UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

IN RE: POLYURETHANE FOAM ANTITRUST LITIGATION (JZ)	)	MDL Docket No. 2196
	)	Index No. 10-MD-2196
THIS DOCUMENT RELATES TO:	)	Hon. Jack Zouhary
INDIRECT PURCHASER CLASS	)	

INDIRECT PURCHASER CLASS' MOTION FOR ORDER REQUIRING POSTING OF APPEAL BOND AND INCORPORATED MEMORANDUM OF LAW

The Indirect Purchaser Class ("Plaintiffs" or the "Class") respectfully moves for an Order requiring objectors Andrews, Cannata, Cochran, and Sweeney (the "Appealing Objectors") to post an appeal bond pursuant to Rule 7 of the Federal Rules of Appellate Procedure. The Class further requests that such bond be set in the amount of $305,463, to be posted jointly and severally by the Appealing Objectors, to cover a portion of the costs of the appeal that they have each interposed challenging the Court's Final Approval Order (Dkt. No. 2020) and Judgment Entry (Dkt. No. 2021).

INTRODUCTION

More than 52,000 individuals and businesses have filed claims seeking compensation for the Defendants' actions to fix prices in the market for polyurethane foam. Of those tens of thousands of Class members, only seven filed objections to the extraordinary Settlement.

The Court, after providing the objectors the opportunity to air their concerns in exhaustive briefing and at the fairness hearing, overruled their objections or otherwise

addressed them in the Final Approval Order. Now, four of the seven objectors have filed Notices of Appeal of the Court's Final Approval Order. *See* Dkt. Nos. 2035, 2037, 2038, 2093. Each of these Appealing Objectors is a serial objector, motivated by a transparent desire to extort money from Class Counsel. Indeed, this Court has recognized that each of these Appealing Objectors falls into one or more of the following categories: possessing improper motives, plainly misstating the facts, offering boilerplate language that they had presented to other courts unsuccessfully, being the subject of serious disciplinary proceedings, making scurrilous unfounded accusations including perjury and fraud, and/or making extortionist threats. Final Approval Order, Dkt. No. 2020, at 14.

Rather than being chastened by the Court's recounting and rejection of their cavils or being satisfied with the Court's careful consideration of their objections, these four Appealing Objectors continue to try to disrupt the orderly conclusion of this case for their own selfish motives. Tellingly, the only objector that this Court deemed to have submitted its objections in good faith has chosen *not* to appeal this Court's thoughtful Final Approval Order.

On this record, it is, to put it charitably, highly improbable that the Sixth Circuit Court of Appeals will conclude that the Court abused its discretion when approving the Settlements and in granting a reduced fee award to Class Counsel. In the meantime, because Defendant Carpenter is not obligated to make its final $43.5 million settlement payment until appellate rights are exhausted, this appeal will cause a substantial sum of interest income to be diverted to Carpenter – interest which would otherwise be accruing to the sole benefit of the Class members. In addition, the continuing attempt to extort a payment from Class

Counsel will delay the payment of millions of dollars in claims to Class members and increase the costs of this litigation, including increased administrative claims processing costs. For all these reasons, the need for an appropriate bond is now both ripe and urgent.

The requested amount of $305,463 is a conservative estimate of the costs that will ultimately be taxed to the Appealing Objectors, and it includes: (a) an estimated $10,000 in appeal-related expenses taxable under 28 U.S.C. § 1920 and Fed. R. App. P. 39(e); (b) an estimated $30,463 in lost interest income that will be diverted to Defendant Carpenter rather than be reserved for the exclusive benefit of the Class; (c) estimated additional claims administration costs up to $15,000; and (d) estimated attorneys' fees of approximately $250,000.

Imposition of the requested $305,463 appellate bond, to be paid jointly and severally by the Appellants, is both reasonable and necessary to protect the Class.

LEGAL STANDARD FOR IMPOSITION OF AN APPELLATE BOND

Federal Rule of Appellate Procedure 7 empowers district courts to "require an appellant to file a bond or provide other security in any form and amount necessary to ensure payment of costs on appeal." The purpose of a bond is to protect the appellee against the risk of non-payment of costs by an unsuccessful appellant. *See Adsani v. Miller*, 139 F.3d 67, 75 (2d Cir. 1998); *Pedraza v. United Guar. Corp.*, 313 F.3d 1323, 1333 (11th Cir. 2002).

The Court has the discretion to decide whether to require a bond and the amount of the bond. *See In re Munn*, 891 F.2d 291, 291 (6th Cir. 1989); *see also Sckolnick v. Harlow*, 820 F.2d 13, 15 (1st Cir. 1987) (holding that the district court did not abuse its discretion in including attorneys' fees that might be awarded under Rule 38 in cost bond on appeal, where

district court found appeal to be frivolous). The Court retains jurisdiction "during the pendency of the appeal" to order appeal bonds. *See In re Advanced Elecs., Inc.*, 283 F. App'x 959, 963 (3d Cir. 2008) (quoting *Venen v. Sweet*, 758 F.2d 117, 120-21(3d Cir. 1985)). Finally, the amount of the bond set by the Court is reviewable only for abuse of discretion. *See In re Cardizem CD Antitrust Litig.*, 391 F.3d 812, 818 (6th Cir. 2004).

As this Court recognized in its prior ruling, courts in the Sixth Circuit consider four factors in determining whether to impose a bond under Rule 7: "(1) the appellant's financial ability to post a bond; (2) the risk that the appellant would not pay appellee's costs if the appeal is unsuccessful, (3) the merits of the appeal, and (4) whether the appellant has shown any bad faith or vexatious conduct." *See* Dkt. No. 2020 at 42-43 (quoting *Gemelas v. Dannon Co., Inc.*, 2010 WL 3703811, at *1 (N.D. Ohio Aug. 31, 2010) (granting motion to impose bond on serial objector, who had objected in three prior class actions, in the amount of $275,000, consisting of litigation costs and appellees' attorneys' fees)).

