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' OMNIBUS REPLY IN SUPPORT OF MOTION FOR ORDER REQUIRING POSTING OF APPEAL BOND

The oppositions filed by the Objector-Appellants (Dkt. Nos. 2046, 2051, 2054) fail to repudiate the showing in the Class' Motion (Dkt. No. 2042) that an appeal bond is justified and, indeed, necessary, based on each of the four relevant considerations: (1) whether the appellants have shown bad faith or vexatious conduct, (2) the merits of their appeal, (3) the risk that the appellants would not pay appellees' costs if the appeal is unsuccessful, and (4) the appellants' financial ability to post a bond.[1]

In fact, since the filing of the Class' Motion, the Objector-Appellants have continued to engage in the type of bad faith and vexatious conduct that necessitates the imposition of a bond. Far from acting in the Class' best interest, these career objectors' attempted extortion of Class Counsel is resulting in substantial harm to the Class in the form of increased administration costs, a permanent loss of interest income from the Defendant Carpenter Co.'s settlement monies, and fees and costs associated with defending the frivolous appeals – all of

[1] *See* Final Approval Order, Dkt. No. 2020, at 42-43 (citing *Gemelas v. Dannon Co., Inc.*, 2010 WL 3703811, at *1 (N.D. Ohio Aug. 31, 2010)).

which are appropriately included in an appeal bond under the governing case law that was set forth in the Class' Motion and that is discussed further below. In addition to those costs, these frivolous appeals will also, of course, delay distribution of the massive settlement fund that is owed to the Class.

I. Appellants' Continued Bad Faith And Vexatious Conduct Warrant The Imposition Of A Bond.

A. Andrews' Latest Vexatious Filings And Taunting Communications To Class Counsel Further Establish His Bad Faith.

Proving a key argument in the Class' Motion through his recent actions, Objector Andrews has, since the Class filed its bond motion less than one month ago, continued to delay these proceedings, harass Class Counsel with increasingly scurrilous correspondence designed to extort a payment,[2] and even openly disparage Class Counsel and this Court.

Andrews has even disparaged this Court and Class Counsel in filings to the Sixth Circuit. For example, Andrews made the absurd claim that this Court is engaged in some sort of "quid pro quo" with Class Counsel and with the Sixth Circuit that creates an "uneven playing field" against him. *See* App. No. 16-3168, Dkt. 7, at 2, 3 (6th Cir. Mar. 9, 2016), Ex. A hereto. Andrews also accused the judiciary of entering into a conspiracy of "unbelievable favoritism shown [to] class counsel at the district court level and at this appeals court level." *Id.* at 2.

Andrews has also been mischaracterizing and twisting this Court's findings from its Final Approval Order. For example, he has falsely claimed that this Court determined that

[2] While Andrews has sent Class Counsel menacing and harassing emails for the past five months, the following (and attached) are Andrews' correspondence in the past month: Email dated Mar. 3, 2016, Ex. B hereto; Email dated Mar. 8, 2016, Ex. C hereto; Email dated Mar. 14, 2016, Ex. D hereto.

Class Counsel had engaged in massive billing "fraud" and that the Court "caught [Class Counsel] scamming $9 million in fees." App. No. 16-3168, Dkt. 6, attaching Andrews' Opposition to Bond Motion, Ex. E hereto, at 11; App. No. 16-3168, Dkt. 6, Ex. E hereto, at 2. He is wrong. The Final Approval Order did not make any such findings. Rather, this Court, in engaging in a lodestar crosscheck of its 24% fee award calculation, discounted Class Counsel's lodestar due to what the Court perceived as inefficiencies in billing rates and hours. Andrews should be reprimanded for so grossly mischaracterizing this Court's findings and making defamatory claims that this Court found Class Counsel guilty of alleged "fraud."

