizes this Court to require an appellant to post a bond to ensure payment of costs on appeal:

> 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.

The purpose of Rule 7 is to protect an appellee against the risk of nonpayment by an unsuccessful appellant. *Heekin v. Anthem, Inc.*, No. 1:05-cv-01908, 2013 U.S. Dist. LEXIS 26700, at *3 (S.D. Ind. Feb. 27, 2013) (citing *Adsani v. Miller*, 139 F.3d 67, 70 (2d Cir. 1998)). Appeal bonds also serve to discourage frivolous appeals. *See Pedraza v. United Guar. Corp.*, 313 F.3d 1323, 1333 (11th Cir. 2002) ("an appellant is less likely to bring a frivolous appeal if he is required to post a sizeable bond"); *In re Polyurethane Foam Antitrust Litig.*, 178 F. Supp. 3d 635, 645-46 (N.D. Ohio 2016) (requiring $143,463 bond: "This Court has supervised this litigation for five years, working with the parties to meet the goals of Federal Civil Rule 1 in a way that allowed for a just

[2] Plaintiffs do not concede that McDonald is even a Class Member, but reserve the right to explore that status more fully in future filings.

resolution. To now have Objectors file frivolous appeals in pursuit of a payoff is not simply a detriment to the settling parties – it is an insult to the judicial system."). "The award and amount of an appeal bond is within the discretion of the district court" and should be sufficient to cover and secure the costs of the appeal. *Heekin*, 2013 U.S. Dist. LEXIS 26700, at *3-*6.

Although the Seventh Circuit has not enumerated a test for deciding whether an appeal bond should be required, district courts generally consider several factors, including: (1) the appellant's financial ability to post a bond; (2) the risk that the appellant would not pay appellee's costs if appellee prevailed; (3) the merits of the appeal; and (4) whether the appellant has shown any bad faith or vexatious conduct. *Heekin*, 2013 U.S. Dist. LEXIS 26700, at *6.

The sizeable costs that will be incurred by the Class here include taxable costs specified by Rule 39, the costs associated with the disruption of the settlement administration process, and the interest lost from delay in distributing the settlement. *See* 28 U.S.C. §§1912, 1927; Fed. R. App. P. 38. Under these circumstances, this Court should exercise its considerable discretion to require Objector and his counsel to post a bond to secure payment of appeal-related costs.

A. The Factors Courts Consider in Determining Whether to Require a Bond Support Plaintiffs' Request

1. Objector and His Counsel Have Not Demonstrated Financial Inability to Post a Bond

The first factor courts consider in determining whether to require a bond is the financial ability of the appellant to post a bond. Objector and his counsel have not demonstrated a financial inability to post such a bond, and the burden is on them to make such a showing. *See Heekin*, 2013 U.S. Dist. LEXIS 26700, at *7; *Baker v. Urban Outfitters*, No. 01-CV-5440 LAP, 2006 WL 3635392, at *1 (S.D.N.Y. Dec. 12, 2006) ("[Plaintiff] has submitted no financial information, and thus I conclude that he is not arguing that he does not have the financial ability to post a bond.").

Plaintiffs' requested bond of $4,251,500 to cover costs associated with the meritless appeal is admittedly substantial. However, the size of the bond sought is actually conservative and commensurate with the anticipated costs Objector's appeal will inflict on the Class. *See* §II.C, *infra*. Furthermore, as the Court noted in ordering Lead Plaintiffs to pay defendants $13,281,282 in

appellate costs earlier in the litigation, the Seventh Circuit has held that "[b]y moving the risk of loss from the representative plaintiffs to the lawyers (who spread that risk across many cases and thus furnish a form of insurance) counsel can eliminate the financial disincentive that costs awards otherwise would create." Dkt. No. 2061 at 4 (quoting *White v. Sunstrand Corp.*, 256 F.3d 580, 585-86 (7th Cir. 2001)). The same rationale holds true here: although neither Objector nor his counsel have been appointed to represent the Class, Objector's Counsel – whose practices focus heavily on class action objections – can spread appellate costs across the cases in which they object just as Class Counsel can in representative actions. To the extent Objector's Counsel seek to apply his objection to the Class, and thus reap "a substantial financial return" in the form of a fee award for a successful appeal, they must be prepared to "tak[e] the risk of failure in exchange," just like Lead Counsel did for the Class in first paying the $13.28 million appellate costs prior to continuing the fight that led to the $1.575 billion settlement. *Id.*

