UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE WEATHERFORD INTERNATIONAL SECURITIES LITIGATION	11 Civ. 1646 (LAK) (JCF) CLASS ACTION

PLAINTIFFS' SUR-REPLY IN SUPPORT OF (I) MOTION FOR FINAL APPROVAL OF SETTLEMENT AND PLAN OF ALLOCATION; AND (II) LEAD COUNSEL'S MOTION FOR AN AWARD OF ATTORNEYS' FEES AND REIMBURSEMENT OF LITIGATION EXPENSES

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Plaintiffs respectfully submit this sur-reply in further support of: (i) Plaintiffs' Motion for Final Approval of Class Action Settlement and Approval of Plan of Allocation (ECF No. 250) and (ii) Lead Counsel's Motion for an Award of Attorneys' Fees and Reimbursement of Litigation Expenses (ECF No. 252).[1] This sur-reply is submitted pursuant to the Court's June 25, 2014 order endorsing Plaintiffs' request for an extension of certain deadlines set forth in the Court's April 1, 2014 Notice Order (the "June 25, 2014 Order"). *See* ECF No. 267.

I. INTRODUCTION

On May 27, 2014 Plaintiffs submitted opening briefing and supporting settlement materials to the Court (ECF Nos. 250-254) (collectively, the "Opening Papers") establishing that: (i) the proposed Settlement is fair, reasonable and adequate under *Detroit v. Grinnell Corp.*, 495 F.2d 448 (2d Cir. 1974); (ii) the proposed Plan of Allocation provides a fair and reasonable method for equitably apportioning and distributing the net settlement proceeds among eligible Settlement Class Members; and (iii) Lead Counsel's request for attorneys' fees and expenses is fully supported by the factors set forth in *Goldberger v. Integrated Resources, Inc.*, 209 F. 3d 43 (2d Cir. 2000). Following the receipt of just two individual objections and a handful of exclusions, Plaintiffs submitted a Reply brief on June 20, 2014, to address the objections and update the Court on the status of the notice administration process. ECF No. 263.

Since the filing of Plaintiffs' Opening Papers and, in large part, in response to belated requests for Notices from seven broker/nominees (detailed in Lead Counsel's June 20, 2014 letter to the Court), the Court-approved claims administrator, The Garden City Group, Inc. ("GCG"), has mailed over 335,000 *additional* Notices to potential Settlement Class Members. In

[1] Capitalized terms used herein shall have those meanings contained in the Stipulation of Settlement and Release dated January 28, 2014 (ECF No. 240-1). Unless otherwise noted, all emphasis is added and internal citations and footnotes are omitted.

response, Lead Counsel has received just one additional request for exclusion (0.0003% of the additional Notices mailed) and one objection from Ralph L. Cochran (the "Cochran Obj.") (Ex. A).[2] As discussed herein, Mr. Cochran's generalized opinions that trading losses should never be compensable under the securities laws, however, says nothing about the fairness of the proposed Settlement. *See* Cochran Obj. at 1 ("any investor, trader, or owner should be responsible for their own gains or losses"). Mr. Cochran concedes that he made money on his Settlement Class Period Weatherford transactions. *Id*. Thus, the reaction of the Settlement Class during the extended deadlines endorsed by the Court further buttresses the reasonableness of the Settlement, Plan of Allocation and request for attorneys' fees and expenses.

In total, in response to Plaintiffs' comprehensive notice program including nearly *one million* direct-mail Notices and publication in widely circulated periodicals and on the dedicated settlement website, not a ***single*** institutional investor has objected. Additionally, only three individual objections have been received, representing a minuscule 0.0012% of the approximately 502.4 million shares of potentially damaged Weatherford common stock acquired during the Settlement Class Period.[3] Moreover, only 15 requests for exclusion have been submitted, further underscoring the overwhelmingly positive reaction of the Settlement Class. *See* Second Supplemental Affidavit of Jose C. Fraga (Ex. B), submitted on behalf of GCG, at ¶9.

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[2] All "Ex." references are to the exhibits attached to the Declaration of Eli R. Greenstein in Support of Plaintiffs' Sur-Reply in Support of (I) Motion for Final Approval of Settlement and Plan of Allocation; and (II) Lead Counsel's Motion for an Award of Attorney's Fees and Reimbursement of Litigation Expenses, filed concurrently herewith.

[3] Only two of the objectors provided information regarding their purchases of Weatherford common stock. From the information supplied, these objections represent a total of 6,100 shares, none held by institutional investors. *See, e.g., In re AOL Time Warner, Inc. Sec. & ERISA Litig.*, 2006 WL 903236, at *10 (S.D.N.Y. 2006) (the fact that "not a single institutional Class Member objected to the Settlement" supported its approval); *In re Sumitomo Copper Litig.*, 189 F.R.D. 274, 281 (S.D.N.Y. 1999) (the fact that fewer than 1% of class members requested exclusion "strongly favor[ed] approval of the proposed settlement").

In addition, despite the fact that the Court's June 25, 2014 Order extending deadlines was confined to "recipients of late notice," professional objector Jeff M. Brown, who previously objected to the Settlement on June 11, 2014, has improperly submitted a "reply" without leave of Court (the "Brown Reply") (ECF No. 271). As detailed below, Mr. Brown's reply, which mainly regurgitates the same groundless arguments made in his objection, is premised on a fundamental misunderstanding of the procedural posture and substantive efforts in this Action.[4] Indeed, had Mr. Brown taken the time to fully review either the Opening Papers or the extensive docket in this case, he would have seen that, contrary to his assertions that "the litigation has not progressed beyond the pleading stage," at the time the Settlement was reached, Plaintiffs had substantially completed fact discovery, including, *inter alia*, (i) the review and analysis of approximately 2.3 million pages of documents produced by Defendants and various non-party witnesses; (ii) the filing of seven motions to compel further discovery; and (iii) the taking or defending of 14 depositions with 10 additional depositions scheduled for the three-week period remaining in the discovery period.

Simply put, the developments and reaction of the Settlement Class since Plaintiffs' prior submissions serve only to reinforce the fairness, reasonableness and adequacy of the Settlement, Plan of Allocation and request for fees and expenses.

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[4] Mr. Brown's objection, as well as the objection from Stephen Schoeman, were fully addressed in Plaintiffs' Reply on June 20, 2014. *See* ECF No. 263. Since Plaintiffs' Reply, Lead Counsel has received three additional letters from Mr. Schoeman (Exs. C, D and E). Lead Counsel has contacted Mr. Schoeman to discuss his objection and Mr. Schoeman has indicated that Lead Counsel has answered all of his questions to his satisfaction. *See* Declaration of Jennifer L. Enck Regarding Objection of Stephen Schoeman, Ph.D (Ex. F).

II. ARGUMENT

A. Mr. Brown's Reply Is Meritless

On July 17, 2014, without seeking the Court's leave, Mr. Brown filed an 11-page "Reply" to Plaintiffs' Reply. The majority of the Brown Reply is devoted to rehashing the same unsubstantiated arguments raised in his objection, which were fully addressed in Plaintiffs' Reply (ECF No. 263 at 3, 5-20). The remainder consists of generalized arguments based on erroneous factual premises, making clear that Mr. Brown, who has a history of filing meritless objections, has not troubled himself to fully read the Opening Papers or to conduct even a cursory review of the ample record in this Action.

1. Mr. Brown Is a Professional Objector Being Advised by Undisclosed Counsel

As demonstrated in Plaintiffs' Reply (ECF No. 263 at 5-6), Mr. Brown is a serial objector[5] who has lodged numerous objections in recent securities class actions, many if not all of which have been either overruled or voluntarily withdrawn for lack of standing.[6] Despite Mr. Brown's failure to identify any attorney (other than himself) involved in his previously filed objection in this case, the Brown Reply now cryptically states in a footnote that he has "sought and obtained assistance from an attorney in preparing this reply" and "does not seek any

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[5] "[P]rofessional objectors can levy what is effectively a tax on class action settlements, a tax that has no benefit to anyone other than to the objectors." *Barnes v. FleetBoston Fin. Corp.*, 2006 WL 6916834, at *1 (D. Mass. 2006). *See also In re Initial Pub. Offering Sec. Litig.*, 721 F. Supp. 2d 210, 215 (S.D.N.Y. 2010) ("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").

[6] *See, e.g., In re Verifone Holdings, Inc. Sec. Litig.*, Case No. 3:07-cv-06140-EMC (N.D. Cal. Dec. 30, 2013) (ECF No. 334) ("*Verifone*"); *In re Sanofi-Aventis Sec. Litig.*, Civil Action No. 1:07-cv-10279-GBD (S.D.N.Y. Dec. 16, 2013) (ECF No. 273) ("*Sanofi-Aventis*"); *In re SunPower Sec. Litig.*, Case No. 09-CV-5473-RS (JSC) (N.D. Cal. June 12, 2013) (ECF No. 264) ("*SunPower*"). Copies of Mr. Brown's objections in *Verifone*, *Sanofi-Aventis* and *SunPower* and related orders were submitted with Plaintiffs' Reply. *See* ECF Nos. 264-6 through 264-12.

advantage by submitting this reply [himself]." Brown Reply at 11. Mr. Brown does not disclose the identity of the "attorney," or explain what "advantage" he is referring to. Given Mr. Brown's history of teaming up with other professional attorney objectors—one of whom has been repeatedly implicated in bad-faith conduct—Mr. Brown's failure to provide full disclosure raises questions about Mr. Brown's motives here.

In *Verifone* and *SunPower*, for example, Mr. Brown was represented by Joseph Darrell Palmer, who has been admonished by several courts for ghost-representing objectors without making an appearance, as well as for his pattern of frivolous, bad-faith objections. *See, e.g.*, *Heekin v. Anthem, Inc.*, 2013 WL 752637, at *3 (S.D. Ind. 2013) (finding that objector "appears to be represented by [Darrell Palmer] who has not entered an appearance in this case" and that Mr. Palmer's "vexatious conduct" was "in bad faith and also potentially violative of local and ethical rules."); *In re Uponor, Inc., F1807 Plumbing Fittings Prods. Liab. Litig.*, 2012 WL 3984542, at *3 (D. Minn. 2012) (finding bad faith conduct where the objectors "appear to be represented by an attorney [Darrell Palmer] who has not entered an appearance in this case and who is believed to be a serial objector to other class-action settlements").[7]

In light of Mr. Brown's pattern of filing baseless objections and his connection to other professional objector attorneys, his attempt to avoid disclosing information regarding his prior objections to class action settlements during the past five years—in violation of this Court's

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[7] Mr. Palmer is also currently facing disciplinary charges by the State Bar of California for misrepresenting to various courts that he has never been the subject of disciplinary actions when, in fact, he was suspended from the bar following a felony conviction in Colorado. *See In the Matter of Joseph Darrell Palmer*, No. 125147, Case No. 12-O-16924 (Ex. G). In addition, in *Sanofi-Aventis*, Mr. Brown was represented by Forrest S. Turkish. Mr. Palmer and Mr. Turkish are no strangers to the process of objecting to class action settlements and filing subsequent appeals. *See, e.g.*, Exs. H through K for documents filed in *In re Merck & Co., Inc. Vytorin/Zetia Sec. Litig.*, No. 13-4327 (3d Cir.) (Mr. Palmer representing Mr. Turkish's client on appeal), *In re Schering-Plough Corp./Enhance Sec. Litig.*, No. 13-4328 (3d Cir.) (same), *In re Bank of America Corp. Sec., Deriv. & ERISA Litig.*, No. 13-1830 (2d Cir.) (same), and *In re American Int'l Group. Sec. Litig.*, No. 13-1929 (2d Cir.) (same).

Notice Order—is not surprising. Furthermore, contrary to Mr. Brown's assertions, this Court did not "err[]" in requiring such basic information, nor did such a requirement "interfere" with Mr. Brown's right to object. Brown Reply at 9. The required information simply provides the Court with context to assess the legitimacy and motives of potential objectors—particularly those who attempt to hold up settlements to extract unearned fees. *See, e.g.*, *In re Lehman Bros. Mortgage-Backed Sec. Litig.*, No. 09-MD-2017, Sept. 9, 2013 Hrg. Tr. at 7:3-6 (Ex. L) (Kaplan, J.) ("I understand your point about not providing an unreasonable incentive to people to try to engage in a hold-up by using the leverage you speak of and that, to a point, is a valid concern…"). In fact, this Court has required the same information from objectors in several recent settlements. *See, e.g.*, *In re Lehman Brothers Equity/Debt Sec. Litig.*, No. 08-CV-5523-LAK (S.D.N.Y.) (Dec. 15, 2011, ECF Nos. 306, 307; Nov. 27, 2013, ECF No. 542) (Exs. M, N and O).[8] Mr. Brown's refusal to provide basic information regarding his prior objections is both a violation of the Court's Notice Order and a transparent attempt to avoid his well-known history as a professional objector. It is yet another reason to reject his baseless objection in this Action.

