IN THE UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF PENNSYLVANIA

IN RE: SHOP-VAC MARKETING AND SALES PRACTICES LITIGATION	:	**MDL No. 2380**
	:	**Civil Action No. 4:12-md-02380**
THIS DOCUMENT RELATES TO: All Cases	:	**(Judge Kane)**

OBJECTOR/APPELLANT MICHELLE W. VULLINGS' RESPONSE IN OPPOSITION TO THE MOTION OF CLASS PLAINTIFFS TO COMPEL OBJECTOR/APPELLANT MICHELLE W. VULLINGS TO POST AN APPEAL BOND, PURSUANT TO FED. R. APP. P. 7

Objector/Appellant Michelle W. Vullings hereby responds in opposition to the motion of class Plaintiffs to compel Objector/Appellant Michelle W. Vullings to post an appeal bond, pursuant to Fed. R. App. P. 7. This responds in opposition to the motion is supported by the accompanying Memorandum of Law and the Declaration of Objector/Appellant Michelle W. Vullings.

Dated: January 5, 2017

Respectfully submitted,

*/s/ Brent F. Vullings*_____________

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TABLE OF AUTHORITIES

Cases

Adsani v. Miller, 139 F.3d 67, 77 (2nd Cir. 1998) 9
Adsani v. Miller, 139 F.3d67, 79 (2nd Cir. 1998) 14
Azizian v. Federated Dept. Stores, Inc., 499 F.3d 950, 960 (9th Cir. 2007) 14
Carol Rougvie v. Ascena Retail Group, Inc., No. 15-cv-724-MJK (E.D. Pa., Oct. 14, 2016) 6, 7, 15
Chiaverini, Inc. v. Frenchie's Fine Jewelry, Coins & Stamps, Inc. 2008 WL 2415340 (E.D. Mich., June 12, 2008) 11
Clark v. Universal Builders, Inc., 501 F.2d 324, 341 (7th Cir. 1974) 9, 14
Cobell v. Salazar, 816 F.Supp.2d 10, 13 (D.D.C. 2011) 10
Dewey, 2013 WL 3285105, at *2 12
Embry v. ACER Am. Corp., No. 23 09-01808, 2012 WL 2055030, at *2 (N.D. Cal. June 5, 2012) 8
In Azizian v. Federated Dep't Stores, Inc., 499 F.3d 950 (9th Cir. 2007) 8
In re Am. Inv. Life Ins. Co. Annuity Mktg. & Sales Prac. Litig., 695 F. Supp. 2d 157, 166 (E.D. Pa. 2010) 13
In re Am. Inv'rs Life Ins. Co. Annuity Mktg. & Sales Practices Litig., 695 F. Supp. 2d 157, 165 (E.D. Pa. 2010) 8
In re Am. President Lines, 779 F.2d 714,717 (D.C. Cir. 1985) 14
In re American President Lines, Inc., 779 F.2d 714, 717 (D.C. Cir. 1985) 9
In re Bayer Corp. Combination Aspirin Products Mktg. and Sales Practices Litig., 2013 WL 473564 (E.D.N.Y. Sept. 3, 2013 8
In re Certainteed Fiber Cement Siding Litig., No. 2270, 2014 WL 2194513, at *2 (E.D. Pa. May 27, 2014) 12
In re Certainteed Fiber Cement Siding Litig., No. 2270, 2014 WL 2194513, at *4 7
In re Diet Drugs (Phentermine, Fenfluramine, Dexfenfluramine) Prod. Liab. Litig., No. CIV.A. 99-20593, 2000 WL 1665134, at *5 (E.D. Pa. Nov. 6, 2000) 7
In re HP Inkjet Printer Litig., No. 5:05-cv-3580 JF, 2011 WL 2462475, at *1 (N.D. Cal. June 20, 2011) 14
In re Navistar Diesel Engine Products Liability Litigation, 2013 WL 4052673 (N.D.Ill. August 12, 2013) 8
Lindsey v. Normet, 405 U.S. 56, 77-79 (1972) 9
Lundy v. Union Carbide Corp. 598 F.Supp. 451, 452 (D. Or. 1984) 11
Rossi, 2014 WL 1050658, at *2 7
Vaughn v. Am. Honda Motor Co., 507 F.3d 295, 300 (5th Cir. 2007) 8, 13

Statutes

28 U.S.C.A 6

Rules

Fed. R. App. P. 7 .... 6, 8, 13, 15
Fed. R. App. P. 8 13

I. INTRODUCTION

Michelle W. Vullings, Objector and Appellant, by and through her attorney, Brent F. Vullings, Esq., submits this Brief in Opposition to the Motion of the Class Representatives for Appeal Bond in this matter.