2. The Risk of Nonpayment Is Great

Absent a bond, Class Members face a substantial risk that they will not be reimbursed for the extensive costs and expenses imposed by the appeal. Collecting payment from the Objector or his counsel would likely be an arduous task, and the risk of nonpayment here is compounded by McDonald's "insubstantial stake[] in the outcome." *Heekin*, 2013 U.S. Dist. LEXIS 26700, at *7. (Indeed, McDonald's claimed stake in the recovery is estimated to be $1,734 – just 0.000000828% of the settlement.) In addition, the Objector and his counsel reside out of state and outside of the Seventh Circuit, making collection of appellate costs even more difficult.[3] This weighs in favor of requiring a bond. *See Polyurethane*, 178 F. Supp. 3d 635, 641.

3. The Appeal Patently Lacks Merit

The utter lack of merit in the appeal also strongly favors imposition of an appeal bond. *Adsani*, 139 F.3d at 79 ("A district court, familiar with the contours of the case appealed, has the discretion to impose a bond which reflects its determination of the likely outcome of the appeal."). Even if McDonald's objections have merit (which they do not), it is unlikely they will be sustained on appeal,

[3] McDonald resides in Texas and Objector's Counsel reside in California.

as this Court's approval of the Settlement and fee award will be overturned only if there has been an abuse of discretion. *Silverman v. Motorola Solutions, Inc.*, 739 F.3d 956, 958 (7th Cir. 2013).

In cases like this one, where the appellee is likely to prevail and the appeal is without merit, courts have required the appellant to post a bond. *See In re Polyurethane Foam Antitrust Litig.*, No. 16-3168, 2016 WL 6599570, at *2 (6th Cir. June 20, 2016) (dismissing appeal for failure to post $145,463 bond where the "objections to the settlements lack merit, [the] appeal has the practical effect of prejudicing the [plaintiff class] by delaying the disbursement of settlement funds, and [objector] offers no proof of financial hardship that would justify his failure to post the bond"); *Heekin*, 2013 U.S. Dist. LEXIS 26700, at *8 (requiring $250,000 bond where "the Court is inclined to agree the appeals lack merit"); *appeal dismissed*, *Heekin v. Anthem, Inc.*, No. 13-1477, Order at 1 (7th Cir. May 17, 2013) (prior to dismissal the Seventh Circuit stayed the lower court's imposition of appeal bond); *Barnes v. FleetBoston Fin. Corp.*, No. 01 Civ. 10395, 2006 WL 6916834, at *1 (D. Mass. Aug. 22, 2006) (requiring $645,000 appeal bond because "the burden of litigating frivolous appeals [should] shift[] to [the objectors] instead of to the class").[4]

For example, in *Allapattah*, 2006 WL 1132371, the court approved a $1.075 billion settlement to more than 10,000 current and former Exxon direct-served dealers in 35 states. *Id.* at *2, *4, *17. A single objection to the settlement was filed by Westheimer Service Station ("Westheimer"). *Id.* at *8. The court found that Westheimer's objection was frivolous "both as to the objector itself and to the Class as a whole." *Id.* at *11. The court also found that Westheimer's appeal was properly limited to its own claim, but required it to post a $13.5 million bond to cover the costs that the class would suffer if it attempted to file a class-wide appeal:

> To the extent that Westheimer attempts to appeal this Order on behalf of the ***entire*** Class, however, Westheimer will be required to post a bond. I make this conclusion

[4] *See also In re Wal-Mart Wage and Hour Emp't Practices Litig.*, MDL No. 1735, 2010 WL 786513, at *2 (D. Nev. Mar. 8, 2010) ("The Court further finds that the four Objectors should be required to file an[] appeal bond sufficient to secure and ensure payment of costs on appeals which in the judgment of this Court are without merit and will almost certainly be rejected . . . ."); *In re Pharm. Indus. Avg. Wholesale Price Litig.*, 520 F. Supp. 2d 274, 279 (D. Mass. 2007) ("the class is likely to be damaged if the appeal is rejected and there are public policy reasons to prevent frivolous objectors from threatening to hold up class distributions"); *Baker*, 2006 WL 3635392, at *1 (requiring appeal bond where "'the determination of the likely outcome of the appeal'" was that appellees would prevail easily, and the appeal was without merit) (quoting *Adsani*, 139 F.3d at 79).