Andrews has also acknowledged that he is strategically attempting to delay the Class' ability to obtain their settlement dollars. In a private communication to Class Counsel, Andrews bragged that he had already prepared a draft of his appeal brief. *See* Email dated Feb. 25, 2016, Ex. F hereto ("The rough draft for the appeal brief totals dozens of pages which I will cut down to twenty five pages…"). But, two weeks later, he filed in the Sixth Circuit a request for an additional *sixty days* to draft his appeal brief. *See* App. No. 16-3168, Dkt. 7 (6th Cir. Mar. 9, 2016), Ex. A hereto. He has also threatened Class Counsel that he will continue to delay resolution of the case by calling for a second and third fairness hearing and multiple appeals. *See* Email dated Feb. 25, 2016, Ex. F hereto (threatening a "second appeal… third fairness hearing and appeal number three"). Needless to say, this strategy of delay is transparently intended to extort a payment from Class Counsel. It will not happen. Andrews' conduct is the paradigm where an appeal bond is needed due to bad faith and vexatious conduct.

In short, Andrews has continued in this case his habit in many other cases of engaging in a relentless campaign of harassment until either: (1) he is able to extort a payment from Class Counsel, or (2) he is compelled to post a bond.

B. Cochran's Newly Added Counsel Is Also A Serial Objector Who Dismisses Appeals In Exchange For Payoffs.

Objector-Appellant Cochran recently expanded his litigation team to include a kingpin of serial objectors, John J. Pentz, who has filed objections in no less than fifty-five class actions (in addition to this one) and has frequently lodged appeals to his meritless objections solely to leverage a fee for himself.[3] As a result of his delay tactics, courts have routinely required Pentz to post bonds for acting in "bad faith" and engaging in "vexatious conduct."[4] Despite court orders, Pentz has also refused to post bonds, thereby resulting in

[3] *See, e.g., In re Wal-Mart Wage & Hour Emp't Practices Litig*., 2010 WL 786513, at *1, 2 (D. Nev. Mar. 8, 2010) (Pentz 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."); *Barnes v. FleetBoston Fin. Corp*., 2006 WL 6916834, at *1, 2 (D. Mass. Aug. 22, 2006) (Pentz is a "professional objector" who seeks to "make a living simply by filing frivolous appeals and thereby slowing down the execution of settlements"); *In re Charles Schwab Corp. Sec. Litig.*, 2011 WL 633308 (N.D. Cal. Feb. 11, 2011) (Pentz, who "stalks settlements," was "shameless in his quest to extort settlement fees"); *In re AOL Time Warner ERISA Litig.*, 2007 WL 4225486, at *3 & n.2 (S.D.N.Y. Nov. 28, 2007) (Kram, J.) (Pentz's objection "contained several arguments that were irrelevant or simply incorrect," were "counterproductive," and were supported by "*no* evidence whatsoever") (emphasis in original); *Ouellette v. Wal-Mart Stores, Inc*., No. 67-01-CA-326, slip op. (Fla. Cir. Ct., Wash. Cty., Aug. 21, 2009), Ex. G hereto (reprimanding Pentz for submitting "generic boilerplate objections" and finding he "inject[ed]" himself into the litigation in "an effort to extort money from the class and/or class counsel"); *Spark v. MBNA Corp*., 289 F. Supp. 2d 510 (D. Del. 2003) (finding Pentz's opposition to be "nothing more than an attempt to receive attorneys' fees").

[4] *In re Initial Pub. Offering Sec. Litig.*, 721 F. Supp. 2d 210, 214, 215 (S.D.N.Y. 2010) (Scheindlin, J.) (imposing $25,000 bond against Pentz after concluding that Pentz is a "serial objector"); *see also Benacquisto v Amer. Express*, 2001 U.S. Dist. LEXIS 23914 (D. Minn. May 15, 2001) (ordering Pentz and his clan to post $500,000 bond); *In re Currency Conversion Fee Antitrust Litig*., MDL No. 1409, 2010 WL 1253741 (S.D.N.Y. March 5, 2010) (ordering Pentz

even greater sanctions.[5] This Court should have no reservations about following the lead of the many other federal courts that imposed six-figure bonds against Pentz and his clients and should require him to post a bond here.

C. Cannata Offers Nothing To Refute Her Attorney's Long History As A Serial Objector.

Ms. Cannata's single-page response to the Class' Motion simply adopts the objection brief filed on behalf of Objector Cochran. Accordingly, Cannata offers nothing to refute the fact set forth in the Motion (Dkt. No. 2042 at 9), that her attorney and husband, Sam Cannata, is the type of serial objector "who appears to be in the business of objecting to, and appealing, class action settlements in order to obtain some financial reward." *See Gemelas v. Dannon Co. Inc.*, 2010 WL 3703811, at *1 (N.D. Ohio Aug. 31, 2010).