ARGUMENT

I. An Appeal Bond Is Necessary And Justified.

A. The Appellants' Actions Establish A History Of Bad Faith And Vexatious Conduct.

The factor most relevant to this Motion is the issue of whether the Appellants have "shown any bad faith or vexatious conduct." *Gemelas,* 2010 WL 3703811, at *1. The answer is clear and unequivocal. Each of the Appellant's historical record demonstrates them to be a "serial objector" who has been previously admonished in other actions for their vexatious

conduct. Dkt. No. 2020 at 13.[1] Moreover, each of the Appellants is part of a class of serial objectors whose goal is to divert a portion of the proceeds to themselves. *See Tornes v. Bank of Am.*, 830 F. Supp. 2d 1330, 1361 n.30 (S.D. Fla. 2011) (often, the "sole purpose" of serial objectors "is to obtain a fee by objecting to whatever aspects of the Settlement they can latch onto" and levy "what is effectively a tax on class action settlements, a tax that has no benefit to anyone other than to the objectors."); *Gemelas*, 2010 WL 3703811, at *2 (noting that appellant "appears to be making a business of objecting to, and appealing, class action settlements in order to obtain some financial reward" and holding that his "form appeal" was meritless); *In re Wal-mart Wage & Hour Emp. Practices Litig.*, 2010 WL 786513, at *1 (D. Nev. Mar. 8, 2010) (holding that objections were meritless, and noting that attorneys for objectors had "documented history of filing notices of appeals from orders approving other class action settlements, and thereafter dismissing said appeals when they and their clients were compensated by the settling class or counsel for the settling class"; ordering each objector to file $500,000 appeal bond).

1. Andrews' Conduct

Andrews may be the most egregious of the serial, extortionate objectors in this action, and his vexatious conduct has plagued courts throughout the country. He has objected to numerous settlements in the past eight years. *See* Dkt. No. 1991 at 53 (collecting cases). In

[1] Sam Cannata and Edward Cochran routinely file objections on behalf of their family members; these attorneys—not their purported "clients"—are the driving force behind the objections. *See, e.g.*, *In re Kentucky Grilled Chicken Coupon Marketing & Sales Practices Litig.*, 09-cv-07670, Dkt. No. 105 (N.D. Il. Oct. 24, 2011) (S. Cannata representing his wife, J. Cannata, in the objection and abandoning notice of appeal); *Poertner v. The Gillette Company*, 12-cv-00803, Dkt. No. 127 (M.D. Fl. Feb. 27, 2014) (S. Cannata representing G. Cannata in objection); *Gemelas v. The Dannon Company, Inc.*, 08-cv-00236, Dkt. No. 60 (E.D. Ohio May 24, 2010) (E. Cochran representing W. Cochran in objection and abandoning notice of appeal).

each of these cases, Andrews attempted to delay settlement to obtain a personal payout.[2] In at least three cases, counsel publicly complained to the court that Andrews had harassed and extorted them.[3] As already shown in this case, he continues that pattern.

Andrews has been repeatedly admonished by federal judges for this behavior.[4] Despite these formal and public reprimands, Andrews continues his extortionate tactics in this case. Tellingly, Andrews informed counsel that he would be objecting, *before he had even reviewed any of the settlement terms or details regarding the claims process*. *See* A. Jewell Decl., Ex. 33 to Dkt. No. 1991, at ¶ 4. As this Court recognized in the Final Approval Order, Andrews has made "inflammatory and conclusory accusations of fraud" by Class

---

[2] At times, Andrews has succeeded in coercing counsel to pay him in exchange for withdrawing his objection. *In re Tyco Int'l, Ltd. Multidistrict Sec. Litig.*, No. 02-md-01335 (D.N.H. 2007), Dkt. Nos. 1146-17, Ex. 31 to Dkt. No. 1991 (agreeing to withdraw his objection in exchange for a $25,000 payment, on top of $12,000 counsel had already paid him); *In re Lehman Bros. Sec. and ERISA Litig.*, 1:09-md-02017 (E&Y Settlement) (S.D.N.Y. 2014), Dkt. Nos. 889-9, Ex. 32 to Dkt. No. 1991 (agreeing to withdraw his objection in exchange for a $25,000 payment from the attorneys' fees award).

[3] *See Shane Grp., Inc. v. Blue Cross Blue Shield of Michigan*, 2:10-cv-14360-DPH-MKM (E.D. Mich. 2014), Dkt. Nos. 169-15 & 206-1 (Andrews demanded $153,450 and told counsel to "have a check ready for me to pick up…*regardless of how the court rules*. If not it will get much worse when I take further actions….") (emphasis added); *Shane Grp., Inc. v. Blue Cross*, No. 15-1544 (6th Cir. 2015), Dkt. No. 28 at 27 (stating that Andrews continually made "personal and professional threats and baseless accusations;" "warned that 'counsel risks losing everything at any time'" and "repeatedly threatened to file bar complaints, intervene in Class Counsel's other cases, or send his scurrilous claims to media outlets and judges throughout Michigan."); *In re Lehman Bros. Equity/Debt Sec. Litig.*, No. 08-CV-5523 (S.D.N.Y. 2012), Dkt. No. 387 (April 12, 2012 Hr'g Tr. at 5, 33 (Andrews "tried to extort a fee from us"); *In re Nutella Mktg. & Sales Practices Litig.*, 3:11-cv-01086 (D.N.J. 2012), Dkt. No. 89 at 13 ("Andrews demanded compensation in exchange for forgoing filing his objection.").

[4] In *Nutella*, the Honorable Freda L. Wolfson stated, "Mr. Andrews … has extorted additional fees from counsel in other cases through his objections or threats to object, and has…done so in this case." Dkt. No. 111 (July 9, 2012 Tr. at 128-29). In *Shane*, Judge Denise P. Hood, found that "Andrews' pro se submissions…are not warranted by the law and facts of the case, were not filed in good faith and were filed to harass Class Counsel." *Shane Grp., Inc. v. Blue Cross Blue Shield of Michigan*, No. 10-CV-14360, 2015 WL 1498888, at *20 (E.D. Mich. Mar. 31, 2015).

