UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
Miami Division

In re: Checking Account Overdraft Litigation	**) 1:09-MD-2036-JLK**

OPPOSITION TO PLAINTIFFS' MOTION TO REQUIRE POSTING OF APPEAL BONDS

Appealing Class Members/Objectors Elizabeth M. Locke, Michelle W. Locke, Michael V. Vilece, Frank J. Vilece, Todd Taylor, and Taylor Hughes hereby oppose Plaintiffs' motion to Require them to post appeal bonds, for the following reasons.

Plaintiffs concede that they are requesting a *supersedeas* bond from appellants who have not moved for a stay of the judgment on appeal, which is a prerequisite for FRAP 8 to apply. FRAP 8(a)(1) provides that a party may move in the district court for a stay of the judgment or order of a district court pending appeal. FRAP 8(a)(2)(E) provides that "[t]he court may condition relief on a party's filing a bond or other appropriate security in the district court." Therefore, the only condition under which a district court may impose a *supersedeas* bond is when granting a motion to stay. No such motion has been filed in this case.

I. A Class Action Judgment That, By The Settlment's Own Terms, Does Not Become Final Until Appeals Are Exhausted Is Not Stayed By An Appeal.

Plaintiffs concede at page 15 of their Bond Memorandum that "the Settlement does not permit distributions to Settlement Class Members until after resolution of any appeals." Thus, it is the settlement itself, which was negotiated by the Plaintiffs, that prevents the finality of the Judgment and the distribution of settlement funds until the appeals are concluded. The Appellants have neither requested a stay of the Judgment,

nor did they negotiate the Settlement's terms. The Fifth Circuit has clarified that, in these circumstances, FRAP 8 is not germane, and lost interest is not properly included in a FRAP 7 appeal bond against a party that has not requested a stay of judgment. *See Vaughn v. American Honda Motor Co. Ltd.*, 507 F.3d 295, 298-299 (5th Cir. 2007).[1] The Fifth Circuit noted that the question of who should bear costs of delay on appeal is determined by the settlement agreement, which in *Vaughn*, as here, "makes no provision for the payment of pre-judgment interest on the benefits Honda has agreed to pay, and the settlement does not become effective, by its terms, until any appeals are concluded. The parties to the settlement thus agreed that the financial time-value of the benefits to be paid under the settlement is not to be awarded to the plaintiffs." *Id*. at 299. There is no authorization for the inclusion of delay damages in a FRAP 7 appeal bond, nor is there any authority for invoking FRAP 8 when no party has requested a stay of the judgment on appeal.[2]

II. Plaintiffs Do Not Satisfy The Factors For a Cost Bond Pursuant to FRAP 7 or FRAP 39(e).

Apart from the improper *supersedeas* bond addressed above, Plaintiffs request $5000 in costs authorized by FRAP 39(e). The Plaintiffs have failed to show, however, that there is any significant risk that the nine separate groups of appellants will be unable to pay $5000 in costs. The only evidence cited in support of the risk of nonpayment

[1] Interestingly, the sole authority cited by Plaintiffs for the proposition that a court may ignore the express terms of FRAP 8 and impose a *supersedeas* bond even when a stay has not been requested is a 1979 decision of the Fifth Circuit that was clearly overruled by *Vaughn*, *Poplar Grove Planting & Refining Co., Inc. v. Bache Halsey Stuart, Inc.*, 600 F.2d 1189 (5th Cir. 1979). *See* Bond Memo at p. 8. Judges Gold and Scott apparently relied on this outdated decision when imposing a bond in the *Exxon* case, which predated *Vaughn* by one year.

[2] Even if the rule were otherwise, Class Counsel have no need for a bond to protect the settlement fund, since it has already been paid into escrow and is already earning interest. See Order of Final Approval of Settlement at p. 20. Therefore, Class Counsel's request that the appellants contribute additional interest over and above what the settlement fund is already earning is duplicative and unnecessary.

factor is that "the Objector-Appellants are scattered around the country." Bond Memo at p. 13. In a recent case from the Southern District of New York, the geographical distribution of the appellants was held to be insufficient justification for a finding that there is a risk of nonpayment. *See Blessing v. Sirius XM Radio Inc.*, 2011 U.S. Dist. LEXIS 134628 at **13-14 (SDNY November 22, 2011) (copy attached as *Exhibit A*). Accordingly, Plaintiffs have failed to establish that there is any risk that the nine sets of Appellants would be unable to pay costs in an amount up to $5000, and therefore there is no basis for the imposition of even a modest cost bond pursuant to FRAP 7.

CONCLUSION

Wherefore, Appellants pray that this Court DENY Plaintiffs' Motion To Require Posting of Appeal Bonds By Objector-Appellants in its entirety.

Respectfully submitted,
Elizabeth M. Locke, Michelle W. Locke,
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Todd Taylor, and Taylor Hughes
By their attorney,

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing has been served via transmission of Notices of Electronic Filing generated by CM/ECF on January 10, 2012 and was filed with the Clerk of Court using CM/ECF, and that as a result a copy of this filing has been served upon every counsel of record.

/s/ Brian Silverio

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CARL BLESSING ET AL., Plaintiffs, - against - SIRIUS XM RADIO INC., Defendant.

09 CV 10035 (HB)

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

2011 U.S. Dist. LEXIS 134628

November 22, 2011, Decided
November 22, 2011, Filed

COUNSEL: **[*1]** For Carl Blessing, on behalf of himself and all others similarly situated, Plaintiff: James Joseph Sabella, Jay W. Eisenhofer, Shelly L Friedland, LEAD ATTORNEYS, Grant & Eisenhofer P.A. (NY), New York, NY; Peter George Safirstein, LEAD ATTORNEY, Milberg LLP (NYC), New York, NY; Christopher B. Hall, PRO HAC VICE, Edward S Cook, PRO HAC VICE, COOK, HALL & LAMPROS, LLP, Atlanta, GA; Mary Sikra Thomas, PRO HAC VICE, Grant & Eisenhofer P.A., Wilmington, DE; Reuben Guttman, Washington, DC; Thomas J. O'Reardon, II, PRO HAC VICE, Blood Hurst & O'reardon, LLP, San Diego, CA; Timothy Gordon Blood, PRO HAC VICE, Blood Hurst & O'Reardon LLP, San Diego, CA.

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For Andrew Dremak, on behalf of themselves and all others similarly situated, Todd Hill, on behalf of

themselves and all others similarly situated, Joshua Nathan, Susie Stanaj, on behalf of themselves and all others similarly situated, Scott Byrd, on behalf of themselves and all others similarly situated, Glenn Demott, on behalf of themselves and all others similarly situated, Melissa Fast, on behalf of themselves and all others similarly situated, James Hewitt, on behalf of themselves and all others similarly situated, Ronald William Kader, on behalf of themselves and all others similarly situated, Edward Leyba, on behalf of themselves and all others similarly situated, Greg Lucas, on behalf of themselves and all others similarly situated, Kevin Stanfield, on behalf of themselves and all others similarly situated, Todd Stave, on behalf of themselves and all others similarly situated, Paola Tomassini, on behalf of themselves and all others similarly situated, Janel Stanfield, on behalf of themselves and all others similarly situated, Plaintiffs: James Joseph Sabella, Jay W. Eisenhofer, LEAD ATTORNEYS, Grant & Eisenhofer P.A. (NY), New York, NY; Peter George Safirstein, **[*4]** LEAD ATTORNEY, Milberg LLP (NYC), New York, NY; Thomas J. O'Reardon, II, PRO HAC VICE, Blood Hurst & O'reardon, LLP, San Diego, CA; Timothy Gordon Blood, PRO HAC VICE, Blood Hurst & O'Reardon LLP, San Diego, CA.

For Curtis Jones, on behalf of themselves and all others similarly situated, James Sacchetta, on behalf of themselves and all others similarly situated, David Salyer, on behalf of themselves and all others similarly situated, Paul Stasiukevicius, on behalf of themselves and all others similarly situated, Plaintiffs: Christopher B. Hall, PRO HAC VICE, Edward S Cook, PRO HAC VICE, LEAD ATTORNEYS, COOK, HALL & LAMPROS, LLP, Atlanta, GA; James Joseph Sabella, Jay W. Eisenhofer, Shelly L Friedland, LEAD ATTORNEYS, Grant & Eisenhofer P.A. (NY), New York, NY; Peter George Safirstein, LEAD ATTORNEY, Milberg LLP (NYC), New York, NY; Reuben Guttman, LEAD ATTORNEY, Washington, DC; Mary Sikra Thomas, PRO HAC VICE, Grant & Eisenhofer P.A., Wilmington, DE; Thomas J. O'Reardon, II, PRO HAC VICE, Blood Hurst & O'reardon, LLP, San Diego, CA; Timothy Gordon Blood, PRO HAC VICE, Blood Hurst & O'Reardon LLP, San Diego, CA.

Thomas Himinez, Plaintiff, Pro se.

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Donald K Nace, Appellant, Pro se.

For Sirius XM Radio Inc., Defendant: Todd R. Geremia, LEAD ATTORNEY, Jones Day (NYC), New York, NY; Brian Keith Grube, PRO HAC VICE, Thomas Demitrack, Jones Day (Cleveland), Cleveland, OH; John Michael Majoras, PRO HAC VICE, Jones Day (DC), Washington, DC.

For Marvin Union, Objector: Edward Frank Siegel, PRO HAC VICE, PRO HAC VICE, **[*6]** Cleveland, OH.

For Adam Falkner, Objector: Edward Frank Siegel, PRO HAC VICE, Cleveland, OH.

For Nicolas Martin, Objector: David Stein, Samuel & Stein, New York, NY; Theodore H Frank, PRO HAC VICE, Center fo Class Action Fairness, Washington, DC.

For Crutchfield Stephen, Krueger D Scott, Asset Strategies, Inc., Zuravin B Charles, Deachin Jennifer, Objectors: Matthew Jay Weiss, Weiss & Associates, P.C, New York, NY.

For Lange M. Thomas, Objector: John J Pentz, PRO HAC VICE, Maynard, MA.

For John Sullivan, Sheila Massie, Jason M. Hawkins, Objectors: Robert Keith Erlanger, Erlanger Law Firm, PLLC, New York, NY.

For Tom Carder, Objector: Charles M. Thompson, PRO HAC VICE, Charles M. Thompson, P.C., Birmingham, AL.

For Randy Lyons, Objector: R. Stephen Griffis, PRO HAC VICE, R. Stephen Griffis P.C., Hoover, AL.

For Christopher Batman, Objector, Pro se, Corpus Christi.

For Jeannine Miller, Objector: Steve A. Miller, PRO HAC VICE, Steve A. Miller, P.C., Denver, CO.

For Dave Denny, Interested Party: Rachel Eve Schwartz, LEAD ATTORNEY, Rachel E. Schwartz, Esq., New York, NY.

JUDGES: Hon. Harold Baer, Jr., United States District Judge.

OPINION BY: Harold Baer, Jr.

OPINION

OPINION & ORDER

Hon. Harold Baer, Jr., District Judge:

Before **[*7]** the Court is Plaintiffs-Appellees' ("Plaintiffs") motion pursuant to *Rule 7 of the Federal Rules of Appellate Procedure* for an order requiring Appellants-Objectors ("Objectors") to post a Bond in the amount of $200,000 or such other amount as the Court deems appropriate to cover the Plaintiffs' potential costs and attorneys' fees that could result from Objectors' appeal from this Court's Final Judgment and Order and Order Awarding Attorneys' Fees and Expenses, both entered on August 25, 2011. The August 25, 2011 Orders concluded a class action against Sirius XM. Objectors are Class Members who objected to approval of the Settlement Agreement and the award of attorneys' fees and expenses to Class Counsel, and have appealed to the Second Circuit. For the reasons set forth below, the Motion is DENIED.

I. Costs Included in an Appeal Bond

Under *Rule 7 of the Federal Rules of Appellate Procedure*, a district court "may require an appellant to file a bond or provide other security in any form and amount necessary to ensure payment of costs on appeal." *Fed. R. App. Proc. 7*. "The power to impose an appeal bond under *Rule 7* has been specifically given to the discretion of the district court." *Adsani v. Miller, 139 F.3d 67, 79 (2d Cir. 1998)*.

The **[*8]** parties disagree about whether attorneys' fees may be included in the costs of an appeal bond in this case. There are two potential bases for including attorneys' fees in an appeal bond: (1) the substantive statute under which the appeal is sought provides for attorneys' fees "as part of the costs" awarded to the prevailing party, *id. at 75*, or (2) the district court determines that the court of appeals might award fees under *Fed. R. App. P. 38* because the appeal is frivolous, regardless of whether the underlying statute permits an attorneys' fee award. *In re Currency Conversion Fee Antitrust Litig., 01 MDL No. 1409, 2010 U.S. Dist. LEXIS 27605, at *7 (S.D.N.Y. Mar. 5, 2010)*; *In re AOL Time Warner, Inc., Sec. & "ERISA" Litig., 02 Cv. 5575, 2007 U.S. Dist. LEXIS 69510, 2007 WL 2741033, at *4-5 (S.D.N.Y. Sept. 20, 2007)*.

Plaintiffs concede that the substantive statute under which the appeal is sought in this case, *Section 4 of the Clayton Act*, only provides a basis for requiring antitrust defendants to pay the attorneys' fees of successful antitrust plaintiffs and that attorneys' fees are not appropriately included in the Bond on this basis. Pls.' Reply 4; *In re Currency Conversion, 2010 U.S. Dist. LEXIS 27605, at *7* **[*9]** (rejecting award of attorneys' fees on the basis of *Section 4 of the Clayton Act* because the Clayton Act provides for fees only to successful plaintiffs). However, Plaintiffs argue that attorneys' fees are appropriate under *Fed. R. App. P. 38*, because the appeal in this case is frivolous.

Appellate *Rule 38* states that, "[i]f a court of appeals determines that an appeal is frivolous, it may, after a separately filed motion on notice from the court and reasonable opportunity to respond, award just damages and single or double costs to the appellee." *Fed. R. App. Proc. 38*. Although some courts in other circuits have awarded fees under *Rule 38* where they found that the court of appeals might make a determination that the appeal was frivolous, courts in the Second Circuit have found that "the imposition of sanctions is a question for the Court of Appeals to determine." *In re Currency Conversion, 2010 U.S. Dist. LEXIS 27605, at *8-9* (finding that *Rule 38* was not a basis for including attorneys' fees in the bond); *In re Initial Public Offering*

Sec. Litig., 728 F. Supp. 2d 289, 297 (S.D.N.Y. 2010) (same); *In re AOL Time Warner, 2007 U.S. Dist. LEXIS 69510, 2007 WL 2741033, at *4-5* (same). Because an award of attorneys' **[*10]** fees under *Rule 38* would impermissibly infringe on the authority given to the Second Circuit under *Rule 38*, I would not include attorneys' fees in any possible bond award.[1]

1 Plaintiffs' argument that *In re NASDAQ Market-Makers Antitrust Litig., 187 F.R.D. 124 (S.D.N.Y. 1999)* is "[o]n all fours with the instant case" is unpersuasive. *NASDAQ* was an antitrust case in which the district court included attorneys' fees in a *Rule 7* bond. *Id. at 128*. However, that case--incorrectly in my view--included attorneys' fees in the bond on the basis of the underlying statute, the Clayton Act, not under *Rule 38*. *Id*. As Plaintiffs concede, and as numerous other courts in this Circuit have concluded, the inclusion of attorneys' fees in a bond on the basis of a statute that is not a fee-shifting statute, such as the Clayton Act, is not proper. *See, e.g., In re Currency Conversion, 2010 U.S. Dist. LEXIS 27605, at *7* (rejecting award of attorneys' fees on the basis of *Section 4 of the Clayton Ac*t because the Clayton Act provides for fees only to successful plaintiffs); *In re Initial Public Offering Sec. Litig., 728 F. Supp. 2d at 297* (rejecting award of attorneys' fees on the basis of *Section 11(e)* of the **[*11]** 1933 Securities Act because "*section 11(e)* is not a fee-shifting statute"). Moreover, in the only section where *NASDAQ* refers to *Rule 38*, it does so in a manner that undercuts, rather than supports, Plaintiffs' argument. *187 F.R.D. at 128 n.4* (rejecting plaintiffs argument that the bond should secure double costs on appeal pursuant to *Rule 38* because "it is for the court of appeals and not the district court to decide whether *Rule 38* costs and damages should be allowed in any given case") (internal quotation marks and citation omitted).

II. Appropriateness of a Bond

In deciding whether to grant a motion for an appeal bond, courts consider several nonexhaustive factors including, "(1) the appellant's financial ability to post a bond, (2) the risk that the appellant would not pay appellee's costs if the appellant loses, (3) the merits of the appeal, and (4) whether the appellant has shown any bad faith or vexatious conduct." *Baker v. Urban Outfitters Wholesale, Inc., 01cv5440, 2006 U.S. Dist. LEXIS 90120, at *1 (S.D.N.Y. Dec. 12, 2006)*.

A. Financial Ability to Post a Bond

A finding that an appellant is financially unable to post a bond might weigh against the imposition of an appeal bond **[*12]** in a specific case. *Adsani, 139 F.3d at 77, 79* (noting that "Government's power to 'close its courts' by imposing fees upon appeal . . . is not unlimited" but finding that the appellant had not made a showing of "financial hardship"); *In re Initial Public Offering, 728 F. Supp. at 293* (finding appellant was not arguing that it lacked the financial ability to post a bond where no financial information was submitted); *In re AOL Time Warner, 2007 U.S. Dist. LEXIS 69510, 2007 WL 2741033, at *2* (same).

None of the Objectors provide specific financial information detailing their inability to post a bond, and in fact, just one of the Objectors states that joint and several liability for a $200,000 bond would make pursuing this appeal nearly impossible for him. *See* Ireland Opp. Memo 6 ("This Appellant can pay a small cost bond . . . [h]owever, in his wildest dreams, Appellant does not have the means to post a cost bond for $200,000."). Because none of the other Objectors state that they would be unable to pay a $200,000 bond, I find, as have other courts to examine the issue, that the other Objectors are not opposing the bond on this basis. *See In re Initial Public Offering, 728 F. Supp. 2d at 293*; *In re AOL Time Warner, 2007 U.S. Dist. LEXIS 69510, 2007 WL 2741033, at *2*. **[*13]** Further, although Ireland specifically states that he could not afford a $200,000 bond, he could pay a "small cost bond." Ireland Opp. Memo 6. Plaintiffs have not taken the trouble to separate out the portion of the bond attributable to potential attorneys' fees from the portion attributable to potential costs. However, a bond including only a provision for costs would likely be substantially smaller than $200,000,[2] and alleviate any risk of chilling the Objectors' right to appeal. *Adsani, 139 F.3d at 79*. In short, the Objectors would have the financial ability to post a substantially smaller bond limited to Plaintiffs' potential costs; however, for the reasons below, I find such a bond unnecessary.

2 Although in reply, Plaintiffs argue that the bond would be "substantial" even if it were limited to costs, they again fail to provide any

estimate of the separate amount attributable to fees versus costs.

B. Risk of Objectors' Nonpayment

Plaintiffs have failed to demonstrate that there is a substantial risk of nonpayment of appeal costs by the Objectors, merely noting that appellants are scattered around the country. Pls.' Reply 2. Furthermore, Plaintiffs appear far more concerned with ensuring **[*14]** that they have "a bond to secure any award of attorneys' fees," which as noted above is not permissible in this case, than they are with securing any potential award for costs. Although some courts have found a significant risk of nonpayment merely because the appellants were "dispersed around the country," *see In re Currency Conversion, 2010 U.S. Dist. LEXIS 27605, at *5*; *In re Initial Public Offering, 728 F. Supp. 2d at 293*, other courts have found a legitimate risk of nonpayment, and consequently imposed a bond, where specific facts established a substantial likelihood of nonpayment. *Adsani, 139 F.3d at 70* (finding risk of nonpayment when appellant had no assets in the United States); *Tri-Star Pictures, Inc. v. Unger, 32 F. Supp. 2d 144, 147 (S.D.N.Y. 1999)* (same); *Baker v. Urban Outfitters Wholesale, Inc., 2006 U.S. Dist. LEXIS 90120, at *3* (finding risk of nonpayment established where appellant had failed to comply with previous court order to pay costs). Plaintiffs have not shown a significant risk of nonpayment, especially in light of the fact that any bond in this case would not include attorneys' fees and so would be substantially smaller than the $200,000 Plaintiffs request. **[*15]** *In re Air Cargo Shipping Services Antitrust Litig., 06-MD-1775, 2010 U.S. Dist. LEXIS 27242, 2010 WL 1049269, at *2 (E.D.N.Y. Mar. 22, 2010)* (finding the small amount of the possible bond, which would not include requested attorneys' fees, "considerably reduces any financial risk").

C. The Merits of the Appeal

Naturally, this appeal in my view lacks merit, a factor weighing in favor of requiring a bond. *Baker v. Urban Outfitters Wholesale, Inc., 2006 U.S. Dist. LEXIS 90120, at *3*. The settlement resulted from extensive negotiations and followed a fairness hearing at which objectors were heard; I find it unlikely that the Objectors will succeed.

D. Bad Faith or Vexatious Conduct

Although the Plaintiffs characterize several of the attorneys involved in this appeal as "professional objectors," I do not find that they have exhibited any bad faith or vexatious conduct in filing this appeal or in the litigation in general. *Id*. Merely characterizing some of the attorneys as "professional objectors" without specifying what, exactly, they have done that is either in bad faith or vexatious, is not enough. *Compare In re Air Cargo Shipping Services Antitrust Litig., 2010 U.S. Dist. LEXIS 27242, 2010 WL 1049269, at *3* (finding that although plaintiffs characterized **[*16]** one attorney as a professional objector and noted vexatious conduct he had engaged in during earlier litigation, "in my judgment, that is insufficient to support a finding in this case") *with In re Initial Public Offering, 728 F. Supp. 2d at 294-95* (finding vexatious conduct where, in addition to the fact that attorneys were professional objectors, one attorney had sought an exorbitant fee from Class Counsel in exchange for withdrawing their appeal and several others had refused to comply with the court's orders); *In re AOL Time Warner, 2007 U.S. Dist. LEXIS 69510, 2007 WL 2741033, at *3* (finding some evidence of bad faith or vexatious conduct where non-class member tried to "extract a settlement from the Plaintiff, but it failed to provide the information necessary to complete the extraction").

E. A Bond is Inappropriate

Although it is unlikely that the Objectors will succeed in their appeal, Plaintiffs have failed to demonstrate either that there is a significant risk of nonpayment or that the Objectors have engaged in bad faith or vexatious conduct. *In re Air Cargo Shipping Services Antitrust Litig, 2010 U.S. Dist. LEXIS 27242, 2010 WL 1049269, at *3* (rejecting an appeal bond where the objectors were "unlikely to prevail on appeal" but "I **[*17]** find that the low risk of nonpayment and the lack of bad faith by the appellants obviate the need for an appeal bond in this case").

Conclusion

For the reasons stated above, the Plaintiffs-Appellees' motion to require Objectors-Appellants to Post an Appeal Bond is DENIED. The clerk of the Court is instructed to close the motion and remove it from my docket.

SO ORDERED

November 22, 2011
New York, New York

/s/ Harold Baer, Jr.

Hon. Harold Baer, Jr.

U.S.D.J.