2. Mr. Brown's Arguments Regarding Lead Counsel's Work In This Action are Based on Erroneous Factual Assumptions

Mr. Brown's reply is premised upon his mistaken assumption that this "litigation has *not progressed beyond the pleading stage*." Brown Reply at 1. From there, Mr. Brown extrapolates that the only work done by Plaintiffs, and the only risk borne by Lead Counsel, occurred prior to filing the Amended Complaint in August 2011. Had Mr. Brown (or his unidentified attorney) performed even a cursory review of the Reply, the Opening Papers, or the docket in this case, however, he would have discovered a robust record of years of hard-fought discovery, motion

[8] Similarly, Mr. Brown's reference to "Rule 23's purposes" and his attempt to equate the Court's Notice Order to "discovery of absent class members" are unfounded. Brown Reply at 9-10. Providing a simple list of prior objections does not amount to "discovery," and no discovery requests have been served on Mr. Brown.

practice and Court orders reflecting the substantial work and risk taken on by Lead Counsel. ECF Nos. 250-254. Rather than conduct this rudimentary due diligence prior to filing his objection, Mr. Brown admits that he ignored most of the record in this case and "rel[ied] on the summary in the [August 2011] Amended Complaint," because it purportedly is "the only real factual information available to class members" in assessing the risks and work done by Lead Counsel. Brown Reply at 1. This is simply untrue. The Settlement materials provided to Mr. Brown (including a detailed 53-page declaration) and the publicly available litigation record provide a comprehensive roadmap of Lead Counsel's efforts and the significant risks of litigation. Indeed, Mr. Brown had access to no less than seven discovery orders issued by Judge Francis—many of which are published—containing extensive summaries and discussion of evidence generated through Plaintiffs' successful motion practice. Mr. Brown and his counsel have utterly disregarded this record.

Based on the same erroneous premise, Mr. Brown also argues that Lead Counsel "overstate the complexity of the work done and downplay the contribution made by the SEC, the DOJ and other third parties in developing their case." Brown Reply at 1. As evidence, Mr. Brown simply provides a string of paragraphs from the Amended Complaint that reference the "SEC" and "DOJ" without any meaningful analysis. But the paragraphs referenced by Mr. Brown, most of which refer to alleged FCPA violations, the Iraq oil-for-food program, and business ventures in sanctioned countries, merely provided background information regarding Weatherford's past conduct. Nor did the information gleaned from analyst reports and the news media—most of which was provided in connection with alleging loss causation—meaningfully assist Plaintiffs in pleading and proving fraud. To the contrary, Lead Counsel's success was the result of hard-fought discovery efforts, including establishing Defendants' waiver of attorney-client privilege and work product protections over the vigorous opposition of two law firms.

Mr. Brown's attempt to trivialize the information provided by Plaintiffs' confidential witnesses ("CWs") as "anecdotal" similarly fails. Brown Reply at 6. In fact, the CW allegations—particularly those attributed to CW2—were crucial in adequately alleging a strong inference of scienter under the PSLRA. Indeed, the Court's November 2012 order explicitly highlighted the CW2 allegations as reinforcing scienter. *See* ECF No. 103 at 22 ("While discovery ultimately may undermine the probative value of the supposed deficiencies referenced by CW2, the complaint is sufficient in this respect to survive a motion to dismiss."). Accordingly, Mr. Brown's assertions do not undermine the Settlement or fee request.

3. Mr. Brown's Attacks on Lead Counsel's Staff Attorneys Are Baseless

The Brown Reply recycles his prior objection regarding Staff Attorney time, contending that Lead Counsel should not have "claim[ed] such a high lodestar for the work done by the staff attorneys." Brown Reply at 8. In response, Plaintiffs' Reply demonstrated that the Staff Attorneys' work was crucial to the success of the case and that even if Lead Counsel's Staff Attorney lodestar incurred for pure document review was reduced or *eliminated entirely*, or the hourly rates for such time was reduced, Lead Counsel's requested fee would still be well within the Circuit's accepted range of multipliers and in accord with this Court's most recent fee awards. *See* ECF No. 263 at 12-14; Corrected Exhibit P (ECF No. 268-1). The Brown Reply fails to address these inconvenient facts. Mr. Brown also speculates without any factual support that the rates charged for Staff Attorneys "seem" inflated. Brown Reply at 9. Yet, he does not provide any legal authority or basis for comparison, nor does he address the fact that the hourly rates for Lead Counsel's Staff Attorneys have been accepted by this Court and numerous others in the district. *See* ECF No. 263 at 12-14.

Further, Mr. Brown's argument is based on the same false assumption that this Action has "not progressed beyond the pleading stage" and, thus, the entirety of the Staff Attorneys' work must have consisted of investigation for purposes of preparing the Amended Complaint. *See, e.g.*, Brown Reply at 9 ("the Complaint provides the only tool available to class members to analyze their investigative work. The analysis above indicates that much of the legal work involved reviewing, summarizing and synthesizing analyst calls, analyst reports, SEC and DOJ correspondence and news reports."). Again, Mr. Brown is simply mistaken. As both the Opening Papers and Plaintiffs' Reply demonstrate, the work done by Lead Counsel's Staff Attorneys was a central, indispensable facet of Lead Counsel's extensive discovery efforts and development of the evidence used throughout the Action. In addition to reviewing and analyzing over 2.3 million pages of documents received in discovery, many of which involved complex tax accounting issues, Lead Counsel's Staff Attorneys devoted approximately 60% of their time to integral tasks such as: developing witness files and evidence for depositions, motion practice, and discovery negotiations with Defendants; identifying and analyzing documents to be utilized in amended pleadings; and drafting complex legal and factual memoranda regarding evidence developed during discovery. ECF No. 254 at 18-19, 44; ECF No. 263 at 12-14.

Finally, Mr. Brown's derisive references to Lead Counsel's Staff Attorneys as "second class citizens" and "lowly staff attorneys" (Brown Reply at 8-9) are not only at odds with the factual record, but also serve to severely discredit and belittle these members of the bar without any basis. Indeed, Lead Counsel's Staff Attorneys attended respected law schools (including, among others, the University of Pennsylvania Law School and Temple University Beasley

School of Law) and are highly experienced attorneys, with an average of *nine years* of experience between them.[9] These attorneys have worked extremely hard to secure a substantial recovery for the Settlement Class, and the fact that they have positions as Staff Attorneys at this juncture of their careers should not detract from their tremendously valuable contributions in this Action. Accordingly, for the reasons set forth in Plaintiffs' Reply and those discussed above, Mr. Brown's objection should be rejected.

B. The Cochran Objection Should be Overruled

Mr. Cochran's letter "protest[s] this settlement in all respects" (Cochran Obj. at 1); however, his basis for "protesting" has nothing to do with the Settlement, the Plan of Allocation or the request for attorneys' fees and expenses. According to the transactional data provided with his letter, Mr. Cochran *made money* on his transactions in Weatherford common stock and is not eligible to receive a recovery under the proposed Plan of Allocation. Mr. Cochran's complaint with "this settlement" appears to be driven by his overall objection to securities class action suits in general, based on nothing more than speculation that he "might" have made more money if the Action had not been brought. There is no basis in the record to support such a theory. In any event, Mr. Cochran's personal opinion does not suffice to undermine the fairness, adequacy or reasonableness of the proposed Settlement and should be rejected.

III. <u>CONCLUSION</u>

For the foregoing reasons and those set forth in Plaintiffs' Opening Papers and Reply, Plaintiffs respectfully request that the Court approve: (i) the Settlement; (ii) the Plan of Allocation; (iii) Lead Counsel's request for attorneys' fees and expenses; and (iv) Plaintiffs' request for costs and expenses incurred in connection with representing the Settlement Class.

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9 Biographies for all Staff Attorneys employed by the firm were submitted with Plaintiffs' Opening Papers (*see* ECF No. 254-5) and appear on the firm's website.

Dated: August 4, 2014

Respectfully submitted,

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CERTIFICATE OF SERVICE

On this 4th day of August, 2014, I hereby caused a true and correct copy of the foregoing document to be served via Overnight Mail upon:

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<u>Addendum of Unpublished Authorities</u>

In re AOL Time Warner, Inc. Sec. & ERISA Litig.,
No. MDL 1500, 2006 WL 903236 (S.D.N.Y. April. 6, 2006)

Barnes v. FleetBoston Fin. Corp.,
No. 01-10395-NG, 2006 WL 6916834 (D. Mass. Aug. 22, 2006)

Heekin v. Anthem, Inc.,
No. 1:05-cv-01908-TWP-TAB, 2013 WL 752637 (S.D. Ind. Feb. 27, 2013)

In re Uponor, Inc., F1807 Plumbing Fittings Prods. Liab. Litig.,
No. 11-MD-2247 ADM/JJK, 2012 WL 3984542 (D. Minn. Sept. 11, 2012)

Only the Westlaw citation is currently available.

United States District Court,
S.D. New York.
In re AOL TIME WARNER, INC. Securities and "ERISA" Litigation

No. MDL 1500, 02 Civ. 5575(SWK).
April 6, 2006.

OPINION & ORDER

KRAM, J.

***1** This Opinion considers the fairness of a $2.65 billon class action settlement (the "Settlement") reached in the securities litigation arising from America Online, Inc. ("AOL") and AOL Time Warner, Inc.'s ("AOLTW") allegedly fraudulent accounting of advertising revenue during, and in the years immediately preceding, AOL's merger with Time Warner, Inc. ("Time Warner"). [FN1] Coming on the heels of AOLTW's $150 million settlement with the Department of Justice ("DOJ") [FN2] and its $300 million settlement with the Securities and Exchange Commission ("SEC"), this Settlement marks the conclusion of the primary shareholder lawsuit against the Company.

FN1. Although Defendant AOLTW has changed its name to Time Warner, Inc., for clarity, the Court will continue to refer to the merged entity as AOLTW, or the Company.

FN2. The DOJ directed that the $150 million fund established by its settlement with the Company be used for AOLTW's settlement of securities litigation. AOLTW allocated that entire sum to the instant Settlement, in addition to the $2.4 billion provided by AOLTW and the $100 million provided by AOLTW's auditor, Ernst & Young LLP ("Ernst & Young"), under the terms of the Settlement. The Settlement's inclusion of the entire $150 million from the DOJ settlement is the basis of one of the objections discussed below. *See infra* Part II.E.1.

Although Lead Plaintiff's Counsel distributed approximately 4.7 million Settlement notifications to putative Class Members, the Court has received only six objections to various facets of the Settlement, one of which was withdrawn prior to the fairness hearing . [FN3] Of the remaining objections, two contest the reasonableness of the Settlement amount, and there are individual objections to the adequacy of the Class representative, the Settlement Notice, and the Plan of Allocation. After briefly commenting on the Court's earlier certification of the Settlement Class, reviewing the standards for the approval of class action settlements, and addressing the aforementioned objections, the Court grants Lead Plaintiff's petition for approval of the Settlement.

FN3. As explained in greater detail below, two of the six objections were filed by parties acknowledging that they are not members of the Class, including the party that withdrew its objection. *See infra* Parts I.C & II.E. Plaintiffs allege that two of the other objectors also lack standing to object to the Settlement.

I. Background

This Settlement is the culmination of over three years of litigation and seven months of mediation with a Court-appointed special master. The relevant history of the litigation through May 5, 2004 is described in the Court's Opinion considering Defendants' motions to dismiss. *See In re AOL Time Warner, Inc. Sec. & "ERISA" Litig.,* 381 F.Supp.2d 192 (S.D.N.Y.2004). The Court presumes familiarity with that Opinion.

A. The Fraudulent Accounting Allegations

In brief, Plaintiffs allege that AOL and

AOLTW improperly accounted for dozens of advertising transactions, inflating revenue for fifteen quarters between 1998 and 2002. These transactions were allegedly designed to create the appearance that they were generating revenue, despite providing completely illusory benefits to the Company.

Plaintiffs describe myriad sham transactions between AOLTW and over a dozen separate companies. For example, Plaintiffs allege that AOLTW engaged in a number of three-legged “round-trip” transactions with the internet vendor Homestore. In the first “leg” of such transactions, Homestore would pay a third party for services and products that it did not need. In the second leg, the third party would purchase advertising from AOLTW with the money it received from Homestore. Finally, AOLTW would purchase advertising from Homestore in substantially the same amount as the third-party's purchase of advertising from AOLTW. While capital flowed to each of the parties and appeared to increase AOLTW's advertising revenue, the parties received no real benefits apart from their inflated earnings statements. *See In re AOL Time Warner,* 381 F.Supp.2d at 226. These round-trip transactions are representative, but hardly exhaustive, of Plaintiffs' allegations.[FN4]

> FN4. AOLTW is also alleged to have employed such techniques as “jackpotting” (repetitive display of an advertising partner's advertisements immediately before a reporting period), the conversion of non-advertising proceeds into advertising revenues, and the impermissible double-booking of valid advertising revenue. (Second Am. Compl. ¶ 15.)

***2** Ultimately, Plaintiffs allege that these fraudulent schemes resulted in AOLTW's overstatement of revenue by at least $1.7 billion, inflating the value of AOLTW stock and causing billions of dollars in damage to investors, in violation of the federal securities laws.

B. Motion Practice

The Court evaluated Defendants' motions to dismiss the Complaint, and, on May 5, 2004, issued an opinion denying the motions in large part and preserving a wide variety of claims against AOLTW, Ernst & Young, and a half dozen individual defendants. Shortly thereafter, the Court granted Plaintiffs leave to amend their Complaint. Plaintiffs filed a Second Amended Complaint on August 23, 2004.