Counsel in this case – allegations which this Court "rejct[ed] completely." Dkt. No. 2020 at 9; *see also* Dkt. Nos. 1928 & 1929 (claiming that Counsel committed a "$30 million wire and financial fraud misconduct scheme," an "organized conspiracy," "embezzlement," "high on meth…review," "perjury," "a coordinated scheme to plunder funds," an "attempt to violate HIPPA," and "tortuous [*sic*] interference in a business relationship" and threatening to "visit with an agency…that has subpoena powers to investigate this computer and wire fraud conspiracy;" to "assemble a sanctions motion under Rule 11 and 28 U.S.C. 1927;" to have counsel sanctioned and disbarred; and that "Class Counsel **will** pay the objector substantial damages.").

Even after the Court rejected Andrews' behavior, Andrews has continued his harassment of Counsel in an apparent effort to discourage Counsel from filing an appeal bond. On the same day that the Notice of Appeal was filed, Andrews emailed lead counsel:

> Dear Sir, From what I remember you made an extraordinary admission in the Fairness Hearing which proves your unfitness to represent the class going forward and would be used by our opponents to the detriment of the class. If Class Counsel files a motion for an appeal bond, which you will lose, I will immediately forward the Farness Hearing Transcript and accompanying information to someone who will look into that admission further. I will also raise the issue in my opposition to bond filing opposing the bond request. There will be no further discussion about this particular issue. Chris Andrews

Email of Christopher Andrews, Feb. 22, 2016, Exhibit A hereto. Of course, there is no "extraordinary admission." But if Andrews were a sincere objector, he would have shared with the Court the information that he believed to be material; he would not conceal the information in a crude attempt to gain leverage with Class Counsel.

2. Cochran's Conduct

Edward Cochran, an Ohio attorney representing his relative Sean Cochran, is another serial objector who has filed objections in myriad class actions. *See* Dkt. No. 1991 at 59 (collecting cases). And Cochran has been repeatedly reprimanded for filing frivolous objections. *See In re UnitedHealth Group Inc. PSLRA Litig*., 643 F. Supp. 2d 1107, 1109 (D. Minn. 2009) (finding that Cochran's clients' objections "contributed nothing…in a pleading which may charitably be described as disingenuous"; denying his "outlandish fee requests"; and noting that the objections were motivated by an attempt to "hijack as many dollars ... as they can wrest from a negotiated settlement"); *In re Wal-Mart Wage & Hour Employment Practices Litig.*, 2010 WL 786513, at *1 (D. Nev. Mar. 8, 2010) (finding objection had "no merit" and would "most certainly be rejected by the Ninth Circuit Court of Appeal" and ordering Cochran's client to pay an appeal bond of $500,000, and also noting that Cochran and other attorneys representing objectors have "a documented history of filing notices of appeal from orders approving other class action settlements, and thereafter dismissing said appeals when [he] and [his] clients were compensated by the settling class or counsel for the settling class"); *In re Vytorin/Zetia Mktg. Sales Practices and Prods. Liab. Litig.*, No. 2:08-cv-00285, MDL No. 1938 (D.N.J. 2009), Dkt. No. 207, attached as Ex. 63 to Dkt. No. 1991 in this case (withdrawing objection after agreement to pay $55,000 from class counsel's expenses to, *inter alia*, Cannata, represented by Cochran).

3. Cannata's Conduct

Sam P. Cannata, an Ohio attorney who represents his wife Jill Cannata, is also a serial objector who has worked with Objector Cochran for years to object, or serve as objectors' counsel, in numerous class actions. *See* Dkt. No. 1991 at 61 (collecting cases).

Cannata's habit of objecting and appealing is also consistently frivolous; to Class Counsel's knowledge, Cannata's objections have never upended a targeted settlement, and all of his objection-related appeals have been withdrawn or dismissed. *See, e.g., Poole v. Merrill Lynch, Pierce, Fenner & Smith Inc*., No. 3:06-cv-01657 (D. Ore. 2010), Dkt. No. 119, attached as Ex. 57 to Dkt. No. 1991 in this case; *Sampang et al v. AT&T Mobility LLC et al.*, No. 2:07-cv-05325 (D.N.J., 2010), Dkt. No. 630, attached as Ex. 58 to Dkt. No. 1991 in this case; *Trombley v. Nat'l City Bank,* 826 F. Supp. 2d 179, 200 (D.D.C. 2011) (finding Cannata's objection was "unwarranted" and "unfounded"); *Hartless v. Clorox Co*., 473 F. App'x 716 (9th Cir. 2012) (upholding district court's determination to overrule Cannata's objection); *Poertner v. Gillette Co*., No. 14-13882, 2015 WL 4310896, at *6 (11th Cir. July 16, 2015); *Masters v. Lowe's Home Ctr*., No. 3:09-cv-02555 (S.D. Ill. July 14, 2011), Dkt. No. 73, attached as Ex. 59 to Dkt. No. 1991 in this case (finding objection to be "without merit"); *Schulte v. Fifth Third Bank,* 2011 WL 3269340, at *17 (N.D. Ill. July 29, 2011); *Marsikian v. Mercedes-Benz, USA, LLC*, No. 08-04876 (C.D. Cal. May 17, 2010), Dkt. No. 124, attached as Ex. 60 to Dkt. No. 1991 in this case in this case; *In re HP Inkjet Printer Litig*., No. 05-03580 (N.D. Cal. 2011), Dkt. No. 310, attached as Ex. 61 to Dkt. No. 1991 in this case (denying Cannata fee application). In short, he is a recognized "serial objector" who "appears to be in the business of objecting to, and appealing, class action settlements in order to obtain some financial reward." *Gemelas v. Dannon Co*. *Inc.*, 2010 WL 3703811, at *1 (N.D. Ohio Aug. 31, 2010).[5]

