CHAVEZ & GERTLER LLP
MARK A. CHAVEZ (Bar No. 90858)
42 Miller Ave.
Mill Valley, CA 94941
Tel: (415) 381-5599
Fax: (415) 381-5572

Attorneys for Objecting Class Members
Allen Roger Snyder and Linton Stone Weeks

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

IN RE: TOYOTA MOTOR CORP. UNINTENDED ACCELERATION MARKETING, SALES PRACTICES, AND PRODUCTS LIABILITY LITIGATION

THIS DOCUMENT RELATES TO:

ALL ECONOMIC LOSS CASES

Case No: 8:10 ML2151 JVS (FMOx)

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF OPPOSITION OF ALLEN ROGER SNYDER AND LINTON STONE WEEKS TO PLAINTIFFS' MOTION FOR IMPOSITION OF APPEAL BONDS UNDER FEDERAL RULE OF APPELLATE PROCEDURE 7

Date: October 21, 2013
Time: 9:00 a.m.
Place: Courtroom 10C
Judge: Hon. James V. Selna

TABLE OF CONTENTS

PAGE

I. INTRODUCTION 1

II. ARGUMENT 1

A. The Amount Of The Requested Bonds Is Excessive 1

1. The costs claimed by Plaintiffs are duplicative 1

2. Expenses due to settlement delay and administration are not "costs" that are taxable to an appeal bond 2

3. Plaintiffs' Cases Do Not Require A Contrary Conclusion 6

4. The amount of requested delay expenses is unsupported and those "costs" should be denied on that basis as well 7

B. The Equities Are Against Requiring Snyder and Weeks To Pay For The Posting Of A Bond 8

III. CONCLUSION 10

TABLE OF AUTHORITIES

PAGE

CASES

Adsani v. Miller
139 F.3d 67 (2nd Cir. 1998) 3

AOL Time Warner, Inc., Sec. and "ERISA" Litig.
2007 WL 2741033 (S.D.N.Y. Sept. 20, 2007) 6, 10

Azizian v. Federated Dep't Stores, Inc.
499 F.3d 950 (9th Cir. 2007) ..... *passim*

Baker v. Urban Outfitters, Inc.
2006 WL 3635392 (S.D.N.Y. Dec.12, 2006) 10

Chiaverini, Inc. v. Frenchie's Fine Jewelry, Coins & Stamps, Inc.
2008 WL 2415340 (E.D. Mich., June 12, 2008) 8

Clark v. Universal Builders, Inc.
501 F.2d 324 (7th Cir. 1974) 3

Cobell v. Salazar
816 F.Supp.2d 10 (D.D.C. 2011) 5

Fleury v. Richemont North America, Inc.
2008 WL 4680033 (N.D. Cal. Oct. 21, 2008) 6, 7

Gay v. Chandra
682 F.3d 590 (7th Cir. 2012) 9

In re American Investors Life Ins. Co. Annuity Marketing and Sales Practices Litigation
695 F.Supp.2d 157 (E.D. Pa. 2010) 5

In re American President Lines, Inc.
779 F.2d 714 (D.C. Cir. 1985) 3

In re Bayer Corp. Combination Aspirin Products Mktg. and Sales Practices Litig., 2013 WL 473564 (E.D.N.Y. Sept. 3, 2013) 4,8

In re Currency Conversion Fee Antitrust Litigation 2010 WL 1253741(S.D.N.Y. March 5, 2010) 6, 10

In re Initial Public Offering Securities Litigation 728 F.Supp.2d 289 (S.D.N.Y. 2010) 5

In Re Wal-Mart Wage & Hour Empl. Practices Litig. 2010 WL 786513 (D. Nev. Mar. 8, 2010) 7

Lindsey v. Normet 405 U.S. 56 (1972) 3

Lundy v. Union Carbide Corp. 598 F.Supp. 451 (D. Or. 1984) 8

Miletak v. Allstate Ins. Co. 2012 WL 3686785 (N.D. Cal. Aug. 27, 2012) 6, 7

Schulken v. Washington Mut. Bank 2013 WL 1345716 (N.D. Cal. Apr. 2, 2013) 6, 7

Selletti v. Carey 173 F.3d 104 (2nd Cir. 1999) 9

Simulnet East Associates v. Ramada Hotel Operating Co. 37 F.3d 573 (9th Cir. 1994) 9

Vaughn v. American Honda Motor Company, Inc. 507 F.3d 295 (5th Cir. 2007) 4, 7

RULES

Federal Rule of Appellate Proc. 7 ..... *passim*
Federal Rule of Appellate Procedure 39 ..... *passim*
Ninth Circuit Rule 39-1 2

I. INTRODUCTION

The Court's discretionary authority to require the posting of an appeal bond pursuant to Federal Rule of Appellate Procedure 7 ("Rule 7") is limited to an amount necessary to ensure payment of properly taxable costs on appeal. As to Objectors and Appellants Allen Roger Snyder and Linton Stone Weeks ("Snyder and Weeks"), those costs are more accurately estimated as $513, rather than the $536,326 alleged by Plaintiffs-Appellees ("Plaintiffs"). Because neither the equities nor the economic risks to Defendant Toyota posed by Snyder and Weeks' appeal warrant the relief requested, Plaintiffs' motion for imposition of an appeal bond should be denied.

II. ARGUMENT

A. The Amount Of The Requested Bonds Is Excessive

1. The costs claimed by Plaintiffs are duplicative

Plaintiffs ask the Court to order *each* of the 14 groups of Objectors-Appellants to post a bond in the amount of $536,326. Of that amount, $525,000 is represented as necessary to cover "delay damages," and $11,326 is for the administrative costs of preparing and reproducing 14 opposition briefs, appendices, and motions. Putting aside whether these costs are properly included in the calculation of an appeal bond – which they are not (see below) – these costs are unjustifiably duplicative. If Plaintiffs' motion is granted, the Appellants will collectively have paid for bonds to insure the identical "delay damages" not once, but *14 times*.