D. Sweeney Was Recently Reprimanded, Again, For His "Specious" Objections And May Face Additional Sanctions.

Objector Sweeney has not opposed the Class' Motion, leaving this Court with an unrefuted record that he is a serial objector who regularly asserts bad faith objections. Moreover, just since the Class filed its Motion, Sweeney has, yet again, been criticized by a

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and his cohorts to pay a $50,000 bond); *In re Compact Disc Minimum Advertised Price Antitrust Litigation*, 2003 U.S. Dist. LEXIS 25788, n.3 (D. Maine October 7, 2003) (imposing appeal bond because Pentz' appeal appeared "frivolous" and noting that it was "a real possibility" that sanctions would be imposed on appeal).

[5] *See, e.g., In re Wal-Mart Wage and Hour Employment Practices Litig.*, Dkt. 641 (D. Nev. May 25, 2010) & Dkt. 694 (D. Nev. Aug. 25, 2010), Exs. H, I hereto (sanctioning Pentz and his cohorts $40,000 for failing to post $500,000 bond after Pentz demanded $800,000 to cease their appeals); *In re Compact Disc Minimum Advertised Price Antitrust Litig.*, MDL 1361, 2003 WL 22417252 (D. Me. Oct. 7, 2003) (refusing to post $35,000 bond for a "frivolous appeal" and "groundless objections" and, instead, voluntarily dismissing his appeal several days after the bond order); *Barnes v. FleetBoston Financial Corp.*, No. 01-10395-NG, 2006 U.S. Dist. LEXIS 71072 (D. Mass. Aug. 22, 2006) (voluntarily dismissing appeal after Pentz's mother-in-law was required to post $645,111.60 bond for appeal).

federal judge for lodging objections that are "facially specious and without merit." *Gay v. Tom's of Maine*, No. 14-cv-60604 (S.D. Fla. Mar. 11, 2016), Dkt. 43, Ex. J hereto, at 6. That court noted that Sweeney's objections "are the same recycled, boilerplate arguments … previously (and unsuccessfully) used in the past in a number of other class action settlements" and that Sweeney and the other objector were "unfamiliar with the actual pleadings and submissions in this case, as well as the substantive terms of the settlement at issue." *Id.* at 7. Moreover, less than two weeks ago, that court instructed a Magistrate Judge to investigate whether Sweeney violated ethical rules in connection with his objections and to determine whether his conduct merits the imposition of sanctions. *See Gay v. Tom's of Maine*, No. 14-cv-60604 (S.D. Fla. Mar. 11, 2016), Paperless Order, Ex. K hereto.

II. Appellants' Opposition Briefs Offer Nothing To Suggest That Their Appeals Have Any Merit.

As discussed in the Class' Motion, the Objector-Appellants have no likelihood of success on their appeals, particularly given the abuse of discretion standard applicable on appeal. *See Fidel v. Farley*, 534 F.3d 508, 513 (6th Cir. 2008) (holding that district court order approving settlement is reviewed for abuse of discretion). This Court's Final Approval Order addressed each and every concern that the Objectors raised.

Nothing in the Objector-Appellants' Opposition briefs raises any legitimate doubt about the appropriateness of the Final Approval Order. The arguments that they indicate they will raise in their appeals were either not raised in this Court - and are therefore waived on appeal - or are merely statements of disagreement with how the Court exercised its discretion. None of the Opposition briefs cites a single controlling authority that would reverse any of this Court's findings. Mere *disagreement* with the amount of fees the Court

awarded to Class Counsel (or any other issue in the Final Approval Order) is simply not a basis for reversal. *See, e.g.*, *Bailey v. White*, 320 F. App'x 364, 367 (6th Cir. 2009) (affirming class action settlement where "the district court correctly applied the seven-factor test"); *Olden v. Gardner*, 294 F. App'x 210 (6th Cir. 2008) (even where "some of the relevant factors certainly weigh against approving the settlement, it cannot be said that the settlement agreement is unfair, unreasonable, or inadequate, given the deference owed to the district court"); *Alvarado v. Memphis-Shelby Cnty. Airport Auth.*, 229 F.3d 1150 (6th Cir. 2000) ("the district court has wide discretion in determining whether a settlement of a class action is fair and reasonable"); *Bowling v. Pfizer, Inc.*, 102 F.3d 777, 779 (6th Cir. 1996) ("It is within the district court's discretion to determine the appropriate method for calculating attorney's fees in light of the unique characteristics of class actions in general, and of the unique circumstances of the actual cases before them. The district court's award of attorney's fees in common fund cases need only be reasonable under the circumstances."); *Webster v. Sowders*, 928 F.2d 1134 (6th Cir. 1991) ("Once the district court establishes that a proposed settlement is not tainted with collusion, the objector bears a heavy burden of demonstrating that the decree is unreasonable").