[5] *See also Masters v. Lowes*, No. 3:09-cv-255 (S.D. Ill. 2011), Dkt. No. 68 at 2, attached as Ex. 55 to Dkt. No. 1991 in this case (Pls. Mot. for Appellate Cost Bond, declaring that Cannata "had multiple telephonic communications with Plaintiff's counsel…in which he offered to withdraw

Cannata also engages in patently unethical conduct. Counsel have noted that, in other matters, Cannata "invented" a fake firm and letterhead in pursuing his objection "to protect his real firm – Cannata Phillips – from any liability for [his] ill-conceived actions" and intentionally misrepresented his legal experience. *In re Kentucky Grilled Chicken Coupon Marketing & Sales Practices Litig.*, No. 1:09-cv-07670 (N.D. Ill. 2011), Dkt. No. 108-13 attached as Ex. 62 to Dkt. No. 1991 in this case (J. Edelson Decl. at ¶ 8); *see also In re Quantcast Advertising Cookie Litig.*, No. 10-cv-05484 (May 31, 2011), Dkt. No. 78 at 7 n. 4, attached as Ex. 64 to Dkt. No. 1991 in this case ("Troublingly, although Mr. Cannata's firm website … describes him as having 'over 16 years of experience handling various legal matters,' it appears he has only been an admitted attorney since 2005.") (citing *In re Admin. Actions Dated April 30, 2004*, 807 N.E.2d 929 (Ohio 2004)).

4. Sweeney's Conduct

Like his counterparts, Sweeney has a history of objecting to settlements and representing objectors in class actions, and has been admonished for improper motives. *See Roberts v. Electrolux Home Prod.*, No. 8:12-cv-01644 (C.D. Cal 2014), Dkt. No. 193 at 21-22, attached as Ex. 67 to Dkt. No. 1991 in this case (finding that Sweeney's objections were

---

Ms. Cannata's objection in exchange for the payment of attorney's fees to Mr. Cannata"); *Embry v. ACER Am. Corp.*, 09-cv-01808 (N.D. Cal. 2012), Dkt. No. 253 at 3, attached as Ex. 56 to Dkt. No. 1991 in this case (withdrawing appeal after court imposed bond because his objections "are lacking in merit"); *In re Kentucky Grilled Chicken Coupon Marketing & Sales Practices Litig.*, No. 1:09-cv-07670 (N.D. Ill. 2011), Dkt. Nos. 108-13, attached as Ex. 62 to Dkt. No. 1991 in this case ("Mr. Cochran…has been known to work with Cannata in bringing objections to class action settlements, then requesting fees as a result of their objections"); *In re Vytorin/Zetia Mktg. Sales Practices and Prods. Liab. Litig.*, No. 2:08-cv-00285, MDL No. 1938 (D.N.J. 2009), Dkt. No. 207, attached as Ex. 63 to Dkt. No. 1991 in this case (withdrawing objection after agreement to pay $55,000 from class counsel's expenses to, *inter alia*, Cannata, represented by Cochran).

"filed by counsel who routinely files objections to class settlements" and that he is "a serial objector."); *Larsen v. Trader Joe's Co*., No. 11-cv-05188, 2014 U.S. Dist. LEXIS 95538, **22-24 (N.D. Cal. July 11, 2014) (finding that Sweeney's "objection is lawyer-driven and appears to be brought for an improper motive" and is "without merit, without evidentiary support, and rest[] on inaccurate premises and mischaracterizations of the Settlement" and recognizing that "attorney Patrick Sweeney also has a long history of representing objectors in class action proceedings"). These admonishments have apparently not deterred Sweeney, as he attempts to disrupt this Settlement with a list of one-sentence objections with no factual or legal support.

In fact, as this Court explained in the Final Approval Order: "In a two-page objection, Sweeney offers a list of boilerplate, conclusory assertions, including the "[c]laims administration process fails to require reliable oversight, accountability, and reporting about whether the claims process actually delivers what was promised;" and the claim "[t]imeframes and deadlines benefit Defendants and Class Counsel, but not Class Members" (Dkt. No. 1968). Sweeney offers absolutely no analysis or factual support for these statements. His objections, like Andrews, are also overruled." Dkt. No. 2020 at 16-17.

Taken together, there is overwhelming evidence that these Appealing Objectors are pursuing their appeals for vexatious purposes. This factor alone warrants the imposition of an appellate bond.

B. The Appeal Is Meritless.

The Court should consider "the merits of the appeal." *Gemelas*, 2010 WL 3703811, at *1. This Court is well aware of the implausibility of the Appellants succeeding on their

appeals. "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." *Adsani v. Miller*, 139 F.3d 67, 79 (2d Cir. 1998).

Critically, this Court's Final Approval Order will be overturned only if there had been an abuse of discretion. *See Fidel v. Farley*, 534 F.3d 508, 513 (6th Cir. 2008) ("We review a district court's approval of a settlement as fair, adequate, and reasonable for abuse of discretion."). Given that tremendous deference and the ample evidence of the inherent fairness and reasonableness of the Final Approval Order, it is highly unlikely that the Court's findings and rulings could be found to be an abuse of discretion.