Subsequent to the Court's denial of Defendants' motions to dismiss, Plaintiffs initiated formal discovery and began reviewing over 15.5 million documents turned over by AOLTW. (Heins Decl. ¶ 7, Dec. 2, 2005.) In addition, Plaintiffs responded to Defendants' substantial document requests and interrogatories, battled over various aspects of their and Defendants' discovery requests, and engaged in extensive negotiations to address Defendants' claims to privileged documents. (Heins Decl. ¶¶ 65-69.) On the basis of relevant discovered materials, Plaintiffs not only supplemented their existing claims, but eventually drafted a Third Amended Complaint and petitioned the Court for leave to amend. Plaintiffs later indicated that they had identified “over 100 separate transactions which [they] thought were material to their allegations .” (Final Approval Hr'g Tr. 4-5, Feb. 22, 2006.) By the time they entered into the Settlement, Plaintiffs had laid “the groundwork to prepare for hundreds of merits and expert depositions to occur in the fall and spring of 2005-2006.” (Heins Decl. ¶ 37.)

Meanwhile, Defendants drafted a motion for summary judgment, alleging that Plaintiffs failed to establish loss causation as a matter of law. The standard for loss causation has been the subject of substantial litigation over the past several years. In the interval between the filing of the motion to dismiss and the instant Settlement, the Second Circuit and Supreme Court have weighed in with a number of influential opinions, altering the relevant legal standards for active securities lawsuits. The most recent Supreme Court precedent addressing loss causation, *Dura Pharms., Inc. v. Broudo,* 544 U.S. 336 (2005), was argued and decided in the months immediately following the final briefing of Defendants' motion for summary judgment. With a decision on that motion pending, the parties entered a phase of intense and protracted settlement discussions.

C. The Settlement

In late 2004, the Court appointed Paul D. Wachter as special master for discovery in this litigation. Special Master Wachter proceeded to play a prominent role mediating settlement negotiations between the parties. During the mediation sessions before Special Master Wachter, the parties discussed the viability of their respective claims and defenses, the role of emerging securities law precedent, and their widely divergent views of potential outcomes.

***3** Plaintiffs relied on their Complaint, a variety of economic experts, and the results of their massive discovery operation to buttress their claims that the Class sustained extensive damages. On the other hand, Defendants insisted, and continue to insist, that their accounting statements were not fraudulent and that, even if such allegations could be proved, such fraud did not cause the declining price of AOLTW stock. After nearly seven months of involved settlement negotiations overseen by Special Master Wachter, the parties entered into a Memorandum of Understanding on July 29, 2005, and began preparing a Stipulation of Settlement.

The Stipulation of Settlement resulted from a second round of negotiations between Lead Plaintiff's Counsel and representatives of the nine firms representing Defendants. The parties negotiated a number of complex issues essential to the Settlement, including the Defendants' right to termination of the Settlement, the scope of releases, and the specific language of the Stipulation. At the same time, Lead Plaintiff's Counsel drafted supplemental documents, including the Notice to the Class, the Proof of Claim and Release, and the Plan of Allocation. After finalizing the drafts of all relevant documents, the parties petitioned the Court for preliminary approval of the Settlement.

On September 28, 2005, the Court held a preliminary approval hearing to address the Settlement materials provided by the parties. After reviewing those materials (including the Stipulation of Settlement, draft notice material, the Plan of Allocation, and supporting memoranda) and considering the issues raised at the preliminary approval hearing, the Court provided the parties an opportunity to modify the notice procedures and opt-out requirements. On September 30, 2005, the Court issued Orders certifying the Class for settlement purposes and preliminarily approving the Settlement. Upon receiving preliminary approval of the Settlement, Plaintiffs commenced the mailing and publication of the Settlement Notice.[FN5]

FN5. A short time later, in compliance with the terms of the Stipulation of Settlement, Defendants deposited the $2.65 billion Settlement Fund into an escrow account. The Fund has earned approximately $303,000 a day for the benefit of the Settlement Class since its deposit. (Pls.' Br. In Support of Final Approval 1, Jan. 30, 2006.)

Lead Plaintiff's Counsel retained Gilardi & Co., LLC (the “Settlement Administrator” or “Gilardi”) to administer the Settlement. The Settlement Administrator initially mailed 115,080 “Notice Packages” to the names and addresses provided by AOLTW's transfer agent.[FN6] The Settlement Administrator also contacted the brokerage houses that hold securities in “street name” for beneficial owners, giving those institutions the option to mail Notice Packages directly to the beneficial owners or to provide Gilardi with a list of those owners' addresses. (Forrest Decl. ¶ 5, Jan. 1, 2006.) In addition, summary notices were published over the course of two weeks on separate weekdays in the New York Times, Wall Street Journal, Financial Times, and USA Today. (Forrest Decl. ¶ 7.) The Settlement Administrator has mailed more than four and a half million more Notice Packages in response to requests from putative Class Members. (Forrest Decl. ¶ 6.)

FN6. Each Notice Package included a "true and correct copy of the Notice, including the Proof of Claim and Release, the Plan of Allocation, and the Request for Exclusion from Securities Class." (Forrest Decl. ¶ 2, Jan. 1, 2006.) These materials were also available at the website maintained throughout the course of this Settlement. *See* AOL Time Warner Securities Litigation Settlement, http://www.aoltimewarnersettlement.com (last visited March 20, 2006).

***4** The Settlement Administrator initiated its mailing in early October, shortly after the Court's preliminary approval of the Settlement. The Notice set two important deadlines for responses to the Settlement: (1) objections to the Settlement and requests to opt out of the Settlement were to be filed by January 9, 2006, while (2) Settlement claims were to be submitted by February 21, 2006. By the January 9 objection deadline, the Court had received four objections from putative Class Members, and two motions to intervene and object to the Settlement, one of which was withdrawn shortly thereafter.[FN7]

FN7. Plaintiffs in the ERISA action stemming from the same operative facts as the instant lawsuit initially submitted a motion to intervene and object to the Settlement on January 7, 2006, but voluntarily withdrew their motion on January 27, 2006. Accordingly, the Court declines to address their objection.

On February 22, 2006, the Court conducted the final approval hearing. At the hearing, both Lead Plaintiff's Counsel and defense counsel for AOLTW were given the opportunity to make final remarks supporting the fairness of the Settlement. At that time, Lead Plaintiff's Counsel reported that almost all significant holders of affected stock had filed claims to the Settlement and noted the lack of significant opposition or adverse comment by institutional investors with Settlement claims. Not one of the formal objectors attended or spoke at the hearing, each of them resting on her papers. Further, nobody attending the hearing contested the fairness of the Settlement. The Court reserved judgment, pending this written Opinion.

II. Discussion

A. Certification of the Settlement Class

On September 30, 2005, the Court certified the Class for settlement purposes. This section briefly supplements that Order with the facts supporting class certification under Federal Rule of Civil Procedure 23.

1. Numerosity

To qualify for certification, a class must be "so numerous that joinder of all members is impracticable." Fed.R.Civ.P. 23(a)(1). Here, more than 4.7 million Settlement Notices have been mailed to putative Class Members and the Settlement Administrator has received approximately 600,000 claims. Hence, the numerosity requirement is clearly satisfied.

2. Commonality

Rule 23(a)(2) requires that "there are questions of law or fact common to the class." Fed.R.Civ.P. 23(a)(2). "[W]here putative class members have been injured by similar misrepresentations and omissions, the commonality requirement is satisfied." *Fogarazzo v.. Lehman Bros., Inc.,* 232 F.R.D. 176, 180 (S.D.N.Y.2005) (citations omitted). Plaintiffs allege that the Class suffered damages as a result of three and a half years of AOLTW's misrepresentations about the Company's financial condition and its fraudulent accounting practices. Due to the public nature of Defendants' financial statements and the breadth of the alleged fraud, the issues of law and fact underlying this litigation are common to the Class.

3. Typicality

Under Rule 23(a)(3), the interests of the class representatives must be "typical of the claims ... of the class." Fed.R.Civ.P. 23(a)(3). This requirement is satisfied if "each class member's claim arises from the same course of events, and each class member makes similar legal arguments to prove the defendant's liability." *Robinson v. Metro-North Commuter R.R. Co.,* 267 F.3d 147, 155 (2d Cir.2001) (citation omitted). Further, a class representative's claims "are not typical if that representative is subject to unique defenses." *Fogarazzo,* 232 F.R.D. at 180 (citation omitted).

***5** Here, Lead Plaintiff, like all Class members, claims damages allegedly caused by Defendants' misrepresentation of AOL's financial health, including the overstatement of advertising revenues to artificially inflate the stock of AOL and AOLTW. The legal theories pleaded by Lead Plaintiff, numerous violations of the federal securities laws, are shared by all Class Members. Furthermore, no unique defenses may be asserted against Lead Plaintiff that would make its claims atypical. As such, the typicality requirement is satisfied.

4. Adequacy

Rule 23(a)(4) requires that the class representatives "fairly and adequately protect the interests of the class." Fed.R.Civ.P. 23(a)(4). In considering a class representative's adequacy, the court asks whether the representative (1) has any interests that conflict with the rest of the class, and (2) is represented by qualified and capable legal counsel. *Baffa v. Donaldson, Lufkin & Jenrette Sec. Corp.,* 222 F.3d 52, 60 (2d Cir.2000) (citation omitted).

On several occasions throughout the course of this litigation the Court has commented favorably on Lead Plaintiff's representation of the Class. *See In re AOL Time Warner, Inc. Sec. & "ERISA" Litig.,* No. MDL 1500, 2003 WL 102806, at *2 (S.D.N.Y. Jan. 10, 2003); *In re AOL Time Warner,* 381 F.Supp.2d at 208 n. 8. Lead Plaintiff's conduct during the Settlement has not altered the Court's earlier findings. All Class Members, including Lead Plaintiff, seek to obtain the largest possible recovery for losses resulting from Defendants' alleged misconduct. Lead Plaintiff has successfully prosecuted the claims it shares with the rest of the Class, resulting in the $2.65 billion Settlement at issue. There is no evidence that Lead Plaintiff's interests conflict with the rest of the Class. Similarly, the Court continues to be impressed with the quality of representation provided by Lead Plaintiff's Counsel, its prosecution of the lawsuit, and its negotiation of the Settlement. *See also In re AOL Time Warner,* 2003 WL 102806, at *2; *infra* Part II.C. Both Lead Plaintiff and its choice of counsel satisfy the adequacy requirement of Rule 23(a)(4).

5. Maintainability

In addition to finding that a class meets the requirements of Rule 23(a), courts must ascertain whether the class is maintainable under one of the Rule 23(b) criteria. One commonly applied criterion requires "that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy." Fed.R.Civ.P. 23(b)(3).

With respect to the first Rule 23(b)(3) prong, the Supreme Court has noted that predominance is "readily met in certain cases alleging ... securities fraud...." *Amchem Prods. v. Windsor,* 521 U.S. 591, 625 (1997). This case readily illustrates that principle. Allegations of Defendants' misrepresentations and the improper inflation of AOL's accounting revenues underlie the factual and legal claims of every Class Member. *See supra* Part II.A.2. The Court is satisfied that common questions of law and fact are predominant.

***6** With respect to the second Rule 23(b)(3) prong-the superiority of the class action to other methods of adjudicating the controversy-securities cases like this one "easily satisfy" that requirement. *In re Blech Sec. Litig.,* 187 F.R.D. 97, 107 (S.D.N.Y.1999). The Settlement provides a vehicle of recovery for individuals that would find the cost of individual litigation prohibitive, yet allows anyone wishing to initiate her own lawsuit to opt out of the Settlement. The Court's previous decision to consolidate this litigation is also consistent with the Settlement. The Settlement offers a single forum to resolve the common claims of millions of potential Class Members and prevents the initiation of countless claims in state and federal courts throughout the nation. Finally, at this stage, the risk of encountering any serious difficulty in managing the Class is negligible. Maintainability is satisfied here.

B. Standard for Final Approval of Class Action Settlements

Federal Rule of Civil Procedure 23(e) governs the settlement of class action litigation. Courts may approve class action settlements after proponents of the settlement have distributed adequate notice of the proposed settlement and the settlement has been the subject of a fairness hearing. Fed.R.Civ.P. 23(e)(1). The touchstone for court approval is that the settlement be "fair, reasonable, and adequate," Fed.R.Civ.P. 23(e)(1)(C), and "not a product of collusion." *D'Amato v. Deutsche Bank,* 236 F.3d 78, 85 (2d Cir.2001) (citing *Joel A. v. Giuliani,* 218 F.3d 132, 138 (2d Cir.2000)); *see also Wal-Mart Stores, Inc. v. Visa U.S.A. Inc.,* 396 F.3d 96, 116 (2d Cir.2005), *cert denied,* 125 S.Ct. 2277 (2005).

Courts analyze a settlement's fairness, reasonableness and adequacy with reference to both "the negotiating process leading up to settlement as well as the settlement's substantive terms." *D'Amato,* 236 F.3d at 85. The court may not engage in mere "rubber stamp approval" of the settlement, yet it must "stop short of the detailed and thorough investigation that it would undertake if it were actually trying the case." *City of Detroit v.. Grinnell Corp.,* 495 F.2d 448, 462 (2d Cir.1974).

Further, courts should be "mindful of the 'strong judicial policy in favor of settlements, particularly in the class action context." ' *Wal-Mart,* at 116 (quoting *In re PaineWebber Ltd. P'ships Litig.,* 147 F.3d 132, 138 (2d Cir.1998)). As the Second Circuit has long recognized, "[t]here are weighty justifications, such as the reduction of litigation and related expenses, for the general public policy favoring the settlement of litigation." *Weinberger v. Kendrick,* 698 F.2d 61, 73 (2d Cir.1982). This concern is reinforced by the Court's analysis of both the procedural and substantive fairness of the Settlement.