Plaintiffs also unjustifiably ask Snyder and Weeks to "insure" payment of costs attributable solely to the appeals of *other parties*. By Class Counsel's own estimate, only $809 (1/14) of the $11,326 in administrative costs are related to the appeal of Snyder and Weeks; the remaining $10,517 is attributable to the costs of preparing documents responsive to the briefs and motions of *other* parties. Yet

Plaintiffs ask the Court to require Snyder and Weeks (and each of the other Appellants) to post a bond to cover the entire administrative costs of *all* the appeals.

Plaintiffs have successfully moved the Court of Appeals to consolidate the appeals on the ground they arise out of the identical orders and involve similar issues, and also asked the Court of Appeals to order joint briefing and argument. Now, they ask this Court to calculate their costs of appeal based on an alleged need to prepare 84 copies (14 times 6) of the identical 800-page Appendix. (Declaration of Steve W. Berman, ¶ 2.) There is no reason why one copy of a Joint Appendix could not be submitted to the Court of Appeals and each of the parties in support of all of Plaintiffs' motion papers relating to the consolidated appeals.

The requested administrative costs are also inflated because the only cost for which a bond may be required under Rule 7 is for the cost of copying and binding briefs and appendices ($596 of the $809 calculated here). Plaintiffs nevertheless ask each of the Objector-Appellants to post a bond to cover an additional $213 in estimated costs for motions that may be filed, including post-appeal motions for sanctions. The Ninth Circuit in *Azizian v. Federated Dep't Stores, Inc.,* 499 F.3d 950 (9th Cir. 2007) held that Rule 7 authorizes a bond to cover only those "costs" on appeal as are defined by rule or statute, and motion-related costs are not included. (*Id*. at 958.)

2. Expenses due to settlement delay and administration are not "costs" that are taxable to an appeal bond

The costs that may be included in an appeal bond are set forth in Federal Rule of Appellate Procedure 39(e) ("Rule 39"). These costs include: "(1) the preparation and transmission of the record; (2) the reporter's transcript, if needed to determine the appeal; (3) premiums paid for a supersedeas bond or other bond to preserve rights pending appeal; and (4) the fee for filing the notice of appeal." (Rule 39(e); *see also* Ninth Circuit Rule 39-1, "Costs and Attorneys Fees on

Appeal," and Ninth Circuit Form 10. Bill of Costs, similarly listing the excerpts of record, opening brief, answering brief, and/or reply brief as the standard taxable costs.) Appellee expenses outside of Rule 39 costs must have an express rule or statutory basis to be included in the Rule 7 appeal bond. (*Azizian, supra.*) Plaintiffs have provided no statutory or other basis that would require costs due to delay in the implementation of a settlement to be taxable to an appeal bond.

In *Azizian*, the plaintiffs sought an appeal bond of $12,833,501.80 to secure repayment of (1) Rule 39 costs, (2) appellate attorney's fees, (3) interest on their hoped-for attorney's fees award, and (4) delay damages. (*Azizian*, 499 F.3d at 954.) In denying the request for a bond for interest and delay damages while sharply reducing the bond for attorney's fees, the District Court had stated that:

> [W]hile the decision to impose a cost bond is within the sound discretion of the Court, the Court may not order an appellant to post a bond in an amount beyond what is necessary to ensure adequate security if to do so would effectively preclude pursuit of an appeal. *See Lindsey v. Normet*, 405 U.S. 56, 77-79 (1972). Although this issue has not been squarely addressed in the Ninth Circuit, other circuit courts have held that Rule 7 was not intended to be used as a means of discouraging appeals, even when those appeals are perceived to be frivolous. *In re American President Lines, Inc.*, 779 F.2d 714, 717 (D.C. Cir. 1985); *see also Clark v. Universal Builders, Inc.*, 501 F.2d 324, 341 (7th Cir. 1974) (bond may not be imposed for the purpose of discouraging exercise of the right to appeal). So long as the bond is appropriately tailored to cover only those costs that may be incurred during an appeal, however, the imposition of a bond does not offend principles of Equal Protection or Due Process. *Adsani v. Miller*, 139 F.3d 67, 77 (2nd Cir. 1998).

(Order, No. C 03-3359 SBA, (N.D.Cal August 9, 2005) [Attached as Exhibit A hereto.])

On appeal, the Ninth Circuit ultimately reduced the $12.8 million bond to just the $2,000 sought for Rule 39 costs by ruling that attorney's fees could not be included in a Rule 7 bond. (*Azizian*, 499 F.3d at 962.) The Court emphasized that a district court may not prejudge the frivolousness of an appeal when setting an appeal bond, noting that "award of attorney's fees for frivolousness under Rule 38

is highly exceptional," requiring a fully developed appellate record, and that "only the court of appeals may order the sanction of appellate attorney's fees under Rule 38." (*Id*. at 960.)