Each of the Appealing Objectors' objections was largely boilerplate, often raising the same issues that they raise in every class action. *See* Dkt. No. 1991 at 56-57, 62. But to the extent that any of the objectors' submissions warranted a response, they were considered by the Court and either rejected because they were frivolous or addressed in the detailed, thoughtful, 44-page opinion that ultimately approved the final settlement and awarded a reduced fee to Class Counsel. As such, there would simply be no basis for the Sixth Circuit to overturn the Final Approval Order based on these Appellants' objections. Objector Andrews' Notice of Appeal attempts, in vain, to circumvent this problem by asserting a stream-of-consciousness list of many issues that were never even raised before this Court and so are clearly waived. Of course, it is well settled that an appeal premised on waived issues lacks merit and may be subject to an appellate bond on that basis. *See In re Pharms. Indus. Average Wholesale Price Litig.*, 520 F. Supp. 2d 274 (D. Mass. 2007) (imposing a $61,000 appeal bond and stating that the appeal was frivolous because the objections were not

preserved for appeal); *J.C. Wyckoff & Assocs. v. Standard Fire Ins. Co.*, 936 F.2d 1474, 1488 (6th Cir. 1991) ("Issues not presented to the district court but raised for the first time on appeal are not properly before the Court."). Similarly, Cannata and Sweeney never developed their boilerplate, bare-bounds grounds for objecting, thus waiving them. *See* Dkt. No. 1950; Dkt. No. 1968. And Cochran's objections contain misstatements of fact which demonstrate a lack of familiarity with the basic facts of this case. *See* Dkt. No. 1964.

This is far from the type of case where a court has overruled objections but where an appeal of a rejected legal position taken by the objectors is still up for valid debate due to the complexity or novelty of the issues. *Cf. In re Countrywide Fin. Corp. Customer Data Sec. Breach Litig.*, 2010 WL 5147222, at *3 (W.D. Ky. Dec. 3, 2010) (holding that this factor was neutral where the court overruled the objections but the objections involved novel issues and "present[ed] substantive issues that at least warrant consideration on appeal"). Rather, this is the type of case where serial objectors "should not be encouraged to continue holding up valuable settlements for class members by filing frivolous appeals." *Gemelas*, 2010 WL 3703811, at *1; *see also In re Pharm. Indus. Average Wholesale Price Litig.*, 520 F. Supp. 2d at 279 ("[T]he 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.").

For all of these reasons, and for all the reasons set forth in the Final Approval Order, there is simply no likelihood of success on the merits of the appeals interposed by any of the Appealing Objectors.

C. The Appellants' History Establishes That There Is A Significant Risk That They Will Not Pay Costs.

Next, the Court should consider the risk that the appellant would not pay appellee's costs if the appeal is unsuccessful. *Gemelas*, 2010 WL 3703811, at *1. An appellants' conduct "suggest[ing] a pattern of noncooperation and noncompliance with court orders" supports a conclusion that the appellant will not pay costs. *In re Porsche Cars N. Am., Inc. Plastic Coolant Tubes Prods. Liability Litig.*, 2014 WL 2931465, at *2 (S.D. Ohio June 30, 2014) (noting that appellant made unauthorized filings and failed to timely file briefs).

As noted above, each of the Appealing Objectors has a history of filing poorly-founded objections and having those objections overruled. Some of the Appealing Objectors also have a history of routinely disobeying court orders. Andrews, for example, has repeatedly filed over-length, rambling, and unauthorized filings on the same topic without leave of court. *See* Dkt. No. 1920; Dkt. No. 1928; Dkt. No. 2013. *See also Shane Grp., Inc. v. Blue Cross Blue Shield of Michigan*, 2:10-cv-14360-DPH-MKM (E.D. Mich. 2014), Dkt. No. 208 (noting that Andrews flouted the rules governing page limits). Andrews' lack of genuine interest in this appeal is demonstrated by his pattern of objecting to settlements and filing notices of appeal that he drops when he is not paid off. *See* cases cited *supra* at n. 2. Additionally, Andrews has refused to comply with the Court's orders by declining to provide required personal information including his actual address. This lack of required information would likely make it difficult to recover costs from his ultimately unsuccessful appeal.

Objector Cochran also has a history of filing appeals that he later abandons when counsel does not pay him off, which creates concerns here that he will not comply with a court order to pay costs. *See In re Wal-Mart Wage & Hour Employment Practices Litig.*, No. 2:06-cv-00225, 2010 WL 786513, at *1 (D. Nev. Mar. 8, 2010) (noting that Cochran has "a

documented history of filing notices of appeal from orders approving other class action settlements, and thereafter dismissing said appeals when [he] and [his] clients were compensated by the settling class or counsel for the settling class.").

Objector Cannata's disrespect for legal ethics and the rules of his profession cast serious doubt on whether he would follow a court order to pay costs for his unsuccessful appeal. The Ohio Supreme Court recently stayed a suspension against Cannata from the practice of law provided he does not engage in further misconduct as a result of his "admitted conflict of interest violations" where he falsely stated or implied that he and another attorney "were practicing law as a partnership, when they were not." *In re Complaints Against Sam P. Cannata*, No. 2014-091, at 1, 18, Bd. of Professional Conduct (Ohio Aug. 10, 2015), Ex. 65 to Dkt. No. 1991; *see also* Relator's Answer to Objections, 2015 WL 6558950, at *12, 16 (Ohio 2015) ("Cannata concocted and participated in a sham legal process in an effort to benefit Cannata" and "violat[ed] his fiduciary duties.").

Finally, objector Sweeney demonstrates similar disrespect for the rules of the Court and his profession. As of the date that he filed his objection in this case, his license to practice law was suspended from the Wisconsin Bar. *See* State Bar of Wisconsin License Status, Ex. 66 to Dkt. No. 1991. Additionally, Sweeney filed his objection in this case four days after the deadline set forth in the Class Notice. *Compare* Dkt. No. 1991-2 (requiring objections to be filed by Nov. 13, 2015) *with* Dkt. No. 1968 (filing objection on Nov. 17, 2015).[6]

[6] Sweeney also recently sent a cryptic email to Lead Class Counsel suggesting that the appeal process be discussed privately to create an arrangement that would be "beneficial to all parties." *See* Composite Ex. B hereto, Feb. 4, 2016 Email from Patrick Sweeney. And Sweeney again

Moreover, certain of these Appellants are from outside the Court's jurisdiction – a fact that weighs in favor of requiring a Rule 7 appeal bond. *See In re Initial Pub. Offering Sec. Litig.*, 728 F. Supp. 2d 289, 293 (S.D.N.Y. 2010) ("Objectors are dispersed around the country and none has offered to guarantee payment of costs that might be assessed against them. In the event the Objectors are unsuccessful on appeal, plaintiffs would need to institute collection actions in numerous jurisdictions to recover their costs. As a result there is a significant risk of non-payment."); *In re Porsche Cars*, 2014 WL 2931465, at *2 (noting that appellant refused to speak to plaintiffs' counsel and resides outside of the jurisdiction, supporting the conclusion that she may not pay costs of an unsuccessful appeal); *In re Countrywide Fin. Corp. Customer Data Sec. Breach Litig.*, 2010 WL 5147222, at *3 (W.D. Ky. Dec. 3, 2010) (noting that the need to institute collections actions in several jurisdictions for multiple objectors creates a risk that costs will not be paid).