C. Procedural Fairness: The Negotiation Process

"A court reviewing a proposed settlement must pay close attention to the negotiating process, to ensure that the settlement resulted from 'arms-length negotiations and that plaintiffs' counsel have possessed the experience and ability, and have engaged in the discovery, necessary to effective representation of the class's interests." ' *D'Amato,* 236 F.3d at 85 (quoting *Weinberger,* 698 F.2d at 74). This inquiry into a settlement's procedural fairness helps to ensure that the settlement is not the product of collusion. Evidence of arms-length negotiation between experienced counsel that have engaged in meaningful discovery may give rise to a presumption of fairness. *Wal-Mart,* 396 F.3d at 117 (citation omitted).

***7** In evaluating a settlement's procedural fairness, the Second Circuit has noted that that "a court-appointed mediator's involvement in precertification settlement negotiations helps to ensure that the proceedings were free of collusion and undue pressure." *D'Amato,* 236 F.3d at 85 (citing *County of Suffolk v. Long Island Lighting,* 907 F.2d 1295, 1323 (2d Cir.1990)). Courts in this District have also commented on the procedural safeguards inherent in cases subject to the PSLRA, wherein the lawyers are not "mere entrepreneurs acting on behalf of purely nominal plaintiffs," but are "selected by court-appointed Lead Plaintiffs who are substantial and sophisticated institutional investors with access to independent legal and financial specialists and a huge stake in the litigation." *In re Global Crossing Sec. & ERISA Litig.,* 225 F.R.D. 436, 462 (S.D.N.Y.2004).

This Settlement is the product of seven months of intense arms-length negotiations, overseen and assisted by a court-appointed special master, between major financial entities, both of whom are represented by experienced, highly regarded counsel. Lead Plaintiff, the Minnesota State Board of Investment ("MSBI"), "manages the investment of retirement fund assets of the Minnesota State Retirement System, Teachers Retirement Association, and the Public Employees Retirement Association, as well as idle cash of other state agencies," with total assets exceeding $50 billion. Minnesota Office of the Legislative Auditor, Report Summary: Minnesota State Board of Investment, http:// www.auditor.leg.state.mn.us/FAD/2006/f0604.htm (released Feb. 15, 2006). Upon assigning MSBI lead plaintiff status, this Court noted that MSBI had sustained an estimated loss of $249 million, thus had the largest financial stake in the litigation. *See In re AOL Time Warner,* 2003 WL 102806, at *2. [FN8] Lead Plaintiff's public mission, financial experience, and vested interest in obtaining the best terms for the Settlement Class reflect favorably on its selection of counsel here.

> FN8. MSBI's loss was calculated on the basis of a class period nearly two years shorter than the Class Period ultimately defined in the Settlement. Accordingly, its loss is presumably greater than $249 million.

Indeed, Lead Plaintiff's Counsel, Heins, Mills & Olson, PLC, is a respected class action litigator, with considerable experience in major securities and antitrust class action lawsuits. *See, e.g., In re Monosodium Glutamate Antitrust Litigation,* MDL 00-1328 (D.Minn.); *In re Broadcom Corp. Sec. Litig.,* SA CV 01-0275 (C.D.Cal.). Lead Plaintiff's Counsel has garnered judicial praise for its representation in previous actions, and has continued to show its client commitment and exceptional lawyering in this case. On the other side of the table, AOLTW's counsel, Cravath, Swaine & Moore LLP ("Cravath") is generally regarded as one of the country's premier law firms. Cravath has extensive experience in the defense of major class action lawsuits and has vigorously defended Plaintiffs' allegations throughout this litigation. At the fairness hearing, counsel for both parties noted their continuing disagreement about Plaintiffs' allegations. With the mediation of Special Master Wachter, however, both parties concluded that the Settlement was the best and most efficient outcome for their clients in light of the costs of litigation and mutability of applicable legal standards.

***8** Special Master Wachter assumed his role during the early stages of discovery, overseeing the terms of the discovery process before playing a vital role in the settlement negotiations between the parties. Special Master Wachter fulfilled his assignment with considerable skill and diligence, remaining in close contact with both parties and mediating dozens of face-to-face and remote meetings between them over the course of seven months. Special Master Wachter's oversight of the process lends considerable support to the Court's finding of procedural fairness.

In light of the substantial evidence that settlement negotiations were conducted at arms-length without the slightest hint of collusion, the Court credits the Settlement with a presumption of fairness. This presumption is supported by the fairness of the Settlement terms.

D. Substantive Fairness: The Settlement Terms

In evaluating the fairness, reasonableness, and adequacy of a settlement, the court is primarily concerned with the "substantive terms of the settlement compared to the likely result of a trial." *Malchman v. Davis,* 706 F.2d 426, 433 (2d Cir.1983) (citations omitted). In order to make this evaluation, courts in this Circuit have consistently employed the *Grinnell* factors:

> (1) the complexity, expense and likely duration of the litigation;
>
> (2) the reaction of the class to the settlement;
>
> (3) the stage of the proceedings and the amount

of discovery completed;

(4) the risks of establishing liability;

(5) the risks of establishing damages;

(6) the risks of maintaining the class action through the trial;

(7) the ability of the defendants to withstand a greater judgment;

(8) the range of reasonableness of the settlement fund in light of the best possible recovery;

(9) the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation.

Wal-Mart, 396 F.3d at 117 (quoting *Grinnell,* 495 F.2d at 463 (citations omitted)).

1. Complexity, Expense and Likely Duration of the Litigation

Due to its notorious complexity, securities class action litigation is often resolved by settlement, which circumvents the difficulty and uncertainty inherent in long, costly trials. *See, e .g., Hicks v. Stanley,* No. 01 Civ. 10071, 2005 WL 2757792, at *6 (S.D.N.Y. Oct. 24, 2005); *In re American Bank Note Holographics, Inc.,* 127 F.Supp.2d 418, 424 (S.D.N.Y.2001); *In re Sumitomo Copper Litig.,* 189 F.R.D. 274, 281 (S.D.N.Y.1999). This notoriety is amply illustrated by the instant case, which is particularly conducive to settlement.

Plaintiffs allege wrongdoing by one of the largest companies in the world, during the largest corporate merger in history. Plaintiffs' allegations span more than three and a half years and implicate financial statements filed over fifteen consecutive quarters. Plaintiffs point to hundreds of fraudulent transactions carried out over multiple years, employing diverse accounting techniques, and often including multiple, interrelated revenue components. These sophisticated and complex transactions shared just one common characteristic: their allegedly inappropriate inflation of revenue. There is no question that the presentation of these transactions, and the conflicting interpretations which they would be subject to, would stretch the patience, attention, and understanding of even the most exemplary jury.

***9** Since the denial of Defendants' motions to dismiss and the commencement of formal discovery, Plaintiffs have pored over millions of documents, employed nine experts, added six defendants, and laid the groundwork for dozens of depositions. (Heins Decl. ¶¶ 4, 7, 70, 77.) The breadth of resources dedicated to the prosecution of this lawsuit reflects the complexity of the issues involved and the expenses that lie ahead. Shortly after the denial of their motions to dismiss, Defendants initiated an extensive round of deposition and document requests and negotiated with Plaintiffs over the scope of discovery. Defendants continue to deny liability and have been subject to only limited criminal prosecution for their alleged wrongdoing. Defense counsel's vigorous defense of this lawsuit indicates Defendants' continued willingness to defend the allegations in the absence of the Settlement.

In addition to the complex issues of fact involved in this case, the legal requirements for recovery under the securities laws present considerable challenges, particularly with respect to loss causation and the calculation of damages. These challenges are exacerbated here, where a number of controlling decisions have recently shed new light on the standard for loss causation. *See, e .g., Dura Pharms.,* 544 U.S. at 336; *Lentell v. Merrill Lynch & Co., Inc.,* 396 F.3d 161, 173 (2d Cir.2005). If Defendants' pending motion for summary judgment on the issue of loss causation did not prove dispositive, it would continue to be the subject of profound dispute throughout the litigation.

In the absence of the Settlement, this litigation could very well last for several more years. The parties have not yet finished discovery. At a minimum, months of depositions would precede trial. A presumably lengthy trial would then be followed by years of inevitable appeals. Each step of the way, expenses would continue to accumulate, further decreasing the funds available to Class Members. Conversely, the $2.65 billion Settlement under consideration here "results in a substantial and tangible present recovery, without the attendant risk and delay of trial." *Maley v. Del Global Techs. Corp.,* 186 F.Supp.2d 358, 362 (S.D.N.Y.2002).

After careful consideration of the circumstances of this litigation, the Court finds that a trial would be long, complex, and costly. This factor strongly favors the Settlement.

2. Reaction of the Class to the Settlement

The reaction of the class is generally gauged by reference to the extent of objection to the settlement. Courts in this Circuit have noted that "the lack of objections may well evidence the fairness of the Settlement." *In re American Bank Note Holographics,* 127 F.Supp.2d at 425. Courts have also commented favorably on settlements that are not contested by institutional investors and class representatives. *In re NASDAQ Market-Makers Antitrust Litig.,* 187 F.R.D. 465, 479 (S.D.N.Y.1998).

***10** Here, the Settlement Administrator mailed over 4.7 million Notice Packages to putative Class Members and has received an estimated 600,000 proofs of claim. Only four such individuals filed an objection to any aspect of the Settlement, and just two dispute the reasonableness of the Settlement Fund.[FN9] Further, not a single institutional Class Member objected to the Settlement.[FN10] The relative lack of dissent here compares favorably with settlements previously approved in this District. *See, e.g., D'Amato,* 236 F.3d at 86-87 (eighteen objectors out of 27,883 notices); *Hicks,* 2005 WL 2757792, at *6 (three objectors out of approximately 100,000 potential members of the class); *In re WorldCom, Inc. Sec. Litig.,* 388 F.Supp.2d 319, 337-338 (S.D.N.Y.2005) (seven objectors out of 4,000,000 potential class members and 830,000 claimants).

FN9. Moreover, Plaintiffs argue that two of the four objectors lack standing to object to the Settlement. The Court addresses all objections in considerably more detail below. *See infra* Part II.E.

FN10. One institutional investor seeks to intervene in order to file an objection, *see infra* Part II.E.1, but by exercising its right to opt out of the Class, that entity is protected from the binding legal effect of this Settlement.

The Settlement Administrator also noted that 10,082 persons and entities filed valid requests for exclusion from the Class. (Forrest Decl. ¶ 3, Feb. 21, 2006.) Although a large number at first glance, these opt-outs amount to less than 0.2% of the 4.7 million putative Class Members.[FN11] Comparably small percentages of opt-outs have favored settlement in the past. *See In re Sumitomo,* 189 F.R.D. at 281 (finding that fewer than 1% of class members requesting exclusion "strongly favor[ed] approval of the proposed settlement [ ]"). The small number of objections and low percentage of opt-outs here strongly favor the Settlement.

FN11. Additionally, as opt-outs were not required to submit transactional information in order to file a valid request for exclusion, it is impossible to ascertain what percentage of the opt-outs would have had valid claims to the Settlement.

3. Stage of Proceedings and Amount of Discovery Completed

Courts have approved settlements at all stages of the proceedings. The relevant inquiry for this factor is whether the plaintiffs have obtained a sufficient understanding of the case to gauge the strengths and weaknesses of their claims and the adequacy of the settlement. The parties need not "have engaged in extensive discovery" as long as "they have engaged in sufficient investigation of the facts to enable the Court to 'intelligently make ... an appraisal' of the settlement." *In re Austrian &*

German Holocaust Litig., 80 F.Supp.2d 164, 176 (S.D.N.Y.2000) (quoting *Plummer v. Chemical Bank,* 668 F.2d 654, 660 (2d Cir.1982)); *see also Maley,* 186 F.Supp.2d at 363; *In re American Bank Note Holographics,* 127 F.Supp.2d at 425-26.

At the time of the Stipulation of Settlement, this litigation had reached an advanced stage of discovery. Even prior to formal discovery, Plaintiffs reviewed the relevant public facts pertaining to this litigation, with their review culminating in the 300 page Amended Complaint. Upon commencing formal discovery, Plaintiffs reviewed over 15 million documents, consulted with nine different economic and accounting experts, briefed numerous motions, and laid the foundation for hundreds of depositions. Although the final stages of discovery, including depositions, were not yet complete, it is not certain that Plaintiffs would have been able to maintain this action long enough to reach that stage of discovery. Defendants' motion for summary judgment was pending before the Court, and presented a difficult question that, if decided in favor of Defendants, may have resulted in dismissal of the lawsuit. The thorough briefing of this and other motions prior to settlement supplemented Plaintiffs' consideration of the strengths of their claims and the defenses they were likely to face at trial.

***11** Although discovery had not been completed prior to the Settlement, Plaintiffs had conducted meaningful pre-trial discovery and had engaged in sufficient trial preparation to appraise their likelihood of success. Accordingly, the third *Grinnell* factor also weighs in favor of the Settlement.

