UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF ILLINOIS

EASTERN DIVISION

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

REPLY IN SUPPORT OF PLAINTIFFS' MOTION FOR AN APPEAL BOND

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I. INTRODUCTION

Plaintiffs established that the Court has the authority to require Objector and his counsel to post an appeal bond and that such a bond is necessary here. In response, Objector does not challenge Plaintiffs' showing that there is a substantial risk of non-payment if the appeal is unsuccessful, and he does not present evidence to contest the costs of delay that the appeal will impose on the Class.[1] Instead, Objector asserts that a bond is not necessary because "after closely balancing the merits of proceeding with the objection to the settlement, Mr. McDonald is willing to agree to forego appealing from the approval of the settlement, if it will permit the distribution of funds to the class without further delay." *See* Dkt. No. 2286 at 13 ("Opp."); Dkt. No. 2287 ("McDonald Decl."), ¶16. This, he contends, "would render this proceeding moot." Opp. at 13. According to Objector, he is now "cognizant . . . of the relatively narrow odds and significant additional delay [he] would face" in continuing to appeal the final Settlement approval. McDonald Decl., ¶15. His decision to jettison that portion of the appeal, he claims, is the product of "closely balancing the merits of proceeding with the objection to the settlement." Opp. at 13.

Of course, Objector and his counsel were required to perform their "close[] balancing" ***before*** appealing from the final approval of the Settlement. Despite their admissions, they ***still*** have not dismissed that portion of the appeal, notwithstanding Plaintiffs' urgent reminder that their failure to act is harming the Class each day, and despite Objector's sworn declaration that he would do so. *See* Ex. A to the Reply Declaration of Luke O. Brooks in Further Support of Plaintiffs' Motion for an Appeal Bond ("Brooks Reply Decl."). Incredibly, the evening before this brief was due, Objector's Counsel informed Plaintiffs that Objector will not keep his word. Objector no longer plans to dismiss his appeal of the Settlement, not because he believes in its merits, but because his counsel believes that maintaining the meritless appeal gives him some advantage in establishing

[1] Objector does assert that an appeal bond cannot be required for the portion of the Settlement Fund that is allocated to Lead Counsel for attorneys' fees and expenses because those amounts are subject to a "quick pay" provision. Plaintiffs' calculation of the requested bond amount was exceedingly conservative both in terms of the assumption of the expected duration of the appeal and the actual cost arising out of Class Members' inability to use the Settlement Funds. However, in the interest of removing this distraction from the analysis, Plaintiffs agree to modify the requested bond amount to $3,089,195, which includes lost interest on the Settlement Amount, calculated using the same methodology set forth in the Brooks Declaration (Dkt. No. 2276), but excluding the costs and fees awarded to Lead Counsel.

standing to appeal the fee award. *Id.*, Ex. B. This is a textbook example of vexatious conduct: Objector and his counsel first needlessly multiplied the proceedings – and in the process injured the Class they claim to be protecting – and now refuse to mitigate the harm even after admitting that the appeal is not worth pursuing. Plaintiffs are entitled to recover the costs imposed by Objector's vexatious actions, and the requested bond should be granted to ensure that there will be something to recover.

Objector advances a series of additional arguments asserting that a bond should not be required. None of these arguments have merit. Objector's attempt to re-litigate the merits of his objection is refuted by his admission that the odds of overturning the Settlement are "relatively narrow," his reneged agreement not to pursue that portion of his appeal, and the record facts. As for approval of Lead Counsel's fee, Objector all but concedes that his appellate theory conflicts with long-established Seventh Circuit precedent, and apparently plans to take his cause up with the Supreme Court. *See* Opp. at 13 n.7. But McDonald has always claimed his arguments are based on Seventh Circuit law, not in opposition to it, so that option is not viable. Objector's appeal suffers from the additional problem that he lacks standing for a class-wide appeal. Objector's attempt to skirt that issue by arguing that if Plaintiffs' position is correct the "appeal would not delay anything" (Opp. at 2) misses the point entirely. McDonald purports to act on behalf of the Class; whether he has the appellate standing to do so will be determined by the Court of Appeals, but in the interim the delay from his meritless appeal continues to cause damage. *See Allapattah Servs. v. Exxon Corp.*, 2006 WL 1132371, at *17-*18 (S.D. Fla. Apr. 7, 2006).

Objector asserts that the Court does not have authority to impose a bond that incorporates the administrative costs his appeal will impose on the class, or an interest component to account for the lost use of the Settlement funds. However, Objector does not confront the cases Plaintiffs cite – including controlling Seventh Circuit precedent – and relies on cases that are distinguishable.

