IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MISSOURI

IN RE BLUE BUFFALO COMPANY, LTD. MARKETING AND SALES PRACTICES LITIGATION	)	Case No. 14-md-02562-RWS
RELATES TO: ALL CASES	)	

REPLY MEMORANDUM IN FURTHER SUPPORT OF MOTION FOR APPEAL BOND

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INTRODUCTION

Plaintiffs respectfully submit this memorandum in reply to the responses of Objectors Paul Lopez, Gary Sibley, and Caroline Nadola. *See* Dkt. Nos. 237, 238, 239.[1]

As the Court already recognized, none of the objections raised here have merit. *See* Fee Order ¶ 10 ("The Court also has thoroughly considered the objections to the fee requested, which are few in number, and rejected them. None of the objections demonstrated the requested fee and expense award to be unfair."); and Final Approval Order ¶ 8 ("Each of the objections submitted in this matter is overruled. The objections regarding the settlement value are without merit. … The objections that raise individual state law claims are not well taken as the Settlement is evaluated in its entirety, rather than on a claim by claim basis."). Moreover, in light of the Objectors' failures to substantiate the basis for their appeals, it is very likely that they will be deemed frivolous by the Eighth Circuit.

As other courts have recognized, frivolous appeals by serial objectors impose significant costs on class members:

> The damages that an appellee class incurs when confronted with a frivolous appeal from a judgment entered pursuant to a class action settlement include those additional administrative costs that are associated with the delay in distribution of a settlement fund. Those costs decrease the amount of the settlement funds available for distribution to the class and represent a quantifiable amount of damages.

In re Gen. Elec. Co. Sec. Litig., 998 F. Supp. 2d 145, 151 (S.D.N.Y. 2014). Accordingly, not only is Plaintiffs' motion for an appeal bond in the amount of at least $150,309.00 supported by Fed. R. App. P. 7, precedent, and fairness, it is also necessary to protect the class from bearing

[1] Objectors Pamela Sweeney and Pamela McCoy failed to respond to Plaintiffs' motion. Accordingly, any opposition is waived.

the costs of these frivolous appeals. Like "ants on a jelly roll, scrambling to extort money from the approved settlements," serial objectors Mr. Sibley, Ms. Sweeney, Ms. McCoy,[2] and Mr. Lopez, along with his counsel, Mr. Bandas, seek to vexatiously delay a fair and reasonable Settlement that would have already put substantial funds in the hands of class members. The requested appeal bond is a necessary check on such conduct. *In re Polyurethane Foam Antitrust Litig.*, 2016 WL 1452005, at *3 (N.D. Ohio Apr. 13, 2016).

ARGUMENT

I. OBJECTORS LOPEZ AND SIBLEY MUST BE REQUIRED TO POST A RULE 7 BOND

A. THE LOPEZ AND SIBLEY APPELS ARE MERITLESS

"An argument is 'frivolous' for purposes of Rule 38, Fed. R. App. P., when it is 'totally lacking in merit, framed with no relevant supporting law, conclusory in nature, and utterly unsupported by the evidence.'" *In re Gen. Elec. Co. Sec. Litig.*, 998 F. Supp. 2d at 153 (quoting *T.Co Metals, LLC v. Dempsey Pipe & Supply, Inc.*, 592 F.3d 329, 341 (2d Cir. 2010)).

Lopez argues that he "properly objected that the percentage of attorneys' fees should have only been calculated *after* deduction of the $1.4 million in administrative costs." Lopez Br. at 12. However, in support of his Opposition to the bond, Lopez fails to address any of the numerous in-Circuit cases cited by Plaintiffs in their response to his objection, which

[2] Counsel for Plaintiffs have been informed that Ms. McCoy, who purportedly appeared pro se, has now retained George W. Cochran as counsel. Another Court described Mr. Cochran's appearance in that matter as: "[t]he remoras are loose again" and stated that Mr. Cochran's goal in the litigation was "to hijack as many dollars for [himself] as [he] can wrest from a negotiated settlement." *In re UnitedHealth Grp. Inc.PSLRA Litig.*, 643 F. Supp. 2d 1107, 1108–09 (D. Minn. 2009).

demonstrate the lack of merit in his objection.[3] *See* Omnibus Response to Objectors at 18-19; and *see e.g. Barfield v. Sho-Me Power Elec. Co-op.*, 2015 WL 3460346, at *4 (W.D. Mo. June 1, 2015) (approving an attorney's fee award, calculated on a percentage of the gross amount of the settlement fund, which included the expenses of administration). Moreover, the cases Lopez does rely on are inapposite. For example, Lopez cites to *In re Unisys Corp. Retiree Med. Benefits ERISA Litig.*, a case in which administrative costs **were** included in the value of the settlement fund for purposes of determining attorneys' fees. 886 F. Supp. 445, 485 (E.D. Pa. 1995).

