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United States District Court,
D. New Jersey.
John M. DEWEY, et al., Plaintiffs,
v.
VOLKSWAGEN OF AMERICA, et al., Defendants.
Jacqueline **Delguercio**, et al., Plaintiffs,
v.
Volkswagen of America, et al., Defendants.

Nos. 07–2249, 07–2361.
March 18, 2013.

No one was present, for the Plaintiffs.

No one was present, for the Defendants.

King Transcription Services, Pompton Plains, NJ, for Audio Operator, Transcription Service.

TRANSCRIPT OF RECORDED OPINION BY THE HONORABLE PATTY SHWARTZ UNITED STATES MAGISTRATE JUDGE
SARA L. KERN, District Judge.

Proceedings

(Commencement of proceedings)

*1 THE COURT: This matter has come before the Court by way of plaintiffs' motion for an order directing the appellant objectors to post an appeal bond pursuant to Fed. R.App. P. 7. For the reasons set forth in the Opinion, the appellant objectors shall post an appeal bond in the amount of $10,000.

This **class action** concerns an allegedly defective pollen filter gasket areas and sunroof drains on various Volkswagen and Audi vehicles. On December 14, 2012, the Court entered orders granting final approval of a class settlement and awarding fees and expenses to class counsel. ECF Numbers 420 and 421. For the procedural history of this matter preceding final approval of the settlement, the Court incorporates by reference its summary of the procedural history in the Opinion dated December 14, 2012. ECF Number 419.

On January 10, 2013, Objectors David T. Murray and Jennifer B. Murray filed a notice of appeal. ECF Number 426.

On January 11, 2013, Objector Peter Braverman filed a notice of appeal. ECF Number 427.

On January 25, 2013, plaintiffs filed the present motion for an order directing Appellant Objectors David T. Murray, Jennifer B. Murray, and Peter Braverman to post an Proceedings 3 appeal bond pursuant to Fed. R.App. P. 7.

On February 5, 2013, the Murray Objectors filed a brief in opposition to plaintiffs' motion. ECF Number 431. And Braverman filed a letter brief joining in Murray's arguments. ECF Number 432.

On February 12, 2013, plaintiffs filed a reply brief in further support of their motion. ECF Number 433.

Plaintiffs argue that the Court should require the appellant objectors to post a $25,000 bond to ensure payment of costs incurred by the class should they prevail. Plaintiffs note that the Court previously ordered a $25,000 bond in the 2010 appeal in this action. They argue that courts have "aggressively imposed bonding requirements" where objectors pursue meritless appeals, challenging **class action** settlements. They further argue that the appellant objectors "are likely driven by improper motives," namely to extract a settlement from class counsel and to obstruct class

counsel's fee award due to personal animus.

In opposition, the Murray Objectors argue there has been no showing that the appellant objectors would not readily pay an award of costs in the range of $1927, the cost awards resulting from the successful appeal of the 2010 settlement in this case. They contend that costs on appeal will be lower than in 2010 and characterize their appeal as involving two legal issues: One, whether the Court applied the correct law in evaluating class counsel's fee award; and two, whether the undersigned had jurisdiction to approve the settlement and fee award. They argue that a $25,000 appeal bond is excessive, that the actual costs of prosecuting an appeal are significantly lower, and that an excessive bond would improperly chill potential appeals. Braverman joins in these arguments and further contends that counsel for the appellant objectors have the resources to satisfy any anticipated cost award resulting from an unsuccessful appeal.

***2** In reply, plaintiffs argue that there is a risk that a cost award may go unpaid because the Murray Objectors are out of state and that Braverman has a documented animus toward class counsel. Plaintiffs further argue that their probable costs on appeal will be greater than the appellant objectors' estimates, that total costs from the 2010 appeal were $12,351.58, and that the costs here will be at least as great. Plaintiffs contend that a $25,000 bond is "standard" in this Circuit in connection with appeals of complex litigation settlements.