Objector likewise fails to substantiate his claim that the proposed bond amount would "foreclose appellate review." Opp. at 9. Objector's declaration that he cannot afford the bond is both unsupported and insufficient. More importantly, Objector's Counsel are fully aware of the

potential costs and risks involved in inserting themselves into class litigation, and have made no showing that they cannot pay the bond. Their argument that they cannot be held jointly and severally liable for the bond is meritless. Several courts have required objector's counsel to post bonds, and Objector's Counsel here are on the hook for the damage their meritless appeal has and will continue to cause under 28 U.S.C. §§1912, 1927, and Rule 38 of the Federal Rules of Appellate Procedure.

II. ARGUMENT

A. Objector's Appeal Is Frivolous

"'An appeal is frivolous when the result is obvious or when the appellant's argument is wholly without merit.'" *Mestayer v. Wisconsin Physicians Serv. Ins. Corp.*, 905 F.2d 1077, 1081 (7th Cir. 1990).[2] By this definition, McDonald's appeal is a textbook example of frivolousness. Indeed, McDonald himself now recognizes what he calls "the relatively narrow odds" he faces in challenging the Settlement (McDonald Decl., ¶15), admitting that he did not "closely balanc[e] the merits of proceeding with the objection to the settlement" until ***after*** filing the notice of appeal. Opp. at 13. As the Court acknowledged, the $1.575 billion Settlement in this case amounts to an unprecedented 75-250% recovery for the Class. This recovery – the largest ever of its kind in the Seventh Circuit – is an extraordinary result and provides a higher percentage of recovery for Class Members than any other $500,000,000-plus securities class action settlement in history. McDonald's assessment of "relatively narrow odds," while dire, is too optimistic: the objection to the Settlement was utterly without merit and his appeal is hopeless.

In rejecting McDonald's objection to the Settlement, the Court described his attempt to refute the percentage of recovery as "perfunctory" and "conclusory." Oct. 20, 2016 Hearing Transcript ("Tr.") at 55-56. The Court also found that the notice to the class was accurate as a matter of fact and not misleading, rejecting Objector's argument to the contrary. *Id.* at 59. Further, the Court noted that there was only one objector among 33,871 class members (which "is unusual in a large case like this"), with not a single objection from claimants with the large claims or fiduciary duties

[2] Here, as elsewhere, unless noted otherwise citations are omitted and emphasis is added.

to uphold. *Id.* at 58. Indeed, "[e]very factor in the Court's analysis of [the] settlement ***strongly*** favor[ed] approval." *Id*. at 60. No reasonable lawyer could believe in good faith that Objector has the slightest chance of overturning the Settlement.

Recognizing the futility of appealing the approval of the Settlement, Objector swore under oath that he would dismiss that portion of his appeal. McDonald Decl., ¶16. Based on this promise, he asserts that Plaintiffs' request for a bond is moot. *See* Opp. at 13.[3] However, despite another warning that his conduct continues to harm the Class, McDonald has not dismissed the appeal of the Settlement. Brooks Reply Decl., Ex. A. Objector has now confirmed that his change of heart is the product of an ill-conceived tactical play: rather than dismiss, Objector intends to press on with his appeal of the Settlement in the hope that it will help with his standing on the fee appeal. *Id.*, Ex. B. Of course, this is not an appropriate reason to continue with an appeal Objector and his Counsel know is frivolous, or to impede the distribution of more than a billion dollars to Class Members. Objector's stunning admission that his objection to the Settlement appeal has nothing to do with its merits is further confirmation that the objection is frivolous and an appeal bond is needed.

Objector's Counsel's deliberate bad faith is apparent, but even if the Court finds itself unable to determine whether Davis and Nutley had "subjective bad faith," the Seventh Circuit has recognized that "[a] lawyer's reckless indifference to the law may impose substantial costs on the adverse party," and "Section 1927 permits a court to insist that the attorney bear the costs of his own lack of care." *TCI*, 769 F.2d at 445. To date, the price of Objector and his counsel's bad faith includes approximately $675,000 in lost interest and the cost is rising every day. They – and not the Class – should be required to pay the price for their conduct. *See Khalil v. Cicero*, 1990 U.S. App. LEXIS 18329, at *5 (7th Cir. Oct. 15, 1990) (unpublished) ("Ignoring dispositive contrary authority makes an appeal frivolous. Sticking one's head in the sand is more than undignified. It is

[3] Objector and his counsel's obligation was to closely balance the merits of his appeal ***before*** they noticed it and held up the distribution to Class Members. Their failure to do so has multiplied these proceedings "unreasonably and vexatiously." 28 U.S.C. §1927; *see also Boyer v. BNSF Ry. Co.*, 824 F.3d 694, 708 (7th Cir. 2016) ("'If a lawyer pursues a path that a reasonably careful attorney would have known, after appropriate inquiry, to be unsound, the conduct is objectively unreasonable and vexatious.'") (quoting *In re TCI, Ltd.*, 769 F.2d 441, 445 (7th Cir. 1985)); *Dal Pozzo v. Basic Mach. Co.*, 463 F.3d 609, 614 (7th Cir. 2006) (same).

sanctionable. In this case appellees' attorneys' fees are an appropriate sanction; these are costs that would not have been incurred but for a doomed appeal, and the expense should be borne by the side that created them."). The bond should issue to ensure that they do.