Mr. Lopez's second objection concerning Class Counsel's time records is also likely to be found frivolous given the practice in this Circuit. As Plaintiffs have already explained, the law in this Circuit is that submission of detailed time records is not necessary when the fee sought is based on the percentage of the fund method. While courts may perform a lodestar crosscheck (as the Court did here), detailed daily time records are not required in this Circuit. *See In re Genetically Modified Rice Litig.*, 2012 WL 6085141, at *2 (E.D. Mo. Dec. 6, 2012), *aff'd*, 764 F.3d 864 (8th Cir. 2014) ("I have similarly reviewed all the evidence, and I agree with Special Master Limbaugh that it is appropriate to rely on the sworn declarations of counsel. The procedure used by plaintiffs' co-lead counsel is acceptable …"); *id.* at *3 ("As set out above, an in-depth examination of individual time sheets is not necessary given the sworn declarations of plaintiffs' co-lead counsel regarding the procedures used in analyzing those time sheets."). Nonetheless, Class Counsel addressed this concern at the fairness hearing by unilaterally providing the Court with detailed declarations from each law firm serving on the executive

[3] Lopez's reliance on *In re BankAmerica Corp., et al.*, 4:99-md-01264-CEJ (E.D. Mo. Oct. 15, 2012) is questionable. Although the court there deducted the administrative costs in calculating an appropriate attorneys' fee award, its opinion lacks any citations that this was required. Since the parties' underlying briefing is unavailable on Pacer due to the age of the case, it is impossible to know whether class counsel sought this exclusion.

committee. *See* 5/19/16 Fairness Hearing Tr. at 41:19-42:6. The Court found the information provided by Class Counsel sufficient:

> Although not required to do so, the Court also has cross-checked the fee request under a lodestar analysis and finds the information submitted pertaining to lodestar hours and rates to be sufficient, the hours and rates to be reasonable, and the resulting multiplier "in line with multipliers used in other cases." *In re Xcel*, 364 F. Supp. 2d at 999. The Court also has considered factors approved in this circuit for assessing reasonableness of fee requests, *Allen v. Tobacco Superstore, Inc.*, 475 F.3d 931, 944 n. 3 (8th Cir. 2007), and finds them supportive of the fee requested. The Court also has thoroughly considered the objections to the fee requested, which are few in number, and rejected them. None of the objections demonstrated the requested fee and expense award to be unfair. *In re U.S. Bancorp Litig.*, 291 F.3d at 1038.

6/16/16 Fee Order at 3.

With respect to Lopez's last objection, requiring proofs of purchase for Option 2 claims does not render the settlement "inherent[ly] unfair[]." Lopez Br. at 14. As the Court explained at the Fairness Hearing, this requirement is a necessity:

> Likewise, the objections to the provision of variable relief depending on whether class members have proof of purchase -- I think that that's actually a necessary consideration in any class settlement in order to avoid and discourage fraudulent activity by those who actually didn't or weren't victims of the -- giving rise to a claim.
>
> In addition, it's been made clear that proofs of purchase were readily available through big box retailers, of which class members were informed; so the burden of obtaining proofs of purchase, while not insubstantial, is comparatively and relatively low.

5/19/16 Fairness Hearing Tr. at 51:3-14. Lopez's reliance on *Rougvie v. Ascena Retail Group, Inc.* is misplaced as that court approved a settlement that, like the one here, required proofs of purchase for claimants to be entitled to a higher amount of relief over this exact objection. 2016 WL 4111320, at *24 (E.D. Pa. July 29, 2016). As the *Rougvie* explained, "Class members who

find this method too burdensome may elect to receive the standard cash award or voucher without producing any proof of purchase. The options presented are fair." *Id.* Here, as in *Rougvie*, class members who found Option 2's proof of purchase requirement burdensome had the choice to submit a claim pursuant to Option 1, which had no such requirement. *See, e.g.*, Final Approval Br. at 6 ("Option one provides that class members without valid proof of purchase may receive ten percent for up to $100 in eligible purchases.").

As for Sibley, his opposition to the bond motion does not address the merits of his appeal other than to argue that "[a]n appeal should be decided by the appellate court." Sibley Br. at 3. In doing so, Sibley fails not only to detail how the Court abused its discretion in overruling his objections, but also fails to respond to any of the arguments raised by Class Counsel in their opening brief in support of a bond, and in their earlier response to Sibley's objections. *See* Opening Brief at 17-18, 20; *see generally* Plaintiffs' Omnibus Response to Objections. Accordingly, this factor weighs in favor of a bond.

B. THE COURT MAY CONSIDER THE MERITS OF THE APPEALS

Lopez and Sibley assert that "[t]he merits of [their] appeal[s] will be determined by the Eighth Circuit alone, and cannot be resolved through a Rule 7 bond." Lopez Br. at 9; Sibley Br. at 2. That is false. While it is true that "[o]nly the appellate court has authority to impose sanctions for a frivolous appeal," Sibley Br. at 3, the merits of an appeal are properly considered by the district court in determining whether a bond is proper. *See, e.g.*, *Uponor*, 2012 WL 3984542, at *2 ("'A district court, familiar with the contours of the case appealed, has the discretion to impose a bond which reflects its determination of the likely outcome of the appeal.'") (quoting *Adsani*, 139 F.3d at 79); *In re Initial Pub. Offering Sec. Litig.*, 28 F. Supp. 2d 289, 293–94 (S.D.N.Y. 2010); *In re Gen. Elec. Co. Sec. Litig.*, 998 F. Supp. 2d at 151 ("In

setting the amount of a Rule 7 Bond, a district court may 'prejudge[ ]' the case's chances on appeal. ").