The Ninth Circuit's decision in *Azizian* is consistent with the growing trend to exclude administrative or delay costs in class action appeals from being included in a bond to be posted under Rule 7. For example:

- The Northern District of Illinois has very recently held that, "*[t]he extra expenses of administration that plaintiffs will incur do not fall within any of the[ ] categories*" of costs taxable under Rules 7 and 39. (*In re Navistar Diesel Engine Products Liability Litigation*, 2013 WL 4052673 (N.D.Ill. August 12, 2013) [emphasis added.])
- In *In re Bayer Corp. Combination Aspirin Products Mktg. and Sales Practices Litig.*, 2013 WL 473564 (E.D.N.Y. Sept. 3, 2013), a New York district court refused to issue an appeal bond to cover the identical delay damages claimed here – including maintaining the call center and responding to communications from class members – because "no statute underlying the litigation authorizes the inclusion of delay costs in an appeal bond." (*Id*. at *4.)
- In the same year *Azizian* was decided, the Fifth Circuit in *Vaughn v. American Honda Motor Company, Inc*., 507 F.3d 295 (5th Cir. 2007) reversed the issuance of a $150,000 appeal bond in an appeal of a class action settlement valued at $115 million (defendant's cost) to $244 million (market value). The Circuit Court found the lower court had abused its discretion by ordering a class member who appealed from the denial of his objection to the class settlement to pose a $150,000 bond, ordering that the amount of the bond be reduced to $1,000 (the amount proposed by the objector). The Court rejected the

appellee's argument that the bond should cover either the alleged costs of delay engendered by the appeal, or any potential attorneys' fee award in the event the appeal were "summarily denied" for lack of merit. "There is no provision in the rules of procedure for a district court to predict that an appellate court will find an appeal frivolous and to set a bond for costs on appeal based on an estimate of what "just damages" and costs the appellate court *might* award." (*Id*. at 299.) "The district court could not use Rule 7 in conjunction with Rule 38 as a vehicle to erect a barrier to [objector's] appeal in the form of a $150,000 bond for costs on appeal." (*Ibid*.)

- In *Cobell v. Salazar*, 816 F.Supp.2d 10, 13 (D.D.C. 2011), a district court in the District of Columbia denied a bond for attorney's fees, post-judgment interest and increased cost of settlement administration, holding that the costs referred to in Rule 7 to ensure payment of costs on appeal "are simply those that may be taxed against an unsuccessful litigant under Federal Appellate Rule 39…."
- In *In re Initial Public Offering Securities Litigation*, 728 F.Supp.2d 289 (S.D.N.Y. 2010), the district court judge similarly stated, "I concur with those courts that have concluded that damages for delay cannot be included in Rule 7 bonds where no underlying statute provides for the inclusion of such costs. Thus, there are no grounds for awarding delay costs here."
- In *In re American Investors Life Ins. Co. Annuity Marketing and Sales Practices Litigation* 695 F.Supp.2d 157 (E.D. Pa. 2010), involving an objector's appeal of final approval of class action settlement valued at $165 million-$549 million, the court denied plaintiffs' request for $12.75 million cost bond, instead requiring a bond of $25,000, finding

among other things that the alleged loss of benefits to the class during the pendency of the appeal were not eligible costs under Rule 7.

- *See also AOL Time Warner, Inc., Sec. and "ERISA" Litig.,* 2007 WL 2741033 (S.D.N.Y. Sept. 20, 2007) at *4 & n. 4; *In re Currency Conversion Fee Antitrust Litigation*, MDL No. 1409, 2010 WL 1253741 at *3 (S.D.N.Y. March 5, 2010) [both reaching a similar conclusion].)

This Court should follow the above authorities, and similarly find that the delay damages alleged by Plaintiffs are not the type of costs that may be considered in evaluating a motion for a bond on appeal pursuant to Rule 7.

3. Plaintiffs' Cases Do Not Require A Contrary Conclusion

Plaintiffs rely on an unpublished order of this Court in *In re Broadcom Corp. Secs. Litig.*, Case No. 01-275 (Dec. 5, 2005), imposing a bond for delay costs and attorney's fees and then doubling both. (Plaintiffs' Memorandum at 20-21, fn.89.) That case precedes the Ninth Circuit's decision in *Azizian* and cannot be relied on. In *Azizian*, the Ninth Circuit specifically ruled that attorney's fees could *not* be included in costs for a Rule 7 bond while the District Court in *Azizian* ruled that delay costs in the form of interest could not be included in a Rule 7 bond.

Plaintiffs also rely on *Miletak v. Allstate Ins. Co.*, 2012 U.S. Dist. LEXIS 125426, 2012 WL 3686785 (N.D. Cal. Aug. 27, 2012) as supporting their contention that an appeal bond could include the administrative costs of delay after *Azizian*. However, two decisions in the same District have reached the opposite conclusion, denying attempts to include the administrative expenses resulting from a delay of settlement in an appeal bond: *Fleury v. Richemont North America, Inc.*, 2008 WL 4680033 (N.D. Cal. Oct. 21, 2008), and *Schulken v. Washington Mut. Bank*, 2013 U.S. Dist. LEXIS 48175 [2013 WL 1345716] (N.D. Cal. Apr. 2, 2013).

The Court in *Schulken* explicitly questioned the accuracy of the *Miletak* decision, holding instead that expenses due to settlement delay can only be taxable to an appeal bond when authorized as "costs" by statute or precedent.[3] In *Fleury*, the Court held that "costs" due to delayed implementation of settlement are more aptly categorized as delay damages that could be recovered post-appeal under the purview of 28 U.S.C. § 1912.

Plaintiffs also cite *In Re Wal-Mart Wage & Hour Empl. Practices Litig.*, 2010 WL 786513 (D. Nev. Mar. 8, 2010), where the Court without any analysis other than the sentence quoted by Appellees found a bond of $500,000 to be reasonable. However, the payment of the assessed bond was stayed by the Ninth Circuit citing *Vaughn, supra.* (*In Re Wal-Mart Wage & Hour Empl. Practices Litig.*, No. 10-15516, Order entered on June 3, 2010 [attached as Exhibit B hereto]). Accordingly, the *Wal-Mart* decision should not be considered good law.

