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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

RACHEL CODY AND LINDSEY KNOWLES, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,

Plaintiffs,

v.

SOULCYCLE INC.,

Defendant

Case No. 15-CV-6457-MWF-JEM

PLAINTIFFS' NOTICE OF MOTION AND MOTION TO REQUIRE POSTING OF APPEAL BOND BY OBJECTOR KERRY ANN SWEENEY

DATE: DECEMBER 11, 2017
TIME: 10:00 A.M.
JUDGE: HON. MICHAEL W. FITZGERALD
CTRM: 5A

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I. INTRODUCTION

Objector Kerry Ann Sweeney has filed a notice of appeal from this Court's final Orders approving the settlement and awarding attorneys' fees and expenses in this action. Not only is Ms. Sweeney's appeal without merit, but her extensive history of class action settlement objections,[1] often appealing only to dismiss the appeal months later without effecting any positive changes to the settlements, belies an ulterior motive for her appeal in this instance. Plaintiffs therefore respectfully move this Court for an Order requiring Ms. Sweeney post an appeal bond pursuant to Federal Rule of Appellate Procedure 7 in the amount of at least $1,000. This amount is a conservative estimate of the tangible costs associated with the appeal and this amount (and indeed, far greater amounts) have been approved by courts addressing similar circumstances.

The facts of this case closely align with the factors considered in determining whether to impose a bond requirement. Ms. Sweeney presents a risk of non-payment. Ms. Sweeney is a repeat objector whose objection here clearly lacks merit. A Federal Rule of Appellate Procedure 7 bond is appropriate here because the three factors courts typically take into account weigh heavily in favor of a bond, namely: (1) Sweeney's financial ability to post a bond; (2) the risk that Sweeney will not pay the appellee's costs if she loses the appeal; and (3) the merits of the appeal. Indeed, after fully considering Ms. Sweeney's objection, including full and separate briefing by all Parties, this Court overruled Ms. Sweeney's objection. *See* Dkt. 254 ("Final Order") at 12 ("The Sweeney

[1] *See e.g., Patrick Cotter, et al. v. Lyft, Inc.*, Case No. 13-cv-4065, Dkt. 264 (N.D. Cal. Nov. 1, 2016); *In re MagSafe Apple Power Adapter Litig.*, Case No. 09-cv-1911, Dkt. 86 (N.D. Cal. Jan. 6, 2012); *Larsen v. Trader Joe's Co.,* Case No. 11-cv-5188, Dkt. 100 (N.D. Cal. June 6, 2014); *Hendricks v. Starkist Co.,* Case No. 13-cv-00729, Dkt. 299 (N.D. Cal. Nov. 20, 2015); *Melito v. Am. Eagle Outfitters, Inc.*, Case No. 14-cv-2440, Dkt. 275 (S.D.N.Y June 5, 2017); *Legg v. Spirit Airlines, Inc.,* Case No. 14-cv-61978, Dkt. 141 (S.D. Fla. June 20, 2016); *In Re: Checking Account Overdraft Litig.*, Case No. 09-md-2036, Dkt. 3698 (S.D. Fla. Nov. 13, 2013).

Objection is overruled.").

Federal Rule of Appellate Procedure 7 appeal bonds are an integral and important component of the civil justice system and are often necessary, as here, to ensure that appellees actually receive costs awarded in connection with an ill-conceived appeal. Requiring a bond is appropriate here given the relevant factors.

First, Ms. Sweeney cannot demonstrate she is unable to post a bond of $1,000. Ms. Sweeney herself stated in filings in another case where she objected to final approval of a class action settlement that, "if she is required to pay costs, she will not be difficult to locate; her father, also an attorney, is a lifelong friend of her attorney. There is literally no risk of non-payment." *In re MagSafe Apple Power Adapter Litig.*, Case No. 09-cv-1911, Dkt. 184 at 4-5 (N.D. Cal. June 25, 2012), attached as Exhibit A.[2] Further, in that same case the Court ordered Sweeney to post a $15,000 bond "in light of the significant risk of non-payment of costs and the lack of merit in Objector Sweeney's appeal." *In re MagSafe Apple Power Adapter Litigation*, Case No. 09-cv-1911, Dkt. 194 at 3 (N.D. Cal. July 6, 2012), attached as Exhibit B.

Second, absent a bond, Plaintiffs have serious concerns as to whether they will be able to recover even a portion of their costs on appeal because Ms. Sweeney has a history of failing to pay filing fees and has had her appeals repeatedly dismissed for failure to pay the required filing fees. *See e.g., Patrick Cotter, et al v. Lyft, Inc.*, Case No. 17-15724, Dkt. 10 at 1 (9th Cir. June 5, 2017), attached as Exhibit C ("A review of the docket demonstrates that appellant [Ms. Sweeney] has failed to pay the docketing/filing fees in this case. Pursuant to Ninth Circuit Rule 42-1, this appeal is dismissed for failure to prosecute."). Note, Ms. Sweeney has yet to pay the required filing fee after initiating the appeal of

[2] All "Exhibit" references are attached to the Declaration of Daniel P. Hipskind in Support of Plaintiffs' Motion for Posting of an Appeal Bond by Kerry Ann Sweeney to Secure Payment of Costs on Appeal (Fed. R. App. P. 7) ("Hipskind Decl.").

this Court's Final Order.