D. None Of The Appealing Objectors Has Demonstrated That He Is Unable To Post A Bond.

Finally, to the extent that any of the Appealing Objectors claims an inability to post a bond, "it is [the appellants'] burden to demonstrate that the bond would constitute a barrier to her appeal." *In re Porsche Cars N. Am., Inc.*, 2014 WL 2931465, at *2 (S.D. Ohio June 30, 2014). Notably, none of the Appealing Objectors is proceeding *in forma pauperis* in this case. Moreover, since a joint and several bond is appropriate in this situation (as set forth in Section II. E below), the Appealing Objectors could work out, amongst themselves, the proportion that each would contribute to the joint and several appellate bond. The Class

---

reached out to Lead Counsel immediately after filing his Notice of Appeal. *See* Composite Ex. B hereto, Feb. 25, 2016 Email from Patrick Sweeney.

takes no position as to how the bond is allocated, so long as the Class is assured of recovering its reasonable appeal costs.

II. The Bond Amount Should Include The Allowable "Costs On Appeal," Totaling An Estimated $305,463.

Pursuant to Federal Rule of Appellate Procedure 39, an appellant in a civil case must pay "costs on appeal" to appellees in the event the appeal is dismissed or if the judgment is affirmed. "Costs" under the Rule are defined to "refer to all costs properly awardable under the relevant statute or other authority." *Marek v. Chesny*, 473 U.S. 1, 9 (1985).

Rule 39(e) provides for certain costs to be routinely included in appeal bonds. However, Rule 39(e) list is not exhaustive, and other expenses of appeal may also be included in determining the amount of the bond. *In re Cardizem CD Antitrust Litig.*, 391 F.3d 812, 816 (6th Cir. 2004); *see also In re Checking Account Overdraft Litig.*, 2012 WL 456691 at *2 (S.D. Fla. Feb. 14, 2012) ("The costs that can be included in a Rule 7 bond are not … limited to costs defined by Rule 39"); *Azizian v. Federated Dep't Stores Inc.*, 499 F.3d 950, 958 (9th Cir. 2007) (finding that Rule 39 does not define the universe of "costs" that may be taxed under Rule 7).

Many courts have imposed significant appeal bonds on objectors to ensure that the appeal process is not misused. *See, e.g., In re Cardizem CD Antitrust Litig.*, 391 F.3d 812, 816-17 (6th Cir. 2004) (upholding the imposition of a $174,429.00 appellate bond and upholding dismissal of that objector's appeal after she failed to post the bond); *Barnes v. FleetBoston*, 2006 WL 6916834, at *1 (D. Mass. Aug. 22, 2006) ("[B]y requiring objectors to post a bond that would cover the costs of losing the appeal, the burden of litigating frivolous appeals shifts to them instead of to the class."); *Heekin v. Anthem, Inc.*, 2013 WL

752637, at *2, 4 (S.D. Ind. Feb. 27, 2013) ("[a]ppeal bonds are often required on class action settlements or attorneys' fees awards because the appeal effectively stays the entry of final judgment, the claims[] process, and payment to all class members"; imposing $250,000 bond on each of two objectors to a class action); *In re Pharm. Indus. Avg. Wholesale Price Litig.*, 520 F. Supp. 2d 274, 279 (D. Mass. 2007) ("[T]he 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."); *In re Nutella Mktg. & Sales Practices*, 2012 WL 6013276, at *2 (D.N.J. Nov. 20, 2012) (assessing a $22,500 bond on appealing objectors after observing "the unresponsiveness of the Objectors' briefs in the present motion, coupled with the fact that the Objectors appear to be objectors who repeatedly raise objections in class actions around the country, further suggest that their appeal in this case is meritless"); *Allapattah Servs., Inc. v. Exxon Corp.*, 2006 WL 1132371, at *18 (S.D. Fla. Apr. 7, 2006) (objector to class action settlement required to post bond of $13.5 million in event of appeal to cover damages, costs, and interest as result of delay); *In re Broadcom Corp. Sec. Litig.*, Case No. 01-275, 2005 U.S. Dist. LEXIS 45656, at *9-11 (C.D. Cal. Dec. 9, 2005) (ordering objector to post appeal bond of over $1.2 million in response to appeal of final order approving class action settlement).

A. Class Counsel Is Entitled To A Bond For Costs Listed In Rule 39(e).

Even where courts have considered only those costs specifically outlined in Rule 39(e), such as photocopying and preparing and serving the record on appeal, they have required significant bonds. A bond for such expenses is routine and need not be requested with exact precision. *See In re Ins. Brokerage Antitrust Litig.*, 2007 WL 1963063, at *2-3

(D.N.J. July 2, 2007) (imposing $25,000 appeal bond jointly and severally on objectors); *In re Initial Pub. Offering Sec. Litig.*, 728 F. Supp. 2d 289, 295 (S.D.N.Y. 2010) (imposing $25,000 appeal bond to cover Rule 39(e) costs); *In re Wells Fargo Loan Processor Overtime Pay Litig*., 2011 WL 3352460, at *10 (N.D. Cal. Aug. 2, 12011) (imposing $20,000 appeal bond on class action objector).

Here, Plaintiffs request that Appellants be required to post $10,000 to guarantee Plaintiffs' costs of photocopying, serving, preparing, and transmitting the record. *See* Declaration of Marvin A. Miller, Ex. C hereto, at ¶7.