[3] The court in *Schulken* stated:

> [T]he *Miletak* Court distinguished between "delay damages" (caused by the delay in recovering the award) and the "administrative costs" of responding to class members' needs pending the appeal, and included the latter in assessing the amount of an appeal bond. *Miletak*, 2012 WL 3686785 …. This opinion did not identify any fee-shifting statute authorizing administrative expenses as "costs," but nonetheless interpreted such expenses as falling within the meaning of "costs" in Rule 7.

Because the Plaintiffs–Appellees before the court "were unable to identify any additional precedent or statutes authorizing administrative expenses as 'costs,' and could neither concretely identify the basis for their $10,000 estimate, nor clearly distinguish the projected costs from those that could be claimed as attorney's fees," the court declined to include the claimed $10,000 of administrative costs in the appeal bond. (*Schulken*, *8 [emphasis added].)

4. The amount of requested delay expenses is unsupported and those "costs" should be denied on that basis as well

In addition to the fact that Rule 7 does not authorize the issuance of a bond for delay damages, the bond requested here should also be denied because the amount sought by Plaintiff is too high. Plaintiffs' estimate of the expenses associated with delay in administration of the settlement provides insufficient detail to support the very large amount requested. (*See* Plaintiffs' Memo. at 20-21; Declaration of Gilardi & Co. representative Markham Sherwood at ¶ 3.) The $525,000 in delay expenses are broken down into two broad categories without any detail or explanation – (1) $480,000 in expenditures on communications with class members and (2) $45,000 in case and website management outlays. Nowhere have Plaintiffs provided any accounting or a breakdown of these estimated expenses. (*Compare In re Bayer, supra*, 2013 WL 473564 at *4 [in multi-district litigation involving a national class, appellees estimated delay costs associated with maintaining the call center and handling communications and emails with class members at $36,250 to $57,500].)

The absence of detailed support for the exponentially higher delay costs claimed by Plaintiffs herein supports denial of the requested bond. (*See, e.g, Chiaverini, Inc. v. Frenchie's Fine Jewelry, Coins & Stamps, Inc.* 2008 WL 2415340 (E.D. Mich., June 12, 2008) [denying bond where "defendant has not met its burden of justifying the amount of its request or providing a reasonable estimate of the actual costs it may incur on appeal," citing *Lundy v. Union Carbide Corp.* 598 F.Supp. 451, 452 (D. Or. 1984)].)

B. The Equities Are Against Requiring Snyder and Weeks To Pay For The Posting Of A Bond

"In requiring a security bond for defendants' costs, care must be taken not to deprive a plaintiff of access to the federal courts. To do so has serious constitutional

implications." (*Simulnet East Associates v. Ramada Hotel Operating Co.* 37 F.3d 573, 575-76 (9th Cir. 1994); *see also Gay v. Chandra* 682 F.3d 590, 593 (7th Cir. 2012) ["A court abuses its discretion when it requires a cost bond that it knows the party cannot afford."].) The purpose of a cost bond is to prevent the dissipation of assets pending a potential future cost award to the appellee – not as a sanction against the appellant, or a tool to deny individuals with legitimate interests from exercising their legal right to appeal. (*See Selletti v. Carey,* 173 F.3d 104, 112 (2nd Cir. 1999).) To require individuals like Mr. Snyder and Mr. Weeks, who seek no personal benefit from their appeal, to spend upwards of $50,000 to obtain a bond in advance of any evidence or adjudication that the appeal is frivolous or not undertaken in good faith, would be punitive, and render these Appellants unable to continue at the appeal. Such a result is unwarranted where, as here, the moving parties have not shown a bond is necessary to protect the interests of the Defendants.

Mr. Snyder and Mr. Weeks are members of the settlement class by virtue of their ownership of Toyota vehicles encompassed by Plaintiffs' claims. They seek no compensation for themselves in this appeal and, unlike other Objector-Appellants, did not ask this Court for compensation or attorneys' fees in connection with their objections. Nor are they professional or "serial" objectors. Rather, Snyder and Weeks object to the settlement's Automobile Safety Research and Education Fund because the Fund serves only to advance the interests of Toyota and does not promote the interests of the class.

Snyder and Weeks contend that the allocation of millions of dollars of settlement funds to study and "promote driver safety" would advance Toyota's position – that unintended acceleration was caused by driver error – rather than the interests Plaintiffs sued to protect and the position Plaintiffs advanced in the litigation – that the unintended acceleration was caused by vehicle defects that

Toyota concealed, and that this would be an utter waste of settlement funds. Those contentions were supported by declarations from two renowned experts in the field – highway safety expert Benjamin Kelley (ECF Doc. 3598 filed May 10, 2013), who opined that the proposed Research and Education Program "would be a waste of money, would lack safety benefits, and would divert attention and resources away from the pressing issues raised in the litigation" (Kelley Decl. ¶ 10), and Executive Director of the Center for Auto Safety Clarence Ditlow (ECF Doc. 3668 filed May 21, 2013), who opined that the Program "not only [has] nothing to do with the underlying cause of action but also will not provide any safety benefits to class members" (Ditlow Decl. ¶ 17).

Plaintiffs offer no evidence these objections and opinions were advanced in bad faith, for purposes of delay, or for personal gain. (*See, e.g., In re Currency Conversion Fee Antitrust Litigation*, (*suma* at *1["whether the appellant has shown any bad faith or vexatious conduct" is one factor to be considered in assessing whether a Rule 7 appeal bond should be ordered (quoting *Baker v. Urban Outfitters, Inc.*, 2006 WL 3635392 at *1 (S.D.N.Y. Dec.12, 2006))]; *In re AOL Time Warner, supra*, 2007 WL l 2741033 at *3 [appeal bonds are less appropriate when the appellant is not using the suit "as a vehicle to pursue 'his unrelated, individual claims' [citation].")