On December 9, 2016, this Court granted the Class Representatives' Motions for Final Approval and for an Award of Attorneys' Fees, Costs and Incentive Awards in their entirety. As approved, the Settlement will provide no direct monetary compensation to Class Members.

Three class members objected to this Settlement, including Michelle W. Vullings. In her Objection, Michelle W. Vullings asked this Court, among other things, to:

1. Reduce Class Counsel's fee request because:
    a. Class Counsel did not provide a full and fair opportunity for Class Members to examine and object to its fee motion, and
    b. The fee request was excessive;
2. Reduce Incentive Awards because they are excessive and unfair to the class;
3. Reduce Claims Administrator's Costs and Fees because they are excessive and unfair to the class;
4. Provide injunctive relief to protect the class and the public from Defendant's conduct going forward;
5. Compensate Class Members for their waiver of consumer fraud and Magnuson-Moss Warranty Act claims;

6. Increase the total settlement amount so that Class Members may be compensated for their waiver of consumer fraud and Magnuson-Moss Warranty Act claims; and
7. Allow class members to opt out by phone and/or email.

In its Final Approval decision, the Court Denied Vullings' Objection.

In turn, Vullings filed a Notice of Appeal to the Court's Final Approval Order and Judgment. Counsel for the Class Representatives filed a Motion for Appeal Bond with a brief in support. In that brief, their arguments center around the alleged "weakness" and "meritlessness" of Vullings' arguments as well as her alleged bad faith and vexation conduct. Thus, Class Counsel requested that this Court require Vullings to post an appeal bond in the amount of $32,000 pursuant to Federal Rules of Appellate Procedure 7 and 39.

Class counsel has stated that the undersigned's objections "never succeed." This statement is without merit and is a gross misrepresentation to this Honorable Court. The record shows that the undersigned's objections have actually *never failed* on the Appellate level.

II. ARGUMENT

a. As per FRAP 39 and 7, only anticipated costs for the cost of copying and binding briefs and appendices are includable in the amount of an appeal bond. All other amounts requested for delay, administration, or lost interest must be denied as impermissible.

Class counsel cites *In re Nutella Mktg. & Sales Practices Litig.*, 589 F. App'x 53,61 (3d Cir. 2014), but misrepresents the facts of the case to this Honorable Court. Class counsel's argument here is completely without merit when the facts of the *Nutella* case are fully considered. The costs claimed by Class Counsel for purposes of this appeal bond are simply impermissible.

In *Nutella*, the Third Circuit held that it was within district court's discretion in a consumers' class action to impose an appeal bond of $22,500 on objectors to the settlement agreement, but only where *the objectors were nonresponsive in their briefing objecting to the imposition of an appeal bond* (emphasis added). Further, this appeal bond consisted of *only* $2,500 in costs. Additionally, in *Nutella*, the bond was placed collectively on *ten* objectors rather than individually on *one* objector (emphasis added). *Id*; Fed. R. App. P. 7, 28 U.S.C.A.

In the present matter, Objector/Appellant Michelle W. Vullings has been responsive throughout this matter including her objections, valid appeal, and in her objecting to the imposition of the appeal bond. Objector/Appellant Michelle W. Vullings has raised several valid legal arguments in opposition to class counsel's astronomical and unsubstantiated appeal bond request. Here, class counsel is seeking $25,000 in costs, or twelve and a half times the costs granted in *Nutella*, the case class counsel cites. Objector/Appellant Michelle W. Vullings is *one* objector, not *ten*. Furthermore, even if such costs were permissible – which they are not - the present matter does not warrant the costs of a typical class action. The present matter does not even include the distribution of any funds to the class members. The class settlement funds will be distributed only to class counsel and the administrator.