Third, a bond in the amount of $1,000 is appropriate. Plaintiffs conservatively estimate that the costs they stand to recover as the prevailing party on this appeal pursuant to Federal Rule of Appellate Procedure 39(e), will be significantly greater than $1,000. These costs are based on the projected costs to prepare the relevant reporter transcripts and copy the record and briefs on appeal, as well as the various motions associated with the appeal that Plaintiff intends to file, including moving for summary affirmance and an expediated briefing schedule. Further, supporting the reasonableness of Plaintiffs' bond request is that other Courts have ordered Ms. Sweeney and other members of Ms. Sweeney's family to post bonds in amounts that are equal to or greater than the amount sought here. *See In re MagSafe Apple Power Adapter Litig.*, Case No. 09-cv-1911, Dkt. No. 194 at 4 (N.D. Cal. July 6, 2012) ("Objector Sweeney shall either post a $15,000 bond or file a notice of dismissal of her appeal."); *In re: Blue Buffalo Company, Ltd. Marketing and Sales Practices Litig.*, Case No. 14-md-2562, Dkt. 263 at 1 (E.D. Mo. October 3, 2016) (ordering Pamela Sweeney [Ms. Sweeney's mother] post a $5,000 bond); *In re Polyurethane Foam Antitrust Litigation*, Case No. 10-md-2196, Dkt. 2065 at 16 ("April 13, 2016") (Ordering Patrick Sweeney and other "Objectors shall post an appeal bond of $145,463.").

II. BACKGROUND

On October 3, 2017, after over two years of hard-fought litigation, the Court granted final approval of a Settlement that provides meaningful recovery and benefits to more than 150,000 customers of SoulCycle, Inc. ("SoulCycle"). Eight of those class members opted out of the Settlement and three class members initially objected. Two of the three objectors withdrew their objections, which the Court approved. Dkt. 254 at 8. In sum, therefore, only one objector, Ms. Sweeney, remained and her objection related to the Motion for Attorneys' Fees. The Court considered Ms. Sweeney's objection, overruled it, and found Class

Counsel's fee request to be "fair and reasonable." *Id.* at 10-12. Nonetheless, this settlement is now under attack by Kerry Ann Sweeney, a serial objector who filed a notice of appeal from this Court's Order granting Final Approval of the Settlement and Plaintiffs' Attorneys' Costs and Fee Request ("Final Order") (Dkt. No. 254) and the final Judgment (Dkt. No. 255). *See* Ex. D (Sweeney's Notice of Appeal).

Class Counsel negotiated and obtained Court-approval of a strong class action settlement, which includes between $6.9-$9.2 million in value for class members, together with considerable injunctive relief to present and prospective SoulCycle customers, separate and apart from the award of attorneys' fees and costs. Under the terms of the class action settlement, SoulCycle will distribute 299,646 reimbursed classes to more than 150,000 affected individuals, each of these classes are valued between $30 and $40, as well as $25 to those Class members who opted to receive a cash payment in lieu of a reimbursed class. The Settlement further requires SoulCycle to make substantial alterations to its business practices in response to the litigation. Those changes clarify SoulCycle's policies going forward.

A) Filing of the Complaint, Pre-Settlement Discovery, And Class Certification.

Plaintiff Rachel Cody filed this action on August 25, 2015 (Dkt. 1) and filed the First Amended Complaint ("FAC") on October 9, 2015 (Dkt. 12), asserting seven claims including violations of the Electronic Funds Transfer Act ("EFTA") as amended by the Credit Card Accountability and Disclosure Act ("CARD"), violations of the California gift certificate law, California Civil Code, § 1749.5 ("Gift Certificate Law") and claims under the Consumer Legal Remedies Act, Cal. Civil Code § 1750 et seq. ("CLRA").[3] The claims centered on

[3] Class Counsel appreciates that the Court is familiar with the procedural and factual background of this litigation (*see*, *e.g*. Preliminary Approval order, (Dkt 225)) and provides here only an abbreviated summary of the case history.

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Defendant SoulCycle's requirement that customers purchase class credits to use them to book cycling classes. Those credits often expired before customers could use them, and customers could not obtain refunds of the money they had paid to SoulCycle for those expired class credits.

On February 10, 2016, Plaintiff Lindsey Knowles and Plaintiff Cody filed the SAC. Dkt. 33. On April 22, 2016, the Court granted SoulCycle's motion to dismiss as to Plaintiffs' Gift Certificate Law claim. The Court otherwise permitted Plaintiffs to proceed on their EFTA and California Business and Professions Code §17200 *et seq.* (the "UCL") claims, reserving the question whether the Complaint sufficiently alleged a UCL violation based on the Gift Certificate Law. *Id.*, at 7.

On October 31, 2016, Plaintiff filed a Motion for Class Certification. Dkt. No. 71. On March 13, 2017, the Court held a hearing on the Motion for Class Certification. Dkt. No. 190. Before the Court issued its final ruling on the Motion for Class Certification, the parties filed a Joint Report and Notice of Settlement in Principle (Dkt. No. 217), the Court then vacated and stayed all pending deadlines and denied as moot all pending motions. Dkt. No. 218. From the outset, SoulCycle denied liability and disputed Plaintiffs' legal arguments and factual and expert allegations.

B) Settlement, Preliminary Approval, And Motion For Attorneys' Fees.

The Parties first mediated their dispute on September 23, 2016 with Antonio Piazza of Mediated Negotiations in San Francisco, California. At that stage, prior to the commencement of discovery or briefing of Plaintiffs' class certification motion, the case did not settle. Thereafter, while discovery and litigation were actively ongoing, the parties engaged in continued settlement discussions through December 2016. On April 19, 2017, the Parties mediated again, this time with Randall W. Wulff, of Wulff Quinby & Sochynsky. At the conclusion of that mediation session, the Parties reached a settlement agreement in

principle and executed a settlement term sheet. The Parties promptly filed their Joint Report of Mediation and Notice of Settlement in Principle. Dkt. 217.