B. Appellants Must Bond The Increased Cost Of Administering The Settlement.

Unfortunately, this appeal will dramatically alter the timing of the claims process. As set forth in the attached declaration of the claims administrator, Eric J. Miller, the delay occasioned by the appeal will increase the settlement administration costs by approximately $9,000 to $15,000. *See* Ex. D hereto at ¶¶ 6-8.

Such costs are part of "the costs attendant to the delay associated with an appeal." *See Miletak v. Allstate Ins. Co.*, 2012 WL 3686785, at *2 (N.D. Cal. Aug. 27, 2012) (finding good cause supports inclusion of $50,000 in "administrative costs," incurred in order "to continue to service and respond to class members' needs pending the appeal"); *see also In re Cardizem*, 391 F.3d at 817-18 (holding that it was within the discretion of the district court to include increased administrative fees in a Rule 7 bond where the underlying claim was based on the Tennessee antitrust laws); *In re Wal-Mart Wage and Hour Employment Practices Litig*., 2010 WL 786513, at *2 (D. Nev. Mar. 8, 2010) (requiring a $500,000 appeal bond to cover "administrative costs and interest costs, and … other costs reasonably incurred under

Rule 39"); *In re Pharm. Indus. Avg. Wholesale Price Litig.*, 520 F. Supp. 2d 274, 279 (D. Mass. 2007) (requiring that appealing objector post $61,000 Rule 7 bond including "administrative costs attributable to delay in [settlement] distribution"); *In re General Electric Co. Sec. Litig.*, 998 F. Supp. 2d 145, (S.D.N.Y. 2014) (imposing $54,700 appeal bond, and noting that settlement administration expenses can be included in bond, and holding that the "authority to award costs is not limited to the costs awarded under a fee-shifting statute. Rule 7 costs also include damages imposed under Rule 38, Fed.R.App.P."); *In re Uponor, Inc.*, 2012 WL 3984542, at *6 (D. Minn. Sept. 11, 2012) (recognizing that appeal bonds may cover excess administration costs such as additional class notice that otherwise would not have been incurred and imposing $170,000 appeal bond, of which $125,000 was earmarked for supplemental class notice); *Heekin v. Anthem*, 2013 WL 752637 at *2 (S.D. Ind. Feb. 27, 2013) (approving cost of supplemental notice as part of appeal bond, requiring appellants to post $250,000 appeal bond, and concluding that "excess administrative costs created by the delay incident to the appeal, can be characterized as a 'cost of appeal' under Rule 7").

C. Appellants Should Bond The Interest Payments That Belong To The Class But That Will Be Diverted To Defendant Carpenter While The Appeal Is Pending.

Another significant harm to the Class that will flow from the appeal is that tens of thousands of dollars will be retained by Defendant Carpenter Company rather than being made available to the Class. As the Court noted in its Final Approval Order, Carpenter is not obligated to make its final $43.5 million settlement payment until appellate rights are exhausted. Dkt. No. 2020 at 4. In other words, in the absence of the appeal, the Carpenter

Co. would have paid $43.5 million 10 days after the February 26, 2016 expiration of the appellate period. Had that money been paid to the escrow agent on or about that date, that money would have been immediately invested in an interest bearing account with the amounts already paid by the Carpenter Co. Moreover, the interest generated from those funds would have been for the *sole* benefit of the Class because the Court directed that no portion of the interest generated by the settlement funds would be paid to Counsel. Dkt. No. 2020 at 42. Now, instead, those funds will remain in the accounts of the Carpenter Co. and will accrue to its benefit rather than that of the Class. *See* Declaration of Robert Muilenburg, Ex. E hereto, at ¶4.

To be clear, this is a loss of interest and not merely a delay of payment, whereby the Settlement Fund would continue to accrue earnings for the benefit of the Class. And courts have held that interest is an allowed cost even where it merely flows from a delay of payment and not as an actual loss as will occur here. *See, e.g., In re Wal-Mart Wage and Hour Employment Practices Litig.*, 2010 WL 786513 (D. Nev. March 8, 2010) (imposing appeal bond of $500,000 per objector under FRAP 7 to compensate the class for, *inter alia*, lost interest resulting from the appeal); *In re Checking Account Overdraft Litig.*, No. 09-MD-02036, Dkt. No. 2473, at 6 n.6 (S.D. Fla. Feb. 14, 2012) (requiring a bond in the amount of two years' compounded interest).

As set forth in the accompanying Declaration from the escrow agent for the Carpenter Co. escrow account, from April 2016 through May 2017, this interest that will be lost to the Class totals $30,463.33. *See* Ex. A to Declaration of Robert Muilenburg, attached as Ex. E hereto.

D. The Class Is Entitled To A Bond Covering Its Attorneys' Fees.

Finally, where, as here, "an appeal is taken in bad faith, a district court may also exercise its discretion to impose a bond amount for attorneys' fees likely to be incurred on appeal." *Gemelas v. Dannon Co., Inc.*, 2010 WL 3703811, at *1 (N.D. Oh. 2010). In *Gemelas*, the Court ordered a purported class member who routinely filed form objections to class settlements to pay a $275,000.00 appeal bond that included attorneys' fees. The Court found that it was appropriate to include attorneys' fees in the bond because, *inter alia*, the appeal was "frivolous, unreasonable and groundless" and to discourage serial objectors from holding up settlements. *Id*. at *1-3. *See also Adsani v. Miller,* 139 F.3d 67, 75, 79 (2d Cir. 1998) (finding the imposition of a "cost bond" with attorneys' fees is proper where the appeal is "objectively unreasonable"); *Azizian v. Federated Dep't Stores, Inc.,* 499 F.3d 950, 959–60 (9th Cir. 2007) (upholding bond including security for appellate attorneys' fees, under the fee-shifting provision in Section 4 of the Clayton Act pursuant to the "private enforcement of the antitrust laws"); *Young v. New Process Steel, LP,* 419 F.3d 1201, 1202–03 (11th Cir. 2005) (holding appellate bond should include anticipated attorneys' fees "where the appeal is likely to be frivolous, unreasonable, or without foundation").

The attached declaration of Marvin A. Miller establishes that based on Class Counsel's expenses in opposing four interlocutory appeals previously sought by defendants in this action, it is conservatively estimated that Class Counsel's fees with regard to the four appeals brought by objectors will be approximately $250,000.00. *See* Declaration of Marvin A. Miller, Ex. C hereto. For the reasons set forth above regarding the merits of the appeals

and the vexatious conduct of the Appealing Objectors, it is entirely appropriate to require the posting of a bond to cover the anticipated legal fees by Class Counsel.[7]

E. It Is Appropriate For The Bond To Be Ordered To Be Posted Jointly And Severally.

Courts routinely require multiple appellants appealing the same Order or Judgment to post a bond jointly and severally. *See, e.g., In re Ins. Brokerage Antitrust Litig*., 2007 WL 1963063, at *2-3 (D.N.J. July 2, 2007); *In re Target Corp. Customer Data Sec. Breach Litig.*, 2016 WL 259676, at *2 (D. Minn. Jan. 21, 2016); *Heekin v. Anthem, Inc*., TWP, 2013 WL 752637, at *4 (S.D. Ind. Feb. 27, 2013); *In re Merck & Co., Inc. Vytorin/Zetia Sec. Litig*., 2014 WL 3667213, at *3 (D.N.J. July 23, 2014); *In re Currency Conversion Fee Antitrust Litig*., 2010 WL 1253741, at *3 (S.D.N.Y. Mar. 5, 2010). This arrangement allows the objectors to pool their resources, while ensuring that each is pursuing the appeal in good faith.

CONCLUSION

For the foregoing reasons, Plaintiffs and Class Counsel respectfully request that the Court grant their application for an appeal bond in the amount of $305,463, or in such amount this Court deems appropriate, to be paid jointly and severally by Appellants, and for whatever other and further relief this Court deems just and appropriate.

[7] In *Cardizem*, the Sixth Circuit held that attorneys' fees may also be appropriately included in a Rule 7 appellate bond where the underlying statute or statutes provide for fee shifting. *In re Cardizem CD Antitrust Litig.*, 391 F.3d at 817-18. There, the Sixth Circuit relied on the antitrust statutes of Tennessee, which is a class state in this litigation. By way of example, Florida, the state which objector Cannata alleges that she purchased polyurethane foam containing products, also includes a fee shifting provision under it consumer protection statute. *See* Fla. Stat. § 501.2105. As such, the appellate bond may also include attorney fee costs on this basis.

Dated: March 1, 2016

Respectfully submitted,

/s/ *Marvin A. Miller*

Marvin A. Miller
MILLER LAW LLC
115 S. LaSalle Street, Suite 2910
Chicago, IL 60603
Phone: 312-332-3400
Fax: 312-676-2676
Email: mmiller@millerlawllc.com

Lead Counsel for Indirect Purchaser Plaintiff Class

Richard M. Kerger (0015864)
KERGER & HARTMAN, LLC
33 S. Michigan Street, Suite 100
Toledo, OH 43604
Telephone: (419) 255-5990
Fax: (419) 255-5997
Email: rkerger@kergerlaw.com

Executive Committee for Indirect Purchaser Plaintiff Class

Jay B. Shapiro
Samuel O. Patmore
Abigail G. Corbett
Maria A. Fehretdinov
STEARNS WEAVER MILLER WEISSLER ALHADEFF & SITTERSON, P.A.
150 West Flagler Street, Suite 2200
Miami, Florida 33130
Telephone: (305) 789-3200
Fax: (305) 789-3395
Email: jshapiro@stearnsweaver.com
spatmore@stearnsweaver.com
acorbett@stearnsweaver.com
mfehretdinov@stearnsweaver.com

Eric D. Barton
WAGSTAFF & CARTMELL LLP
4740 Grand Avenue, Suite 300
Kansas City, MO 64112

(816) 701-1100
Email: ebarton@wagstaffcartmell.com

Shpetim Ademi
ADEMI & O'REILLY, LLP
3620 East Layton Avenue
Cudahy, Wisconsin 53110
(414) 482-8000
Email: sademi@ademilaw.com

Martin D. Holmes
DICKINSON WRIGHT PLLC
424 Church Street
Suite 1401
Nashville, TN 37219
(615) 244-6538
Email: mdholmes@dickinsonwright.com

Avidan J. Stern
LYNCH & STERN LLP
150 South Wacker Drive
Suite 2600
Chicago, IL 60606
(312) 346-1600
Email: avi@lynchandstern.com

David Schiller
SCHILLER & SCHILLER, PLLC
Professional Park at Pleasant Valley
5540 Munford Road, Suite 101
Raleigh, North Carolina 27612
Telephone: (919) 789-4677
Email: dschiller@yahoo.com

Susan Bernstein
Attorney at Law
200 Highland Avenue, Suite 306
Needham, MA 02494
Telephone: (781) 290-5858
Email: susan@sabernlaw.com

Counsel for Indirect Purchaser Plaintiff Class

CERTIFICATE OF SERVICE

I hereby certify that on March 1, 2016, a copy of the foregoing was filed electronically. Notice of this filing will be sent by operation of the Court's electronic filing system to all parties indicated on the electronic filing receipt, pursuant to Local Rule 5.1(b)-(c) and Initial Case Management Conference Order dated January 20, 2011 (Dkt. No. 17). Parties may access this filing through the Court's system. Service via U.S. mail was made upon the following counsel and/or *pro se* parties:

Patrick S. Sweeney
2590 Richardson Street
Madison, WI 53711

Christopher Andrews
P.O. Box 530394
Livonia, MI 48153-0394

/s/ Richard M. Kerger
Richard M. Kerger