Moreover an objector's (or his or her counsel's) status as a professional or serial objector is a valid consideration in considering whether imposition of an appeal bond is appropriate.[4] *See, e.g.*, *In re Law Office of Jonathan E. Fortman, LLC*, 2013 WL 414476, at *1-2 (E.D. Mo. Feb. 1, 2013) (agreeing that "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"); and *In re Initial Pub. Offering Sec. Litig.*, 728 F. Supp. 2d at 294-95 ("I concur with the numerous courts that have recognized that professional objectors undermine the administration of justice by disrupting settlement in the hopes of extorting a greater share of the settlement for themselves and their clients. Thus, the Objectors are required to file an appeal bond sufficient to secure payment of costs on appeal.").

In fact, "[c]ourts treat with particular disapproval the objections and appeals of 'professional objectors,' whose objections amount to a 'tax that has no benefit to anyone other than to the objectors' but serves to 'tie up the execution of [a] Settlement and further delay payment to the members of the Settlement Class….'" *In re Uponor, Inc.*, 2012 WL 3984542, at *5 (citation omitted). For example, in *In re Gen. Elec. Co. Sec. Litig.*, the Southern District of

[4] In the Lopez Opposition at n.8 (Dkt. No. 237), Mr. Bandas improperly attempts to testify via footnote in order to misleadingly take credit for beneficially modifying settlements through the cited objections and/or appeals in six other cases. For example, he cites to *In re Baby Products Antitrust Litig.*, 708 F.3d 163 , 181-82 (3d Cir. 2013) and includes a parenthetical accurately stating that both the attorneys fee award and settlement fund allocation plan were vacated. However, he fails to report that, on remand, the District Court credited other counsel—not Mr. Bandas—with successfully appealing final approval of the Initial Settlement, and the Court denied Mr. Bandas's request for attorneys' fees. Specifically, the Court stated that "district courts in this Circuit have rejected fee award applications where the benefit of counsel's input was not apparent or was patently lacking." Thereafter, the Court held that Mr. Bandas "is not entitled to a fee award for his role in objecting to the settlement." *McDonough v. Toys R Us, Inc., 80 F. Supp. 3d 626, 659-64 (E.D. Pa. 2015).*

New York held that the "Lead Plaintiff has shown that Hampe's appeal is brought in bad faith" where the appellant had "a history of vexatious conduct through frivolous settlement objections:"

> Recently, in *In re Nutella Marketing & Sales Practices*, 2012 WL 6013276, at *2 (D.N.J. Nov. 20, 2012), the district court found that Hampe's appeal of an objection to a class action settlement was meritless. That court observed that Hampe's papers failed 'to put forth any cogent argument' why the appeal would not be frivolous and referred to another legal matter – as if he had simply copied and pasted his opposition papers from another proceeding. ... Most relevant for present purposes, the court noted that Hampe 'appear[s] to ... repeatedly raise objections in class actions around the country.' … Lead Plaintiff points to at least two other cases in which Hampe has filed conclusory objections to other class action settlements and appealed those objections.... Hampe's relationship with Bandas, a known vexatious appellant, further supports a finding that Hampe brings this appeal in bad faith.

998 F. Supp. 2d at 155–56 (emphasis added); *see also In re Uponor, Inc.*, 2012 WL 3984542, at *3 ("Moreover, 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.… The Palmer Objectors' objections and subsequent appeal appear little more than dilatory tactics of questionable motivation.… Given the Palmer Objectors' bad faith conduct, in addition to the other three factors, this Court finds that a bond is warranted to cover the costs of appeal pursuant to Rule 7.").

Given Sibley and Lopez's (and Bandas') reputations as serial objectors, *see* Opening Brief at 8-12; Omnibus Response to Objectors at 9-11, this factor weighs in favor of a bond. *See Heekin v. Anthem, Inc.*, 2013 WL 752637, at *3 (S.D. Ind. Feb. 27, 2013) ("Finally, the Court does find evidence of bad faith or vexatious conduct on the part of appellants. Mr. Paul appears to be represented by an attorney who has not entered an appearance in this case.… Plaintiffs have produced evidence that [this attorney] is likely a serial objector and other courts have recognized similar behavior.… As in *In re Uponor*, this Court finds such behavior in bad faith

and also potentially violative of local and ethical rules."); *In re Initial Pub. Offering Sec. Litig.*, 728 F. Supp. 2d at 294 ("Finally, there is evidence of bad faith or vexatious conduct by the Objectors. Other courts have found that counsel for the Pentz, Siegel, and Weinstein Objectors are serial objectors and have required them to post bonds in other actions.").[5]

Courts routinely require objectors to post appeal bonds when their appeals appear to lack merit, or when the appellant – or his or her counsel – have a history of vexatious appeals. Here, Lopez and his counsel, Christopher Bandas, as well as Sibley, are known serial objectors, and their appeals here lack merit on their face. Accordingly, an appeal bond is necessary and appropriate to protect class members from the delays occasioned by the frivolous appeals.