Requiring Snyder and Weeks to post a bond in the exorbitant amount of $536,000 would, in short, serve only to deter these objectors from pursuing a meritorious appeal whose only goal is to protect the interest of the public and class members. Under these circumstances, the interests of equity would be hindered, rather than served, by the requirement that Snyder and Weeks post the requested bond.

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III. CONCLUSION

For all of the foregoing reasons, Plaintiffs-Appellees' motion should be denied as to Objector-Appellants Snyder and Weeks. In the alternative, Snyder and Weeks request the Court to set the amount of the bond at $513.00.

Dated: September 30, 2013 CHAVEZ & GERTLER LLP

/s/ Mark A. Chavez

By: _____

Mark A. Chavez

EXHIBIT A

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

FATEMAH AZIZIAN, et al.,	No. C 03-3359 SBA
Plaintiffs.	CLASS ACTION
v.	**ORDER**
FEDERATED DEPARTMENT STORES, et al.,	[Docket No. 511]
Defendants.	

This matter comes before the Court on Plaintiffs' Motion to Require Objectors Grace Wright and Kamela Wilkinson to Post a Bond on Appeal ("Motion for Bond on Appeal"). Having read and considered the arguments presented by the parties in the papers submitted to the Court, the Court finds this matter appropriate for resolution without a hearing. The Court hereby GRANTS IN PART AND DENIES IN PART Plaintiffs' Motion for Bond on Appeal [Docket No. 511].

BACKGROUND

In 1998, Class Plaintiffs ("Plaintiffs") filed a number of class action complaints on behalf of persons who purchased Department Store Cosmetics Products ("DSCPs")[1] in California. The original complaints were filed in various California Superior Courts and were ultimately coordinated and assigned by the Judicial Council to the Honorable M. Lynn Duryee, Judge of the Superior Court in and for the County of Marin. Plaintiffs alleged

[1] DSCPs are high-end, prestige or specialty beauty and cosmetic products and product lines (including color products, treatment and fragrances) sold by the "Manufacturer Defendants" under various brand names from May 29, 1994 through July 16, 2003. These products were sold primarily through traditional department and/or specialty stores and not through mass distribution channels. The "Manufacturer Defendants" are: The Estée Lauder Companies Inc., L'Oréal USA, Inc., Conopco, Inc., Christian Dior Perfumes, Inc., Guerlain, Inc., Parfums Givenchy, Inc., Chanel, Inc., Boucheron (USA) Ltd., and Clarins U.S.A., Inc.

that certain "Department Store Defendants"[2] engaged in anti-competitive practices that discouraged the discounting of DSCPs in the United States. On May 17, 2000, after extensive discovery, Plaintiffs filed an Amended Consolidated Complaint, which added the Manufacturer Defendants. The Amended Consolidated Complaint alleged pervasive joint practices of the Department Store Defendants and the Manufacturer Defendants to discourage discounting of DSCPs.

On January 5, 2001, Judge Duryee ordered the parties to mediation, and they retained the services of former Judge Weinstein and Catherine Yanni of JAMS to mediate settlement negotiations. The parties eventually reached settlement. In order to obtain nationwide settlement and relief, however, a federal complaint was filed in this Court on July 18, 2003.

Class Counsel promptly sought preliminary approval of their proposed settlement, which this Court granted on November 21, 2003. Nationwide notice was subsequently disseminated to the putative class members. Only sixty-one persons purported to opt out of the class; of these, one was a duplicate, a second was untimely, and a third was later withdrawn. Only twenty-six unique objections made on behalf of a total of seventy-three persons were submitted to the Court.

Hearings regarding final approval of the settlement were conducted on January 11, 2005 and March 8, 2005.

On March 30, 2005, the Court entered the Final Judgment Granting Final Approval to the Class Action Settlement with All Defendants and Awarding Attorneys' Fees and Costs.

On April 29, 2005, Objectors Grace Wright and Kamela Wilkinson each filed a Notice of Appeal.

On July 6, 2005, Plaintiffs filed the instant Motion to Require Objectors Grace Wright and Kamela Wilkinson to Post a Bond on Appeal ("Motion for Bond on Appeal").

ANALYSIS

A. Motion for Bond on Appeal

Federal Rule of Appellate Procedure 7 provides the district court with the authority to require an appellant to file a bond or "provide other security in any form and amount necessary to ensure payment of costs

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[2] The "Department Store Defendants" are: Federated Department Stores, Inc., The Neiman-Marcus Group, Inc., Nordstrom, Inc., The May Department Stores Company, Saks Incorporated, Gottschalks Inc., Target Corporation, and Dillard's, Inc.

on appeal." Fed. R. App. P. 7. In the instant Motion, Plaintiffs request that the Court order Objectors Grace Wright ("Wright") and Kamela Wilkinson ("Wilkinson") to post a bond in the amount of $12,833,501.80 in order to "safeguard" the Stipulated Judgment from the potential "harm" that may result from Wright and Wilkinson's appeals, which Plaintiffs view as frivolous. Plaintiffs' proposed bond is comprised of the following amounts:

1. All costs on appeal recoverable under Fed. R. App. P. 39: $6,540.00
2. Plaintiffs' estimated attorney's fees on appeal: $300,000.00
3. The estimated interest on the $24 million attorney's fees award: $178,457.68
4. "Delay" damages: $5,931,753.22

SUBTOTAL: $6,416,750.90

Since Plaintiffs allege that the instant appeals lack merit, they contend that the $6,412,750.90 sub-total may be doubled pursuant to Fed. R. App. P. 38 to reach a total amount of $12,833,501.80.