Andrews' Opposition rants in conclusory and melodramatic fashion that the Court was wrong on a host of rambling issues. *See, e.g.*, Dkt. No. 2054 at 6 ("A small claims judge would even throw this [the settlements] out…"). Andrews also intends to raise new points of error on appeal, which have not been preserved. *See, e.g., id.* at 8 (arguing that the settlements are legally invalid because they "fail to state which individual lawsuits named plaintiffs filed, and applicable case numbers, apply to which deals"); *id.* at 11 (claiming that

the settlements are invalid because the class representatives are "Missing In Action" and have not "signed off" on the settlements). Andrews' intent to raise issues that he has not properly preserved, and therefore are waived, is critical to the appeal bond analysis because it demonstrates that his appeal lacks merit. *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); *see also 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.").

In addition to unpreserved appellate issues, Andrews and some of the other Objector-Appellants are barred from raising on appeal boilerplate arguments that they failed to sufficiently develop in the district court. *See Thurman v. Yellow Freight Sys., Inc.*, 90 F.3d 1160, 1172 (6th Cir. 1996) ("[I]ssues not ***squarely presented*** to the trial court are considered waived.") (emphasis added); *Speck v. Agrex, Inc.*, 888 F. Supp. 2d 867, 876 (N.D. Oh. 2012) (Zouhary, J.) ("Issues adverted to in a perfunctory manner, unaccompanied by some effort at ***developed argumentation***, are deemed waived. It is not sufficient for a party to mention a possible argument in the most skeletal way, leaving the court to put flesh on its bones.") (quoting *United States v. Stewart*, 628 F.3d 246, 256 (6th Cir. 2010) (emphasis added)). For example, Sweeney's objection contained only a bullet-point list of issues, without mention of any facts unique to this case. Dkt. No. 1968 at 2. Similarly, Cannata's objection merely concluded -- without any basis or explanation -- that Class Counsel's fee award should be 18% rather than 30%. Dkt. No. 1950 at 1. Such barebones efforts do not satisfy the Sixth

Circuit's requirement of "developed argumentation" necessary to preserve an issue for appeal.

Objector Cochran indicates in his Opposition that he will raise only two issues on appeal: (1) the percentage amount of the fee award, and (2) whether the fee award should be based on the net versus the gross settlement fund. Dkt. No. 2046 at 3-4. On the issue of the percentage-of-the-fee award, Cochran wholly fails to explain how this Court's 24% fee award could ever amount to an abuse of discretion under Sixth Circuit case law. To the contrary, the fee award is well within the range of awards for similar cases, and is supported by a detailed Final Approval Order that carefully analyzes every factor the Sixth Circuit encourages district courts to consider in awarding a fee to Class Counsel.

On the issue of using the net versus the gross settlement fund, this Court followed the same logical reasoning utilized by a host of other courts. Courts in the Sixth Circuit routinely award fees from the gross settlement fund, as demonstrated by the approval of settlements in which the costs of administration and notice are paid from the settlement fund. *See, e.g.*, *Clevenger v. Dillards, Inc.*, 2007 WL 764291, at *3 (S.D. Ohio Mar. 9, 2007) (approving of an award from the gross settlement fund) (citing each of the following: *In re Valley Sys. Sec. Litig.*, No. 5:92-cv-2124 (Bell, J.) (N.D. Ohio Mar. 16, 1994) (awarding 30% of total fund in fees, plus expenses); *In re Nord Res. Corp. Sec. Litig.*, 1992 WL 1258516 (S.D. Ohio Dec. 9, 1994) (awarding 30% plus expenses); *In re Cincinnati Microwave, Inc. Sec. Litig.*, No. C-1-95-905 (S.D. Ohio Mar. 21, 1997) (awarding 30% plus expenses)).