Fed. R.App. P. 7 provides that "in a civil case, the district court may require the appellant to file a bond or provide other security in any form and amount necessary to ensure payment of costs of appeal." Fed. R.App. P. 7. The purpose of such bonds is to "protect the rights of appellees...." *In re Insurance Brokerage,* MDL No. 1663, Civ. No. 04–5184, 2007 WL 1963063 at *2 (D.N.J. July 2, 2007), "against the risk of non-payment by an unsuccessful appellant." *In reAOL Time Warner Inc., SEC, and ERISA Litigation,* MDL No. 1500, Civ. No. 02–5575, 2007 WL 2741033 at *2 (S.D.N.Y. September 20, 2007). In some cases the bonds are needed to provide "some level of security to [the appellees] who have no assurances that appellants have the ability to pay the costs and fees associated with opposing their appeals." *In reInsurance Brokerage,* 2007 WL 1963063 at *2.

The decision to require a bond and its amount is subject to the discretion of the district court. *See* the Advisory Committee Note to the Fed. R.App. P. 7. The "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." *Adsani v. Miller,* 139 F.3d 67, 79 (2d Cir.1998) (internal quotation marks and citations omitted). *See also Federal Prescription Services Inc. v. American Pharmaceuticals Association,* 636 F.2d 755, 757 n. 2 (D.C.Cir.1980).

The following factors have guided courts when they exercise their discretion regarding whether to require a bond and its amount: (1) whether the amount of the bond is "necessary to assure adequate security," *In reDiet Drugs Products Liability Litigation,* MDL 1203, Civ. No. 99–20593, 2000 WL 1665134 at 5 (E.D.Pa. November 6, 2000); (2) the risks that the appellant will not pay the costs if it loses the appeal, *In reInitial Public Offering Securities Litigation,* 728 F.Supp.2d 289, 292 (S.D.N.Y. July 20, 2010); *Fleury v. Richemont North America Inc.,* Civ. No. 05–4525, 2008 WL 4680033 at *6 (N.D.Cal. October 21, 2008); *In reAOL,* 2007 WL 2741033 at *2; (3) the appellant's financial ability to post the bond, *In re IPO,* 728 F.Supp.2d at 292; *Fleury,* 2008 WL 4680033 at *6; and (4) whether the amount of the bond will effectively preclude pursuit of the appeal; *In reDiet Drugs,* 2000 WL 1665134 at *5.

While it is tempting to also consider whether the appeal is frivolous when deciding whether to require a bond, and cases such as *Adsani* suggest that the potential outcome of the appeal can inform the bond

decision, "the court of appeals is the best forum to litigate the merits of the appeal and to account for any frivolity that harms the [appellees]." *In reAmerican Investors Life Insurance Company Annuity Marketing & Sales Practices Litigation*, 695 F.Supp.2d 157, 166 (E.D.Pa.2010) (internal citations omitted). "Rule 7 was not intended to be used as a means of discouraging appeals, even if perceived to be frivolous," *In* re American Investors, 695 F.Supp.2d at 166, as the appellee has "adequate remedies available to it in the court of appeals" to seek relief for having to defend a frivolous appeal. *In reDiet Drugs*, 2000 WL 1665134 at *5, Fed. R.App. P. 38. *See also Vaughn v. American Honda Motor Company*, 507 F.3d 295, 299 (5th Cir.2007). As the *Vaughn* court observed, 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." *Vaughn*, 507 F.3d at 300 (internal citations omitted).

***3** Considering each factor, the Court finds that a bond is warranted. As to Factors 1 and 2, a bond is necessary to assure adequate security, and there is a risk that plaintiffs will have difficulty collecting costs from the appellant objectors if the appeal does not succeed. There is nothing before the Court demonstrating that the appellant objectors have the intention of satisfying any cost award. While Braverman contends that "counsel for both objectors clearly have the finances and wherewithal to pay," *see* Mr. Braverman's letter, any cost award will be entered against appellant objectors, not their counsel. *See* Fed. R.App. P. 39(a)(1). The appellants have made no representation that they themselves would pay the costs if they lose the appeal, which supports the need for a bond. *SeeIn re Currency Conversion Fee Antitrust Litigation*, MDL 1409, Civ. No. M 21–95, 2010 WL 1253741 at *2 (S.D.N.Y. March 5, 2010). In fact, Braverman's representation that *counsel* have the wherewithal to pay, further indicates that these objections and appeals are being driven by counsel, not the named objectors. The Court has previously observed that Braverman's "motivation at least in part is simply to disrupt a fee award to class counsel in furtherance of hostilities between class counsel and their former partner ... rather than improve the benefits to the class under the settlement." *See* the Transcript of the Intervention Opinion at 5. The Court further observes that the Murray Objectors filed a notice of appeal as to the 2010 settlement in this case, but subsequently chose not to pursue the appeal. *See* Order of U.S.C.A. Dismissal, dated January 13, 2011, ECF Number 307. These facts suggest that the appellant objectors themselves, as distinct from their counsel, are not fully invested in pursuing their appeal on the merits. The appellant objectors' lack of personal interest in the appeal presents a risk of non-payment and favors requiring a cost bond. Moreover, the Murray Objectors are located outside of this district, and if costs are awarded against them, plaintiffs would need to institute collections actions against them in their home state to recover costs. This fact further supports the need for an appeal bond to mitigate the risk of non-payment. *SeeIn reIPO*, 728 F.Supp.2d at 293 n. 7.