1. Reasonableness of the Cost Bond

As a preliminary matter, the Court notes that while the decision to impose a cost bond is within the sound discretion of the Court, the Court may not order an appellant to post a bond in an amount beyond what is necessary to ensure adequate security if to do so would effectively preclude pursuit of an appeal. *See Lindsey v. Normet*, 405 U.S. 56, 77-79 (1972). Although this issue has not been squarely addressed in the Ninth Circuit, other circuit courts have held that Rule 7 was not intended to be used as a means of discouraging appeals, even when those appeals are perceived to be frivolous. *In re American President Lines, Inc.*, 779 F.2d 714, 717 (D.C. Cir. 1985); *see also Clark v. Universal Builders, Inc.*, 501 F.2d 324, 341 (7th Cir. 1974) (bond may not be imposed for the purpose of discouraging exercise of the right to appeal). So long as the bond is appropriately tailored to cover only those costs that may be incurred during an appeal, however, the imposition of a bond does not offend principles of Equal Protection or Due Process. *Adsani v. Miller*, 139 F.3d 67,77 (2nd Cir. 1998).

This Court must therefore carefully scrutinize Plaintiffs' request and determine whether they have adequately established that the bond they seek to have imposed is sufficient, but not greater than necessary, to ensure payment of costs relating to Wilkinson and Wright's appeals.

2. Rule 39 Costs

The first component that Plaintiffs contend should be included in the bond is $6,540.00 for certain filing and copying costs that will be incurred by Plaintiffs during the appeal. In determining the appropriate amount for the bond, Plaintiffs rely on Fed. R. App. P. 39, which sets forth the types of costs that may be assessed against the losing party on an appeal. These costs include: (1) the filing fee; (2) the preparation and transmission of the record;(3) the reporter's transcript; and (4) copying costs relating to the reproduction and service of the briefs or appendices. Fed. R. App. P. 39(c) and (e). Specifically, Plaintiffs allege that, pursuant to Ninth Circuit Rule 39-1.2, if found to be the prevailing party, they will be entitled to obtain reproduction costs for eighteen copies of each brief, plus two copies for each party to be served. They also contend that they will be entitled to obtain reproduction costs for six copies of the excerpts of record plus one copy for each party required to be served. Plaintiffs estimate that they can recover up to 10 cents per page, and that they will have to produce twenty-one copies of a 3,000 page record. Plaintiffs thus conclude that their total potential costs amount to $6,540.00.

The costs set forth in Fed. R. App. P. 39 are regularly included in Rule 7 cost bonds, *see Downey v. United Guaranty Corp.*, 2001 U.S. Dist. LEXIS 24918, * 6 (D. Ga. 2001), and the parties do not dispute that such costs may be included in the instant bond. However, both Wright and Wilkinson contend that Plaintiffs' estimated costs are grossly inflated. For example, Wilkinson argues that Plaintiffs' $6,540.00 estimate is unjustified because she and Wright, as the appellants, are primarily responsible for preparing and filing the record excerpts and for paying for the transcripts. Thus, Wilkinson contends that Plaintiffs will only incur costs in the amount of $240. Wright concurs with Wilkinson, and similarly argues that the amount of the bond should be no more than $240. Plaintiffs do not provide a meaningful response to Wright and Wilkinson's arguments, but nevertheless insist that Wright and Wilkinson's estimate is too low. Plaintiffs also cite to *In re NASDAQ Market-Makers Antitrust Litigation*, 187 F.R.D. 124, 128 n. 6 (S.D.N.Y. 1999), in which the District Court for the Southern District of New York found a $1,500 cost bond to be appropriate after noting that the appellees would likely incur substantial costs in printing and serving the opposition brief in light of the fact that the service list included over one hundred law firms.

Wright and Wilkinson are correct that the appellant bears primary responsibility for producing both the

record and transcript on appeal, and therefore the Court concludes that Plaintiffs' $6,540.00 estimate, which is based almost entirely on copying costs relating to the 3,000 page record, is too high. Given that the service list in this action is fairly extensive, however, it is not inconceivable that the copying costs relating to the briefing on the appeal will be commensurate with the costs identified in *NASDAQ*. Accordingly, the Court finds that it is reasonable and appropriate to include in the bond costs of $1,000 for each appeal.

3. Attorney's Fees

The second component that Plaintiffs seek to include in the cost bond is the attorney's fees they will incur on the appeal, which Plaintiffs contend will amount to $300,000. As both parties concede, the Ninth Circuit has yet to address the question of whether a Rule 7 cost bond may properly include attorney's fees. However, other circuit courts considering this issue have found that attorney's fees may be included in a cost bond under two circumstances: (1) where the underlying statute provides for such an award; or (2) where it is likely that the Court of Appeals will determine that the appeal is frivolous pursuant to Fed. R. App. P. 38. *Downey v. Mortgage Guaranty Ins. Co.*, 313 F.3d 1341, 1342 (11th Cir. 2002) (approving of the inclusion of attorney's fees in a cost bond when the underlying statute provides for such recovery); *In re Cardizem CD Antitrust Litig.*, 391 F.3d 812 (6th Cir. 2004) (same); *Sckolnick v. Harlow*, 820 F.2d 13, 15 (1st Cir. 1987) (approving cost bond that included attorney's fees potentially recoverable under Fed. R. App. P. 38).