Cochran does not point to any case law remotely suggesting that the Sixth Circuit would reverse the fee award.

III. Appellants Offer Nothing To Ensure That They Will Promptly Pay Costs On Appeal.

The Objector-Appellants' Oppositions fail to provide *any* assurances that they will reimburse the Class its costs in connection with these appeals. In fact, Mr. Andrews asserts that he is unwilling or unable to pay *any* costs -- not even the absurdly low $34.00 that he claims is the amount that the bond should be. Dkt. No. 2054 at 14. This factor argues heavily in favor of requiring a substantial bond.

IV. Each of the Appellants Fails To Meet The Burden Of Demonstrating An Inability To Post A Bond.

An appellant claiming an inability to post a bond bears the burden of establishing that inability. *See In re Porsche Cars N. Am., Inc. Plastic Coolant Tubes Prods. Liability Litig.*, 2014 WL 2931465, at *2 (S.D. Oh. June 30, 2014) ("It is [appellant's] burden to demonstrate that the bond would constitute a barrier to her appeal," noting that appellant "does not make any such showing in her brief," and holding that a bond "is appropriate").

Critically, none of the Objector-Appellants, except Andrews, even *attempts* to address this issue – let alone meet this burden. Where "Objectors have not presented any evidence demonstrating that they lack the financial ability to post a bond . . . the Objectors' ability to do so is presumed." *In re Initial Pub. Offering Secs. Litig.*, 728 F. Supp. 2nd 289, 293 (S.D.N.Y. 2010).

Andrews makes a feeble assertion in his Opposition brief – with no supporting evidence or facts – that he "cannot afford any part of that $305,000.00 fee." Dkt. No. 2054 at 14. Even his supplemental filing, which contains a year-old request to proceed *in forma pauperis* in an unrelated matter, fails to establish his inability to pay any bond here. Setting

aside the fact that that *in forma pauperis* request was denied (*see Shane Grp., Inc. v. Blue Cross Blue Shield of Michigan*, 2:10-cv-14360, Dkt. 223 (E.D. Mich. 2014), Ex. L hereto), the document has no evidentiary value and cannot serve as a basis to demonstrate his inability to pay the bond. Even presuming that the document was accurate when it was signed last year, it provides no information regarding Andrews' current financial situation. Andrews claims, in his Motion for Leave, that the detailed financial information in that application is current as of the day he filed his Motion for Leave. Dkt. No. 2053 at 2. However, that is suspicious and lacks credibility. If it were true that Andrews still had only the same *exact same $15.00* in his bank account that he had a year ago, he could not have paid either the appellate filing fee in this case ($505.00) or the appellate filing fee he was required to pay in *Shane* when his *in forma pauperis* application was denied in that case. Furthermore, at the Final Approval Hearing in this case, Andrews stated that he has a job, working indirectly for ADT Security Services. Dkt. No. 2018 at 23:19-25.

In short, none of the Objector-Appellants has offered viable evidence that he or she is unable to pay a bond. This factor therefore also weighs heavily in favor of imposing a bond. *See Adsani v. Miller*, 139 F.3d 67, 79 (2d Cir. 1998) (holding that "without any showing of her financial hardship, the bond imposed on [objector] is not an impermissible barrier to appeal"); *In re Netflix Privacy Litig.*, 2013 WL 613772, at *3 (N.D. Cal. Nov. 25, 2013) (ordering an appeal bond of $21,519 where "Objectors contend that the appeal bond would be burdensome, [but] they do not provide any evidence indicating a financial inability to pay"); *In re Uponor, Inc. F1807 Plumbing Fittings Prods. Liabl. Litig.*, 2012 WL 3984542, at *2 (D. Minn. Sept. 11, 2012) (ordering $170,000 bond jointly and severally against two

groups of objectors where one group stated it did not pose a payment risk but the other group stated it could not pay a bond exceeding $1,000 and where the other factors weighed in favor of requiring a bond).