4. Risks of Class Prevailing (Establishing Liability and Damages, and of Maintaining the Class through Trial)

One of the Court's central inquiries when appraising a settlement is the likelihood that the class would prevail at trial in the face of the risks presented by further litigation. *Grinnell* specifically advises courts to consider the risks of establishing liability and damages, and of maintaining the class through trial. 495 F.2d at 463. This inquiry requires courts to consider legal theories and factual situations without the benefit of a fully developed record, thus courts must heed the Supreme Court's admonition not to “decide the merits of the case or resolve unsettled legal questions.” *Carson v. American Brands, Inc.,* 450 U.S. 79, 88 n. 14 (1981). Rather, “the Court need only assess the risks of litigation against the certainty of recovery under the proposed settlement.” *In re Global Crossing,* 225 F.R.D. at 459 (citing *In re Holocaust Litig.,* 80 F.Supp.2d at 177).

The difficulty of establishing liability is a common risk of securities litigation. *Maley,* 186 F.Supp.2d at 364. In this case, Plaintiffs were not only challenged to establish a valid theory of loss causation, *see supra* Parts I.B & II.D.1, they also faced the risk of being unable to establish scienter for a number of the defendants. In its consideration of Defendants' motions to dismiss, the Court closely reviewed Plaintiffs' allegations of scienter, dismissing claims against several individual defendants while finding other allegations adequate to avoid dismissal. *See In re AOL Time Warner,* 381 F.Supp.2d at 219-31. Of course, avoiding dismissal at the pleading stage does not guarantee that scienter will be adequately proven at trial.

The risk of establishing damages here was equally daunting. The decline in AOL and AOLTW stock prices spanned several years. Defendants argue that this decline was the result of a number of factors-including the general decline in Internet stock values-unrelated to the allegations of fraud. Plaintiffs hired a team of experts to estimate damages and would likely face a conflicting panel of experts retained by Defendants for trial. The risk of establishing damages would be further exacerbated by the difficulty of educating the jury on abstruse economic concepts necessary to the calculation of damages.

Further, Plaintiffs would have faced a considerable challenge explaining the transactions underlying the alleged fraud. The complexity and opacity of these transactions would likely hinder Plaintiffs' ability to present the jury with a coherent explanation of Defendants' misconduct. As their expert, Professor John C. Coffee, Jr., noted, Plaintiffs faced a serious issue "as to whether a jury could understand the convoluted 'round robin' advertising games that had been played" by Defendants. (Coffee Decl. ¶ 30, Dec. 2, 2005.)

***12** The Court certified this Class for settlement purposes only. Plaintiffs report that they had drafted a motion for class certification prior to the Settlement and had fully anticipated that Defendants would oppose class certification as vigorously as it had contested Plaintiffs' allegations and discovery requests. As such, even the process of class certification would have subjected Plaintiffs to considerably more risk than the unopposed certification that was ordered for the sole purpose of the Settlement.

In summary, the *Grinnell* "risk factors" also favor the Settlement.

5. Ability of Defendants to Withstand a Greater Judgment

This factor typically weighs in favor of settlement where a greater judgment would put the defendant at risk of bankruptcy or other severe economic hardship. *See, e.g., In re Warner Comms. Sec. Litig.,* 618 F.Supp. 735, 746 (S.D.N.Y.1985). Here, AOLTW remains a solvent, highly capitalized company, with assets greatly exceeding its $2.4 billion contribution to the Settlement. Neither party contends that Defendants are incapable of withstanding a greater judgment. However, the mere ability to withstand a greater judgment does not suggest that the Settlement is unfair. *See, e.g., D'Amato,* 236 F.3d at 86; *In re NASDAQ Market-Makers,* 187 F.R.D. at 477-78. This factor must be weighed in conjunction with all of the *Grinnell* factors; most notably the risk of the class prevailing and the reasonableness of the settlement fund.

6. Range of Reasonableness of the Settlement Fund

The final two *Grinnell* factors constitute an inquiry into the settlement fund's range of reasonableness (1) in light of the best possible recovery and (2) to a possible recovery in light of all the attendant risks of litigation. 495 F.2d at 463. Though courts are encouraged to consider the best possible recovery, the range of reasonableness inquiry is tightly bound to the risks of litigation, which have been developed in greater detail above. *See supra* Part II.D.4. As such, the following discussion must be tempered by the Court's earlier finding that continued litigation would proceed with a high degree of risk.

Plaintiffs have not provided a specific estimate of the total damages sustained by the Class, in large part, no doubt, due to the difficulty of distinguishing the decline in share price attributable to fraud from the decline attributable to general market forces. In light of the steep decline during the Class Period and the Settlement's estimated recovery per share, however, it seems clear that Class Members will not recover their entire loss. This consideration alone does not undermine my finding that the $2.65 billion Settlement Fund is reasonable in light of the difficulty of establishing damages here. "[T]he settlement amount's ratio to the maximum potential recovery need not be the sole, or even the dominant, consideration when assessing the settlement's fairness." *In re Global Crossing,* 225 F.R.D. at 460-61. Indeed, damages are of such a speculative and contested nature here that the ratio of the settlement amount to a hypothetical maximum recovery would not be dispositive of the Settlement's fairness.

***13** Not only do the parties dispute the amount of damages sustained by the Class, they continue to dispute the very existence of damages. In light of this fundamental disagreement, the $2.65 billion Settlement secured by Plaintiffs is all the more impressive. Plaintiffs have secured a substantial, immediate recovery for the Plaintiff Class that ranks among the five largest securities settlements in history (Coffee Decl. ¶ 2), and is the second largest settlement ever reached with an issuer of securities. (Heins Decl. ¶ 83.) [FN12] In addition, the Settlement Fund is currently in escrow, earning approximately $303,000 a day for the Class. In this sense, the benefit of the Settlement will not only be realized far earlier than a hypothetical post-trial recovery, but dates back to October 7, 2005, when the funds were deposited in the escrow account. The concrete benefits of this Settlement outweigh the possibility of a higher recovery after trial. Under the circumstances of this case, the Settlement Fund is within the range of reasonableness.

FN12. In the early stages of this litigation, legal experts estimated “a payout of $1 billion” in the event of a settlement. (Heins Decl. Ex. 40.) Though this figure represents an estimated settlement amount rather than a full recovery, it provides some indication of the legal community's expectations. The Settlement reached here far exceeds those prognostications.

After carefully considering the *Grinnell* factors, most of which weigh in favor of the Settlement, I find the substantive terms of the Settlement fair, reasonable, and adequate.

E. Objections

The Court received a handful of objections to the Settlement prior to the deadline.[FN13] I will address each objection in the context of the aspect of the Settlement that is disputed.

FN13. Several of the persons objecting to the Settlement also object to Class Counsel's application for attorney's fees. The Court reserves judgment on the issue of attorney's fees at this time and will address the objections to fees in a separate ruling.

1. Stichting's Objection to the Settlement's Handling of the DOJ and SEC Funds

Stichting Pensioenfonds ABP (“Stichting”) filed a motion to intervene, objecting to the Settlement's handling of funds set aside by AOLTW subsequent to the Company's settlements with the DOJ and SEC.[FN14] Stichting's objection to the Settlement's inclusion of the DOJ funds and AOLTW's decision to use its “best efforts” to include the SEC funds are without merit. Because the right of intervention is inessential to my disposition of Stichting's objection, the validity of its intervention is assumed for the purpose of this Opinion.[FN15]

FN14. Stichting is a putative Class Member but has chosen to opt out of the instant Settlement, hence the necessity of its motion to intervene. Stichting has filed a separate lawsuit, which is pending in this Court.

FN15. Stichting's right of intervention is by no means assured under the circumstances of this case. I am particularly troubled by the objector's argument that its intervention in this dispute is timely. Though Stichting filed its motion on the January 9, 2006 deadline for objections, it made no attempt to alert the Court to its objection at the preliminary fairness hearing on September 28, 2004, or at any time prior to January 9, 2006. By the time Stichting objected, the Settlement Administrator had mailed millions of Notice Packages and hundreds of thousands of putative Class Members had filed claims. If Stichting's requested relief were granted, these costs would be duplicated by a second round of Notice.

Although Stichting waited until the last possible minute to bring their objection to the Court's attention, the exhibits to its motion indicate that Stichting was aware of the content of its objection well before the preliminary fairness hearing. (Kairis Decl. Ex. L; Letter from John C. Kairis to Samuel D. Heins and Peter T. Barbur (Aug. 17, 2005).) At that hearing, the Court heard argument from individuals objecting to certain conditions of the Notice, and, where appropriate, suggested that the Plaintiffs modify their pro-

> posal. Stichting's grievance is precisely the type of objection that would have been beneficially brought to the Court's attention at the preliminary fairness hearing. *See* Manual for Complex Litigation (Third) § 30.41, at 265 (2000) ("The court may want to hear not only from counsel but also from named plaintiffs, from other parties, and from attorneys who did not participate in the negotiations.").

Stichting requests that the Court strike the terms of the Settlement that refer to the DOJ and SEC funds, order that those funds be distributed pro rata to all aggrieved shareholders regardless of their participation in the instant Settlement, and order that a modified Notice and Plan of Allocation be published and distributed. Because the DOJ and SEC funds were established under different conditions and the Settlement handles the funds dissimilarly, each fund will be considered in turn.

i. The DOJ Funds

Prior to the instant Settlement, AOLTW entered into a Deferred Prosecution Agreement with the DOJ (the "DPA"). In accordance with the DPA, AOLTW agreed to pay $150 million into a "fund to be established under *its direction and control* to be used for either the settlement of shareholder securities law litigation or for purposes of any compensation fund" related to the transactions underlying the DPA. (Karis Decl. Ex. C; *United States v. America Online, Inc.,* No. 1:04 M 1133, at ¶ 9 (E.D.Va. Dec. 14, 2004) (emphasis added).) Stichting argues that the inclusion of the DOJ funds in the Settlement will preclude them from obtaining their pro rata share of the money provided by the DPA, thus unfairly benefiting the Settlement claimants to the detriment of shareholders who have opted out of the Settlement. (Stichting Obj. 23.)

***14** Stichting's objection to the Settlement's inclusion of the DOJ funds is undermined by the DOJ's directions for the distribution of those funds. Under the DPA, the DOJ funds are put under AOLTW's "direction and control" for "the settlement of shareholder securities law litigation." In its discretion, AOLTW has chosen to distribute those funds by means of the primary class action Settlement, benefiting hundreds of thousands of aggrieved shareholders and eliminating the costs associated with a separate distribution mechanism. Stichting's protestations notwithstanding, the DPA does not expressly indicate that the funds must be distributed pro rata to all harmed investors. Prior to filing their objection, Stichting wrote a letter to the DOJ, submitting their concern to that agency. (Kairis Decl. Ex. M; Letter from John C. Kairis to Paul J. McNulty, Esq., U.S. Dep't of Justice (Dec. 16, 2005).) There is no record of a reply. Without some indication that AOLTW's distribution of the funds is contrary to the Company's agreement with the DOJ, the Court will not disturb an agreement within the jurisdiction of another federal district court by reading conditions absent from the DPA into that agreement.

Stichting has not demonstrated that the Settlement's inclusion of the DOJ funds was improper. Consequently, the Settlement terms including those funds need not be stricken, nor must Plaintiffs distribute a modified Notice and Plan of Allocation on that basis.

ii. The SEC Funds

Following an SEC investigation into AOL's allegedly fraudulent accounting and Time Warner's alleged violation of a cease-and-desist order, AOLTW entered into an agreement with the SEC. Under the terms of a consensual judgment, AOLTW agreed to pay "$300 million in civil penalties, which the Commission will request be distributed to harmed investors." (Kairis Decl. Ex. F; SEC Litigation Release No. 2215 (March 21, 2005).)

In all of the materials announcing and describing the Settlement, the parties have referred to a $2.65 billion Settlement Fund. The $2 .65 billion figure does not include the SEC funds. The first mention of the SEC funds is on page six of the sixteen-page Notice. The Notice states that the SEC has not determined how those funds will be distributed, but that AOLTW has requested that the SEC make those funds, or a portion thereof, available for distribution with the Settlement. The settling parties have twice updated the Settlement website to indicate that the SEC has not made a final decision regarding those funds. In short, the Settlement does *not* include the SEC funds. Consequently, the Court will not require the parties to remove wholly aspirational language regarding the mechanism by which those funds may be distributed.

Furthermore, intermittent references to the SEC funds make neither the Notice nor the Plan of Allocation defective. Each of the Notice's references to the SEC funds is accompanied by a disclosure that those funds are not a part of the Settlement, but that AOLTW will make its best efforts to distribute those funds, or a portion thereof, through the class action mechanism. All estimates of per share recovery clearly indicate that the recovery is based on the $2 .65 billion figure, which does not include the SEC funds. Providing a second set of figures including the SEC funds in the estimated per share recovery would not only be misleading, but potentially inaccurate, because there is no indication of whether the SEC will elect to distribute none of the SEC funds, all of the SEC funds, or a portion thereof, through the Settlement. It cannot be said that the Notice fails to fairly apprise the putative Class Members of the terms of the Settlement.[FN16] To the contrary, the Notice explains the status of the SEC funds as clearly and simply as possible in light of the SEC's indecision with respect to how those funds will be distributed.

FN16. *See infra* Part II.E.4 for an elaboration on the relevant standards for settlement notice.

***15** Along these lines, the Plan of Allocation never mentions the amount of money that will be distributed. It merely states that the "Settlement monies will be distributed on a pro rata basis" under the terms of the Plan. (Plan of Allocation 1.) Stichting fails to explain how the Plan of Allocation would need to be altered to incorporate the greater amount of Settlement monies. If the SEC consented to distributing the $300 million via the Settlement, that money would simply be added to the $2.65 billion Settlement Fund already being distributed. Each claimant's pro rata share would net a greater per share recovery, but the Plan of Allocation itself would not require modification.