McDonald argues that his objections "were hardly frivolous" and that he "supported [an] assertion by citation." Opp. at 12-13. His argument simply ignores this Court's findings of fact. According to McDonald, it is a "fact that the settlement notice was misleading" (*id.* at 12), but this Court already found that the Settlement notice was accurate. Tr. 59-60. McDonald does not even mention the Court's finding, let alone show that it was erroneous.[4] Likewise, McDonald continues to challenge the estimated recovery amount, pressing arguments already rejected as "perfunctory" and "conclusory," without any record support. Objector's assertion that adding prejudgment interest to the maximum damages under the leakage model would yield $5 billion simply conflicts with reality. Tr. at 55-56.

Nevertheless, Objector argues that his objection to the Settlement "was on-the-mark" "particularly given the abject liability of the defendants and the harm that resulted." Opp. at 13. But the harm to which Objector refers appears to be "the near collapse of the banking system," and as even he admits, damages from that calamity simply were not available in this lawsuit. McDonald Decl., ¶¶6-7. In short, McDonald has no basis to argue that the Court abused its discretion in approving the Settlement, and essentially admits that he has no legal substance to support his position, making his appeal regarding the Settlement entirely frivolous.

McDonald's appeal of the attorney fee award is also frivolous. As this Court has already found, McDonald's arguments "do not comport with the Seventh Circuit's market-based approach." Tr. at 68-69. Despite McDonald's invitation to do otherwise, the Court applied the law in this Circuit, explaining that "the Court will not substitute its own ex post judgment for an arrangement that satisfies a willing buyer and a willing seller." *Id.* McDonald's continued insistence on arguments that are contrary to Seventh Circuit law is frivolous. *See Sambrano v. Mabus*, 663 F.3d

[4] McDonald's argument that defendants could not challenge liability in the second trial is simply incorrect. Opp. at 12. This Court ruled that Plaintiffs needed to prove loss causation, an element required to establish liability for securities fraud, at the second trial. *Lawrence E. Jaffe Pension Plan v. Household Int'l.*, 2016 U.S. Dist. LEXIS 70816, at *9-*10 (N.D. Ill. May 31, 2016).

879, 881 (7th Cir. 2011) (finding an appeal frivolous when it "advanc[ed] an argument with no prospect of success"); *Mestayer*, 905 F.2d at 1081 ("An appeal may be frivolous when it merely restates arguments that the district court properly rejected.").

With a frivolous argument entirely at odds with Seventh Circuit law, McDonald alludes to "one court higher than the Seventh Circuit," signaling that he will now seek a reversal of Seventh Circuit precedent. Opp. at 13 n.7. This about-face suffers from two insurmountable problems. First, McDonald's objection purports to be based ***on*** Seventh Circuit law, not in opposition to it. *See In re Hendrix*, 986 F.2d 195, 200 (7th Cir. 1993) ("by appealing in the face of dispositive contrary authority without making arguments for overruling it, [appellant] filed a frivolous appeal"); *cf. Theis v. Smith*, 676 F. Supp. 874, 877 (N.D. Ill. 1988) (finding Rule 11 sanctions appropriate where "[e]very one of the claims [] was foreclosed by prior case law, and plaintiffs' lawyers did not even attempt a good faith argument for extending or modifying that law"). McDonald even admits that his appeal is not an effort to change the law of the Seventh Circuit, but instead a reiteration of his argument that the "market-based" approach "does not support the fee award here." Opp. at 13 n.7. And the very first heading in his objection proclaims (incorrectly) that the fee award is "contrary to Seventh Circuit precedent." Objection at 1 (Dkt. No. 2242). *See also* Objection at 6 (arguing that objector's proposed fee award "would honor Seventh Circuit precedents"); *id*. at 7 (purportedly relying on what "Seventh Circuit precedent indicates"); *id*. at 8 (claiming that "[t]he Seventh Circuit set a ceiling of two" for a multiplier); *id.* at 11 (basing erroneous fee-shifting argument in part on *Pierce v. Visteon Corp*., 791 F.3d 782, 787 (7th Cir. 2015)).