C. ADMINSTATIVE COSTS, ATTORNEYS' FEES, AND DELAY COSTS ARE PROPERLY INCLUDED IN AN APPEAL BOND

Lopez and Sibley both contend that the "administrative costs, delay/interest costs, and attorneys' fees sought by Class Counsel are not listed as costs that may be recovered in an appeal bond under Rule 7." Lopez Br. at 4; Sibley Br. at 1 ("costs are limited to those set forth in Rule 39 FRAP.… Under Rule 7 FRAP, a bond cannot include attorneys' fees, costs of delay or administrative costs."). However, costs that may be taxed under Rule 7 are not limited to those costs enumerated in Fed. R. App. P. 39. *In re Gen. Elec. Co. Sec. Litig.*, 998 F. Supp. 2d at 151 (explaining that "Rule 39 does not define 'costs' for all of the rules of the Federal Rules of Appellate Procedure, much less for all the rules of the Federal Rules of Civil Procedure.").

1. ATTORNEYS' FEES

[5] Sibley contends that "Plaintiffs have no grounds to insinuate that an appeal by Sibley is in bad faith or without merit." Sibley Br. at 3. That is nonsense. Plaintiffs' opening brief contains specific examples of Sibley's meritless objections. *See* Opening Br. at 12. Significantly, Sibley makes no attempt to show that these claims are "false" and "defamatory." Sibley Br. at 4. The same is true of Lopez's attorney, Christopher Bandas. Lopez Br. at 10.

The "the majority view is that a Rule 7 bond may include appellate attorneys' fees if the applicable statute underlying the litigation contains a fee-shifting provision that accounts for such fees in its definition of recoverable costs and the appellee is eligible to recover them." *Int'l Floor Crafts, Inc. v. Dziemit*, 420 F. App'x 6, 17 (1st Cir. 2011). Here, the Missouri Merchandising Practices Act (the "MMPA"), Mo. Ann. Stat. § 407.025.1, authorizes the Court "in its discretion [to] order, in addition to damages, injunction or other equitable relief and reasonable attorney's fees." As the Eighth Circuit has observed, under the MMPA, "[a]warding attorney's fees to successful plaintiffs is indeed the rule rather than the exception." *Grabinski v. Blue Springs Ford Sales, Inc.*, 203 F.3d 1024, 1027-28 (8th Cir. 2000); *see also id.* ("Although the statutory provision contains discretionary language, Ms. Grabinski argues that the Missouri Supreme Court has limited the trial court's ability to refuse fees under this section [of the MMPA]. We agree."). Accordingly, including expected attorneys' fees on appeal in a Rule 7 bond is appropriate.

Moreover, as Plaintiffs explained in their opening brief, the Ohio, Florida, and New Jersey consumer protection statutes provide for attorneys' fees to a prevailing party. *See* Opening Brief at 25, n. 15. Lopez argues "neither Ohio, New Jersey, or Florida consumer protection statutes … would permit attorneys' fees to be awarded against objecting class members." Lopez Br. at 8. That is incorrect. As another court concluded, in considering the Texas[6] and New Jersey statutes:

> The objectors challenge the inclusion of attorney's fees in the appeal bond on the ground that under the applicable consumer fraud statutes, attorney's fees are not recoverable against objectors.

[6] Both Sibley and Lopez are residents of Texas, while Nadola claims to have purchased Blue Buffalo products in Pennsylvania and New Jersey, *see* Nadola Decl. ¶ 5. Accordingly, the state laws applicable to these objectors each support imposing a bond that includes attorneys' fees. *Cf. In re Cardizem CD Antitrust Litig.*, 391 F.3d 812, 817 (6th Cir. 2004) (looking to the fee shifting provisions of the state statute underlying the objector's claim).

> Plaintiffs argue, and the Court agrees, that under the consumer protection statutes of states like New Jersey, Texas, Tennessee, and Ohio, fee-shifting is asymmetrical because they provide attorney's fees to both prevailing plaintiffs or consumers as well as to defendants upon a finding that the action is frivolous, groundless, or without legal or factual merit.... The Court therefore finds that attorney's fees in the amount of $50,000 is appropriately included in the appeal bond.

In re Bayer Corp. Combination Aspirin Products Mktg. & Sales Practices Litig., 2013 WL 4735641, at *4 (E.D.N.Y. Sept. 3, 2013) (citing N.J. Stat. Ann. § 56:8–19; Tex. Bus. & Com. Code Ann. § 17.50(d); Tenn. Code Ann. § 47–18–109(e)(1), (2); Ohio Rev. Code § 1345.09(F)) (emphasis added).

Finally, a "Rule 7 bond may also include attorneys' fees where the district court concludes that the court of appeals might award attorneys' fees as costs under Fed. R. App. P. 38 because the appeal is frivolous." *In re Credit Default Swaps Antitrust Litig.*, 2016 WL 2731524, at *19 (S.D.N.Y. Apr. 26, 2016). As set forth above (and below, regarding the Nadola opposition), the appeals here are frivolous. *See supra* at I.A.; and *infra* at II.C. Accordingly, Plaintiffs properly included attorneys' fees in the requested Rule 7 bond.