> because any appeal of this Order as to the entire class stays both the entry of final judgment on all claims in the Claims Administration Process and payment to all Class members. ***Accordingly, the highly detrimental impact of an appeal of the settlement agreement as to the entire class renders it appropriate for the Court to require Westheimer to post an appeal bond pursuant to Federal Rule of Appellate Procedure 7***.
>
> . . . Pursuant to Rule 7, the Court will require Westheimer to post 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. The amount of the bond will be $13,500,000.00.

Id. at *18.[5]

Here, all of the Objector's objections (relating to the Class notice, the fairness and adequacy of the settlement, and attorneys' fees) were extensively briefed, carefully considered, and ultimately rejected by the Court. The Court's thorough consideration of the merits of Objector's arguments is demonstrated by the extensive record, including the many post-preliminary approval submissions, the lengthy fairness hearing, the involvement and views of the mediator, and by the Court's orders painstakingly addressing all of the issues raised by McDonald's objections. Notwithstanding the Court's recounting and rejection of his spurious objections, Objector continues to try to disrupt the orderly conclusion of this case.

Objector has claimed, for example, that the recovery comprises too small a fraction of what he asserts must have been at least $5 billion in damages. This conjecture finds no support in the record. Instead, the record confirms that damages for the valid claims totaled $2.1 billion under the leakage model, and $624 million under the specific disclosures model, and "that the 1.575 billion settlement represents between 75 percent and more than 250 percent of the damages suffered by the class, depending on the damages model that was used." October 20, 2016 Final Approval Hearing Transcript ("Tr.") at 55. There is no good-faith basis for Objector to challenge the Court's factual finding "that this calculation is correct." *Id.* at 55-56.

Objector likewise faces an insurmountable hurdle in any attempt to challenge the Court's conclusion that Plaintiffs' "chances of prevailing at the second trial [were] at best 50/50, more likely closer to 25/75," that "the value of the settlement is ***more than reasonable*** in light of the value of

[5] Emphasis is added and citations are omitted unless otherwise noted.

further litigation" (Tr. at 57), or that "***[e]very factor*** in the Court's analysis of this settlement ***strongly favors*** approval." Tr. at 60. Objector's arguments to the contrary variously distorted and ignored the record; it will be frivolous for Objector to re-raise them on appeal.

McDonald's objection that the class notice was faulty is equally baseless. This argument, which was entirely unsupported by any factual showing when it was made and, in fact, is contradicted by the very face of the notice, was resoundingly rejected by the Court. Tr. at 58-59. It will be frivolous for Objector to contend on appeal that the Court abused its discretion in holding that the detailed notice was sufficient.

Objector's appeal of the fee awarded to Lead Counsel is equally frivolous. In asserting that the fee should be lower, Objector took a scattershot approach, lobbing several arguments at the wall and hoping one would stick – but none of them did. Objector first argued that the fee should be limited to 5% of the fund, with a lodestar multiplier ceiling of two. Objection to Proposed Settlement and Attorneys' Fees ("Objection"), Dkt. No. 2242, at 1-10, 15. He then asserted that the fee could be no higher than the lodestar amount because of a purported statutory fee-shifting regime – which in truth is nonexistent. Objection at 10-11. At the fairness hearing, Objector offered yet another argument, volunteering that a reasonable fee award could be as high as 18%. Tr. at 51.

None of those arguments have merit, and Objector's constant position-shifting is indicative of his appeal's frivolousness. As the Court found, the authorities Objector relies on are inconsistent with the Seventh Circuit's market-based approach. Tr. at 68-69. For example, Objector's argument that the fee is limited to Lead Counsel's lodestar (or a two-times lodestar cap) is contrary to Seventh Circuit authority. *See, e.g.*, Tr. at 67, 68 (Seventh Circuit does not require use of lodestar or even lodestar cross-check which "would be counterproductive and misleading under the facts of this case, not to mention an inaccurate representation of the market rate"). Based on the evidentiary record, moreover, the Court found (among other things) that the outcome of the case was highly unpredictable (Tr. at 64), Plaintiffs' risk of walking away empty-handed was "very high" (Tr. at 64), Lead Counsel performed "very high-quality" legal work (Tr. at 65), and the fee awarded was consistent with the market rate. Tr. at 65, 67. There is nothing in the record contravening these

findings. This dooms Objector's appeal, as he can make no showing even approaching the required abuse of discretion.