In short, references to SEC funds that are not included in the Settlement amount, but that AOLTW will make its "best efforts" to distribute through the class action mechanism do not make the Stipulation of Settlement, Notice, or Plan of Allocation defective. Stichting's objection is overruled.

2. Objections to the Reasonableness of the Settlement

Two individuals filed formal objections to the reasonableness of the Settlement. Margaret M. Keffer ("Keffer") argues that the Settlement provides inadequate compensation for her loss, suggesting instead that a settlement leading to the recovery of one-third of her losses might be adequate. Paul Heyburn ("Heyburn") argues that, considering the serious allegations against Defendants, the estimated recovery per share simply does not provide a substantial benefit.[FN17]

FN17. Plaintiffs argue that Heyburn does not have standing to object to the Settlement. Indeed, the transaction records attached to Heyburn's objection indicate that he profited from his AOL investment. (Heyburn Obj. Ex 1.) Consequently, he does not have a claim under the Plan of Allocation, which limits recovery to those shareholders that suffered a loss. Without an injury, Heyburn does not have standing to object. *New York v. Reebok Int'l Ltd.,* 96 F .3d 44, 47 (2d Cir.1996). Nevertheless, in order to dispel any perceived unreasonableness of the Settlement, I will briefly address Heyburn's concerns regarding the reasonableness of the Settlement and adequacy of representation. *See infra* Part II.E.3.

Courts routinely approve settlements over conclusory objections. *See, e.g., In re Prudential Sec. Inc., Ltd. P'Ships Litig.,* MDL No. 1005, 1995 WL 798907, at *13 (S.D.N.Y. Nov. 20, 1995); *Saylor v. Bastedo,* 594 F.Supp. 371, 373-74 (S.D.N.Y.1984). Neither Heyburn's nor Keffer's objection provides a legal or factual basis for the alleged insufficiency of the Settlement, nor do they consider the legal or factual context in which the Settlement was reached. Consequently, the objectors' unsupported allegations of unreasonableness do not alter my appraisal of the Settlement's fairness.

3. Objection to Lead Plaintiff's Adequacy of Representation

Heyburn also questions the adequacy of representation. He argues that Lead Plaintiff has failed to adequately protect the interests of Class Members by neglecting to analyze whether "certain class members in certain states would fare better than in others" on the basis of state securities laws. (Heyburn Obj. ¶ 3.) This objection is without merit.

Heyburn overlooks the provisions of the Securities Litigation Uniform Standards Act of 1998 ("SLUSA"). SLUSA amended the federal securities laws to preempt state securities laws in certain class actions.[FN18] In relevant part, SLUSA directs that:

FN18. As the Supreme Court recently noted, SLUSA amends the Securities Act of 1933 ("1933 Act") and the Securities Exchange Act of 1934 ("1934 Act") "in substantially similar ways." *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Dabit,* 547 U.S. 71, __ S.Ct. __, No. 04-1371, 2006 WL 694137, at *7 n. 6 (March 21, 2006). Plaintiffs claims are almost evenly divided between the 1933 Act and the 1934 Act. For ease of reference to the Supreme Court's analysis in *Dabit,* I will quote the amendments to the 1934 Act.

No covered class action based upon the statutory or common law of any State or subdivision thereof may be maintained in any State or Federal Court by any private party alleging-

***16** (A) a misrepresentation or omission of a material fact in connection with the purchase or sale of a covered security; or

(B) that the defendant used or employed any manipulative or deceptive device or contrivance in connection with the purchase or sale of a covered security.

15 U.S.C. § 78bb(f)(1).[FN19]

FN19. The analogous provision in the 1933 Act is found at 15 U.S.C. § 77p(b).

Because the instant action is a "covered class action,"[FN20] alleging materially false and misleading statements or omissions of material fact (Second Am. Compl. ¶¶ 240-432) in connection with the purchase or sale of "covered securit[ies],"[FN21] claims under state securities laws are preempted. Consequently, Lead Plaintiff had no duty to consider, and in fact was prohibited from considering, state securities laws in the context of this class action. *See Dabit,* 2006 WL 694137, at *9; *see also Lander v. Hartford Life & Annuity Ins. Co.,* 251 F.3d 101, 108-10 (2d Cir.2001) (reaching the same conclusion in the context of the 1933 Act). As such, Heyburn's objection to the adequacy of Lead Plaintiff's representation is overruled.

FN20. SLUSA defines a "covered class action" as:

any single lawsuit in which ... damages are sought on behalf of more than 50 persons or prospective class members, and questions of law or fact common to those persons or members of the prospective class ... predominate over any questions affecting only individual persons or members....

15 U.S.C. § 78bb(f)(5)(B). The instant class action clearly falls within this definition.

FN21. "A 'covered security' is one traded nationally and listed on a regulated national exchange." *Dabit,* 2006 WL 694137, at *7 & n. 9 (citing 15 U.S.C. §§ 78bb(f)(5)(E) & 77r(b)). Both AOL (prior to the merger) and AOLTW stock traded on the New York Stock Exchange during the Class Period.

4. Objection to the Notice

"[T]he adequacy of a settlement notice in a class action under either the Due Process Clause or the Federal Rules is measured by reasonableness." *Wal-Mart,* 396 F.3d at 113-14 (citations omitted). Reasonableness refers to the understanding of the average class member; "the settlement notice must 'fairly apprise the prospective members of the class of the terms of the proposed settlement and of the options which are open to them in connection with the proceedings." ' *Id.* at 114 (quoting *Weinberger,* 698 F.2d at 70).

Cynthia R. Levin Moulton ("Moulton") objects to the Class Definition contained in the Notice, arguing that it "is defective and fails to satisfy the minimal requirements of due process" because the definition "only includes those security owners 'who were injured thereby," ' and the "class notice provides nothing by way of guidance concerning what it means to be injured thereby." (Moulton Obj. 2.) Moulton proceeds to describe a number of hypothetical situations in which the "injured thereby" definition may be unclear, as when a putative Class Member realizes gains offsetting her losses or has divergent results stemming from the ownership of distinct investment vehicles.

Moulton made an almost identical objection to the *WorldCom* settlement approved in this District just six months ago. In that case, Moulton argued that the class definition, which contained a similar "injured thereby" clause, "might be confusing to a person who had isolated losses but net gains from securities purchased during the Class Period, or who faced divergent results from purchases of different types of securities." *In re WorldCom,* 388 F.Supp.2d at 340. Judge Cote's well-reasoned analysis of Moulton's objection in that case applies equally here:

> A purchaser of [AOLTW] securities who believed that she had a legally cognizable injury attributable to those purchases would have been on notice that she was included in the Class. It is sufficient that the Class Definition gave putative Class Members who believed they had colorable claims arising from purchases of [AOLTW] securities enough information to alert them that they needed to opt out of the Class if they wished to pursue their claims separately.

***17** *In re WorldCom,* 388 F.Supp.2d at 340-41. Furthermore, the Plan of Allocation provides instructions for the calculation of recovery in many of the allegedly problematic scenarios proposed by Moulton. As in *WorldCom,* Moulton's objection is overruled.

5. Objection to the Plan of Allocation

A plan of allocation is evaluated by the same standards applied to the settlement as a whole: fairness, reasonableness, and adequacy. *See Maley,* 186 F.Supp.2d at 367 (citations omitted). "An allocation formula need only have a reasonable, rational basis, particularly if recommended by 'experienced and competent' class counsel." *Id.* (citations omitted). Despite the existence of one objection here, the Plan of Allocation readily satisfies these standards.

I have already commented on Lead Plaintiff's Counsel's experience and competency. *See supra* Part II.C. Lead Plaintiff's Counsel prepared the Plan of Allocation in consultation with Scott D. Hakala, Ph.D., CPA ("Hakala"), an economics expert who has prepared court-approved plans of allocation in over a dozen securities settlements across the nation. (Hakala Decl. ¶ 1, Jan. 25, 2006.) Hakala designed the Plan of Allocation to provide recovery to damaged investors on a pro rata basis according to their recognized claims of damages. The Plan of Allocation presents clearly defined formulas for calculating claims by reference to a schedule with measures of artificial inflation for all relevant time periods and types of securities. Plans of allocation similarly calculating claims according to inflationary loss have recently been approved as a reasonable approach to the calculation of damages. *See Maley,* 186 F.Supp.2d at 367; *In re Lucent Techs., Inc., Sec. Litig.,* 307 F.Supp.2d 633, 649 (D.N.J.2004).

In his declaration, Hakala explains the methodology used to prepare the Plan of Allocation and asserts that the Plan is "fair and reasonable from an economic perspective." (Hakala Decl. ¶ 28.) While the estimates of damages and methodologies used to produce the Plan are necessarily complex due to the various types of securities involved in the AOLTW merger, the Court agrees with Hakala's assessment.

Pat L. Canada ("Canada") objects to the Plan of Allocation to the extent that it provides for the calculation of damages by the first-in/first-out accounting method ("FIFO"), rather than the last-in/first-out method ("LIFO"). Canada argues that courts prefer LIFO and only reluctantly permit the use of FIFO, thus the Plan of Allocation should be modified to calculate damages using LIFO. FN22

FN22. In addition to their substantive disagreement with Canada's objection, Plaintiffs attack the objection on two procedural grounds. First, they argue that Canada does not have standing, because he did not submit adequate proof of his membership in the Class. Indeed, Canada's non-notarized certification that he purchased 200 shares of AOL stock is not a valid proof of purchase. Second, they argue that Canada's lawyer, Nicholas M. Fausto, Esq. ("Fausto"), is in the practice of submitting "canned objections," thus the Court should be wary of his objection. On this latter point too, Plaintiffs may be correct.

Much of the language in Fausto's brief attacking the use of FIFO is taken directly from Judge Schiendlin's opinion in *In re eSpeed, Inc. Sec. Litig.,* 232 F.R.D. 95 (S.D.N.Y.2005). Despite the fact that it is the most comprehensive authority from this District supporting his argument, Fausto fails to cite the case, choosing instead to lift whole sentences from that opinion without attribution. *Compare* Canada Obj. 7-8, *with In re eSpeed,* 232 F.R.D. at 101-02 & nn. 35-36. None of his arguments are original, nor are they made in the context of the specific factual circumstances of this case. Although I am wary of the Canada objection, I will briefly address the thrust of its argument.

In the context of a securities class action, FIFO and LIFO refer to methods used for matching purchases and sales of stock during the class period in order to measure a class member's damages. Under FIFO, a class member's damages are calculated by matching her first purchases during the class period with her first sales during the class period. Under LIFO, a class member's damages are calculated by matching the class member's last purchases during the class period with the first sales made during the period. Calculating recovery by means of these different methods can affect the measure of a class members' injury. Depending on the trajectory of a stock's percentage of artificial inflation and the sale of shares during the class period, use of FIFO may result in damages where LIFO would not, and vice versa.

***18** The method used to match purchases and sales when calculating damages in a securities action has only recently been the subject of judicial scrutiny and has more commonly arisen in the context of a court's assignment of lead plaintiff status. In this District, both FIFO and LIFO have been used to calculate the financial stake of movants for lead plaintiff status in securities class actions. *Compare In re Veeco Instruments Inc. Sec. Litig.,* 233 F.R.D. 330, 333 (S.D.N.Y.2005) (concluding that FIFO is "the appropriate methodology ... for the purpose of considering the financial stake of the movant for lead plaintiff status"), *with In re eSpeed, Inc. Sec. Litig.,* 232 F.R.D. 95, 100-02 (S.D.N.Y.2005) (concluding that lead plaintiff movant's "loss as calculated by the [movant] demonstrates why FIFO (as applied by the [movant]) is inferior to LIFO"). Determining the method of analysis is especially important in the context of lead plaintiff selection because prospective lead plaintiffs may manipulate their analysis in order to inflate their measure of damages, giving them an advantage over movants that calculate damages according to a different methodology.[FN23]

> FN23. The method of analysis was not contested during the selection of lead plaintiff in this case. Without any objection, FIFO was used to calculate the damages in movants' applications for lead plaintiff. (Crawford Aff. Ex. B, Oct. 15, 2002.) Furthermore, the more than half million claimants to this Settlement have submitted their claims on the basis of the Plan of Allocation as presented here.

The LIFO/FIFO debate has not arisen in the context of a plan of allocation anywhere in this Circuit,[FN24] and Canada's conclusory objection fails to raise the slightest inference of how the Plan of Allocation's use of FIFO is unfair here. *Cf. In re eSpeed,* 232 F.R.D. at 101 (finding FIFO unfair in movant's application for lead plaintiff status in light of the movant's specific, manipulative application of FIFO in that case). Nor can Canada explain how the method of analysis would affect his recovery, as he claims to have made only a single purchase of stock and LIFO/FIFO is necessarily concerned with the matching of multiple stock purchases. Here, the Plan of Allocation is careful to limit a claimant's recovery to shares sold at a loss. Moreover, Plaintiff's economic expert affirms that "the overall effect of using the LIFO method instead of FIFO is not significant in this case." (Hakala Decl. ¶ 27.) Ultimately, there is no evidence that the method of analysis used in this case would result in an unfair distribution of the Settlement Fund.[FN25]

> FN24. One court in this District recently approved a Plan of Allocation using LIFO, but did not elaborate on the choice of methodology, nor is their any evidence that the method of analysis was contested in that case. *See SEC v. Bear, Stearns & Co. Inc .,* No. 03 Civ. 2937, 2005 WL 217018, at *7 (S.D.N.Y. Jan. 31, 2005). The unelaborated use of LIFO in one case does not compel the use of that method of analysis in all cases. Both Hakala and the Settlement Administrator affirm that FIFO has been used in the great majority of the plans of allocation that they have prepared and administrated in the past. (Hakala Decl. ¶ 22; Forrest Decl. ¶ 12.)