2. ADMINISTRATIVE AND DELAY COSTS

Lopez and Sibley both contend that a Rule 7 bond cannot include administrative or delay costs. Sibley Br. at 1; Lopez Br. at 8 ("While a Rule 8 supersedeas bond can secure delay costs, a Rule 7 appeal bond cannot."). This argument is misplaced. As other courts have recognized, "[c]osts incurred as a result of delay of a settlement caused by an appeal are recoverable under Rule 7. An appeal bond is a 'guarantee that the appellee can recover from the appellant the damages caused by the delay incident to the appeal.'" *In re Uponor, Inc.*, 2012 WL 3984542, at

*4 (quoting *In re NASDAQ Market–Makers Antitrust Litig.*, 187 F.R.D. 124, 128 (S.D.N.Y. 1999)) (collecting cases).[7]

Administrative and delay costs may be included in a Rule 7 bond under Fed. R. App. P. 38:

> [T]he term "costs" in Rule 7 refers to "all costs properly awardable under the relevant substantive statute or other authority. In other words, all costs properly awardable in an action are to be considered within the scope of [the] Rule." … The authority to award costs is not limited to the costs awarded under a fee-shifting statute. Rule 7 costs also include damages imposed under Rule 38, Fed. R. App. P.

In re Gen. Elec. Co. Sec. Litig., 998 F. Supp. 2d at 157

Inclusion of administrative and delay costs pursuant to Rules 7 and 38 is particularly appropriate when an appeal is frivolous. "The text of Rule 38 of the Federal Rules of Appellate Procedure, as well as the Advisory Committee Notes that accompany the rule, support a broad reading of the authority of the courts of appeals to award damages to appellees who are confronted with frivolous appeals." *In re Gen. Elec. Co. Sec. Litig.*, 998 F. Supp. 2d at 151. Indeed, "where an objector lodges a frivolous appeal to a class action settlement, a district court may impose a Rule 7 bond in the amount of the additional administrative expenses that are reasonably anticipated from the pendency of the appeal." *Id. at* 153. Because the damages suffered by the appellee class from a frivolous appeal include additional administrative costs associated with the delay in distribution of settlement funds, those costs decrease the amount of

[7] Regardless, "[t]his concern does not prevent imposition of a Rule 7 Bond. Additional costs accrued pending appeal are prospectively incurred new damages and may not be recovered through a supersedeas bond." *In re Gen. Elec. Co. Sec. Litig.*, 998 F. Supp. 2d at 152 (citing *Adsani*, 139 F.3d at 70 n.2).

the settlement funds available for distribution to the class, and therefore represent a quantifiable amount of damages. *Id.* at 151.[8]

Because Lopez's and Sibley's appeals are based on the same objections considered and rejected by the Court, and are therefore likely to be deemed frivolous, it is proper to include these costs in a Rule 7 bond. *See In re Cardizem CD Antitrust Litig.*, 391 F.3d at 817-18 ("Not only was the district court entitled to include in the bond amount attorney's fees, but it was entitled to include any other damages incurred, presumably including administrative costs."); *In re Compact Disc Minimum Advertised Price Antitrust Litig.*, 2003 WL 22417252, at *1 (D. Me. Oct.7, 2003) ("damages resulting from delay or disruption of settlement administration caused by a frivolous appeal may be included in a Rule 7 bond"); *Heekin*, 2013 WL 752637, at *4 ("The remaining $250,000.00 covers much of the administrative costs that will allow the Fund's hotline and website to continue serving Class Members who seek information. This amount is reasonable and is sufficient to protect Plaintiffs against the risk of nonpayment."); *Allapattah Servs., Inc. v. Exxon Corp.*, 2006 WL 1132371, at *18 (S.D. Fla. Apr. 7, 2006) (in connection with imposing a $13,500,000 bond, court held: "Pursuant to Rule 7, the Court will require Westheimer to post an appeal bond in an amount sufficient to cover the damages, costs and interest that the entire class will lose as a result of the appeal."); *In re Checking Account Overdraft Litig.*, 2012 WL 456691, at *3 (S.D. Fla. Feb. 14, 2012) (imposing a $616,338.00

[8] Sibley argues that "Class Plaintiffs have made no showing that these appellate costs will be anywhere near the $150,309.00 that is sought, contrary to Class Counsel's absurd claims and estimates." Sibley Br. at 3. That is wrong. Plaintiffs have quantified their estimates for each element of the bond that they request, and have included declarations in support of the estimates of both attorney's fees and additional administrative costs of the settlement. *See* Prutsman Decl., Opening Br. Ex. L; Garrison Decl, Opening Br. Ex. M. Specifically, with respect to the administrative costs occasioned by the delay the appeal will entail, Class Counsel's estimate of an additional $60,000-$80,000 is based on a declaration from the settlement administrator, and is reasonable.

bond "to ensure payment of costs to the class plaintiffs for defending the appeal and the resulting delay of distribution of funds to the class.").