4. Bad Faith or Vexatious Conduct

Finally, courts may impose bond requirements where an objector's appeal is objectively frivolous, brought in bad faith, or involves vexatious conduct. This factor particularly supports a bond requirement for the Objector here. As described in the previous section, Objector "has shown bad faith and vexatious conduct by insisting upon arguments that mischaracterize and misapply Seventh Circuit case law." *Heekin*, 2013 U.S. Dist. LEXIS 26700, at *10; *see also Barnes*, 2006 WL 6916834, at *2 (ordering objector to post bond, and finding appeal challenging the "computation of attorneys' fees on a 'percentage-of-fund' method of settlement rather than a lodestar approach" was frivolous where circuit law allowed the district court to choose between the two in the exercise of its informed discretion).

Furthermore, McDonald was advised by claims administrator Gilardi & Co. LLC in December 2011 that his claim was rejected as duplicative of a claim filed by Vanguard on behalf of the Household TRIP plan. Dkt. No. 2243, Ex. 1 (at 20 of 38). In response, McDonald did nothing; he neither objected to his claim's rejection nor sought to intervene. Indeed, McDonald never filed ***anything*** with the Court until his objection to the Settlement and requested fee award filed years later, in which he is represented by counsel whose legal practices largely consist of objecting to class settlements – primarily to fees awarded to class counsel. McDonald's claimed interest in justice for the Class is strongly contradicted by his reckless attempt to blow up one of the best recoveries in the history of securities litigation, and in the process hold hostage payment of Settlement proceeds to more than 33,000 Class Members who have waited more than 14 years to be compensated for defendants' alleged fraud. Tellingly, no other Class Member has come forward in support of McDonald's objections or his appeal, which is simply designed to hold up the distribution of Settlement Funds in the hope of extracting a settlement of some kind for himself and Objector's Counsel.

Courts have treated with particular disapproval objections and appeals of those objections that serve no purpose other than to tie up the execution of a settlement and delay payment to the

members of the settlement class. *See*, *e.g.*, *Polyurethane Foam Antitrust Litig.*, 2016 WL 6599570, at *1 ("Professional objectors . . . may not disrupt the settlement process based on nothing more than unsupported suppositions."); *accord Allapattah*, 2006 WL 1132371, at *18 ("[A]ny appeal of this Order as to the entire class stays both the entry of final judgment on all claims in the Claims Administration Process and payment to all Class members. Accordingly, the highly detrimental impact of an appeal of the settlement agreement as to the entire class renders it appropriate for the Court to require Westheimer to post an appeal bond pursuant to Federal Rule of Appellate Procedure 7."); *Barnes*, 2006 WL 6916834, at *1 ("Repeat objectors to class action settlements can make a living simply by filing frivolous appeals and thereby slowing down the execution of settlements. The larger the settlement, the more cost-effective it is to pay the objectors rather than suffer the delay of waiting for an appeal to be resolved (even an expedited appeal)."); *accord In re Checking Account Overdraft Litig.*, 830 F. Supp. 2d 1330, 1361 n.30 (S.D. Fla. 2011).

Given the objectively frivolous character of the present appeal, this factor weighs heavily in favor of requiring Objector to post a bond.

B. The Court Has the Inherent Power to Protect the Settlement Class's Interests

This Court also may order objector-appellants to post bonds pursuant to the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases. *Chambers v. NASCO*, 501 U.S. 32, 49 (1991); *see also In re Mroz*, 65 F.3d 1567, 1575 (11th Cir. 1995). This includes the power to require security for costs. *Anderson v. Steers, Sullivan, McNamar & Rogers*, 998 F.2d 495, 496 (7th Cir. 1993) (district court has inherent power to require security for costs when warranted by the circumstances of the case).

The prejudice to the 33,000-plus Class Members as a result of McDonald's appeal is substantial. Indeed, his actions in '"jeopardizing a settlement agreement cause[] prejudice to the existing parties to a lawsuit.'" *In re NASDAQ Market-Makers Antitrust Litig.*, 184 F.R.D. 506, 514 (S.D.N.Y. 1999). It has now been over five months since the original notice was mailed informing Class Members of the proposed settlement. *See* Dkt. No. 2228. The Class awaits distribution of the Settlement Funds. That cannot happen, however, until the appeal is resolved – and even then, even

if McDonald is unsuccessful, the Class already will have lost at least $4,251,500 – forever. Therefore, irrespective of Rule 7, this Court has and should exercise its inherent power to require the Objector to post a bond.