Plaintiffs first argue that the underlying statute in the instant case provides them with the right to recover attorney's fees. Both parties concede that the applicable underlying statute here is the Clayton Act, 15 U.S.C. § 15, which permits recovery in an antitrust suit for "the cost of suit, including a reasonable attorney's fee." *Id.* Wright and Wilkinson argue, however, that when a plaintiff settles his antitrust claims prior to judgment, he is not entitled to attorney's fees under the Clayton Act. *See, e.g.*, Wilkinson Opp. at 12 (citing *City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 468-9 (2nd Cir. 1974) (discussing, in dicta, that the correct basis for awarding attorney's fees in settled actions brought under the Clayton Act is the equitable fund theory doctrine). Whether Wright and Wilkinson are correct on this point is unclear. As Defendants point out, this is not necessarily a settled question, as district courts within the Second Circuit and other jurisdictions have declined to follow *City of Detroit* and have held that attorney's fees pursuant to the Clayton Act may be included in a cost bond even when a judgment is reached through settlement. *See NASDAQ*, 187 F.R.D. at 128; *see also*

In re Compact Disc Minimum Advertised Price Antitrust Litigation, 2003 WL 22417252, * 1-2 (D. Me. 2003) ("*In re CDs*"). Further, even Wilkinson concedes that 15 U.S.C. § 15 also provides for the recovery of attorney's fees relating to work performed on an appeal. *See Perkins v. Standard Oil Co.*, 399 U.S. 222, 223 (1970). Accordingly, Plaintiffs have shown that there is some support for their contention that the Clayton Act entitles them to include attorney's fees in the cost bond.

Plaintiffs are also arguably entitled to attorney's fees if they can prove that the Court of Appeals is likely to find that the instant appeals are frivolous. *Sckolnick*, 820 F.2d at 15. In this regard, Plaintiffs vigorously contend that such a finding is likely, and in support of their argument, note that: (1) the issues Wright and Wilkinson raise on appeal were already considered, and rejected, by this Court during extensive settlement approval hearings; (2) Wright and Wilkinson are "spoilers" who decided not to opt out of the settlement solely to maximize the amount of money they and their counsel can obtain individually; and (3) Wright and Wilkinson are represented by counsel who routinely raise objections to class action settlements in the hopes of getting "paid off by class counsel."

Given that attorney's fees may be available under the Clayton Act if Plaintiffs successfully resolve the instant appeals in their favor, and given the procedural history of this case, including this Court's and the Special Master's exhaustive review of the settlement agreement and all objections thereto, and the fact that Wright and Wilkinson are the only persons out of the entire class to file appeals, a cost bond including a modest amount of attorney's fees appears to be warranted here. However, Plaintiffs' contention that they will incur approximately $300,000 in attorney's fees, based on their estimate that Plaintiffs' counsel will be forced to spend over 750 hours on the appeals, is completely inconsistent with Plaintiffs' assertion that the appeals are frivolous. If the appeals are truly frivolous, then, presumably, Plaintiffs should be able to dispose of the appeals fairly quickly. The Court therefore cannot fathom how an estimate of 750 hours is reasonable or justified. Accordingly, the Court hereby finds that the bond shall include costs in the amount of $40,000, based on an estimate of 100 attorney hours at Plaintiffs' counsel's blended rate of $400.00 per hour.[3]

[3]The Court further finds that Wilkinson and Wright shall be jointly and severally responsible for paying this cost. This is due to the fact that Plaintiffs have not provided the Court with documentation sufficient to establish that the legal issues raised in Wilkinson and Wright's appeals are not so closely related that there will not will be substantial duplication in the legal briefing and analysis necessary to oppose the appeals.

4. Interest on Attorney's Fees Award in the Stipulated Judgment

Next, Plaintiffs seek to include in the bond the amount of post-judgment interest that could be earned on the award of attorney's fees provided for under the Stipulated Judgment, which Plaintiffs contend will amount to $178,457.68.[4] Plaintiffs argue that, should they prevail on the appeal, they will be entitled to recover this amount pursuant to Fed. R. App. P. 37.[5] This argument is without merit.

First and foremost, Plaintiffs have not provided the Court with any authority in support of their contention that Fed. R. App. P. 37 confers on them the right to recover interest from *Wright* and *Wilkinson*, who were not the defendants in the underlying suit. Further, as Wright points out, in the instant case, the terms of the Settlement Agreement explicitly provide that the settlement shall only become final upon the occurrence of certain events, including the "expiration for the time for appeal . . . or, if appealed, the [affirmance of the] final judgment . . . in its entirety by the Federal Court of last resort to which such appeal has been taken and [when] such affirmance has become no longer subject to further appeal or review." Settlement Agreement, ¶ 15(b). Given that Plaintiffs anticipated that the $24 million attorney's fees award would not be available until the judgment is affirmed on appeal, Plaintiffs have not persuasively shown that they are entitled to include post-judgment interest in the cost bond.

5. "Delay" Damages

The fourth component that Plaintiffs contend should be included in the cost bond is $5,931,753.22 for certain "delay" damages allegedly caused by the appeals. The $5,931,753.22 amount is comprised solely of the interest that would be earned on the $175 million Settlement Fund over a fourteen-month period. Again, given the fact that the Settlement Agreement specifically contemplates the possibility of delay due to appeal, this argument is without merit. Further, the authorities upon which Plaintiffs rely for their contention that a bond imposed under Rule 7 can secure damages caused by delay incident to an appeal are either inapposite or unpersuasive. *See* Pl's Mot. at 8 (citing *NASDAQ*, 187 F.R.D. at 128 and *Livingston v. Toyota Motor Sales*

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[4] This is based on the differential between the statutory interest rate of 3.38% and the interest actually being earned on the $24 million sum, which is 2.75%, and Plaintiffs' estimate that the appeal will take fourteen months to resolve.

[5] Fed. R. App. P. 37 states that "if a money judgment in a civil case is affirmed, whatever interest is allowed by law is payable from the date when the district court's judgment was entered." *Id.*

USA, Inc., 1997 U.S. Dist. LEXIS 24087, * 12 (N. D. Cal. 1997)); *see also* Reply at 8 (citing *In re CDs*, 2003 WL 22417252, * 1).