This Honorable Court cannot and should not require an Appellant/Objector to post a bond for uncertain, speculative administrative charges. *Carol Rougvie v. Ascena Retail Group, Inc*., No. 15-cv-724-MJK (E.D. Pa., Oct. 14, 2016). In fact, in the *Rougvie* matter, Honorable Mark A. Kearney in the Eastern District of Pennsylvania granted only a $1,235.32 appeal bond per Objector/Appellant. *Id*. Most decisions within this Circuit that have considered this question have

decided that a bond imposed under Rule 7 cannot secure costs associated with continued administration of a settlement fund or damages caused by delay incident to an appeal. *In re Diet Drugs (Phentermine, Fenfluramine, Dexfenfluramine) Prod. Liab. Litig.*, No. CIV.A. 99-20593, 2000 WL 1665134, at *5 (E.D. Pa. Nov. 6, 2000) (finding insufficient support for the plaintiffs' contention "that a bond under Rule 7 can secure damages caused by incident to an appeal"); see also *Rossi v. Proctor & Gamble Co.*, No. CIV.A. 11-7238 JLL, 2014 WL 1050658, at *2 (D.N.J. Mar. 17, 2014), *aff'd* (Jan. 6, 2015) ("Because Rule 39 does not enumerate any additional administrative costs caused by delay in the disbursement of settlement funds, inclusion of these costs is denied."); and also *In re Certainteed Fiber Cement Siding Litig.*, No. 2270, 2014 WL 2194513, at *4 (E.D. Pa. May 27, 2014).

Once again, Class counsel offers no explanation, much less a credible explanation, as to why they seek an astronomical and unsubstantiated amount of $32,000. In fact, the only permissible costs they actually cite are reproduction (whether by offset or typography), covers, binding, and sales tax at 6% in Pennsylvania, where class counsel are located. These costs total far less than $32,000, in fact, most likely hundreds of dollars.

Accordingly, the costs claimed by Class Counsel for purposes of this appeal bond are impermissible.

A Rule 7 appeal bond only covers anticipated costs, not the alleged delay damages and/or "administrative costs" sought by Class Counsel. Yet class counsel persists in requesting a vague and unsubstantiated appeal bond amount consisting of $7,000 for administrative costs. Such

anticipated damages may not be required as part of a bond. *Embry v. ACER Am. Corp*., No. 23 09-01808, 2012 WL 2055030, at *2 (N.D. Cal. June 5, 2012).

The only cost for which a bond may be required under Rule 7 is for the cost of copying and binding briefs and appendices. *In Azizian v. Federated Dep't Stores, Inc*., 499 F.3d 950 (9th Cir. 2007); see also *In re Am. Inv'rs Life Ins. Co. Annuity Mktg. & Sales Practices Litig*., 695 F. Supp. 2d 157, 165 (E.D. Pa. 2010). There are similar holdings as to the allowable costs for appeal bonds. See *In re Navistar Diesel Engine Products Liability Litigation*, 2013 WL 4052673 (N.D.Ill. August 12, 2013), *In re Bayer Corp. Combination Aspirin Products Mktg. and Sales Practices Litig*., 2013 WL 473564 (E.D.N.Y. Sept. 3, 2013), *Vaughn v. American Honda Motor Company, Inc*., 507 F.3d 295 (5th Cir. 2007). The Court held that Fed. R. App. P. 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. Thus, the expenses that Class Counsel have asked for 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)) 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.

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).

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.

Yet in the present case, Class Counsel have invited this Court to prejudge the appeal in setting an appeal bond of an exorbitant and appeal deterring amount. This is impermissible. Only the costs listed in the FRAP rules are allowable in a bond on appeal: amounts for the preparation and transmission of the record, the reporter's transcript, if needed to determine the appeal, premiums paid for a *supersedeas* bond or other bond to preserve rights pending appeal, and the fee for filing the notice of appeal.

In the present case, these actual amounts do not equal anywhere near $32,000. Therefore, since the allowable amounts includable in an appeal bond have been significantly trimmed by excluding lost interest and the administrative costs listed by the Class Counsel, any bond on appeal must be limited to the amount of the costs actually allowed by the FRAP rules. Class Counsel's request for appeal bond of $32,000 is impermissible under the applicable FRAP rules.

Class Counsel has asked for an appeal bond based on factors that are beyond this Court's reach and are impermissible under both case law and the FRAP rules. There is no provision in FRAP 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." *Cobell v. Salazar*, 816 F.Supp.2d 10, 13 (D.D.C. 2011).

Class Counsel does not set forth the relevant legal rule and the relevant appellate precedent because *American President Lines* demonstrates that they are not entitled to the relief they request. Their frivolous appeal bond request, if granted, will cause more delay, as the parties engage in collateral litigation over the reversible error that the settling parties have asked this Court to commit.

Further, the bond amount requested here must be denied because it is entirely too high. Most of the administrative expenses claimed, and all of the lost interest claimed, are not allowable costs under FRAP. Nowhere have Class Counsel provided any accounting or a breakdown of actual, allowable estimated expenses. The absence of detailed support for the exponentially higher delay costs claimed 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)].)