Second, even if any of McDonald's arguments could be characterized as seeking a modification of existing law, none of them are reasonable, and his appeal therefore remains frivolous. *See TCI*, 769 F.2d at 447 ("If a competent attorney would find no basis for a legal argument, then it does not interfere with zealous advocacy to penalize the repetitious assertion of that argument.").

In addition to its fatal substantive flaw, Objector's appeal suffers from a procedural problem. As Plaintiffs explained in their opening brief, because Objector failed to intervene he should be

limited to appealing on his own behalf, and if he does not so limit his appeal the bond should be large enough to cover the class-wide costs of delay. Mem. at 10-11 (Dkt. No. 2275). In response, Objector argues that if Plaintiffs are right there should be no bond because the "appeal would not delay anything." Opp. at 2. But whether he has appellate standing to represent the Class will be adjudicated in the appeal. In the interim, the Class will lose millions of dollars. This is why the court in *Allapattah*, 2006 WL 1132371, required the objector to post a $13.5 million bond to cover costs, including lost interest, if the objector filed an appeal both as to the objector and as to the class as a whole, even after finding that the objector lacked appellate standing to do so. *Id.* at *18.[5]

Several circuit courts have approved bonds to secure costs incurred due to frivolous litigation and appeals. In *Anderson v. Steers, Sullivan, McNamar & Rogers*, 998 F.2d 495, 496 (7th Cir. 1993), the Seventh Circuit upheld a bond based on "[t]he apparently frivolous character of this litigation," where a litigant did not establish that he could or would pay costs if he lost and did not establish that the required bond was an unreasonable estimate of the likely costs. In *Cardizem*, the Sixth Circuit dismissed an appeal for failure to pay an $174,429 appeal bond, holding the arguments on appeal "were 'all without merit and bordered on frivolousness,'" the district court was "entitled to include in the bond amount attorneys' fees," and also "any other damages incurred, presumably including administrative costs." *In re Cardizem CD Antitrust Litig.*, 391 F.3d 812, 817-18 (6th Cir. 2004). Likewise, in *Polyurethane*, the Sixth Circuit recently dismissed an objector's appeal for failure to post a $145,463 bond because the "objections to the settlements lack merit, [the objector's] appeal has the practical effect of prejudicing the [class] by delaying disbursement of settlement funds and he offers no proof of financial hardship that would justify his failure to post the bond." *In re Polyurethane Foam Antitrust Litig.*, 2016 WL 6599570, at *2 (6th Cir. June 20, 2016). In *Sckolnick v. Harlow*, 820 F.2d 13, 15 (1st Cir. 1987), the First Circuit upheld the bond where "the

[5] Contrary to Objector's claim, the Seventh Circuit did not address this issue in *Eubank v. Pella Corp.*, 753 F.3d 718 (7th Cir. 2014). In that case plaintiffs argued that Seventh Circuit law under *Devlin v. Scardelletti*, 536 U.S. 1 (2002), required an appeal to be dismissed when the objector failed to intervene and could have opted out of the settlement. *See* Reply, *Eubank v. Pella Corp.*, No. 13-2091 (7th Cir. 2014) (Dkt. No. 47). Moreover, in *Eubank* four of the six objectors had been named plaintiffs but were forced out of the case by lead counsel after they opposed the settlement. *Eubank*, 753 F.3d at 722. In addition, the Seventh Circuit determined the settlement was "scandalous," and lead plaintiff and lead counsel inadequate. *Id.* at 721, 729.

district court's decision to set the amount at $5,000 implied a view that the appeal might be frivolous." And, in *Adsani v. Miller*, 139 F.3d 67, 79 (2d Cir. 1998), the Second Circuit noted that "[a] district court, familiar with the contours of the case appealed, has discretion to impose a bond which reflects its determination of the likely outcome of the appeal." Objector simply disregards this precedent.[6]

B. The Costs of Delay Are Properly Included in the Bond

Objector's frivolous appeal of the Court's order approving the Settlement has economic consequences: measured conservatively, the Class is suffering more than $10,500 per day in lost interest and claims administration costs. Objector has presented no evidence to question the conservatively-calculated measure of economic loss, and has made no attempt to show the lost sums could be collected absent a bond. Instead, Objector insists that delay costs cannot be included in a Rule 7 bond absent a specific statute. Opp. at 5. But this argument ignores Plaintiffs' citation to two specific statutes, §§1912 and 1927, Rule 38, and the numerous decisions allowing such costs in Rule 7 bonds.[7]

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[6] Objector also fails to address, let alone distinguish, *Barnes v. FleetBoston Fin. Corp.*, 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"); *In re Wal-Mart Wage and Hour Emp't Practices Litig.*, 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) (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 because "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 v. Urban Outfitters*, 2006 WL 3635392, at *1 (S.D.N.Y. Dec. 12, 2006) (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).