As noted above, the Settlement reached by the parties requires SoulCycle to maintain alterations that it has made to its business practices in response to this litigation and provide reinstated classes or, if elected, cash payments to the Settlement Class as described below. These changes brought SoulCycle's practices in compliance with the EFTA. In settling the claims against it, SoulCycle agreed to provide economic and non-economic consideration.

Economic Component of The Settlement. The economic component of the Settlement permits class members to choose between reinstatement of up to two expired classes or cash reimbursement for up to two expired classes. Dkt. 254 at 3. The classes will be automatically reinstated to class members' online SoulCycle accounts, unless the class members elect the Cash Option, which allows payment of up to $50 (or $25 for up to two reinstated classes each). *Id.* In other words, Class members do not need to submit a claim form to receive the reinstated classes, but if they elect the Cash Option, they must submit a Cash Claim Form. *Id.*

Injunctive Relief Components of The Settlement. The non-economic component of the Settlement requires SoulCycle to revise and amend its policies going forward. SoulCycle has clarified where purchased class credits can be used, and updated the Terms and Conditions and Frequently Asked Questions on its Website and smartphone App to reinforce that class credits do expire while gift certificates do not, and that customers may contact SoulCycle to request or discuss extensions or reinstatements of expired classes. Dkt. 254 at 2-3.

C) Preliminary Approval.

The Court held a preliminary approval hearing on June 19, 2017, and issued an order granting preliminary approval of the class settlement on June 22, 2017. Dkt. 225. The Court appointed Settlement Administrator, Dahl

Administration LLC ("Dahl"), successfully implemented the notice program on schedule.

On August 28, 2017, Plaintiffs' counsel filed their motion for attorneys' fees, reimbursement of expenses and incentive awards. Dkt. No. 238. Prior to the final fairness hearing, Kerry Ann Sweeney submitted her objection to the Claims Administrator. Dkt. 248 at 4 n.4.[4] Ms. Sweeney's limited – and conclusory – objection was to the attorney fee award. This Court, in its Order granting final approval, described Ms. Sweeney's objection:

> The one Objection to the fee amount comes from Ms. Sweeney, who argues in her written objection that the cash portion of the Settlement amount is minimal, since most of the consideration comes in the form of class reinstatements. (Sweeney Objection at 2). She contends that the class reinstatements are more like "coupons," which weighs against the requested fee amount under the Class Action Fairness Act.

Dkt. 254 at 11.

Plaintiffs extensively addressed the issue raised in Sweeney's objection in its briefing and at the final approval hearing. *See* Dkt. 248 at 11-19.

D) Final Approval.

A fairness hearing was held on October 2, 2017. This Court entered its Final Order and Judgment approving the Settlement, along with its Findings of Fact, Conclusions of Law, and Order Awarding Fees and Costs on October 3, 2017. *See* Dkt. 254, 255. The Court considered each factor required for certification of the Settlement Class and approved the settlement as fair, reasonable, and adequate. *See* Dkt. No. 254 at 2-11. The Court also considered Ms. Sweeney's objection, overruling it as contrary to Ninth Circuit law.

> However, as Class Counsel emphasized in the briefing and at the hearing, there is a crucial difference between ***coupons*** and ***vouchers***. Class Counsel argues that the class reinstatements provided by the Proposed Settlement are vouchers, not coupons, because they give

[4] Two objectors filed and served objections to the proposed settlement and/or Plaintiffs' request for attorneys' fees but withdrew their objections prior to the fairness hearing. Dkt. 254 at 10.

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> class members a free product or service. . . . Because class members here may elect the "Cash Option" or keep the "cash-equivalent" of the reinstated classes, without spending any money of their own or receiving any "discount," this Settlement is not a "coupon settlement" and therefore not subject to CAFA's limitations on contingent fees. The Sweeney Objection is overruled.

Id. at 11-12 (citations omitted) (emphasis in original).

The Court approved attorneys' fees and costs of $1,790,000 which "represents 25% of $7,160,000, which is on the lower end of the Settlement value range." *Id.* at 10-11 (citing *Vizcaino v. Microsoft Corp*., 290 F.3d 1043, at 1048–50 (9th Cir. 2002)).

III. MS. SWEENEY'S HISTORY AS A PROFESSIONAL OBJECTOR

Objector Kerry Ann Sweeney has an extensive history of objecting to, appealing from, and mid-appeal withdrawing those appeals from class action settlements. Respectfully, there is every reason to expect the pattern to continue here. In addition to draining the Court's resources, this approach delays settlement recovery by class members. "[P]rofessional objectors can levy what is effectively a tax on class action settlements, a tax that has no benefit to anyone other than to the objectors. Literally nothing is gained from the cost: Settlements are not restructured and the class, on whose benefit the appeal is purportedly raised, gains nothing." *In re Checking Account Overdraft Litig.,* 830 F. Supp. 2d 1330, 1361 n.30 (S.D. Fla. 2011) (quotations omitted, alteration in original).[5]

A) Ms. Sweeney's Unmeritorious Objections.