> FN25. This Opinion should not be read as an unconditional endorsement of FIFO as the method for matching purchases and sales for the calculation of damages in securities fraud litigation. Rather, the insignificance of the methodology applied in this case makes it counter-productive to require Plaintiffs to revise the Plan of Allocation and reinitiate the Notice period in order to calculate damages according to LIFO.

In light of overwhelming support for the Plan of Allocation by nearly all of the estimated 600,000 claimants to the Settlement, and the insignificance of the method of matching sales with purchases in the context of this case, I find the Plan of Allocation fair, reasonable, and adequate.

III. Conclusion

For the foregoing reasons, Lead Plaintiff's petition for approval of the Settlement and Plan of Allocation is granted. A separate opinion establishing attorney's fees and expenses will follow.

SO ORDERED.

S.D.N.Y.,2006.
In re AOL Time Warner, Inc.
Not Reported in F.Supp.2d, 2006 WL 903236 (S.D.N.Y.)

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Only the Westlaw citation is currently available.

United States District Court,
D. Massachusetts.
Deborah J. BARNES, Plaintiff,
v.
FLEETBOSTON FINANCIAL CORP., and Fleet National Bank, N.A., Defendants.

C.A. No. 01–10395–NG.
Aug. 22, 2006.

Alexander H. Burke, Cathleen M. Coombs, Daniel A. Edelman, Edelman, Combs, Latturner & Goodwin, LLC, Chicago, IL, Yvonne W. Rosmarin, Law Office of Yvonne W. Rosmarin, Arlington, MA, for Plaintiff.

Alan S. Kaplinsky, Ballard, Spahr, Andrews & Ingersoll, Philadelphia, PA, Jon E. Hayden, Fleetboston Financial Corporation, Corporate Law Dept., Joseph L. Kociubes, Rheba Rutkowski, Bingham McCutchen LLP, Boston, MA, for Defendants.

MEMORANDUM AND ORDER RE: MOTION TO REQUIRE OBJECTOR FELDMAN TO POST APPEAL BOND

GERTNER, District Judge.

***1** (This Memorandum replaces the one issued yesterday in that typographical errors have been corrected.)

Plaintiffs have filed a motion for bond pursuant to Fed. R.App. P. 7, which states "[i]n a civil case, the district court may require an appellant to file a bond or provide other security in any form and amount necessary to ensure payment of costs on appeal." First Circuit case law indicates that "costs," as contemplated in Rule 7, include the costs attendant to the delay associated with an appeal, and attorneys' fees, as well as double costs under Fed. R.App. 38, and other costs as delineated in Fed. R.App. P. 39. *See Sckolnick v. Harlow,* 820 F.2d 13, 15 (1st Cir.1987); *In re Compact Disc Minimum Advertised Price Antitrust Litig.,* 2003 WL 22417252, at *3 (D.Me.2003). Here plaintiffs seek a bond of $675,111.60 alleging that the appeal of objector Nancy Feldman is frivolous and vexatious, and further, that the delay occasioned by this appeal will harm class members.

Plaintiffs note that part of the difficulty in arriving at and executing this settlement was the difficulty in obtaining addresses for potential class members. The longer the settlement distribution was delayed, the more likely it was that a substantial number of class members would change residences during the appeal. Thus, delay means more than simply loss of use, or the devaluation of the settlement fund, which are compensable by interest. Here, delay means that certain class members would lose the benefit to which they are entitled under the settlement, even if the appeal fails. Plaintiffs further note that Ms. Feldman and her counsel are professional objectors, bringing this appeal not in the interests of the class, but in their own interest.

These concerns are well taken. Repeat objectors to class action settlements can make a living simply by filing frivolous appeals and thereby slowing down the execution of settlements. The larger the settlement, the more cost-effective it is to pay the objectors rather than suffer the delay of waiting for an appeal to be resolved (even an expedited appeal). Because of these economic realities, professional objectors can levy what is effectively a tax on class action settlements, a tax that has no benefit to anyone other than to the objectors. Literally nothing is gained from the cost: Settlements are not restructured and the class, on whose behalf the appeal is purportedly raised, gains nothing.

Under these circumstances, Fed. R.App. P. 7 makes perfect sense: by requiring objectors to post a bond that would cover the costs of losing the appeal, the burden of litigating frivolous appeals shifts to them instead of to the class. Posting a bond sufficient to ensure that the class can recoup the costs of appeal provides the class with an appropriate incentive to litigate the appeals and establish their lack of merit. And if the appeal turns out not to be frivolous despite initially appearing so, the objectors will get almost the entirety of their bond back.

***2** Feldman and her attorney, John Pentz (who is also her son-in-law) are professional objectors, not unlike the plaintiff in *Sckolnick,* whom the First Circuit described as a "litigious pro se who has filed numerous lawsuits in state court." *Sckolnick,* 820 F.2d at 15. In *In Re Compact Disc Minimum Advertised Price Antitrust Litig.,* No. MDL 1361, 2003 WL 22417252, at *3 (D.Me. Oct.7, 2003), the court required Hannah Feldman,[FN1] also represented by Mr. Pentz, to post a bond because that appeal "might be frivolous," and because imposition of sanctions on appeal pursuant to Rule 38 was "a real probability." The court noted that a bond for "damages resulting from delay or disruption of settlement administration caused by a frivolous appeal may be included in a Rule 7 bond." *Id.* Ms. Feldman voluntarily dismissed her appeal several days later.

FN1. Hannah Feldman is John Pentz's wife.

Two questions remain: First, are Feldman's grounds for appeal frivolous? Second, is the amount of the bond requested too high? With respect to the latter question, the bond could presumably be set at such a high point that objectors would be totally precluded from raising an appeal, thereby raising due process concerns. However, objectors have made no arguments about their inability to pay the proposed bond thus far. In any event, if the bond were beyond their ability to pay, they could well move for reconsideration.

On the frivolousness of the appeal: Feldman challenges the computation of attorneys' fees on a "percentage-of-fund" method of settlement rather than a lodestar approach. Feldman and her counsel made the same objection in *In re Relafen,* case no. 01–12239 (D. Mass 2006), appeal docketed and dismissed May 5, 2006, *sub nom Direct Radiography Purchaser v. Smithkline,* appeal no. 05–2846 (1st Cir.). The court in *Relafen* stated "in a common fund case the district court, in the exercise of its informed discretion, may calculate counsel fees either on a percentage of the fund basis or by fashioning a lodestar." *In re Relafen Antitrust Litig.,* 231 F.R.D. 52, 77 (D.Mass.2005). Indeed, *Relafen* dramatizes the point made above: The objectors settled the appeal relating to excessive attorneys' fees for $500.00 for each of the five objectors and $97,500.00 in attorneys' fees. The settlement otherwise remained unchanged and the class received no additional benefit of any kind. Plaintiffs represent that the settlement was entered into by class counsel in *Relafen* to "short-circuit the potential damage to the class that an appeal would cause." Pl. Reply at 5.

Feldman next challenges whether "a court must first make a threshold finding that it is impracticable to distribute settlement funds to the class members before a *cy pres* distribution may be made." Feldman did not raise this issue in her objection papers; therefore, the issue has been waived.

Finally, Feldman suggests that the Court should redistribute the *cy pres* award to the class members based on an interpretation of a decision rendered by the Massachusetts Supreme Judicial Court after the settlement in the instant case had been executed. In *Hershenow v. Enterprise Rent–A–Car Co. of Boston,* 445 Mass. 790, 840 N.E.2d 526 (2006), the court held that a "plaintiff seeking a remedy under G.L. c. 93A § 9, must demonstrate that even a *per se* deception caused a loss." 445 Mass. at 799, 840 N.E.2d 526. Since no class member is entitled to statutory damages, Feldman argues, "payment of any amounts to class members must be regarded as a distribution of cy pres funds." Obj. Reply at 6. The argument is extraordinary: First, there is no precedent for restructuring a settlement agreement based on legal developments that happened later. Second, if a later case could be used to restructure a settlement, *Hershenow* could provide the basis for defendants' repudiation of the existing agreement. Paragraph 15 of the Agreement provides that if any portion of the settlement (other than attorney's fees) is invalidated, the parties may repudiate the settlement in its entirety. Under *Hershenow,* the defendants might well have argued that the hundreds of thousands of class members should split $500,000.00 under the Truth in Savings Act, 12 U.S.C. § 4301, et seq ., rather than the $12.5 million they obtained in the settlement.

***3** With respect to the amount of the bond: The bond the plaintiffs seek is calculated as follows: 5.15% interest on a settlement of $12 .5 million, dating from June 14, 2006, the date of judgment for one year (assuming the case takes only one year to go through the appellate process). That amount would be $643,750.00. Plaintiffs assert that the appeal would likely result in attorneys' fees of $30,000.00. The costs for the earlier appeal in the case amounted to $680.80. Double costs, or $1,361.60, plaintiffs contend, would be appropriate under Fed. R.App. 38, if the Court of Appeals agrees that this appeal was frivolous.

I agree with this computation with one exception: the $30,000.00. attorneys' fees amount. Counsel has provided an evidentiary basis for all components of the bond, with the sole exception of the attorneys' fees.

Accordingly, I order that objector Nancy Feldman post a bond in the amount of Six Hundred Forty–Five Thousand, One Hundred Eleven and 60/100 ($645,111.60) Dollars.

SO ORDERED.

D.Mass.,2006.
Barnes v. Fleetboston Financial Corp.
Not Reported in F.Supp.2d, 2006 WL 6916834 (D.Mass.)

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Only the Westlaw citation is currently available.

United States District Court,
S.D. Indiana,
Indianapolis Division.
Kevin T. HEEKIN, Mary E. Ormond, Estate of Mary A. Moore On behalf of Themselves and all Others Similarly Situated, Plaintiffs,
v.
ANTHEM, INC., Anthem Insurance Companies, Inc., Defendants.

No. 1:05–cv–01908–TWP–TAB.
Feb. 27, 2013.

Dennis Paul Barron, Dennis Paul Barron LLC, Naples, FL, Eric Hyman Zagrans, Elyria, OH, Edward O'Donnell Delaney, Kathleen Ann Delaney, Delaney & Delaney LLC, Indianapolis, IN, Michael F. Becker, The Becker Law Firm Co., L.P.A., Cleveland, OH, Lynn L. Sarko, T. David Copley, Cari C. Laufenberg, Keller Rohrback L.L.P., Seattle, WA, H. Laddie Montague, Jr., Peter R. Kahana, Todd S. Collins, Neil F. Mara, Berger & Montague, P.C., Philadelphia, PA, for Plaintiffs.

Anne Kramer Ricchiuto, Christopher G. Scanlon, Kevin M. Kimmerling, Matthew Thomas Albaugh, Paul A. Wolfla, Faegre Baker Daniels LLP, Indianapolis, IN, Adam K. Levin, Craig A. Hoover, Peter R. Bisio, Hogan Lovells U.S. LLP, Washington, DC, for Defendants.

ORDER ON REQUEST FOR APPEAL BOND

TANYA WALTON PRATT, District Judge.

***1** This matter is before the Court on Plaintiffs' Motion to Require Objectors to Post Appeal Bonds (Dkt.797). On November 16, 2012, the Court approved the Class Settlement in this case (Dkt.780), which included a $90 million common fund settlement to be paid out pro rata to the over 707,000 Class Members. On November 20, 2012, the Court granted Plaintiffs' motion for attorney's fees and costs (Dkt.786). On December 10 and 19, 2012, respectively, interested parties and objectors Franklin DeJulius and Edwin Paul filed separate Notices of Appeal to the Seventh Circuit Court of Appeals. Mr. DeJulius is appealing the Court's Entry for attorneys' fees, costs and contribution awards (Dkt.787) and Mr. Paul appeals the final approval of the settlement, the allocation plan, and the attorney fee and representative incentive awards (Dkt.791). Plaintiffs request an appeal bond in the amount of $550,000.00 for each objector, or jointly and severally. For the reasons set forth below, the Court **GRANTS, in part,** Plaintiffs' motion.

I. *DISCUSSION*

This action arises from Anthem, Inc.'s demutualization of Anthem Insurance and failure to offer stock for sale to the public at a higher IPO price. A thorough background of the facts in this case can be found in the Court's Entries mentioned above (Dkt.780, 786).

A. Costs Allowed in an Appeal Bond

Federal Rule of Appellate Procedure 7 states: “In a civil case, the district court may require an appellant to file a bond or provide other security in any form and amount necessary to ensure payment of costs on appeal.” Rule 7 exists to protect the rights of appellees by appellants who pose payment risks. *See Adsani v. Miller,* 139 F.3d 67, 75 (2d Cir.1998). The award and amount of an appeal bond is within the discretion of the district court. Appeal bonds only apply to costs relating to the appeal. The Circuits are split as to whether costs under Rule 7 include all costs or only those available under Federal Rule of Appellate Procedure 39(e).[FN1] *See Walton v. City of Carmel,* No. 05–902, 2008 WL 2397683, *3 (S.D. Ind. June 10, 2008) (noting split). The Seventh Circuit has not squarely addressed the issue of whether only Rule 39(e) costs can be secured by an appeal bond under Rule 7. *Id.*

FN1. Rule 39 enumerates the taxable costs

> on appeal. Such costs include the preparation and transmission of the record, the reporter's transcript, premiums paid for a supersedeas bond or other bond to preserve rights pending appeal, and the fee for filing the notice of appeal. The Circuit split deals more specifically with whether attorneys' fees can be secured by an appeal bond, which Plaintiffs do not request in this case. The majority view is espoused by the Ninth Circuit in *Azizian v. Federated Dep't Stores, Inc.,* 499 F.3d 950, 953 (9th Cir.2007).