Once again, the costs claimed by Class Counsel for purposes of this appeal bond are impermissible.

b. The requested bond is beyond what Vullings can pay

Class counsel argues that a bond here is "necessary to assure adequate security to protect the interests of the settlement class." Since the class have received no monetary compensation, and all monetary compensation is for class counsel, the Administrator, and the named Plaintiffs, this argument is completely without merit. Class counsel also argues that "there is no evidence in the record that Ms. Vullings would be unable to post an appeal bond, or that a bond would preclude pursuit of the appeal." This argument is equally without merit.

A court's determination of the amount of an appeal bond should be guided by "whether the amount of the bond will effectively preclude pursuit of the appeal." *In re Certainteed Fiber Cement Siding Litig.*, No. 2270, 2014 WL 2194513, at *2 (E.D. Pa. May 27, 2014); see also *Dewey,* 2013 WL 3285105, at *2.

In the present matter, Class counsel offers no explanation, much less a credible explanation, as to why they seek a bond in the astronomical amount of $32,000. In fact, the only permissible costs they actually cite are reproduction (whether by offset or typography), covers, binding, and sales

tax at 6% in Pennsylvania, where class counsel are located. These costs total far less than $32,000, in fact, most likely just hundreds of dollars.

Pursuant to the guidelines of FRAP 7, the imposition of an appeal bond in the amount of $32,000 would be not only be unjust and unfair, but it would severely prejudice Vullings' due to her limited means. [Declaration of Michelle W. Vullings]. Imposition of such an appeal bond acts to protect class counsel and the defendants but not the class since Vullings is arguing for a more positive as well as monetary result for the class.

Vullings does not have the financial ability to post a bond in the amount of $32,000. Vullings' ability to post a bond in any amount is limited. [Declaration of Michelle W. Vullings].

c. Whether Vullings is pursuing frivolous arguments is a question best left to the Court of Appeals. This Court may not impose a high FRAP 7 bond amount on appeal based on its stated conclusions without impermissibly encumbering Vullings' right to appeal as well as effectively pre-empting the Court of Appeals' prerogative to determine these questions. Such an attempt to prevent an appeal is unwarranted and intolerable.

The Federal Rules of Appellate Procedure empower district courts to "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. P. 7; see also Fed. R. App. P. 8 (permitting a court to impose bond for stay during appeal). The purpose of Rule 7 is to protect an appellee against the risk of non-payment by an unsuccessful appellant.

"Yet Rule 7 was never intended to be used as a means of discouraging appeals, even if perceived to be frivolous." *In re Am. Inv. Life Ins. Co. Annuity Mktg. & Sales Prac. Litig.*, 695 F. Supp. 2d 157, 166 (E.D. Pa. 2010); see also *Vaughn v. Am. Honda Motor Co.*, 507 F.3d 295, 300

(5th Cir. 2007) (Even if the objectors are using the appeal "as a means of leveraging compensation for themselves or their counsel [and even where the] detriment to class members can be substantial . . . imposing too great a burden on an objector's right to appeal may discourage meritorious appeals or tend to insulate a district court judgment in approving a class settlement from appellate review.") (Internal citations omitted).

In short, the alleged taint of frivolity or threat of detriment to class members are not substantial reasons to discourage an objector's right to appeal in cases where class settlements are presented for appellate review. Vullings' right to appeal this Court's decision and/or her ability to pay a bond beyond costs trumps any assertion of frivolity or costs accrued through delay to class members as a result.

Although this Court has set forth its opinion as to Vullings' objection, it is clear that "the court of appeals is the best forum to litigate the merits of the appeal." *In re Am. Inv. Life Ins. Co. Annuity Mktg. & Sales Prac. Litig*., 695 F. Supp. 2d 157, 166 (E.D. Pa. 2010) (internal citations omitted). Specifically:

> the question of whether, or how, to deter frivolous appeals is best left to the courts of appeals, which may dispose of the appeal at the outset through a screening process, grant an appellee's motion to dismiss, or impose sanctions including attorney's fees under Rule 38. *In re Am. President Lines*, 779 F.2d 714,717 (D.C. Cir. 1985). Allowing districts court to impose high Rule 7 bonds where the appeals might be found frivolous risks "impermissibly encumber[ing]" appellants' right to appeal and "effectively preempt[ing] this court's prerogative" to make its own frivolousness determination. *Id*. at 717, 718; see also *Adsani v. Miller*, 139 F.3d67, 79 (2nd Cir. 1998) ("[A]ny attempt by a court at preventing an appeal is unwarranted and cannot be tolerated.") (quoting *Clark v. Universal Builders, Inc*., 501 F.2d 324, 341 (7th Cir.1974))." *Azizian v. Federated Dept. Stores, Inc*., 499 F.3d 950, 960 (9th Cir. 2007).