V. The Allowable Costs On Appeal Total An Estimated $305,463.

A. Appellants Fail To Refute That $10,000 Is An Appropriate Estimate Of The Costs Listed In Rule 39(e).

Objectors Cochran, Cannata, and Sweeney do not contest that Rule 39(e) costs are allowable, and they do not attempt to dispute the $10,000 estimate. Objector Andrews does dispute this issue, however, and he says the amount should be only a laughable $34.00. *See* Andrews Opp. at 4-5 (claiming real cost is .10 per page and $4.00 for binding, for a 30-page brief). As an initial matter, there are four appeals here – not one. And even if the four appeals are consolidated, there will still be more than one brief submitted by Class Counsel in this case – indeed, Class Counsel has already submitted several filings to the Sixth Circuit related to the appeals.[6]

Although the myriad issues raised in these appeals are frivolous, they still require thorough briefing by Class Counsel, and it is highly likely that the Sixth Circuit will grant an extension of the standard 30-page limit for the appellee brief(s) -- not to mention the numerous exhibits that will likely accompany the brief(s).

The presence of multiple objectors in this case of course increases printing and reproduction costs. *See In re Ins. Brokerage Antitrust Litig.*, 2007 WL 1963063, at *3 (D.N.J. July 2, 2007) (concluding that a $25,000 appeal bond is reasonable based on plaintiffs'

[6] *See* Motion to Consolidate and Expedite Appeals, App. No. 16-3168, Dkt. 4 (6th Cir. Mar. 1, 2016), Ex. M hereto; Reply in Opp. to Andrews Mot. to Extend Time, App. No. 16-3168, Dkt. 8 (6th Cir. Mar. 11, 2016), Ex. N hereto.

argument that "it is not possible to anticipate all the potential costs of a multi-party appeal" and "it is possible the Plaintiffs will face different issues from different appellants, which may increase the expenses"); *In re Diet Drugs*, 2000 WL 1665134 (E.D. Pa. Nov. 6, 2000) (holding that $25,000 bond imposed jointly and severally for printing and reproduction costs was appropriate because "some of the objectors will utilize parts of the record and reproduce exhibits that others will not …[and] some objectors will likely raise different issues in their appeals than others, causing the class to incur either more or less expense than incurred defending the appeals of other objectors").

Moreover, contrary to Andrews' suggestion, there will be multiple bound copies of our appellee brief(s) – not one, and hard copies of the brief(s) will have to be physically mailed to each of the *pro se* objectors.

As noted in the Class' Motion, many courts, including in the Sixth Circuit, impose fairly high bond amounts for Rule 39(e) printing and reproduction costs. *See* Dkt. No. 2042 at 18-19 (collecting cases). *See also Brandewie v. Wal-Mart Stores, Inc.*, 2016 WL 698110 (N.D. Oh. Feb. 22, 2016) (concluding that "imposition of $25,000 for [Rule 39(e) printing and reproduction] costs on appeal is appropriate"); *Miletak v. Allstate Ins. Co.*, 2012 WL 3686785, at *2 (N.D. Cal. Aug. 27, 2012) (ordering a $60,000 bond with $10,000 estimated as FRAP 39(e) costs); *Eastwood Enterprises, LLC v. Farha*, 2011 WL 2681915, at *1 (M.D. Fla. July 11, 2011) (ordering a $25,000 bond for copying and reproduction costs).

B. Appellants Fail To Distinguish The Substantial Case Law Which Holds That Increased Cost Of Administering A Settlement Are Properly Included In An Appeal Bond.

The legion of cases cited in our initial Motion overwhelmingly supports the fact that the Class is entitled to a bond that includes the increased settlement administration costs. *See* Dkt. No. 2042 at 19-20 (collecting cases, including *In re Cardizem CD Antitrust Litig.*, 391 F.3d 812, 817-18 (6th Cir. 2004)).[7] Objector Cochran's opposition brief fails to address any of those cases but instead cites two cases from *different* Circuits where delay costs were rejected. But as was expressly discussed in one of those two cases, *Tennille v. Western Union Fin. Servcs. Inc.*, 774 F.3d 1249 (10th Cir. 2014), the law in that Circuit regarding what can be included in an appeal bond differs from the law in the Sixth Circuit. 774 F.3d at 1255.

C. Appellants Offer Nothing To Establish That The Bond Should Not Include The Lost Interest Payments That Will Be Diverted To Defendant Carpenter.