D. IMPOSING JOINT AND SEVERAL LIABILITY FOR THE BOND AMONG THE OBJECTORS IS CONSTITUTIONAL

Lopez asserts that "Class Counsel's request that objectors be jointly and severally liable for an appeal bond is improper, and any such order would be unconstitutional." Lopez Br. at 15 n.11. However, Lopez fails to cite any authority on point. In fact, "[c]ourts routinely require multiple objectors who are appealing the same order to post a bond jointly and severally. This arrangement allows the objectors to pool their resources, making the bond less onerous for any given appellant." *In re Polyurethane Foam Antitrust Litig.*, 2016 WL 1452005, at *8. Numerous courts have required objectors to post bonds jointly and severally. *See, e.g.*, *id.* ("Accordingly, the appeal bond of $130,463 shall be joint and several."); *Heekin*, 2013 WL 752637, at *4 ("DeJulius, by and through his attorney John W. Pentz and Mr. Paul, c/o attorney Darrell Palmer, are required to each post a bond, jointly and severally in the amount of $250,000.00, which is comprised of: (1) $15,000.00 for the direct taxable costs of the appeal and (2) $235,000.00 for the administrative costs of the delay caused by the appeal.").

Lopez further argues that "[t]here is no basis for Class Counsel's request that an appeal bond be entered against the Objectors' attorneys." Lopez Br. at 15 n.11. However, Lopez's counsel, Christopher Bandas of the Bandas Law Firm, previously has been required to jointly post an appellate bond with his client. *Conroy v. 3M Corp., et al.*, Case No. C00-2810 CW (N.D.Cal. Aug. 10, 2006). Specifically, Judge Wilken ordered The Bandas Law Firm, jointly with one objector, to post an appellate cost bond in the amount of $431,167.00. *See* Docket No. 265 (Order, filed 8/10/2006).

Moreover, 28 U.S.C.A. § 1927 provides a statutory basis for requiring objectors' counsel to post an appellate bond. *See* 28 U.S.C.A. § 1927 ("Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct.").

Alternatively, the Court may rely on its inherent power to impose a bond on counsel pursuant to E.D.MO Local Rule 83-13.03(F), which provides that "[t]he Court on motion or on its own initiative may order any party to file an original bond for costs or additional security for costs in such an amount and so conditioned as the Court by its order may designate." *See Bressler v. Liebman*, 1997 WL 466553, at *9 (S.D.N.Y. Aug. 14, 1997) (in interpreting a nearly identical Local Rule, the court directed "plaintiff and his counsel to post a bond in the amount of $50,000 as security for the defendants' fees and costs," pursuant to S.D.N.Y. Local Rule 54.2[9] and 28 U.S.C. § 1927).

II. NADOLA MUST BE REQUIRED TO POST A RULE 7 BOND

A. FINANCIAL ABILITY

Nadola contends the first *Uponor* factor weighs in her favor because she does not have the financial ability to post the requested bond. Nadola Br. at 1. But an "appellant asserting that the size of the Rule 7 Bond presents a financial barrier to an appeal must, however, make a sufficient showing in support of that assertion." *In re Gen. Elec. Co. Sec. Litig.*, 998 F. Supp. 2d at 151 (citing *Adsani*, 139 F.3d at 76). Conclusory statements, without more, will not suffice. *Id.*

[9] Like E.D.MO Local Rule 83-13.03(F), S.D.N.Y. Local Rule 54.2 provides that "[t]he Court, on motion or on its own initiative, may order any party to file an original bond for costs or additional security for costs in such an amount and so conditioned as it may designate…."

Here, Nadola merely declares that she "do[es] not have the financial ability to post a $150,309 bond (or even one-fifth of such a bond -- $30,061.80)." Nadola Decl. ¶ 2. She provides no documentary evidence to support her claim that she cannot post the requested bond. Nor does she provide any information about the amount that she can afford. Because Nadola's declaration amounts to nothing but a conclusory statement, this factor weighs in favor of imposing an appeal bond on Nadola.[10] *See Miletak v. Allstate Ins. Co.*, 2012 WL 3686785, at *2 n.4 (N.D. Cal. Aug. 27, 2012) ("Thus, insofar as Objector Wilens has 'submitted no financial information to indicate that she is financially unable to post a bond,' this factor weighs in favor of imposing a bond.") (citation omitted).

B. RISK OF NONPAYMENT

Nadola contends that this factor weighs in her favor because she "ha[s] never before objected to a class action settlement," her "unique appeal is well-founded," and "at least one of the law firms representing Plaintiffs is also located in Pennsylvania." Nadola Br. at 2. However, Nadola's representation that she does not have the financial ability to post a portion of the requested bond (without any indication of what she can pay) tips this factor in favor of Plaintiffs. *See Uponor*, 2012 WL 3984542, at *2 ("Although no financial documents were submitted, the Ortega Objectors state 'they do not pose a payment risk' while the Palmer Objectors aver they are unable to post a bond in excess in $1,000…. Therefore, the risk of nonpayment is high.").