Kerry Ann Sweeney has been an objector in at least seven prior class actions. All of Ms. Sweeney's prior objections have been dismissed based on a failure to pay the requisite fees or were dismissed by Ms. Sweeney. Ms. Sweeney is the daughter of Patrick Sweeney. *See* Deposition of Pamela Sweeney, attached as Exhibit E ("Sweeney Dep.") at 9. In *Larsen et al. v. Trader Joe's Co.*, No. 11-

[5] Kerry Ann Sweeny was an objector in this case. *See In Re: Checking Account Overdraft Litigation,* Case No. 09-md-2036, Dkt. 3698 (S.D. Fla. Nov. 13, 2013).

cv-05188 (N.D. Cal.), the Ms. Sweeney and her father, Patrick Sweeney were objectors represented by Darrell Palmer. *Id*. at Dkt. No. 99. Mr. Palmer has been criticized as a well-known serial objector,[6] as has Patrick Sweeney.[7] In addition to *Larsen*, Kerry Ann Sweeney also was an objector in:

- *Patrick Cotter, et al v. Lyft, Inc.,* Case No. 13-cv-4065, Dkt. 264 (N.D. Cal. Nov. 1, 2016) (Sweeney's appeal was dismissed "for failure to pay fees." App. No. 17-15724, Dkt. 10.).
- *In re Magsafe Apple Power Adapter Litig*., Case No. 09-cv-1911, Dkt. 86 (N.D. Cal. Jan. 6, 2012) (Kerry Ann Sweeney was represented by Darrell Palmer) (Sweeney voluntarily dismissed her appeal after failing to pay the ordered $15,000 appeal bond. App. No. 12-16053, Dkt. 19.).
- *Hendricks v. Starkist Co.,* Case No. 13-cv-00729, Dkt. 299 (N.D. Cal. Nov. 20, 2015) (the District Court overruled Sweeney's objections. Case No. 13-cv-729, Dkt. 373).
- *Melito v. Am. Eagle Outfitters, Inc.,* Case No. 14-cv-2440, Dkt. 275 (S.D.N.Y June 5, 2017) (represented by Patrick Sweeney; objection withdrawn).

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[6] *See, e.g., In re Oil Spill*, MDL 2179, 2013 WL 144042, at *48 n.40 (E.D. La. Jan. 11, 2013) (noting "Mr. Palmer has been deemed a 'serial objector' by several courts" and citing to a transcript in that case involving "Mr. Palmer admitting it was 'regrettable' that he had been found to have engaged in 'bad faith and vexatious conduct'"); *In re Uponor, Inc., F1807 Plumbing FittingsProducts Liab. Litig*., 11-MD-2247 ADM/JJK, 2012 WL 3984542, at *3 (D. Minn. Sept. 11, 2012) (noting "the Palmer Objectors appear to be represented by an attorney who has not entered an appearance in this case and who is believed to be a serial objector to other class-action settlements").

[7] *See, e.g.*, *In re Polyurethane Foam Antitrust Litig.,* 1:10 MD 2196, 2016 WL 1452005, at *2-3 (N.D. Ohio Apr. 13, 2016) (Sweeney and his counsel have "a known history of acting as a 'professional, or serial objector' . . . objections amounted "to pure boilerplate language, wholly untethered from the actual terms of the settlement. They neither sought to argue nor appeared at the fairness hearing. Their behavior needlessly increased the burdens on Class Counsel and this Court. Conduct of this sort falls squarely within the definition of vexatious conduct."); *Roberts v. Electrolux Home Prods., Inc.*, Case No.: 8:12-cv-01644-CAS, 2014 WL 4568632, at *11-15 (C.D. Cal. Sept. 11, 2014) (overruling Sweeney objections, finding that they "are not made for the purpose of benefitting the Class," were "meritless in all respects," and "appear to be made for the improper purpose of delaying the Settlement to extract a fee," and recognizing both Sweeney and Palmer as serial objectors); *Larsen v. Trader Joe's Co.*, 11-CV-05188-WHO, 2014 WL 3404531, at *7 n.4 (N.D. Cal. July 11, 2014) ("Like Darrell Palmer, attorney Patrick Sweeney also has a long history of representing objectors in class action proceedings. Lison Decl. 6. While not formally appearing for his wife and daughter here, Patrick Sweeney has previously represented them as objectors.").

- *Legg v. Spirit Airlines, Inc.,* Case No. 14-cv-61978, Dkt. 141 (S.D. Fla. June 20, 2016) (represented by Patrick Sweeney; objection withdrawn).
- *In Re: Checking Account Overdraft Litigation,* Case No. 09-md-2036, Dkt. 3698 (S.D. Fla. Nov. 13, 2013) (represented by Patrick Sweeney; objection withdrawn).

Kerry Ann Sweeney has appealed at least four times. *Patrick Cotter, et al v. Lyft, Inc.,* App. No. 17-15724, Dkt. 1. (9th Cir. April 13, 2017); *In re Magsafe Apple Power Adapter Litig*., App. No. 12-16053, Dkt. 1 (9th Cir. May 4, 2012); *Larsen v. Trader Joe's Co*., App. No. 14-16521. Dkt. 1. (9th Cir. Aug. 6, 2014); *Hendricks v. Starkist Co*., App. No. 16-17020, Dkt. 1 (9th Cir. Nov. 2, 2016). The appeal in *Cotter v. Lyft* was dismissed on June 5, 2017, due to Ms. Sweeney's "failure to pay fees." App. No. 17-15724, Dkt. 10, attached as Ex C.

Courts have commented that members of the Sweeney family are "prolific in objecting to class action settlements." *Spann v. J.C. Penney Corp*., No. 12-cv-0215, 2016 WL 5844606, at *10 n.11 (C.D. Cal. Sept. 30, 2016); *see also Larsen v. Trader Joe's Co.,* No. 11-cv-05188, 2014 WL 3404531, at *7 n.4 (N.D. Cal. July 11, 2014) (stating that "attorney Patrick Sweeney … has a long history of representing objectors in class action proceedings" and overruling the objections of Mr. Sweeney, his wife, and his daughter in that case). Although Ms. Sweeney is proceeding *pro se* in connection with her objection in this case, she is a seasoned litigant who has repeatedly lodged objections and filed appeals in various Federal Courts.

B) A Recently Disclosed Confidential Agreement Filed In An Objection Brought By Kerry Ann Sweeney Underscores The Vexatious Purpose Of The Objection.