As to Factors 3 and 4, the appellants have not provided any information that indicates they are financially unable to post a bond or that the requirement that a bond be posted would preclude their appeal. *Fleury*, 2008 WL 4680033 at *7. Silence on this topic is sometimes construed as showing that the appellant is not arguing it lacks an ability to post a bond. *In re AOL*, 2007 WL 2741033 at *2; *Baker v. Urban Outfitters*, Civ. No. 01–5440, 2006 WL 3635392 at *1 (S.D.N.Y. December 12, 2006). Thus, whether viewed as a lack of proof of financial inability or a decision not to assert a lack of ability to pay, the record does not show that a bond would impose an "impermissible barrier to appeal." *Adsani*, 139 F.3d at 79.

***4** Plaintiffs further argue that because the Murray Objectors and their counsel are "professional ob-

jectors," the Court should require a bond. While other courts have described the professional objectors in less than flattering terms and many courts have required such objectors to post bonds, *seee.g. In re IPO,* 728 F.Supp.2d at 295; *In re Cardizem CD Antitrust Litigation,* 391 F.3d 812, 818 (6th Cir.2004); *In re-Heritage Bond Litigation,* MDL No. 02–ML–1475 DT, 2005 WL 2401111 at *7 (C.D.Cal. September 12, 2005); *In re American Investor Life,* 695 F.Supp.2d at 167; *In re Diet Drugs,* 2000 WL 1665134 at *5, the Court declines to require a Rule 7 cost bond on this basis alone. Rather, given the absence of any indicator they cannot afford an appropriate bond, the lack of assurance that the costs will be paid if their appeal is lost, and the fact that the Murray Objectors are located out of state which will make collection challenging, the Court finds that a bond is warranted.

Having found that a bond is appropriate, the Court now turns to the issue of the amount of the bond. *Seee.g. Fleury,* 2008 WL 4680033 at *8; *In reDiet Drugs,* 2000 WL 1665134 at *5. The amount should cover the costs that are potentially recoverable. Under Rule 7, recoverable costs are "those to be taxed against an unsuccessful litigant under Fed. R.App. P. 39"; *Hirschensohn v. Lawyers Title Insurance Corp.,* Civ. No. 96–7312, 1997 WL 307777 at *1 (3d Cir. June 10, 1997); *In reAmerican President Lines,* 779 F .2d 714, 716 to 717 (D.C.Cir.1985).

Rule 39 covers costs as those associated with "printing and producing copies of briefs, appendices, records, court reporter transcripts, premiums or costs for supersedeas bonds or other bonds to secure the rights pending appeal and fees for filing the notice of appeal." *In re Insurance Brokerage,* 2007 WL 1963063 at *1. In the context of cost bonds under Rule 7, courts have not included administrative costs incurred while the appeal is pending, *Nicholas v. SmithKline Beecham Corp.,* Civil No. 00–6222 at *1 n. 2 (E.D.Pa. November 15, 2005) attached to Plaintiffs' Brief at ECF 249. Damage to the class as a result of the appeal are its frivolity, *In re* American Investors Life Insurance, 695 F.Supp.2d at 163; Fleury, 2008 WL 4680033 at *8; accord *In re* IPO, 728 F.Supp.2d at 297; or attorneys' fees, Hirschensohn, 1997 WL 307777 at *1. *See alsoIn re* Insurance Brokerage, 2007 WL 1963063 at *3–5; *In re* Diet Drugs, 2000 WL 1665134 at *4–5; *In re* American Investors, 695 F.Supp.2d at 164–65 (citing *McDonald v. McCarthy,* 966 F.2d 112, 116 (3d Cir.1992)).