The Class cited two example cases in its Motion where lost interest -- such as the funds that will be lost to the Class and obtained instead by Defendant Carpenter Co. for the length of the Objectors' appeals here -- were included in an appeal bond. Objector Cochran simply disregards one of those cases -- *In re Checking Account Overdraft Litig.*, No. 09-MD-02036, Dkt. No. 2473, at 6 n.6 (S.D. Fla. Feb. 14, 2012) -- as wrong, with no explanation of why. Dkt. No. 2046 at 3. Then he points out that the lost interest appeal bond order in the other case -- *In re Wal-Mart Wage and Hour Employment Practices Litig.*, 2010 WL 786513 (D. Nev. Mar. 8, 2010) -- has been stayed, but he appears to mischaracterize why. Dkt. No.

[7] Such costs were also included in an appeal bond by a Northern District of Ohio judge just last month. *Brandewie v. Wal-Mart Stores, Inc.*, 2016 WL 698110 (N.D. Ohio Feb. 22, 2016) (holding that "appeal bond should incorporate the additional costs incurred through the delay of administering the class action or providing notice to class members," and adding $13,000 to the bond amount to that end).

2046 at 3.[8] In any event, however, there are numerous other examples where courts have bonded lost interest as an appropriate delay cost. *See, e.g., Brandewie v. Wal-Mart Stores, Inc.*, 2016 WL 698110 (N.D. Oh. Feb. 22, 2016) (noting that class members will lose use of settlement funds during the appeal, and imposing a $38,000 appeal bond that "will fairly account for the loss of use faced by class members due to an appeal"); *Dennings v. Clearwire Corp.*, 2013 WL 355625, at *2 (W.D. Wash. July 11, 2013) (discussing objector's spurious arguments against the imposition of an appellate bond, and noting that that "costs of delay" "refer[s] to the interest that accrues during the time between the settlement agreement and its distribution when the distribution is delayed by an appeal"); *Barnes v. Fleetboston Fin. Corp.*, 2006 WL 6916384, at *2 (D. Mass. Aug. 22, 2006) (ordering $645,111.60 appeal bond, comprised of 5.15% interest on the settlement from the date of judgment for one year, plus anticipated attorneys' fees); *Allapattah Servs., Inc. v. Exxon Corp.*, 2006 WL 1132371 (S.D. Fla. Apr. 7, 2006) (requiring an appeal bond under FRAP 7 "in an amount sufficient to cover the damages, costs, and interest that the entire class will lose as a result of the appeal.").[9] Notably, this is not a simple delay situation where the interest accrues to the benefit of the class but payment is deferred until a later date. Here, Carpenter Co. need not

[8] Cochran claims (with no citation) that the *Wal-Mart* order was stayed because of the Ninth Circuit's ruling in the *Azizian* case (discussed in the next section below); however, the *Wal-Mart* court's stay order makes no mention of *Azizian* and instead cites an apparently unrelated case -- *Vaughn v. Am. Honda Motor Co., Inc.*, 507 F.3d 295, 299 (5th Cir. 2007). *See In re Wal-Mart Wage & Hour Emp. Practices Litig.*, No. 10-15516, Dkt. 11 (9th Cir. June 3, 2010), Ex. O hereto.

[9] Although the *Allapattah* court described this as a "supersedeas bond," it was not; the objector was not required to post a bond for the full amount of the settlement and the bond was calculated from the costs of appeal, not the final judgment award. *See In re Am. Investors Life Ins. Co. Annuity Marketing & Sales Practices Litig.*, 695 F. Supp. 2d 157, 163 (E.D. Pa. 2010) (explaining the *Allapattah* bond order).

pay the balance of its settlement until there are no appeals. The Class is therefore not earning interest on that portion of the payment.

D. Cochran Mischaracterizes The Law Regarding Whether Estimated Reasonable Attorneys' Fees Are Properly Included In the Bond Amount.

The Objector-Appellants' Opposition memoranda contain little legal argument to oppose the inclusion of attorneys' fees in calculating the bond on appeal. Objector Andrews offers only conclusions as to why he does not want to post a bond of any kind.

As to Objector Cochran, what little case law he cites is either incorrect or inapposite. Contrary to Cochran's claims, the Class' Motion does not assert that attorney's fees would necessarily be included in every appeal bond. Moreover, Cochran is wrong in his claim that "the First Circuit is the only circuit to permit a district court to include appellate attorneys' fees in an appeal bond." Dkt. No. 2046 at 1. The Sixth Circuit itself has endorsed the inclusion of attorneys' fees in an appeal bond. *In re Cardizem*, 391 F.3d 812 (6th Cir. 2004).