[7] Objector simply disregards contrary authority which establishes that bonds covering delay costs are both permissible and widely imposed under Rule 7: *Polyurethane Foam*, 2016 WL 6599570, at *2; *Cardizem*, 391 F.3d at 818 (affirming $174,429 bond, including $123,429 in administration costs); *Allapattah*, 2006 WL 1132371, at *18 (requiring objector to post $13.5 million bond to cover the damages and costs, including lost interest, that the class would suffer if objector attempted to file a class-wide appeal); *In re Gen. Elec. Co. Sec. Litig.*, 998 F. Supp. 2d 145, 157 (S.D. N.Y. 2014) (holding that "[t]he authority to award costs is not limited to the costs awarded under a feeshifting statute" and that "Rule 7 costs also include damages imposed under Rule 38, Fed. R. App. P.") (citing *Sckolnick*); *In re Checking Account Overdraft Litig.*, 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 ("First Circuit case law indicates that 'costs,' as contemplated in Rule 7, include the costs attendant to the delay associated with an appeal . . . ."); *Conroy v. 3M Corp.*, 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

More importantly, in focusing exclusively on Rule 7, Objector fails to address in any way Plaintiffs' additional basis for requesting the bond – this Court's inherent authority. Indeed, the Seventh Circuit is clear that even where "[n]o statute or rule, or decision of this circuit, expressly authorizes a court to require the posting of a bond to secure the payment of costs to a party should he prevail in the case . . . the power to tax costs implies the ancillary power to take reasonable measures to ensure that the costs will be paid." *Anderson*, 998 F.2d at 496. Thus, Objector's lengthy arguments about the contours of Rule 7 are irrelevant. In this circuit, "if there is reason to believe that the prevailing party will find it difficult to collect its costs, the court can require the posting of a suitable bond." *Id.* Incredibly, amidst pages of diversion into out-of-circuit authority, Objector does not mention *Anderson*, and does not address the Court's inherent power to require the requested bond.[8]

Although the Court's inherent power is enough, the bond also is available under Rule 7. Rule 7 is designed to protect appellees against the risk of non-payment by unsuccessful appellants. *Adsani*, 139 F.3d at 79. The term "costs" in Rule 7 refers to "all costs properly awardable under the relevant substantive statue ***or other authority***. In other words, ***all costs properly awardable in an action*** are to be considered within the scope of [the] Rule." *Id.*, 139 F.3d at 72; *see also Cardizem*, 391 F.3d at 817 ("Applying the Supreme Court's decision in *Marek* to the meaning of 'costs' under Fed. R. App. 7 . . . we are required to determine what sums are 'properly awardable under the relevant substantive statute ***or other authority***.'") (quoting *Marek v. Chesny*, 473 U.S. 1, 9 (1985)).

Here, the costs from delay Plaintiffs seek to include in the bond are "properly awardable" under 28 U.S.C. §§1912, 1927 and Fed. R. App. P. 38. Rule 38 allows courts of appeal to award "just damages and . . . single or double costs" for bringing a frivolous appeal. Such costs include

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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).

[8] "Notably, courts possess these powers 'even if procedural rules exist which [govern] the same conduct.'" *Pedraza v. United Guar. Corp.*, 313 F.3d 1323, 1335 (11th Cir. 2002) (quoting *Chambers v. NASCO, Inc.*, 501 U.S. 32, 49 (1991)). In *Pedraza*, the Eleventh Circuit confirmed the court's inherent power to require one party to bond their adversary's attorneys' fees notwithstanding the American Rule on attorneys' fees. However, the panel reversed the district court's imposition of a bond on that basis because the court's finding that the appeal was "without foundation" fell short of the subjective bad faith contemplated as an exception to the American Rule by the Supreme Court in *Chambers*. *Id*. at 1336. Plaintiffs here have not sought to include attorneys' fees in the bond and therefore need not meet the heightened subjective bad faith requirement required to overcome the American Rule, but they nevertheless have done so.

"damages, attorney's fees and other expenses incurred by an appellee." Fed. R. App. P. 38 Advisory Committee Notes (1967). Likewise, 28 U.S.C. §1912 provides that "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," and §1927 states, "[a]ny attorney . . . who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct." Federal courts have repeatedly found that Rule 7 appeal bonds may properly include administrative costs and lost interest resulting from appeals by objectors to class action settlements. *See, e.g.*, n.7, *supra*.