Evidence of Kerry Ann Sweeney's history of filing meritless objections is underscored by the record in *Legg v. Spirit Airlines, Inc.* In *Legg*, Kerry Ann Sweeney, represented by her father, attorney Patrick Sweeney filed an objection to the class action settlement. When the Sweeneys attempted to file a notice of appearance in *Legg v. Spirit Airlines, Inc*., they instead accidently filed a

confidential settlement agreement from another case in which Patrick Sweeney extracted $17,500 to withdraw his objection even though he admitted his objection was "without merit." *See* Case No. 14-cv-61928, Dkt. 142, ¶1.5 and ¶2.2(b), attached as Exhibit F. This accidental disclosure of the Sweeneys' *modus operandi* their intent to file meritless objections just to hold up administration of the settlement in the hopes of a quick payoff. The "sole purpose is to obtain a fee by objecting to whatever aspects of the Settlement they can latch on to" and levying "what is effectively a tax on class action settlements, a tax that has no benefit to anyone other than to the objectors." *Tornes v. Bank of America, N.A.,* 830 F. Supp. 2d 1330, 1361 n.30 (S.D. Fla. 2011) (quoting *Barnes v. FleetBoston Fin. Corp.,* 2006 U.S. Dist. LEXIS 71072, at *3-4 (D. Mass. Aug. 22, 2006).

C) Objections by Professional/Serial Objectors Deserve Little Weight.

The purpose of class member objections is to provide assistance to the parties, the class and the Court by identifying a genuine problem in a proposed settlement. However, "serial" or "professional" objectors are a different matter. They file meritless objections to extract payments for themselves by threatening years of delay and expense on appeal:

> Repeat objectors to class action settlements can make a living simply by filing frivolous appeals and thereby slowing down the execution of settlements. The larger the settlement, the more cost-effective it is to pay the objectors rather than suffer the delay of waiting for an appeal to be resolved (even an expedited appeal). Because of these economic realities, professional objectors can levy what is effectively a tax on class action settlements, a tax that has no benefit to anyone other than to the objectors. Literally nothing is gained from the cost: Settlements are not restructured and the class, on whose behalf the appeal is purportedly raised, gains nothing.

Barnes v. FleetBoston Fin. Corp., No. 01-10395-NG, 2006 U.S. Dist. LEXIS 71072, *3-4 (D. Mass. Aug. 22, 2006); *see also Vollmer v. Selden,* 350 F.3d 656, 660 (7th Cir. 2003) (improper to file objection to "cause expensive delay in the hope of getting paid to go away").

The respected authors of Newberg on Class Actions observed that filing objections to class settlements has become a big business. UCLA law professor William Rubenstein has written that "[t]his part of the profession has arguably

attracted lawyers more interested in coercing a fee than in correcting a wrong." William B. Rubenstein, *The Fairness Hearing: Adversarial and Regulatory Approaches*, 53 UCLA L. REV. 1435, 1459 (2006) (citations omitted). Professor Ed Brunet bluntly characterizes professional objectors as "warts on the class action process" and "bottom feeders." Edward Brunet, *Class Action Objectors: Extortionist Free Riders or Fairness Guarantors*, 2003 U. CHI. LEGAL F. 403, 409 (2003). After detailing the extortionist practices of some professional objectors, Professor Brunet observed that they "are as welcome in the courtroom as is the guest at a wedding ceremony who responds affirmatively to the minister's question, 'Is there anyone here who opposes this marriage?'" *Id.* at 408 n.21.

The non-constructive conduct of "professional objectors" such as Ms. Sweeney has been summarized as follows:

> [P]rofessional objectors can levy what is effectively a tax on class action settlements, a tax that has no benefit to anyone other than to the objectors. Literally nothing is gained from the cost: Settlements are not restructured and the class, on whose benefit the appeal is purportedly raised, gains nothing.

In re Cathode Ray Tube (CRT) Antitrust Litig., 281 F.R.D. 531, 533 n.3 (N.D. Cal. 2012) (citations omitted).

Accordingly, "when assessing the merits of an objection to a class action settlement, courts consider the background and intent of objectors and their counsel, particularly when indicative of a motive other than putting the interest of the class members first." *Dennis v. Kellogg Co.,* No. 09-cv-1786, 2013 U.S. Dist. LEXIS 163118, at *11 n.2 (S.D. Cal. Nov. 14, 2013); *In re Law Office of Jonathan E. Fortman, LLC*, 2013 U.S. Dist. LEXIS 13903, at *3 (E.D. Mo. Feb. 1, 2013) (same).

IV. ARGUMENT

A) Standard For Imposition Of An Appeal Bond Pursuant to Federal Rule of Appellate Procedure 7.

As stated by the Ninth Circuit in *Azizian v. Federated Dep't Stores, Inc.,* Federal Rule of Appellate Procedure 7 provides that "the district court may

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require an appellant to file a bond or provide other security in any form and amount necessary to ensure payment of costs on appeal." 499 F.3d 950, 954-55 (9th Cir. 2007), *quoting* Fed. R. App. P. 7. Courts in this District determine whether a bond is necessary based on the following considerations: "(1) the appellant's financial ability to post a bond; (2) the risk that the appellant would not pay the appellee's costs if he loses the appeal; and (3) an assessment of the likelihood that the appellant will lose on appeal and thus be liable for costs." *Padgett v. Loventhal,* 2015 WL 4240804, at *3 (N.D. Cal. July 13, 2015) (citing *Figure Eight Holdings, LLC v. Dr. Jays, Inc*., 534 F. App'x 670, 670 (9th Cir. 2013)). Each of these factors supports an appeal bond here.