While it is the appellant objectors' position that no bond should be required, they refer to the tax costs of 2700 and 1900 for two groups of successful objectors to the 2010 settlement and argue that costs will be lower on this appeal because the legal issues are narrower. Plaintiffs on the other hand, note that the total costs as to all parties to the 2010 appeals was $12,351.58, and that those costs were allocated among all of the parties and objectors due to the presence of cross-appeals. They further contend that the $12,351.58 figure is conservative because it does not include costs for filing briefs and reflects a 20 to 25 discount from the printing company that may not be available on the present appeal. Having considered these arguments and the record of the 2010 appeal, the Court finds that a bond in the amount of $10,000 is appropriate to ensure plaintiffs' reimbursement for costs if they prevail, without improperly precluding the appellant objectors' appeal. The record demonstrates that for the 2010 appeal, total costs for preparation of the joint and supplemental appendices as well as one objector's brief amounted to $12,351.58. ECF Number 43, Exhibits A and B to Mr. Freeman's certification. Although plaintiffs note that this figure does not include plaintiff and defendant's briefs, plaintiff will only incur costs for the preparation of their own brief, not that of the appellant objectors. Thus, the costs associated with the preparation of a single brief are an appropriate proxy for plaintiffs' costs to prepare their brief. The Court must also consider whether the scope of appeal as compared to the 2010 appeal renders the $12,351.58 figure too small or too great. The appellant objectors characterize this appeal as narrower in scope concerning only the issues of choice of

law as to attorneys' fees and the jurisdiction of the undersigned to approve the settlement. *See* the Opposition Brief at 2. Plaintiffs, on the other hand, contend that the costs will be at least as great as the 2010 appeal because the appellant objectors have approved the "fairness of the settlement" and the attorneys' fees and costs award. *See* the Plaintiffs' Reply Brief at 3. In addition, plaintiffs state that Braverman's counsel notified defendants that they "were also appealing the denial of their motion to intervene." *Id.* at 3 n. 4. Notably, Braverman may not have preserved this issue for appeal.

***5** In its opinion on the Braverman motion to intervene, the Court observed that a "motion for leave to intervene is non-dispositive and may be heard before a magistrate judge, even absent consent of the parties." Transcripts of the Intervention Opinion at 3, ECF Number 406 (citations omitted). The Court made clear that it would "treat the motion like any other pretrial, non-dispositive motion pending before it. Any objections to the decision of this Court's may be taken [to the district court] pursuant to 28 U.S.C. § 636(b)(1)(A) and L. Civ. R. 72.1(c)(1)(A)." *Id.* at 3. Braverman did not file an objection or notice of appeal to the district judge within 14 days as required by L. Civ. R. 72.1(c)(1)(A)(1), and the failure to timely appeal to the district judge constitutes a waiver of the right to appeal. *See United States v. Polishan*, 336 F.3d 234, 240 (3d Cir.2003). Thus, this issue may not be eligible for review.

In any event, the Court finds that the plaintiffs have not shown that the present appeal will be broader or cause them to incur more costs than the 2010 appeal. In the 2010 appeal, both the fairness of the settlement and the attorneys' fees awards were at issue. Here, it appears from the record that the only issues on appeal will likely be the calculation of the reasonable attorneys' fees and the jurisdiction of the undersigned. Because the issues in the present appeal will not exceed and may, in fact, be narrower in scope than in the 2010 appeal, it is reasonable to infer that costs associated with present appeal will somewhat be lower. As a result, the Court finds that a bond in the amount of $10,000 is a reasonable approximation of the plaintiffs' costs, should they prevail on appeal, and will require that the appellant objectors to jointly post a bond in that amount pursuant to Fed. R.App. P. 7 under which all objector groups will be jointly and severally liable.

For all of these reasons, the motion that the appellant objectors post an appeal bond pursuant to Fed. R.App. P. 7 is granted.

A form of Order consistent with this Opinion will be issued.

Certification

I, SARA L. KERN, Transcriptionist, do hereby certify that the 15 pages contained herein constitute a full, true, and accurate transcript from the official electronic recording of the proceedings had in the above-entitled matter; that research was performed on the spelling of proper names and utilizing the information provided, but that in many cases the spellings were educated guesses; that the transcript was prepared by me or under my direction and was done to the best of my skill and ability.

I further certify that I am in no way related to any of the parties hereto nor am I in any way interested in the outcome hereof.

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