As a result, this Court is without authority to impose a bond even if this Court agrees that Vullings' appeal is frivolous or without merit. Such determinations are questions for the Court of Appeals and can be vetted by its screening process.

The fact that Class Counsel states that Vullings' appeal is frivolous does not bear on the imposition of an appeal bond. In fact, it supports the logical underpinnings of the conclusion in the case law that the Court of Appeals is in the best position to decide a question of frivolity. Thus, Class Counsel's opinion as to frivolity does not bear on the imposition of a Rule 7 bond on appeal. Class Counsel's Motion for Appeal Bond must be denied as a matter of law and fact.

d. The relevant question before this Court is whether this Court based its approval of the settlement terms on meritorious facts, law, and the application of fact to law. Judicial policy favors objectors to settlement agreements as crucial because they promote valuable information as to fairness, adequacy, and reasonableness of class action settlements.

Objectors play a valuable role in providing the court with information and perspective regarding the fairness, adequacy, and reasonableness of a class action settlement. *In re HP Inkjet Printer Litig*., No. 5:05-cv-3580 JF, 2011 WL 2462475, at *1 (N.D. Cal. June 20, 2011) (citation omitted) (the role of objectors is crucial because "in assessing settlements of representative actions, judges no longer have the benefit of the adversarial process")). Objections may in fact increase the value of the class benefit. *Carol Rougvie v. Ascena Retail Group, Inc*., No. 15-cv-724-MJK (E.D. Pa., Oct. 14, 2016).

In the present matter, Appellant/Objector Michelle Vullings' objections may increase the value of the class benefit. Imposing a bond in an amount larger than just covering costs as a reflection of this Court's opinion as to Vullings' objection based on its answers to questions

reserved for the Court of Appeals is an abuse of discretion; a result repugnant to the letter of the law as well as the policy expressed by the appellate courts in class action cases. For these reasons, the amount of bond may not be tied to this Court's perception of Vullings' chances on appeal as a matter of law.

CONCLUSION

For the reasons set forth above, Objector/Appellant Michelle W. Vullings respectfully request that this Honorable Court deny the motion of class plaintiffs to compel Objector/Appellant Michelle W. Vullings to post an appeal bond, pursuant to Fed. R. App. P. 7 in its entirety.

Dated: January 5, 2017

Respectfully submitted,

*/s/ Brent F. Vullings*______________

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	:	**Civil Action No. 4:12-md-02380**
THIS DOCUMENT RELATES TO: All Cases	:	
	:	**(Judge Kane)**

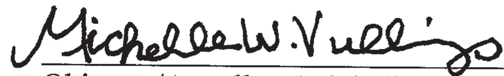
DECLARATION OF OBJECTOR/APPELLANT MICHELLE W. VULLINGS IN OPPOSITION TO CLASS PLAINTIFFS' MOTION TO COMPEL OBJECTOR-APPELLANT MICHELLE W. VULLINGS TO POST AN APPEAL BOND, PURSUANT TO FED. R. APP. P. 7

I, Michelle W. Vullings, declare that the following statements are true to the best of my knowledge:

1. I am among the objectors who have objected to the class action settlement in the above-captioned matter for the reasons set forth in my objection.
2. I am familiar with this action and I firmly believe the District Court has erred in dismissing my objections as I am a class member whom presents a valid argument that represents many class members who may not receive any monetary compensation for defective products and alleged fraudulent activities by the Defendants in this matter.
3. My attorney has asked me to present a declaration regarding my financial ability to provide an appeal bond sought by Class Counsel in this matter.
4. I have paid no attorney's fees to my attorney, neither would I have been able to, no matter who my counsel could have been, because I am not employed and do not have the financial wherewithal to do so. Contrary to what Class Counsel suggests, it is impossible for me to pay an appellate bond beyond one of a *de minimus* nature for costs

let alone one for $32,000. If I am required to do so, my legal right to appeal has been taken from me or extremely compromised and my appeal may effectively be over.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed this 5th day of January 2017, at Collegeville, Pennsylvania.



Objector/Appellant Michelle W. Vullings

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ORDER

Upon consideration of the motion of class plaintiffs to compel Objector/Appellant Michelle W. Vullings to post an appeal bond, it is hereby **ORDERED** that the motion is **DENIED**.

____
Hon. Yvette Kane, Chief Judge