Moreover, the fact that one of the law firms representing Plaintiffs is located in Pennsylvania does not solve the problem as only this Court has jurisdiction over payment of costs. *See, e.g., In re Initial Pub. Offering Sec. Litig.*, 728 F. Supp. 2d at 293 ("[T]he Objectors

[10] Nadola also contends that "requiring [her] to post such a bond would create a barrier to [her] well-founded appeal." Nadola Br. at 1. However, "without any showing of her financial hardship, the bond imposed on [an appellant] is not an impermissible barrier to appeal and [the appellant's] arguments to the contrary should be rejected." *Adsani v. Miller*, 139 F.3d 67, 79 (2d Cir. 1998).

are dispersed around the country and none has offered to guarantee payment of costs that might be assessed against them. In the event the Objectors are unsuccessful on appeal, plaintiffs would need to institute collection actions in numerous jurisdictions to recover their costs. As a result, there is a significant risk of non-payment."); *see also In re Currency Conversion Fee Antitrust Litig.*, 2010 WL 1253741, at *2 (S.D.N.Y. Mar. 5, 2010) (finding a significant risk of non-payment where appellants were dispersed around the country, class counsel would need to institute numerous collection actions to recover their costs, and no appellant offered to guarantee payment of the costs that might be assessed against them); *In re Netflix Privacy Litig.*, 2013 WL 6173772, at *3 (N.D. Cal. Nov. 25, 2013) ("In this instance, Objectors all live outside of the Ninth Circuit's jurisdiction. The Court recognizes the potential difficulties and the risk associated with collecting costs from the out-of-state Objectors, and finds that this factor provides reason for the imposition of an appeal bond.").

C. NADOLA'S APPEAL IS MERITLESS

Ms. Nadola's objection to the settlement, based on a purported failure to account for differences in state unfair trade practices statutes when allocating settlement funds to class members from different states, is unfounded under the law of this circuit, and the practical application of the settlement terms here. In the Eight Circuit, class action settlements are afforded deference as a private contract negotiated between the parties, and are presumed to be fair. *Marshall v. Natl. Football League*, 787 F.3d 502, 509 (8th Cir. 2015), *cert. denied*, 136 S. Ct. 1166 (2016).[11]

[11] Contrary to the standard applied by the Eight Circuit, the *Clement* case cited by Ms. Nadola applies Second Circuit law, which sets forth a more rigorous test for settlement approval than this circuit. *See City of Detroit v. Grinnell Corp.*, 495 F.2d 448 (2d Cir. 1974) (describing the nine factors applied by the Second Circuit in determining the fairness of a settlement).

Moreover, courts are not required to make findings concerning the value of different claims, as the settlement "necessarily reflects the parties' pre-trial assessment as to the potential recovery of the entire class, with all of its class members' varying claims." *Id.* at 518-520. Thus, the settlement here accounts for the parties' determination regarding class member payments that are fair across all states, as well as the strengths and weaknesses of the litigation claims overall.[12]

In analyzing similar objections in other cases, courts have found the objections to be utterly without merit. For example, the court in *In re Wireless Tel. Fed. Cost Recovery Fees Litig.*, 2004 WL 3671053, at *1 (W.D. Mo. Apr. 20, 2004), analyzed whether differences among the state laws of New York, Florida, Massachusetts or Illinois meant that the objecting plaintiffs' claims could not be settled on a nationwide basis. The court concluded that the differences were immaterial because the settlement addressed conduct that occurred in each of the 50 states. *Id.* at *15. In addition, the court found the objectors' arguments unavailing because:

> Variations from state-to-state in the form of state law claims would always prevent a nationwide settlement, thereby defeating the efficiencies of the class action settlement mechanism. Such a position is plainly against the public policy favoring class action settlements and courts frequently and routinely approve nationwide class settlements, including consumer class actions involving state law claims.

Id.

Moreover, numerous courts, including in the Third Circuit (the Circuit where Ms. Nadola resides), have certified settlements classes alleging violations of the consumer protection laws of

[12] Nadola's citation to In re New Motor Ve*hicles Canadian Exp. Antitrust Litig.* is distinguishable because there, the Plaintiffs proposed different classes based on differences in state law only after a 20-state damages class had already been certified and other states were "singled out as having no hope of recovery." 2011 WL 1398485, at *4 (D. Me. Apr. 13, 2011). Here, by contrast, no individual state law claims were ever certified, so any argument based on purported differences are speculative, and do not render the Settlement unfair.

numerous states *without requiring differing allocations by state.* In *Sullivan v. DB Investments, Inc.*, 667 F.3d 273 (3d Cir. 2011), the Third Circuit upheld a nationwide settlement where the plaintiffs alleged violations of antitrust and consumer protection laws based on diamond purchases. The *Sullivan* court drew a clear distinction between examination of variances in state laws at trial, and for settlement: "We simply need not inquire whether the varying state treatments of... damage claims at issue would present the type of 'insuperable obstacles'... pertinent to certification of a litigation class.... The proposed settlement here obviates the difficulties inherent in proving the elements of varied claims at trial or in instructing a jury on varied state laws." *Id.* at 303-04.