B) All Factors Weigh In Favor Of Imposing An Appeal Bond.

1) Ms. Sweeney's Ability To Post A Bond.

Class counsel has no reason to question that Ms. Sweeney would be able to post an appeal bond. Where there is "no indication that [a] plaintiff is financially unable to post bond . . . this factor weighs in favor of a bond." *Fleury v. Richemont N. Am., Inc.,* 2008 U.S. Dist. LEXIS 88166, at *19 (N.D. Cal. Oct. 21, 2008). Indeed, bare assertions of inability to payer are not sufficient evidence to avoid payment of a bond. *Embry v. ACER Am. Corp.,* No. C 09-01808 JW, 2012 U.S. Dist. LEXIS 78068, at *4-5 (N.D. Cal. June 5, 2012) ("In absence of evidence that posting a bond will pose a substantial hardship, this factor weighs in favor of requiring a bond.") (internal citation omitted).

An objector's habit of incessantly filing frivolous appeals – as here – further demonstrates an ability to pay. *See Schulken v. Wash. Mut. Bank*, No. 09-CV-02708-LHK, 2013 U.S. Dist. LEXIS 48175, at *14 (N.D. Cal. April 2, 2013) (finding objector's frequent litigation to be affirmative evidence of his financial ability to pay an appeal bond). Kerry Ann Sweeney's extensive history of objecting to class action settlements then filing frivolous appeals is set forth above. Moreover, even if an objector provides some evidence of a financial

hardship in posting the bond, "the significant risk of non-payment of costs and the lack of merit in Objectors' appeals" can nonetheless tip this factor in favor of requiring a bond. *In re MagSafe Apple Power Adapter Litig.*, C 09-01911 JW, 2012 WL 2339721, *2 (N.D. Cal. May 31, 2012) (where the Court ordered Kerry Ann Sweeney to post a $15,000 bond).

It is the objector's burden to show the lack of ability to post a bond. *See, e.g.*, *Hill v. State St. Corp.*, CIV.A. 09-12146-GAO, 2015 WL 1734996, at *3 (D. Mass. Apr. 16, 2015) (plaintiff movants did not bear burden of establishing another party's financial condition) (citing *In re Gen. Elec. Co. Sec. Litig.,* 998 F. Supp. 2d 145, 153 (S.D.N.Y. 2014) (imposing bond where appellant "has provided no evidence suggesting that he would be financially unable to post $54,700 for an appeal bond").

Plaintiffs are unaware of any inability of Ms. Sweeney to post the requested bond. Lacking evidence of undue hardship, this factor weighs in favor of an appeal bond because "there is no indication that [Sweeney] is financially unable to post bond." *Fleury*, 2008 WL 4680033, at *7; *In re Pharmaceutical Industry Average Wholesale Price Litig.*, 520 F. Supp. 2d 274, 279 (D. Mass. 2007) (imposing a bond where "[t]here is no evidence that a bond would pose an undue hardship on the objector."). Sweeney has previously stated in Court filings that she has the financial ability to pay costs for an appeal. "[I]f she is required to pay costs, she will not be difficult to locate; her father, also an attorney, is a lifelong friend of her attorney. ***There is literally no risk of non-payment***." *In re MagSafe Apple Power Adapter Litigation*, Case No. 09-cv-1911, Dkt. 184 at 4-5 (N.D. Cal. June 25, 2012), attached as Exhibit A (emphasis added).

Thus, the first *Fleury* factor weighs in favor of an appeal bond.

2) Risk That Ms. Sweeney Will Not Pay Appellees' Costs Favors Imposition Of A Bond.

Ms. Sweeney's track record for failure to pay required fees is strong

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evidence of the considerable risk of non-payment here. "Courts have consistently held that there is substantial risk of nonpayment where a party has not paid prior awards." *Figure Eight Holdings, LLC v. Dr. Jay's, Inc*., 2012 U.S. Dist. LEXIS 195828, at *4 (C.D. Cal. June 18, 2012) (citation omitted).

The Ninth Circuit has previously dismissed appeals filed by Ms. Sweeney for failure to file an opening brief and failure to pay appellate fees. *See e.g., Patrick Cotter, et al v. Lyft, Inc.*, Case No. 13-cv-4065, Dkt. 264 (N.D. Cal. November 1, 2016) (Sweeney's appeal was dismissed "for failure to pay fees." App. No. 17-15724, Dkt. 10.). The risk that Ms. Sweeney would not pay appellees' costs is increased given her history as a professional objector with a history of filing numerous, meritless objections and appeals in response to class action settlements. *See supra*.

Given the transparent motive behind this appeal, which has already been considered and rejected by this Court, there is a substantial risk that this professional objector will resist paying any costs imposed by the Ninth Circuit. *In re Wal-Mart Wage and Hour Employment Practices Litigation*, No. 2:06-CV-00225-PMP-PAL, 2010 WL 786513, at *1 (D. Nevada March 8, 2010) (where "Objectors' counsel have a documented history of filing notices of appeal 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 the class ... persuades the Court that collecting costs from the four Objectors would be extremely difficult if not unlikely"). Thus, the second *Fleury* factor also weighs heavily in favor of an appeal bond.

3) Merits Of The Appeal.

The final factor bearing on the propriety of a bond – the merits of the appeal itself – strongly weighs in favor of imposition of a bond. Under Federal Rule of Civil Procedure 23(e), a district court has broad discretion to determine whether a class action settlement is fair, adequate, and reasonable, based on the

law, facts, and circumstances of the case. *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1026 (9th Cir. 1998). Kerry Ann Sweeney did not appear at the fairness hearing. Her objection[8] was to the fee award and whether the fee award was governed by the Class Action Fairness Act provisions relating to coupon settlements. The Court considered this argument, and in a detailed opinion rejected Sweeney's objection as inconsistent with Ninth Circuit law. Dkt. 254 at 11-12.