While it is true that, in *NASDAQ*, the court imposed a bond that included projected costs to the settlement trust resulting from the delay incident to the appeal, in support of this conclusion, the *NASDAQ* court relied exclusively on cases dealing with supersedeas bonds.[6] 187 F.R.D. at 128-29 (citing *Morgan Guaranty Trust Co. of N.Y. v. Republic of Palau*, 702 F. Supp. 60, 65 (S.D.N.Y. 1988) (stating that a "supersedeas bond . . . provides a guarantee that the appellee can recover . . . damages caused by the delay.") and *Omaha Hotel Co. v. Kountze*, 107 U.S. 378, 392 (1883) (discussing measure of damages recoverable on "an appeal bond given for supersedeas of execution on a decree of foreclosure.")). As such, *NASDAQ* is of questionable precedential value on this pont. *See Adsani*, 139 F.3d at 70 n. 2 (noting that cost bonds and supersedeas bonds are separate and distinct and "should not be confused.").

Moreover, even if the court in *NASDAQ* were correct that such "damages" may be included in a Rule 7 cost bond, in *NASDAQ*, the plaintiffs were able to identify specific administrative expenses that were caused by the delay. *Id.* at 128 (finding that proposed bond was supported by showing of increased administrative expenses, including "expenses necessarily incurred in extending the leases on office space and the leases on equipment, extending insurance and website maintenance, picking up mail and answering inquiries about the status of claims . . ., and rehiring and retraining of the claims administration staff."); *see also In re CDs*, 2003 WL 22417252, * 1 (finding that bond was supported by showing of certain administrative costs, including "storage and distribution of the *cy pres* CDs, fees to the bank administering the settlement fund and tracking down claimants who move . . . ."). Plaintiffs have made so such showing here. *NASDAQ* is therefore inapposite and does not provide persuasive support for Plaintiffs' proposed bond.

Similarly, the *Livingston* court appears to have construed the appellee's motion as brought under *either* Rule 7, which covers costs bonds, *or* Rule 8, which covers supersedeas bonds. *Livingston*, 1997 U.S. Dist. LEXIS 24087, * 12. As such, *Livingston* does compel the conclusion that a Rule 7 cost bond may include delay damages. Further, like *NASDAQ*, *Livingston* is also distinguishable from the instant case. For example,

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[6] A "supersedeas bond" is a bond imposed pursuant to Fed. R. App. P. 8. A court may require a party to post a supersedeas bond only after the party seeking relief from the final judgment moves to stay the judgment pending appeal. *See* Fed. R. App. P. 8(a)(1) and (2).

in *Livingston*, the parties did not expressly contemplate a delay in the enforcement of the judgment due to the appeal. Further, in *Livingston*, the plaintiffs provided the court with specific evidence that the value of the judgment, *i.e.* the consumer coupons, would actually *decline* in the event of a delay. *Id.* at *13. Again, Plaintiffs have not produced similar evidence in support of their own proposed bond.

Given the paucity of authority supporting Plaintiffs' position, a bond in excess of $5 million is simply unwarranted and unsupportable. Accordingly, the Court hereby declines to impose a bond that includes Plaintiffs' purported "delay" costs.

6. "Double Costs" Under Rule 38

Last, Plaintiffs seek to have the total amount of the cost bond doubled pursuant to Fed. R. App. P. 38 due to their contention that Wright and Wilkinson's appeals are frivolous. While Fed. R. App. P. 38 provides the *Court of Appeals* with the authority to "award just damages and [to] single or double costs to the appellee" upon a finding that the appeal is frivolous, Plaintiffs have not identified any circuit court authorities that hold that a Rule 7 bond may be doubled at the outset of the appeal by the *district court*. Moreover, as Wilkinson correctly notes, courts interpreting Fed. R. App. P. 38 have determined that attorney's fees are considered"damages" under the rule and are not included in the costs that may be doubled. *Cronin v. Town of Amerbury*, 81 F.3d 257, 261 (1st Cir. 1996). Since the possibility that Plaintiffs may recover attorney's fees pursuant to Fed. R. App. 38 has already factored into the cost of the bond, the Court finds that there is simply no justification for including this same amount twice.

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CONCLUSION

IT IS HEREBY ORDERED THAT Plaintiffs' Motion for Bond on Appeal [Docket No. 511] is GRANTED IN PART AND DENIED IN PART. The Motion is DENIED with respect to Plaintiffs' request that a bond of $12,833,501.80 be imposed on Grace Wright and Kamela Wilkinson. The Motion is GRANTED in that Grace Wright and Kamela Wilkinson shall be jointly and severally responsible for posting a bond in the amount of $42,000 (the "Bond"). The Bond shall be posted within fourteen (14) days of the date of this Order.

IT IS SO ORDERED.

Dated: 8-9-05

SAUNDRA BROWN ARMSTRONG
United States District Judge

EXHIBIT B

FILED

JUN 03 2010

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

In re: WAL-MART WAGE AND HOUR EMPLOYMENT PRACTICES LITIGATION.	No. 10-15516
	D.C. No. 2:06-cv-00225-PMP District of Nevada, Las Vegas
NANCY HALL; et al., Plaintiffs - Appellees, STEPHANIE SWIFT; et al., Objectors - Appellants, v. SAM'S WEST, INC.; et al., Defendants - Appellees.	ORDER

Before: KOZINSKI, Chief Judge, and LEAVY, Circuit Judge.

Appellants' emergency motion to stay the May 25, 2010 district court order is granted. *See Vaughn v. Am. Honda Motor Co.*, 507 F.3d 295 (5th Cir. 2007). Payment of the assessed appellate bond is stayed pending this appeal.

The briefing schedule established previously shall remain in effect.

KB/MOATT