C. The Bond Should Include the Costs of Disruption to the Settlement Administration Process, as Well as Costs Specified Under Rule 39

Plaintiffs seek to require an appeal bond in the amount of $4,251,500. Included in this amount is $4,221,000 for lost interest, $30,000 to secure Plaintiffs' additional settlement administration costs incident to the appeals, and $500 in costs under Rule 39.[6]

1. The Undeniable Costs of Delay – Lost Interest and Additional Settlement Administration Costs

The sole Objector, who did not intervene to lodge his objection, cannot pursue the appeal on behalf of the whole Class. *Allapattah*, 2006 WL 1132371, at *17-*18. However, if Objector attempts to appeal on behalf of the Class – as it appears he has done – the appeal will delay the distribution of the Settlement Fund, costing the Class millions of dollars in lost interest and causing additional costs in completing claims administration. Those irretrievable, substantial costs should be borne by Objector, not the Settlement Class. *Id.* Plaintiffs therefore request that Objector be required to post a bond sufficient to secure the additional costs to the Class arising out of his disruption of final distribution of the Settlement Fund, including lost interest, and the additional settlement administration costs resulting from his appeal.

Prior to *Devlin*, in *Felzen*, the Seventh Circuit held that nonparties ordinarily may not appeal from a decision of any kind in a class action. *Felzen v. Andreas*, 134 F.3d 873, 875 (7th Cir. 1998). The purpose of this rule was to prevent the hijacking of class actions by objectors (like McDonald) who fail to take even the cursory step of intervening as parties. *Id.* The Court reasoned that "the court should not 'fragment the control of the class action' by allowing class members to usurp the role of the

[6] Rule 39 does not limit the universe of costs that are taxable on appeal. *Adsani*, 139 F.3d at 75 (concluding after extensive analysis of rules that Rule 39 does not define "costs" for purposes of Rule 7). *See also Sckolnick v. Harlow*, 820 F.2d 13 (1st Cir. 1987) (upholding imposition of Rule 7 appeal bond); *In re Cardizem CD Antitrust Litig.*, 391 F.3d 812, 817 (6th Cir. 2004) (Rule 39 does not limit or define "costs"); *Pedraza*, 313 F.3d at 1330 (Rule 39 does not attempt to – nor can it be read to – set forth an omnibus definition of "costs" that governs Federal Rule of Appellate Procedure 7, holding Rule 7 bond should be imposed where necessary to protect class members from the burdens of an appeal).

class representative without persuading the district judge that the representative is unfit or unfaithful, or that subclasses should be created." *Id.* (quoting *In re Brand Name Prescription Drugs Antitrust Litig.*, 115 F.3d 456, 457 (7th Cir. 1997)). In *Devlin*, the Supreme Court held that an absent class member who failed to intervene could appeal under certain limited circumstances, but restricted that right to only "that aspect of the District Court's order that affects him." *Devlin*, 536 U.S. at 9. The Court took pains to point out that "[n]onnamed class members . . . may be parties for some purposes and not for others," and expressly aimed to protect a class member's rights where the "only means of ***protecting himself*** from being bound by a disposition of ***his rights***" is through appeal. *Id.* at 9-11.

These precedents are especially apt here, where the Objector has never bothered to undertake even the most basic commitment to good-faith representative litigation – intervention – and has not been subjected to any judicial scrutiny (under Rule 23 or otherwise) of his fitness to represent the entire Class. Thus, Objector's appeal is limited to "protecting himself," and cannot extend to the other 33,000-plus Class members – ***none of whom objected***. *Allapattah*, 2006 WL 1132371, at *17. *Devlin's* narrow carve-out for certain non-intervenors may allow Objector to appeal to protect his ***own*** claim (assuming Objector can demonstrate appellate standing), but it does not allow Objector to unilaterally stall the orderly resolution of the Settlement and distribution of the Settlement Funds for the ***entire*** Class.

If Objector attempts to appeal on behalf of the entire Class, he should be required to post a bond covering the resulting delay costs that the Class will incur due to his actions.