As this Court found, Ms. Sweeney's objection lacks substantive. The settlement in this case is definitively a voucher settlement – *not* a coupon settlement, as Ms. Sweeney mistakenly contends. Courts distinguish between "coupons" which provide "discounts on services offered by the defendant" and "vouchers" which provide "free merchandise or services." *Tchoboian v. FedEx Office & Print Servs.,* No. SA CV10-01008 JAK (MLGx), 2014 WL 10102826, at *6 (C.D. Cal. Mar. 25, 2014). The Settlement here requires Class Members do nothing more than schedule their reinstated SoulCycle classes. No money is required for any Class Member to take advantage of the Settlement. Indeed, as discussed in the Court's order granting final approval the Ninth Circuit has "clarified the difference between coupons and vouchers" and "[b]ecause class members here may elect the 'Cash Option' or keep the 'cash-equivalent' of the reinstated classes, without spending any money of their own or receiving any 'discount,' this Settlement is not a 'coupon settlement' and therefore not subject to CAFA's limitations on contingent fees." Dkt. 254 at 11-12.

A court's prior consideration and rejection of an objection weighs in favor of imposing a bond. *See In re Netflix Privacy Litig.,* No. 5:11-CV-00379-EJD, 2013 U.S. Dist. LEXIS 168298, at *10 (N.D. Cal. Nov. 25, 2013) (granting

[8] Kerry Ann Sweeney is limited on appeal to the objections she previously raised before this Court. *See Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.,* 396 F.3d 96, 124, n. 29 (2d Cir. 2005).

1 motion for appellate bond where the "Court engaged in an extensive analysis of
2 the Settlement, including the merits of the objections, and found the Settlement to
3 be fair, adequate, and reasonable"); *Schulken*, 2013 U.S. Dist. LEXIS 48175, at
4 *15-16 (granting bond where appellant's concerns regarding adequacy of
5 representation, distribution of settlement funds, and sufficiency of notice had been
6 thoroughly addressed and found to be meritless); *Embry*, 2012 U.S. Dist. LEXIS
7 78068, at *5 (granting motion for appellate bond after finding that objector's
8 arguments regarding claims process and excessive attorney fees were without
9 merit); *Fleury*, 2008 WL 4680033, at *8 (granting bond where "the Court ha[d]
10 considered each of [the objector's] objections and found them meritless").

11 Here, the Court has examined (and rejected) Ms. Sweeney's arguments—
12 carefully explaining that they were without merit—which further supports the
13 requirement of an appeal bond. *See Yingling v. eBay, Inc.,* No. C 09-01733 JW,
14 2011 WL 2790181, at *2 (N.D. Cal. July 5, 2011) (finding that "[b]ecause the
15 Court has already considered Objector []'s objections and found them to be
16 meritless, the Court finds that Objector [] is unlikely to succeed on the merits of
17 his appeal" and granting plaintiffs' motion for appeal bond).

18 The low likelihood of success on the merits of the appeal weighs in favor
19 of the imposition of a bond on Ms. Sweeney who has already had her argument
20 rejected once.

21 **V. THE BOND SHOULD BE SET AT A MINIMUM OF $1,000**

22 Plaintiffs respectfully seek a bond set at a minimum of $1,000, which is a
23 conservative figure, given the anticipated costs of appeal. Federal Rule of
24 Appellate Procedure 7 provides that the court may require a bond in "any form
25 and amount necessary to ensure payment of ***costs*** on appeal." Fed. R. App. P. 7.
26 The Ninth Circuit has held that the "costs" referred to in Rule 7 include the
27 following costs identified in FRAP 39(e):

28 (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.

Fed. R. App. P. 39(e).

The Ninth Circuit has held that "costs other than those identified in FRAP 39 can qualify as 'costs' for purposes of Rule 7 if they are so defined by some positive law, such as a fee-shifting statute." *Fleury*, 2008 WL 4680033, at * 8 (citing *Azizian*, 499 F.3d at 958) ("[T]he costs identified in Rule 39(e) are among, but not necessarily the only, costs available on appeal [for purposes of Rule 7]."). For example, "the term 'costs on appeal' in Rule 7 includes all expenses defined as 'costs' by an applicable fee-shifting statute, ***including attorneys' fees***," (*id.*), and additional administrative costs the class will incur as a result of the appeal. *See In re Broadcom Corp. Sec. Litig.*, No. SACV-01-275-DT(MLGx), 2005 U.S. Dist. LEXIS 45656, *11-*12 (C.D. Cal. Dec. 5, 2005) (including additional costs of administration as part of a Rule 7 bond).

Rule 7 does not expressly require Plaintiffs to make any showing of costs for a bond motion. *See* Rule 7; *see also In re Ins. Brokerage Antitrust Litig*., No. 04-5184 (GEB), 2007 WL 1963063, at *3 (D.N.J. July 02, 2007) (finding that Rule 7 does not require any "showing of costs for a bond motion."). However, courts routinely apply $25,000 as a ***minimum***, and often substantially more.[9]