Cochran noted correctly that the Class' Motion contains an incorrect parenthetical on page 22. The Motion was accurate in citing *Azizian v. Federated Dep't Stores, Inc.* as support for the stated proposition that it may be "appropriate to include attorneys' fees" in a Rule 7 appeal bond (Mot. at 22). *See Azizian*, 499 F.3d 950, 958 (9th Cir. 2007) ("We agree with the Second, *Sixth*, and Eleventh Circuits and hold that the term 'costs on appeal' in Rule 7 includes all expenses defined as 'costs' by an applicable fee-shifting statute, *including attorney's fees*.") (emphasis added). Indeed, the Northern District of Ohio has cited *Azizian* for this same point. *Gemelas*, 2010 WL 3703811, at *1. However, the parenthetical that followed incorrectly stated the holding of that case as affirming the bonding of attorneys' fees based on the fee shifting provisions of the Clayton Act, where the bond was actually

reversed based on the Clayton Act. Counsel apologizes for the incorrect parenthetical, but the fact that the bond was ultimately not upheld in that case is entirely and completely irrelevant here, because the asserted claim there – for which that court noted there was no applicable fee shifting provision under the circumstances – was Section 4 of the Clayton Act. As an indirect purchaser class, the Class here is not proceeding under the Clayton Act, nor could it under *Illinois Brick*.

Instead, the Court would look here at the various state statutes under which the single unified indirect purchaser Class sought recovery to determine whether attorneys' fees could be recovered. *See In re Cardizem*, 391 F.3d at 816 & n.4 (holding that attorneys' fees may be included in an appeal bond if attorneys' fees are part of the "sums … 'properly awardable' under the underlying statute").[10] And, in contrast to the Clayton Act, several of those state laws *do* include fee shifting provisions that should be applied here. While not presenting an exhaustive listing, see, e.g., Fla. Stat. § 501.2105 (attorneys' fees recoverable by prevailing party; also the state in which Objector Cannata's claim allegedly arose); Wis. Stat. § 133.18(1)(a) (attorneys' fees recoverable; also the state in which Objector Sweeney's claim allegedly arose); Mich. Comp. Laws 445.778(2) (attorneys' fees recoverable; also the state in which Objector Andrews' claim allegedly arose); N.C. Gen. Stat. Ann. § 75-161.1 (allowing

[10] Cochran suggests in his Opposition brief that the Court should look only to the law of the appealing objector's home state (in his case – California) in determining whether attorneys' fees can be recovered on the objectors' appeal. He presumably relies on language in *Cardizem* where the Court declined to consider "all of the various state and federal statutes asserted by the plaintiffs during the class actions" in determining whether attorneys' fees should be bonded because the objector's "own suit was never certified as a class action" and so the Court focused only on the Tennessee statute "that underlay her suit." *In re Cardizem*, 391 F.3d at 817. But here, in contrast, none of the Objector-Appellants (including Cochran) either opted-out of the settlement or had originally filed an action on their own.

recovery by prevailing party upon a finding of frivolousness); Neb. Rev. Stat. § 59-1609 (attorneys' fees recoverable).

As discussed in its initial Motion, the Class seeks a bond for attorneys' fees not only because of the presence of an appropriate fee-shifting statute, but primarily because the appeals are frivolous. While the Sixth Circuit *has not explicitly opined* that attorneys' fees should be bonded for that particular reason, it has also not opined that they should not. The Northern District of Ohio, however, has acknowledged that the frivolous nature of an appeal is a proper basis for including attorneys' fees in a bond. *See Gemelas*, 2010 WL 3703811, at *1 ("Where 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.").

CONCLUSION

For all of these reasons and the reasons set forth in the Indirect Purchaser Class' Motion for Order Requiring Posting of Appeal Bond, the Indirect Purchaser Class respectfully requests that the Court: (1) grant the application for an appeal bond in the amount of $305,463, or in such amount as this Court deems appropriate, to be paid jointly and severally by Objector-Appellants, and (2) grant whatever other and further relief this Court deems just and appropriate.

Dated: March 24, 2016

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on March 24, 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:

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