One of those costs is the millions of dollars in interest Class Members will lose – forever – during the appeal's pendency. The Stipulation of Settlement mandates that the Settlement Amount shall be invested "in short term United States Agency or Treasury Securities or other instruments backed by the Full Faith and Credit of the United States Government or an Agency thereof, or fully insured by the United States Government or an Agency thereof." Stipulation of Settlement, ¶2.2 (Dkt. No. 2213). As of the date of Final Approval, the Settlement Amount was on average yielding 0.285% in yearly interest. *See* Declaration of Luke O. Brooks in Support of Plaintiffs' Motion for an Appeal Bond ("Brooks Decl."), ¶7. Upon distribution, however, Class Members would be able to

make use of the funds to achieve ***better*** value – such as using the funds to invest in higher-yielding investments, or to pay off mortgages, car loans, or credit card balances that have far higher interest rates than short-term government securities. They cannot do that now, however, due to the Objector's meritless appeal. With a substantial delay in the distribution of Settlement Funds, Class Members will suffer a significant aggregate loss in value – conservatively calculated as $4,221,000 – due to their inability to invest those funds in a slightly higher-yielding investment.[7] *See* Brooks Decl., ¶¶5, 9. Thus, Plaintiffs request a bond to cover "interest that the entire class will lose as a result of the appeal." *Cf. Allapattah*, 2006 WL 1132371, at *18 (requiring $13.5 million bond to cover costs, including lost interest, if objector filed an appeal both as to the objector and as to the class as a whole); *see also In re Checking Account Overdraft Litig.*, No. 1.09-MD-02036-JLK, 2012 WL 456691, at *3 (S.D. Fla. Feb. 14, 2012) (requiring bond of $616,338.00 to ensure payment of costs, including lost interest, from delay of distribution of funds to the class); *Barnes*, 2006 WL 6916834, at *1 (appealing objector required to post $645,111.60 bond to cover costs and 5.15% interest for anticipated one-year delay in distribution to class); *Conroy v. 3M Corp.*, No. C-00-2810 CW, 2006 U.S. Dist. LEXIS 96169, at *6 (N.D. Cal. Aug. 10, 2006) (including in bond amount "$239,667 in anticipated post-judgment interest to compensate for the delayed distribution of the $4.1 million cash portion of the settlement"); *Wal-Mart*, 2010 WL 786513, at *2 (requiring four objectors to post $2,000,000 in bonds ($500,000 per objector) to cover anticipated administrative costs and interest costs as a result of delay in distribution of settlement funds); *but see In re Navistar Diesel Engine Prods. Liab. Litig.*, No. 11 C 2496, 2013 WL 4052673 (N.D. Ill. Aug. 12, 2013).[8]

[7] Plaintiffs calculated the requested amount using the statutory interest rate for judgments, which is "equal to the weekly average 1-year constant maturity Treasury yield, as published by the Board of Governors of the Federal Reserve System, for the calendar week preceding . . . the date of the judgment." 28 U.S.C. §1961(a). Here, the final approval order being appealed is dated November 10, 2016. The one-year constant maturity Treasury yield for the week ending November 4, 2016 was 0.62%. Brooks Decl., Ex. 1. Plaintiffs project at least a 9.6-month delay, which is consistent with the Seventh Circuit's median time for dispositions of civil appeals. Brooks Decl., ¶6 & Ex. 2. Applying the 0.62% interest rate for 9.6 months to the $1.575 billion in cash that is available for distribution to the Class, less the amount of interest the cash is generating pursuant to the Settlement Agreement (0.285%), results in $4,221,000 in total lost interest. Brooks Decl., ¶9.

[8] In *Mirfaishi v. Fleet Mortg. Corp.*, 356 F.3d 781, 782 (7th Cir. 2004), the district court "ordered the challengers to post a $ 3.15 million appeal bond on the ground that if the settlement were delayed Fleet would lose the ability to pay the amounts that it had agreed to pay in the settlement." The Seventh Circuit found

A second, irretrievable cost directly flowing from the delay caused by Objector's appeal is the significant class-action administration costs that will be expended from the Settlement Fund. In cases where appeals of settlements and attorneys' fee awards effectively stay the entry of judgment in class actions, bonds are used to cover these "excess administrative costs that otherwise would not have been incurred." *Heekin*, 2013 U.S. Dist. LEXIS 26700, at *5 (requiring $250,000 bond to cover direct taxable costs and cost of administration delay); *Cardizem*, 391 F.3d at 818 (affirming $174,429 bond); *Polyurethane Foam*, 2016 WL 6599570, at *2 (dismissing appeal for failure to pay $145,463 bond where "appeal has the practical effect of prejudicing the [plaintiff class] by delaying the disbursement of settlement funds"); *In re Merck & Co., Inc. Secs., Deriv. & ERISA Litig.*, MDL No. 1658 (SRC), 2016 WL 4820620, at *2 (D.N.J. Sep. 14, 2016) (requiring $55,000 bond to cover taxable costs and administrative costs of delay); *In re GE Co. Secs. Litig.*, 998 F. Supp. 2d 145, 150 (S.D.N.Y. 2014) (requiring $54,700 bond to cover taxable costs and administrative costs of delay); *In re Broadcom Secs. Litig.*, SACV 01-275, 2005 U.S. Dist. LEXIS 45656, at *9-*12 (C.D. Cal. Dec. 5, 2005) (requiring $1,240,500 bond including costs of delay equaling $517,700). Here, the Class will incur administrative costs relating to, for example, continuing communications with Class Members and counsel, and other case management and systems maintenance costs. *See* Declaration

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"[t]here was no basis for this concern," however, and vacated the bond. *Id.* Here, Plaintiffs' bond request is not based on speculation about defendants' inability to fund the settlement – they have turned over the money – but instead on a conservative mathematical calculation of what the delay caused by Objector's appeal will cost the Class.

The unpublished, non-precedential order in *Allen v. J.P. Morgan Chase Bank, NA*, No. 15-3425, 2015 U.S. App. LEXIS 23165, at *1-*2 (7th Cir. Dec. 4, 2015), likewise does not counsel denial of the requested bond – indeed, the panel merely stayed the bond while directing the parties to "address the appropriateness of the bond in their merits briefs." *Id.* What the Seventh Circuit ultimately would have ruled at that stage is unknown: the appeal was voluntarily dismissed before it reached that stage. *See* Docket No. 25 in No. 15-3425. In *Allen*, moreover, the panel acknowledged the "[s]pecial problems related to abuse of class action objectors," and suggested a motion under Federal Rule of Appellate Procedure 38 was one way to handle such problems. Here, as shown *supra*, such a motion – despite a strong chance of success – will simply be too little too late. The Class already have incurred substantial losses due to the delay, with a great risk of nonpayment. Moreover the conservatively estimated damage inflicted by the delay ($4,251,000) is orders of magnitude greater than the damage anticipated in *Allen* ($121,886). Finally, the *Allen* order does not address – as the present motion does – either the impact of *Felzen* and *Devlin* on a non-intervening objector's attempt to hold up distribution of an entire settlement fund to a non-objecting class or the Seventh Circuit's holding in *White* based on counsel's ability to spread costs across many cases. Since Federal Rule of Appellate Procedure 38 will not work in this case, the problem presented here "must be handled in [an]other way[]" – Objector can avoid a bond entirely if he foregoes his attempt to hijack the Settlement to the Class's detriment and instead pursues his appeal only on his own behalf.

of Michael Joaquin in Support of Plaintiffs' Motion for an Appeal Bond ("Joaquin Decl."), ¶3. These costs are conservatively estimated to be approximately $30,000. *See* Joaquin Decl., ¶4. Once spent, they are likely irretrievable – even if Plaintiffs prevail against McDonald's flimsy arguments – unless they are bonded now.

The delay costs being sought are not designed to punish Objector, but instead simply recognize that Objector is single-handedly depriving Class Members of access to their funds for an extended period of time (and the ability to grow those funds as they see fit). Even though the post-judgment interest rate is quite low – much lower, for example, than the pre-judgment interest rate – the request accounts for the fact that the Settlement proceeds are kept in an interest-bearing account. In light of the fact that Class Members will be deprived of the use of their money as they see fit and will irretrievably lose thousands more due to administrative costs, the request is quite conservative.

2. Rule 39(e) Costs

Plaintiffs also request the Court to include in the bond the taxable costs specified by Rule 39. Class Lead Counsel conservatively anticipate incurring costs taxable under Rule 39 in the approximate amount of $500 – the estimated cost for printing, copying, and mailing briefs and other submissions. Brooks Decl., ¶4.

III. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court require Objector and his counsel to jointly and severally post a bond to secure payment of the costs the Class expects to incur as a result of the frivolous appeal.

DATED: December 19, 2016

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on December 19, 2016, I authorized the electronic filing of the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the e-mail addresses for counsel of record denoted on the attached Service List.

I certify under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on December 19, 2016.

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