[9] *See e.g., In re Wal-Mart*, No. 2:06-CV-00225-PMP-PAL, 2010 WL 786513, at *2 (D. Nev. March 8, 2010) (ordering that *each* or the four objectors post a separate *$500,000* Rule 7 bond); *Gemelas v. Dannon Co., Inc.*, No. 1:08 CV 236, 2010 WL 3703811, at *3 (N.D. Ohio Aug. 31, 2010) (*$275,000* appeal bond imposed); *In re Broadcom Corp. Sec. Litig.*, No. SACV 01-275 DR (MLGx), 2005 U.S. Dist. LEXIS 45656, at *9-*11 (C.D. Cal. Dec. 5, 2005) (ordering objector to post appeal bond in excess of *$1.2 million* in response to appeal from final order approving class action settlement); *Barnes v. FleetBoston Fin. Corp.*, No. 01-10395-NG, 2006 U.S. Dist. LEXIS 71072, at *4, *8-*9 (D. Mass. Aug. 22, 2006) (ordering objector to post Rule 7 bond in the amount of *$645,111.60*); *In re Initial Pub. Offering*, No. 21 MC 92(SAS), 2010 WL 2884794, at *5 (S.D.N.Y. July 20, 2010) (assessing *$25,000* on settlement objectors for cost aspects of Rule 7 bond); *In re Insurance Brokerage*, No. 04-5184 (GEB), 2007 WL 1963063, at *3-*5 (D.N.J. July 2, 2007) (imposing a "reasonable" *$25,000* appeal bond for objectors to class settlement based on line of precedent); *In re Compact Disc Minimum Advertised Price Anti. Litig.*, No. MDL 1361, 2003 WL 22417252, at *2 (D. Me. Oct. 7, 2003) (*$35,000* appeal bond); *In re Currency Conversion Fee*

1) The Requested Bond Amount Is Consistent With Federal Rule of Appellate Procedure 39.

Here, Plaintiffs seek only their Taxable Costs under Rule 39. Rule 7 does not expressly require Plaintiffs to make a showing of specific costs they anticipate incurring for a bond motion. *See* Fed. R. App. P. 7; *In re Ins. Brokerage Antitrust Litig.*, MDL 1663, No. 04-5184 (GEB), 2007 WL 1963063, at *3 (D.N.J. July 02, 2007). Plaintiffs anticipate the specific motions with the appellate court, including moving to dismiss the appeal (*see* 9th Cir. R. 27-11) and/or moving for summary affirmance (9th Cir. R. 3-6). Such motions involve a substantial amount of time and expense, including filing fees and the printing and copying of briefs and other submissions. Plaintiffs also anticipate that they will incur additional costs related to incremental administration costs the parties may incur as a result of Ms. Sweeney's appeal. Accordingly, for this component of costs, Plaintiffs anticipate expending $5,000 (or more), plus interest. Hipskind Decl. ¶¶ 2-3. In an abundance of caution, Plaintiffs seek only a $1,000 bond to ensure that at least some portion of their anticipated costs can be recovered.

2) The Bond Amount Is Consistent With Prior Orders Arising From Appeals by Ms. Sweeney And Her Immediate Family.

Courts have previously ordered Kerry Ann Sweeney and her family members to post appellate bonds of $5,000 and $15,000. Kerry Ann Sweeney was one of several objectors in *In re MagSafe Apple Power Adapter Litigation*. Following briefing and discovery by the parties, the Court ordered Ms. Sweeney to post a $15,000 bond "in light of the significant risk of non-payment of costs and the lack of merit in Objector Sweeney's appeal." *In re MagSafe Apple Power Adapter Litigation*, Case No. 09-cv-1911, Dkt. 194 at 3 (N.D. Cal. July 6, 2012), attached as Exhibit B.

In *In re: Blue Buffalo Company Ltd. Marketing and Sales Practices*

Anti. Litig.,No. 01-01409, 2010 WL1253741, at *3 (S.D.N.Y. Mar. 5, 2010) (*$50,000* appeal bond).

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Litigation, the Court, after extensive briefing by the parties, ordered Ms. Sweeney's mother, Pamela Sweeney, as one of five objectors to post a $5,000 bond. Pamela Sweeney, instead of posting the bond and risking the forfeiture of her money, had her appeal dismissed. *See In re: Blue Buffalo Company Ltd. Marketing and Sales Practices Litigation,* No. 14-md-2562, Dkts. 263 & 269 at 1 (E.D. Mo. Oct. 3, 2016) ("The order required each of the objectors to post a $5,000 bond no later than October 14, 2016. Sweeney has failed to post a bond. Each of the four other objectors have complied with my order.").

VI. CONCLUSION

The settlement in this case that this Court approved represented hard-fought, arms-length negotiations that will provide substantial, valuable relief to the Class. The objector, who routinely appeals without achieving any benefits whatsoever for the class impedes that relief. Imposing a bond in this case will provide necessary security to the Class as a result of the meritless appeal working their way to the Ninth Circuit. Plaintiffs request that the bond be posted within 14 days of entry of the Court's Order. Plaintiffs further request all such other relief that the Court deems necessary and appropriate.

Dated: November 6, 2017

Respectfully submitted,

/s/ Daniel P. Hipskind_______
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Class Counsel

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CERTIFICATE OF SERVICE

I, the undersigned, declare:

1. That declarant is and was, at all times herein mentioned, a citizen of the United States and a resident of Los Angeles, over the age of 18 years, and not a party to the action; that declarant's business address is 1880 Century Park East, Suite 815, Los Angeles, California 90067.

2. That on November 6, 2017, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which will send notification of such filing to the CM/ECF participants registered as counsel of record in this action.

3. That on November 6, 2017, I served by U.S. Mail true and correct copies of the foregoing to the following party by placing said documents in envelopes addressed as shown below:

Kerry Ann Sweeney
1220 20th Street, Unit 101
Santa Monica, California 92404

I declare under penalty of perjury, under the laws of the United States of America, that the foregoing is true and correct.

Executed this 6th day of November 2017 in Los Angeles, California.

/s/ Daniel P. Hipskind
Daniel P. Hipskind