Objector does not address this contrary authority. Instead, he relies heavily on *Tennille v. Western Union Co.* However, the issue in *Tennille* was whether the bond could include unnecessary notice costs, and the costs of maintaining the settlement. *See Tennille v. Western Union Co.*, 774 F.3d 1249, 1254 (10th Cir. 2014). Here, by contrast, the lost interest and administrative cost portions of the bond includes only costs directly caused by the appeal, and recoverable pursuant to statute.[9] Objector also cites several cases holding under various circumstances that attorney fees may not be included in the bond, but Plaintiffs do not seek a bond for attorney fees.[10] Finally, Objector suggests that "this Court should not attempt to pre-judge" whether his appeal is frivolous (Opp. at 10), but the Pennsylvania district court cases he relies on disregard the numerous cases holding that district courts who are "familiar with the contours of the case appealed, has discretion to impose a bond which reflects its determination of the likely outcome of the appeal." *See, e.g.*,

[9] Contrary to Objector's representation, *MercExchange, L.L.C. v. eBay*, 660 F. Supp. 2d 653, 660 (E.D. Va. 2007), had nothing to do with bonding lost interest on a common fund. In that case, the court rejected an attempt by the ***losing*** party in a patent dispute to impose a bond on the ***prevailing*** party. Obviously, here, Plaintiffs are not the losing party. In *Eastwood Enters., LLC v. Farha*, 2011 WL 2681915 74536 (M.D. Fla. July 11, 2011), moreover, the court did not address any of the statutes which would give rise to Objector and his counsel's liability for delay costs in this case, and failed to acknowledge *Pedrazza's* holding that the court has inherent authority to require appeal bonds.

[10] *See Pedraza*, *supra* (excluding attorney fees from costs but holding court has inherent authority to include them in appeal bond); *Young v. New Process Steel, LP*, 419 F.3d 1201, 1208 (11th Cir. 2005) (excluding attorney fees from the bond, unless the appeal is unreasonable); *In re Toyota Motor Corp. Unintended Acceleration Mktg., Sales Practices, & Prods. Liab. Litig.*, 2013 WL 5775118, at *2-*3 (C.D. Cal. Oct. 21, 2013) (acknowledging many courts include administrative costs in appeal bonds, but declining to do so based on Ninth Circuit authority that prohibited including attorney fees in the bond); *In re AOL Time Warner, Inc.*, 2007 WL 2741033, at *5 (S.D.N.Y. Sept. 20, 2007) (excluding attorney fees from bond).

Adsani, 139 F.3d at 79. Nor do Objector's cases have facts like this one, where Objector has admitted his appeal of the Settlement has no merit and conceded that he is only maintaining it for tactical reasons. Indeed, attempts like Objector's here to impose a one-size-fits all framework to appeal bonds have been rejected. *See, e.g.*, *In re Polyurethane Foam Antitrust Litig.*, 178 F. Supp. 3d 635, 644 (N.D. Ohio 2016) ("[W]hile *Cardizem* outlined a method of including fees that fit the facts of ***that*** case, it is not the exclusive method and does not fit ***this*** case. This Court has the 'inherent power to require the posting of cost bonds and to provide for the award of attorneys' fees.'") (emphasis in original).

Objector's assertion that the requested bond is the equivalent of a supersedeas bond is a diversionary tactic. Under the facts of this case, the Court can order the requested bond pursuant to Rule 7, or its inherent authority, or both. Objector also argues that because "interest is not an item of 'damages'" in the Settlement Agreement, Plaintiffs cannot recover from Objector the lost interest caused by his conduct. Opp. at 7-8. But the Settlement Agreement does not govern, let alone limit, Plaintiffs' ability to recover costs from objectors.[11] Nor does the law require the parties to anticipate vexatious interference from an Objector who, when the Settlement Agreement was signed, had never participated in the action.[12] Finally, Objector insinuates that Plaintiffs should have negotiated a

[11] Objector's citation to *In re Enfamil Lipil Mktg.*, 2012 WL 1189763 (S.D. Fla. Apr. 9, 2012), a case in which the defendant, rather than the class, was obligated to bear the costs of delay, has no relevance. In that case, the court distinguished *In Re Checking Account Overdraft Litigation*, 2012 WL 456691, at *2 (S.D. Fla. Feb. 14, 2012), in part, because "the plaintiffs sought to protect a tangible benefit to the class members: two years' compounded interest on the settlement amount," whereas the bond sought in *Enfamil* would have protected the defendant. *Enfamil*, 2012 WL 1189763, at *3. The court distinguished *Allapattah* for the same reason. *Id.* at *3 n.2. Here, unlike *Enfamil*, Plaintiffs have "demonstrate[d] a tangible threat to the class as a whole." *Id.* at *3.

[12] The cases Objector cites are factually inapposite. In *In re American Investors Life Ins. Co. Annuity Mktg. & Sales Practices Litig.*, the plaintiffs did not seek a bond for lost interest but rather for "two types of settlement benefits" – "the reduction in death benefits surrender charges" and "the elimination of surrender charges." 695 F. Supp. 2d 157, 165 (E.D. Pa. 2010). Furthermore, the defendants were "able to implement the settlement if they [chose] to do so" because the final order's requirements for an appeal had not been met by the appellant. *Id.* at 166. Finally, unlike here, there were 12 objectors to the settlement and 840 class members "excluded from the settlement," including 39 opt-outs represented by objector counsel. *Id.* at 160. *In re Connaught Properties, Inc.* involved a "debtor object[ing] to the post-judgment interest rates asserted by [two] secured creditors." 176 B.R. 678, 679 (Bankr. D. Conn. 1995). Besides not being a class action or involving an appeal bond, *Connaught* is inapposite because it merely rejected the debtor's attempt to get a lower interest rate as to one of the creditors, despite having stipulated to a higher rate. Neither Plaintiffs nor Defendants are attempting to circumvent the Stipulation of Settlement here. While *Vaughn v. Am. Honda Co.* was a class action, "[s]everal class members [] objected on disparate grounds," and the court specifically did not decide whether "interest accrued pending appeal can appropriately be included as part of a bond for costs on appeal." 507 F.3d 295, 298-99 (5th Cir. 2007).

settlement that did not prohibit payment of the Settlement Benefits pending appeal, but they know that is unrealistic. No responsible litigant would allow more than a billion dollars to be distributed to 33,000-plus class members, making the funds unrecoverable, while the possibility remained that the Settlement could be overturned on appeal.

In short, there is no question that this Court has the discretion to require the requested bond. Given the weakness of Objector's appeal, and the damage it will do to the Class, the Court should use that discretion to grant Plaintiffs' motion.

C. The Interest Component of the Bond Was Calculated Conservatively; Ultimately, Objector and His Counsel Could Be Required to Pay More

Objector contends that a bond cannot account for post-judgment interest because he cannot be compelled to pay post-judgment interest. Opp. at 8-9. Once again, Objector misses the point. Plaintiffs did not invoke 28 U.S.C. §1961(a) because they contend Objector and his counsel are liable under that statute but instead as a reference to the most conservative measure of lost interest. Ultimately, when Plaintiffs seek their costs, this Court or the Seventh Circuit may award a much higher percentage to compensate the Class for Objector's frivolous delay.

There is no question that awarding interest on the judgment is a proper way to compensate the Class for the delay caused by the frivolous appeal. *See Davis v. Veslan Enterprises*, 765 F.2d 494, 500 (5th Cir. 1985) (affirming district court's award of Rule 11 sanctions based on interest lost due to defendant's frivolous removal petition). *A/S Siljestad v. Hideca Trading, Inc.*, 678 F.2d 391, 392 (2d Cir. 1982) (awarding 14% interest on judgment due to frivolous appeal). Where post-judgment interest is owed, the extra amount to compensate for frivolous delay is added on top. *Brady v. Chem. Const. Corp.*, 740 F.2d 195, 202 (2d Cir. 1984) (awarding 3% interest "in addition to post-judgment interest" because appeal was frivolous); *Oscar Gruss and Son v. Lumbermens Mut. Cas. Co.*, 422 F.2d 1278, 1284 (2d Cir. 1970) (awarding double costs, attorney's fees, and 4% interest in addition to post judgment interest where the largely-frivolous appeal "simply ignored the abundant evidence supporting the determination of the jury and the judge"); *Natl. Serv. Industries, Inc. v. Vafla Corp.*, 694 F.2d 246, 247-48 (11th Cir. 1982) (awarding double costs, attorneys' fees, "and damages which reflect an increase in the applicable interest rate on the district court's judgment" where appeal was

frivolous). Thus, Plaintiffs' use of §1961(a) to establish a floor for quantifying the harm caused by Objector's appeal is not only appropriate, it is extremely conservative.

D. The Proposed Bond Will Not Foreclose Appellate Review

Objector claims that the proposed bond amount is too high such that it would foreclose appellate review. This generalized assertion is insufficient. To establish an inability to pay, an appellant is required to submit financial documentation or other reliable evidence. *See Hess v. Reg-Ellen Mach. Tool Corp.*, 367 Fed. App'x 687, 691 (7th Cir. 2010) (unpublished) ("Havrilesko also asserts that because he submitted an unrebutted affidavit attesting that he could not afford to pay, the court improperly concluded an award of fees was warranted. But the court permissibly ruled that his affidavit did not give it an adequate basis to find an inability to pay: he attached no bank statements or tax returns, and failed to disclose whether he had any alternate sources of income."); *Baker*, 2006 WL 3635392, at *1 ("[p]laintiff and his counsel have not demonstrated financial inability to post a bond as security for costs" where counsel "submitted, under seal, a variety of financial documents," but "does not submit an affidavit to the effect that the balances shown on the documents are accurate and that he has no other assets or interests which could be used to obtain a bond"). Objector's anemic declaration, which contains no financial information whatsoever, is insufficient to substantiate either his inability to post the requested bond, or the amount of the bond he could afford.

Objector's Counsel did not even bother to assert that they are unable to post the bond, let alone submit supporting evidence. Instead, they claim they cannot be required to post the bond or any part of it. But there is ample authority and reason to require Davis and Nutley to be jointly and severally responsible for the bond along with McDonald. First, other courts have required objector's counsel to ensure the posting of an appeal bond. *See Dennings v. Clearwire Corp.*, 2013 WL 3870801, at *1 (W.D. Wash. July 26, 2013) ("Counsel for Objectors was warned in advance that failure to timely post the bond would expose him and his clients to sanctions."); *Baker*, 2006 WL 3635392, at *2 (plaintiff and his counsel "shall each post a bond in the amount of $50,000 as security for costs and fees associated with their appeal"); *Wal-Mart*, 2010 WL 786513, at *1-*2 (granting motion to require "objectors . . . and their attorneys, to post appeal bonds," and ordering

four objectors each to post a $500,000 appeal bond "through her attorneys," and naming the specific objector counsel); *Heekin v. Anthem, Inc.*, 2013 WL 752637, at *4 (S.D. Ind. Feb. 27, 2013) ("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.").

Second, as discussed above, sanctions under 28 U.S.C. §1927 and Fed. R. App. P. 38 are properly awardable in this action against Objector's Counsel. *See* 28 U.S.C. §1927; *Mestayer*, 905 F.2d at 1081 (stating that "Rule 38 sanctions may be assessed against either an appellant or an appellant's attorney"). Thus, Rule 7 in conjunction with §1927 and Rule 38 and the Court's inherent authority provides the Court with the authority to hold objector counsel jointly and severally responsible for the appeal bond. Furthermore, such an order is called for here. Because Objector's Counsel will share in the responsibility of paying costs for the frivolous appeal under §1927 and Rule 38, there is no reason why they should not be jointly and severally responsible for the appeal bond. Indeed, such an order would eliminate any concern that the bond amount will foreclose appellate review. *Cf.* Dkt. No. 2061 at 4 ("'Entrepreneurial attorneys already supply risk-bearing services in class actions. . . . By 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.'") (quoting *White v. Sundstrand Corp.*, 256 F.3d 580, 585-86 (7th Cir. 2001)). Objector's Counsel are nothing if not "[e]ntrepreneurial attorneys"; they freely admit both that they anticipate a "substantial fee" for their work in this case (Opp. at 4), and that they routinely represent class action objectors. *Id.*, n.3.[13]

Finally, Objector's contention that his appeal seeks to "correct[]" the "district court's errors" and somehow constitutes "a benefit to the class" is laid bare by his own admission that his appeal of the Settlement is being maintained not because of its merits, but solely for tactical reasons. *See* Brooks Reply Decl., Ex. B.

[13] Contrary to McDonald's assertion, "[c]ourts routinely require multiple objectors who are appealing the same order to post a bond jointly and severally." *Polyurethane*, 178 F. Supp. 3d at 645 (collecting five such cases). "This arrangement allows the objectors to pool their resources, making the bond less onerous for any given appellant." *Id.*

E. Objector's Request to Stay the Bond Should Be Denied

Noting that Fed. R. App. P. 8(a) requires him to seek a stay in this Court prior to making a motion to the Seventh Circuit, McDonald includes a half-hearted "Conditional Request for a Stay" in his Opposition. "When considering whether to grant a stay, the Court looks to the following factors: 1) whether the appellant has shown a likelihood of success on appeal; 2) whether the appellant has demonstrated a likelihood of irreparable harm if a stay is not granted; 3) whether a stay would substantially harm other parties to the litigation; and 4) the public interest." *Heekin v. Anthem, Inc.*, 2013 WL 1080601, at *1 (S.D. Ind. Mar. 14, 2013) (citing *Hinrichs v. Bosma*, 410 F. Supp. 2d 745, 749 (S.D. Ind. 2006)). Importantly, "a request for a stay is a request for extraordinary relief, equitable in character, and the movant bears a heavy burden." *Schmude v. Sheahan*, 2004 WL 1179418, at *3 (N.D. Ill. May 24, 2004). Here, McDonald has failed even to attempt to meet his heavy burden. As demonstrated herein, Objector cannot meet any of the required criteria. Thus, his request for a stay should be denied.

III. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court require Objector and his counsel to jointly and severally post a $3,089,195 bond to secure payment of the costs the Class expects to incur as a result of the frivolous appeal.

DATED: February 10, 2017

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on February 10, 2017, 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 February 10, 2017.

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