In addition, the *Sullivan* court squarely addressed and rejected the objection at issue here, namely, whether "differences in state law mandate a differential allocation in the percentage of recovery... which should 'account for the[ ] varying strengths and weaknesses' of consumer claims as informed by the applicable state law...." *Id.* at 326. The *Sullivan* court found that an evaluation of the potential allocation differences based on variations in state laws was entirely speculative, and contrary to the purpose of a class action settlement. *Id.* at 327-28 ("[i]t is purely speculative that claimants from indirect purchaser states could anticipate a greater recovery than claimants from other states.... And only by engaging in the type of fact-intensive merits and choice-of-law analyses that we have rejected could a district court attempt to assay the 'varying strengths and weaknesses' of asserted state claims.... We can find no support in our case law for differentiating within a class based on the strength or weakness of the theories of recovery. Accordingly, we decline to require such an analysis.") (internal citations omitted).[13]

[13] *See also In re Warfarin Sodium Antitrust Lit.*, 391 F.3d 516, 529–30 (3d Cir. 2004) (upholding settlement certification, and rejecting objections relating to differences among eligibility for payments due to variations in state laws or original payment methods); *Desantis v. Snap–On Tools Co.*, 2006 WL 3068584, at *4 (D.N.J. Oct. 27, 2006) (approving class settlement providing

Further, although a state-by-state analysis is not warranted, examining the consumer protection laws of the states in which Ms. Nadola purchased products demonstrates the fairness of the instant settlement. In order to obtain any recovery under New Jersey law, Ms. Nadola would have to succeed in *proving* that Defendant engaged in an unfair trade practice that caused an ascertainable loss. *See Bosland v. Warnock Dodge, Inc.*, 964 A.2d 741, 749 (N.J. 2009). In addition, under Pennsylvania law, Ms. Nadola would have to show justifiable reliance. *See Hunt v. U.S. Tobacco Co.*, 538 F.3d 217, 224-27 (3d Cir. 2008). Thus, payment of any amount in either state would likely require protracted litigation, and is entirely speculative. By contrast, here, the settlement avoids the expense and uncertainty of litigation and provides class member payments that are fair across the class, irrespective of variations in the consumer protection laws.[14]

Accordingly, Nadola's appeal is likely to be found to be lacking in merit, and a bond should be imposed to protect class members from bearing the costs and expenses incurred due to delays in the administration of the Settlement occasioned by the appeal.

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for one of two forms of cash payment to former franchisees); *Varacallo v. Mass. Mut. Life. Ins. Co*., 226 F.R.D. 207, 230–32 (D.N.J. 2005) ("These objectors are not taking into account that a Settlement is a compromise, 'a yielding of the highest hopes in exchange for certainty and resolution.'. . . This Court's role is to determine whether the proposed relief is fair, reasonable and adequate, not whether some other relief would be more lucrative to the Class. 'A settlement is, after all, not full relief but an acceptable compromise.'") (citations omitted).

[14] Even assuming Ms. Nadola litigated and proved her claim, it is unlikely she would obtain a greater recovery than the amount that would be provided to her under this settlement. Here, Ms. Nadola did not provide any proof of purchase, so it is unlikely she would recover actual or treble damages under New Jersey law. *See, e.g.*, N.J. Stat. Ann. § 56:8-19 (1998). Further, under the pro rata settlement increase that claimants will receive here, Ms. Nadola will receive approximately $111, slightly more than the amount to which she would likely be entitled under Pennsylvania law. *See* UTPCPL § 201-9.2 (providing that a civil plaintiff may recover actual damages or $100, whichever is greater).

CONCLUSION

The settlement fund ultimately approved in this case represented hard-fought, arms-length negotiations that will provide substantial valuable relief to the class. The objectors, four of whom routinely appeal without achieving any benefits whatsoever for the class, and one whose appeal here is utterly lacking in merit, vexatiously impede that relief. This Court should not countenance such behavior, but review the objections for what they are. Imposing a bond in this case will provide necessary security to the class as a result of the meritless appeals working their way to the Eighth Circuit. Plaintiffs request that the bond be posted within 14 days of entry of the Court's order and that it be made joint and several. Plaintiffs further request all such other relief that the Court deems necessary and appropriate.[15]

[15] Before concluding the brief, counsel for Plaintiffs wanted to briefly address the claim made at n.1 of the Lopez Opposition (Dkt. No. 237) that Plaintiffs' counsel allegedly acted improperly in filing Ex. G with the opening Memorandum in Support of the Appeal Bond. There was nothing improper in the use of Ex. G, and there was no need to file it under seal. Any confidentiality that may have attached to the document at one time was waived during the use of that document during the Lopez deposition, where counsel for other parties in the action were present and participated at the deposition who had never entered into any confidentiality agreement. Moreover, if Lopez was sincerely concerned about maintaining the document in a confidential status, one would have expected one of Mr. Lopez's many counsel to reach out to Plaintiffs' counsel and request the removal of Ex. G. However, the first time Plaintiffs learned of any potential issues with Ex. G was when they were served with the Lopez Opposition to the bond request, 10 days after Ex. G was filed.

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CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing was served electronically upon all counsel of record in this action via the CM/ECF system on this 18th day of August, 2016 with copies mailed and emailed to the following objectors at the addresses appearing on their notices of appeal where appearing *pro se* or to counsel:

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