As noted by the District Court of Minnesota, "[a]ppeal bonds are often required on appeals of class action settlements or attorneys' fee awards because the appeal effectively stays the entry of final judgment, the claims, process, and payment to all class members." *In re Uponor, Inc.,* No. 11–MD–2247ADM/JJK, 2012 WL 3984542, at *2 (D.Minn. Sept.11, 2012). In class action cases, therefore, bonds are used to cover excess administrative costs that otherwise would not have been incurred. *See, e.g., id.; In re Pharm. Indus. Average Wholesale Price Litig.,* 520 F.Supp.2d 274, 279 (D.Mass.2007); *Allapattah Servs., Inc. v. Exxon Corp.,* No. 91–0986, 2006 WL 1132371, at *18 (S.D.Fla. Apr.7, 2006).

***2** Mr. DeJulius argues that courts in this Circuit only give bonds for the cost of copying the briefs and records, but he cites only one case, *In re Starlink Corn Products Liability Litigation,* No. 1403, 01 C 1181, 2002 WL 1291790, at *1 (N.D.Ill. June 11, 2002), to support this position. In *In re Starlink,* Plaintiffs asked for an appeal bond to cover $2,500.00 for costs of appeal as part of a total $100,000.00 appeal bond that also included attorney's fees and lost interest. The Court found that $100,000.00 was excessive and granted only the $2,500.00 costs of appeal. *Id.* That said, *In re Starlink* is not relevant to the bond before the Court. Unlike *In re Starlink,* here Plaintiffs request their taxable costs on appeal and administrative costs caused by the appeal. These delay costs, as noted above, have been recognized by other courts as appropriate for appeal bonds. The Court concludes that in this case, like those cited above, the excess administrative costs created by the delay incident to the appeal, can be characterized as a "cost of appeal" under Rule 7.

B. Determining Appropriateness of Appeal Bond

While the Seventh Circuit has not enumerated a test for when an appeal bond is appropriate, courts generally consider the following factors in determining whether an appeal bond is appropriate: (1) the appellant's financial ability to post a bond, (2) the risk of nonpayment of appellee's costs if the appeal is unsuccessful, (3) the merits of the appeal, and (4) bad faith or vexatious conduct on the part of the appellants. *In re Uponor,* 2012 WL 3984542, at *2. As an initial matter, the trial Court recognizes that it is its place to determine whether an appeal is frivolous. However, the merits of an appeal may be relevant to the risk of nonpayment, "in that if the appellant is pursuing a clearly frivolous appeal one might infer that the appellant is abusing the judicial process and thus has no intention of paying any costs taxed on appeal." *In re Lawnmower Engine Horsepower Mktg. & Sales Practices Litig.,* MDL No. 08–1999, 2010 WL 4630846, at *1 (E.D.Wis. Nov.2, 2010).

In this case, the Court finds that a bond is appropriate. First, neither Mr. DeJulius nor Mr. Paul has submitted to the Court that they are unable to financially sustain a bond.

Second, Plaintiffs have supplied the Court with cases from outside this district in which Mr. DeJulius's counsel and Mr. Paul's counsel [FN2] have been ordered to pay bonds, yet have failed to do so, indicating a risk that appeal costs will likewise not be paid. Moreover, Plaintiffs argue the risk of nonpayment is compounded when Mr. DeJulius and Mr. Paul have insubstantial stakes in the outcome-Mr. DeJulius's total share of the gross settlement is approximately $43.20 and Mr. Paul's share is approximately $433.80. Both are also geographically dispersed from this Circuit, which would present additional expense to Plaintiffs should collection actions be required. While geographic diversity alone will not sustain an appeal bond, *see In re Lawnmower,* 2010 WL 4630846, at *1, taken with the other factors, there is a risk of nonpayment.

FN2. While Mr. Paul ostensibly is representing himself, the Court has reason to believe he has been assisted by counsel, a matter which will be addressed shortly.

***3** Third, Plaintiffs argue the appeals are frivolous and lack merit. For the purposes of Rule 7, the Court is inclined to agree the appeals lack merit. Plaintiffs point to Mr. Paul's surface objection to the *cy pres* award and to Mr. DeJulius's objection to attorney's fees as meritless. Mr. Paul did not directly respond to Plaintiffs' contention, and the Court agrees with Plaintiffs that Mr. Paul's objection did not indicate thorough research or understanding of the applicable law and facts. In Mr. DeJulius's response, he relies heavily on the argument that the Court was required to apply a mandatory sliding scale when awarding attorneys' fees. As it found in previous entries, the Court finds this argument disingenuous and a misapplication of the Seventh Circuit law.[FN3] While the Court does not make a finding the appeals are frivolous, this factor weighs heavily in favor of requiring an appeal bond.

FN3. This is discussed in more detail as evidence of bad faith and vexatious conduct below.

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. It is worth noting that attorney Darrell Palmer ("Mr.Palmer"), previously requested leave to appear *pro hac vice* in this case (Dkt.747). However, this request was withdrawn after the Court scheduled a teleconference to address Mr. Palmer's motion (Dkt.754). Despite this, Mr. Palmer is listed as the payor of Mr. Paul's Notice of Appeal filing fee. Mr. Palmer's office also emailed Plaintiffs a notice and copy of Mr. Paul's most recent filing (Dkt.809–3). Plaintiffs have produced evidence that Mr. Palmer is likely a serial objector and other courts have recognized similar behavior. *See, e.g., In re Uponor,* 2012 WL 3984542, at *3 (in reference to Mr. Palmer, stating, "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"). As in *In re Uponor,* this Court finds such behavior in bad faith and also potentially violative of local and ethical rules.

Moreover, Mr. DeJulius has shown bad faith and vexatious conduct by insisting upon arguments that mischaracterize and misapply Seventh Circuit case law. In his objection, Mr. DeJulius argued that the Court was required to apply the mandatory sliding scale fee structure discussed in *In re Synthroid Marketing Litig.,* 325 F.3d 974 (7th Cir.2003). While a sliding scale fee structure was applied in that case, it was not made mandatory for all class action cases. Mr. DeJulius now argues that his position is supported by Chief Judge Easterbrook's questioning at oral argument in an attorney's fees case. This shift in argument shows that Mr. DeJulius, on some level, acknowledges that he misrepresented the law to the Court and presented a vexatious argument. Furthermore, the Chief Circuit Judge's questions during oral argument are just that, questions, which in no way are determinative or binding on the trial Court. In short, the Court finds that Mr. DeJulius has acted in bad faith.

C. The Amount of the Appeal Bond

***4** Because the factors discussed above heavily favor Plaintiffs, the Court finds an appeal bond is appropriate in this case. Due to the appeal, Plaintiffs estimate they will face $15,000.00 in taxable costs, $273,460.00 in excess administrative expenses, and $300,000.00 to send a supplemental notice to all Class Members about the appeal and delay in the settlement distribution. The total administrative costs are $573,460.00. However, Plaintiffs request only a total of $550,000.00 appeal bond.

Plaintiffs have made a request for an amount lower than their actual estimated costs; however, the Court finds that even $550,000 is a bit excessive. Mr. DeJulius argues that additional notice to the class at a cost of $300,000.00 is unnecessary. Plaintiffs argue that supplemental notice is proper: class members "have never been informed that the distribution process might be held hostage for two years, and the settlement fund potentially *diminished,* by a meritless appeal." Dkt. 809 at 9–10. The Court agrees with Plaintiffs that an additional notice to the class would be beneficial, but such notice, especially a mailed notice, is not required. The Court will therefore decrease the amount of the bond by $300,000. 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.[FN4]

FN4. This amount is also within the range given in other class action cases that include excess administration costs. *See, e.g., In re Cardizem CH Antitrust Litig.,* 391 F.3d 812, 818 (6th Cir.2004) (affirming $174,429 bond); *In re Uponor,* 2012 WL 3984542, at *6 (requiring $170,000 bond); *In re Checking Account Overdraft Litig.,* No. 1.09–MD–02036–JLK, 2012 WL 456691, at *3 (S.D.Fla. Feb.14, 2012) (requiring $616,338 bond); *Allapatah,* 2006 WL 1132371, at *18 (requiring $13.5 million bond)

II. CONCLUSION

For the reasons set forth above, Plaintiff's motion is **GRANTED, in part.** Mr. 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. Mr. DeJulius and Mr. Paul shall file within 10 days of the date of this Order, proof that they have secured the bonds directed by this Order.

SO ORDERED.

S.D.Ind.,2013.
Heekin v. Anthem, Inc.
Not Reported in F.Supp.2d, 2013 WL 752637 (S.D.Ind.)

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Westlaw

Only the Westlaw citation is currently available.

United States District Court,
D. Minnesota.
In re UPONOR, INC., F1807 PLUMBING FITTINGS PRODUCTS LIABILITY LITIGATION
This Order Relates to all Actions.

No. 11–MD–2247 ADM/JJK.
Sept. 11, 2012.

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Chad R. Felstul, Esq., Pemberton, Sorlie, Rufer & Kershner, PLLP, Fergus Falls, MN; and Kenneth S. Kasdan, Esq., Michael D. Turner, Esq., and Michael James White, Esq., Kasdan Simonds Webber & Vaughan LLP, Irvine, CA, and Phoenix, AZ, on behalf of Objectors Oscar Ortega, Toney Abbott, Bonnie Abbott, Alberto Aguilar, Irma Aguilar, Steven A. Archangel, Alejandro Camarena, Monica Camarena, Evelyn Candido, Luis Carillo, John Parrett, Jaime Cubides, Marta Cubides, Verna Culp, Louise Ellis, Rosario Lopez, Monica McCulloch, Daniel Saenz, Angel Morales, Cassandra Smith, Micaela Negrete, Luis Zapata, Todd O'Neal, Sylvia O'Neal, Roberto Perez, Henry Pimentel, Gerardo Rivera, Gregorio Sanchez, Marisol Sanchez, Laura Spindola, Wilber Torres, Kenneth Wright, Debra Wright, Raul Zelaya, Jose Zul, and Lucila Zul.

Objectors Paul Palmer and Jeffrey Palmer, pro se.

MEMORANDUM OPINION AND ORDER

ANN D. MONTGOMERY, District Judge.

I. INTRODUCTION

***1** On August 28, 2012, the undersigned United States District Judge heard oral argument on the Settlement Class's Motion to Require Objectors to File Rule 7 Appeal Bond [Docket No. 112]. For the reasons set forth below, the Motion to Require an Appeal Bond is granted.

II. BACKGROUND

On June 29, 2012, this Court issued a Final Approval Order [Docket No. 96] of a settlement in this underlying multidistrict litigation ("MDL") case concerning brass plumbing fittings sold throughout the country by Radiant Technology, Inc. ("RTI") and Uponor, Inc. ("Uponor") (collectively, the "RTI Defendants"). The approved Settlement Agreement provided substantial benefits for class members, as well as attorneys' fees, costs, and expenses to be paid separately from the fund available for distribution to class members. Aff. of Shawn Raiter in Supp. of Mot. for Final Approval [Docket No. 86] ("Raiter Final Approval Aff.") Ex. A. ("Settlement Agreement") ¶ 85. The Settlement Class includes the owners of an estimated 30,000 homes containing the RTI plumbing system. *See* Raiter Final Approval Aff. ¶¶ 3–6. The costs of repair or replacement could range from $4,000 to $100,000 per structure. *Id.*

After the settlement was reached and the approval and notice process begun, the Ortega Objectors [FN1] and the Palmer Objectors [FN2] sought to intervene and objected to the Settlement Agreement. On June 19, 2012, this Court issued an Order denying Plaintiff–Intervenor Ortega's Motion to Intervene [Docket No. 15], his Motion for Protective Order [Docket No. 24], and his Motion to Decertify Class [Docket No. 28]. *See* June 19, 2012 Order [Docket No. 80]. The Palmer Objectors also filed an objection to the Settlement Agreement, but in the Final Approval Order this Court determined that they were "clearly not class members here" because the pipe fittings they owned were not the pipe fittings involved in the Settlement Agreement. Final Approval Order 6 n. 4. The Ortega Objectors also objected to the Final Approval Order, and their objections were specifically addressed and overruled. *Id.* at 18–21.

FN1. The "Ortega Objectors" include the following thirty-six California homeowners: Oscar Ortega, Toney Abbott, Bonnie Abbott, Alberto Aguilar, Irma Aguilar, Steven A. Archangel, Alejandro Camarena, Monica Camarena, Evelyn Candido, Luis Carillo, John Parrett, Jaime Cubides, Marta Cubides, Verna Culp, Louise Ellis, Rosario Lopez, Monica McCulloch, Daniel Saenz, Angel Morales, Cassandra Smith, Micaela Negrete, Luis Zapata, Todd O'Neal, Sylvia O'Neal, