UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

CASE NO. 1:09-MD-02036-JLK

IN RE CHECKING ACCOUNT OVERDRAFT LITIGATION

MDL No. 2036

THIS DOCUMENT RELATES TO: FIRST TRANCHE ACTIONS

Tornes, et al. v. Bank of America, N.A.
S.D. Fla. Case No. 1:08-cv-23323-JLK

Yourke, et al. v. Bank of America, N.A.
S.D. Fla Case No. 1:09-cv-21963-JLK
N.D. Cal. Case No. 3:09-2186

OPPOSITION TO PLAINTIFFS' MOTION TO REQUIRE POSTING OF APPEAL BONDS BY OBJECTOR-APPELLANTS AND INCORPORATED MEMORANDUM OF LAW

Class members Brooklyn Sarro and Megan Marek (collectively "Appellants") adopt, join, and incorporate herein by reference the Opposition to Plaintiffs' Motion to Require Posting of Appeal Bonds filed in the above-referenced matter by class members Elizabeth M. Locke, et al. (Dkt. 2370). Additionally, Appellants raise the following arguments in opposition to Plaintiffs' motion seeking imposition of an appellate bond.

Plaintiffs seek to have all absent class members who filed notices of appeal in the above-captioned matter post a disproportionate monetary bond (ostensibly, jointly and severally) for $621,338 pursuant to Federal Rules of Appellate Procedure ("FRAP"), Rules 7 and 8, in order to chill further scrutiny by the Eleventh Circuit Court of Appeals of this Court's judgment granting final approval to Plaintiffs' class settlement with defendant Bank of America entered on November 22, 2011.

Plaintiffs' imprecise bond request is based upon "(i) security for expected appellate fees and costs under FRAP 7 [in the amount of $5,000],[1] and (ii) the (at least partial) preservation of the *status quo* on behalf of the 13 million-plus non-objecting Settlement Class Members to account for the delay in distribution of the benefits of the Settlement to Settlement Class Members under FRAP 8 [in the amount of $616,338.00]."[2] *See Motion to Require Posting of Appeal Bonds* ("Motion") at 5.

In seeking a bond, Plaintiffs disregard dispositive underlying facts that moot the necessity for a Rule 7 or 8 bond to preserve the *status quo* and ask this Court to take action contrary to the Eleventh Circuit's opinion in *Pedraza v. United Guar. Corp.*, 313 F.3d 1323, 1328 (11th Cir. 2002). Demagogic rhetoric about so-called "professional objectors" is no substitute for coherent policy rationale or legitimate need.

[1] Objectors request that if this Court is inclined to grant Plaintiffs' motion for a bond, the cost be apportioned between pending appeals on a *pro rata* basis. It is likely all appeals will be consolidated given the shared factual predicate.

[2] To the extent Plaintiffs are internalizing their rationale for the Motion and attempt to reinvent a new one on reply, the Motion fails for want of due process and failure to abide by rules of procedure.

Even when viewed in a light most favorable to Plaintiffs, the legal support for their Motion limits application of any bond to *costs* on appeal – perhaps somewhere in the range of $5,000 if we view Plaintiffs' request with generosity. The idea that this Court's valuable time should be spent considering a $5,000 appeal bond on a settlement in excess of $400 million that amounts to approximately $250 per appellant *pro rata* is patently absurd. Plaintiffs' Motion lacks support, appears on its face to be brought in bad faith, and is purposefully calculated to impose undue burden on class members properly exercising their right to appellate review under Rule 3 of the Federal Rules of Appellate Procedure.

As to the "costs" sought pursuant to Rule 7, the core purpose of this Rule is to protect the appellee from the risk of nonpayment by the appellant, if appellee wins the appeal. *See Adsani v. Miller*, 139 F.3d 67, 75 (2d Cir. 1998). A bond for costs on appeal is simply not warranted since Plaintiffs have failed to establish with any admissible evidence that there is a genuine risk of nonpayment with respect to costs on appeal, or that these costs, even if left unpaid, shall pose any appreciable measure of risk, let alone genuine hardship, especially when squared with the $123 million in attorneys' fees to be earned from the common fund plus interest.[3] Indeed, the award of attorneys' fees to Plaintiffs is approximately 24,000 times the anticipated costs on appeal when considered collectively, or 480,000 times when split *pro rata* among the approximately twenty

[3] While Appellants have submitted evidence of their inability to post a substantial bond (see Exhibits 1 and 2 to this Opposition), they are prepared to post a *pro rata* share of a very modest bond limited to actual costs in the neighborhood of $500.

appellants. The existence of any real or imagined risk of nonpayment of costs is incomprehensible and belied by common sense.

While there may be at least some infinitesimal merit behind Plaintiffs' FRAP 7 request, Plaintiffs' FRAP 8 request is patently frivolous. With regard to FRAP 8, the Motion suffers from an underlying false factual premise that is dispositive and should obviate its consideration. Specifically, Plaintiffs conspicuously neglect to mention that the settlement was, or should have been, funded within fourteen days of this Court's granting of preliminary approval and deposited into an "interest-bearing" escrow account. (Dkt. 1885-1, ¶ 47). In this regard, the Settlement Agreement provides at paragraph 23:

> "Escrow Account" means the interest bearing account to be established by BofA consistent with the terms and conditions described in Section III below. The Escrow Account shall be held at BofA.

The Settlement Agreement further provides at paragraph 48:

> The Escrow Agent shall cause the Settlement Funds in the Escrow Account to be invested in interest-bearing short-term instruments – to be agreed upon by the Settlement Class Counsel and BofA – that are backed by the full faith and credit of the United States Government or that are fully insured by the United States Government or an agency thereof.

Settlement Agreement (Dkt. 1885-1, ¶ 48).

Plaintiffs fail to establish the escrow funds are not already invested in T-bills or other financial instruments yielding perhaps substantially greater returns. In fact, counsel for both Plaintiffs and Bank of America advised this Court at the November 7, 2011 hearing on final approval that Settlement Funds had already been placed in escrow. See Reporter's Transcript; Nov. 7, 2011; 128:13-18.

> THE COURT: To shortcut this, as I understand it, the money is already in an escrow account. Am I right?
>
> MR. PODHURST: Yes, Your Honor, it is in a trust account.
>
> THE COURT: I was going to ask the bank lawyer.
>
> MR. HUTT: It is, Your Honor, in a trust account.

Accordingly, for Plaintiffs to now come before this Court and ask that anyone seeking appellate review be required to post a bond for interest on an account which, pursuant to the terms of the Settlement Agreement, should already be earning interest, is disingenuous at best.

Additionally, Plaintiffs fail to disclose how the fund is currently invested, and its present rate of return. Moreover, Plaintiffs make no attempt to square escrow fund returns with those returns routinely obtainable on retail checking or savings accounts with Bank of America or other financial institutions. Perhaps most notably, Plaintiffs do not explain how or why a bond designed to compensate for interest already being earned by the class would not constitute an inappropriate double recovery. The Supreme Court does not permit double recoveries and none is warranted in this case. *See, e.g., Sea-Land*

Services, Inc. v. Gaudet, 414 U.S. 573, 591 n. 29 (1974) (double recovery for tort not allowed). Surely it cannot be the law that an appellant can be compelled to post a bond that cannot by law mature for an appellee's benefit. The entire premise behind Plaintiffs' Motion is phony. Put simply, Plaintiffs seek to ignore or alternatively gloss over the terms of their own Agreement.

Cases cited by Plaintiffs in support of their argument that district courts have required objectors to post appeal bonds to cover damages that the entire class may lose as a result of the appeal, such as *Allapattah Servs., Inc. v. Exxon Corp*., No. 91-0986-CIV, 2006 WL 1132371 (S.D. Fla. Apr. 7, 2006), are equally unavailing. In *Allapattah*, the district court prospectively ordered an objector, if it filed an appeal, to post a $13 million bond to cover the damages the class would suffer. The district court cited *Pedraza* in support of its ability to order an appeal bond in an amount sufficient to cover the damages that the class will lose as a result of the appeal. *Id*. at *18. The Eleventh Circuit in *Pedraza*, however, did not address or approve including potential damages to a class in an appeal bond. *Pedraza*, 313 F.3d at 1323.

Likewise, Plaintiffs cite *In re Compact Disc Minimum Advertised Price Antitrust Litig*., No. MDL 1361, 2003 WL 22417252, at *1 (Dist. Me. Oct. 7, 2003), to support the argument that damages resulting from delay or disruption of settlement administration caused by a frivolous appeal may be included in a Rule 7 bond. The district court in *Compact Disc*, however, cites *In re NASDAQ Market-Makers Antitrust Litig*., 187 F.R.D. 124, 128 (S.D.N.Y. 1999), as its authority for including damages in an appeal bond. *In re Compact Disc*, 2003 WL 22417252 at *1. Not surprisingly, *In re NASDAQ* appears to be the only opinion from the Second Circuit that supports this argument. The clear majority

of cases in that Circuit hold that damages for delay cannot be included in Rule 7 bonds where no underlying statute provides, as is the case here, for the inclusion of such costs. See *In re Initial Public Offering*, 728 F. Supp. 2d at 296-97; *In re Air Cargo Shipping Servs. Antitrust Litig*., No. 06-MD-1775, 2010 WL 1049269, at 2 (E.D.N.Y. Mar. 22, 2010); *In re AOL Time Warner, Inc., Sec. & "ERISA" Litig*., No. 02 Cv. 5575 (SWK), 2007 WL 2741033 at *4 (S.D.N.Y. Sept. 20, 2007); *In re Currency Conversion*, 2010 WL 1253741 at *3 (S.D.N.Y. Mar. 5, 2010) and, most recently, *Blessing, et al. v. Sirius XM Radio, Inc.*, 2011 WL 5873383 (S.D.N.Y. Nov. 22, 2011), 2011-2 Trade Cases P 77,699.

Moreover, Plaintiffs' apparent transposition of Rules 7 and 8 further confounds their argument. Plaintiffs' purported authority for the delay damages/interest payments in large measure does not deal with Rule 8 but instead focuses on Rule 7. But the delay damage/interest is inexplicably sought pursuant to Rule 8, not 7, and Plaintiffs fail to offer any compelling policy rationale for their novel postulated interpretation of Rule 8. In this regard, Plaintiffs seek to turn the appellate rules on their head by having this Court, in essence, order that a *supersedeas* bond be imposed even though Appellants have not sought a stay or writ of *supersedeas*, do not want one, and do not need one. In any event, this does not overcome the double-recovery problem discussed *supra* and only serves to compound it.

Finally, it was Plaintiffs who in their wisdom and collective business judgment, negotiated a settlement that tied the so-called "Effective Date" to a resolution of any pending appeals, thus triggering a stay mandated by the Settlement Agreement. Those parties responsible for causing the delay can hardly be heard to complain about it. To the

extent Plaintiffs now make the refreshing argument that the Settlement Agreement has unfair terms or unintended consequences, this concession is far too little too late.

In light of the foregoing argument, and attached sworn declarations, class members Brooklyn Sarro and Megan Marek respectfully request that this Court deny Plaintiffs' Motion.

Date: January 12, 2012

Respectfully submitted,

s/ John W. Davis .

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Attorney for Class Members
Brooklyn Sarro and Megan Marek

CERTIFICATE OF SERVICE

CASE NO.: 1:09-MD-02036-JLK

I hereby certify that on January 12, 2012, I filed on behalf of class members Brooklyn Sarro and Megan Marek, the foregoing document entitled Opposition to Plaintiffs' Motion to Require Posting of Appeal Bonds by Objector-Appellants and Incorporated Memorandum of Law, as well as attached Exhibits 1 and 2, with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day either by Notice of Electronic Filing generated by CM/ECF or by U.S. mail on all counsel of record entitled to receive service.

Date: January 12, 2012

s/ John W. Davis .
John W. Davis

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N.D. Cal. Case No. 3:09-2186

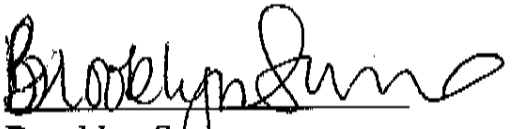
DECLARATION OF FINANCIAL INABILITY TO POST BOND

1. I, Brooklyn Sarro, declare as follows:
2. I am over the age of eighteen years old and make this declaration based on my own personal knowledge. If called as a witness, I could and would testify competently to the matters set forth herein.
3. I understand that the lead plaintiffs in the above-referenced matter have asked the Court to require me to post a $621,338.00 bond. If the Court

requires me to post such an enormous bond in order to pursue my appeal, the Court will effectively prevent appellate review due to my financial inability to post a bond.

4. I earn a relatively modest salary as a reading specialist for the San Diego Center for Children. My total living expenses are approximately $1800.00 while I bring home approximately $2500.00 per month.
5. Moreover, I lack meaningfully sufficient savings or other assets upon which I might draw to fund a bond on appeal.
6. If I am required to post the requested bond, or any bond for that matter, I will be effectively barred from seeking appellate review.

I declare under penalty of perjury under the laws of the United States of America that this declaration was executed on January __6__ , 2012 in San Diego, California.



Brooklyn Sarro

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DECLARATION OF FINANCIAL INABILITY TO POST BOND

1. I, Megan Marek, declare as follows:
2. I am over the age of eighteen years old and make this declaration based on my own personal knowledge. If called as a witness, I could and would testify competently to the matters set forth herein.
3. I understand that the lead plaintiffs in the above-referenced matter have asked the Court to require me to post a $621,338.00 bond. If the Court requires me to post such an enormous bond in order to pursue my appeal, the Court will effectively

slam shut the courthouse doors on me and essentially preclude appellate review due to my financial inability to post a bond.

4. I am a full time college student receiving financial aid in order to pay my tuition. Additionally, I work part-time at the UPS store to help pay my modest living expenses. Even with my financial aid and part-time job, my expenses equal or exceed my monthly income.

5. I have calculated my total monthly living expenses, exclusive of tuition and books, to be approximately $973. I earn approximately $1000 per month. I receive between $6500.00 and $10,500.00 per year in financial aid for school. My tuition is approximately $14,400.00 per year. I make up the difference with supplemental loans. Accordingly, not only can I not post a bond in excess of $600,000.00, a bond in any amount would be insurmountable as well. I do not have any significant assets other than a nominal sum of money kept in my checking account in which I deposit my paychecks and use for living expenses. In fact, my liabilities considerably exceed my assets.

I declare under penalty of perjury under the laws of the United States of America that this declaration was executed on January 2, 2012 in San Diego, California.

Megan Marek

Megan Marek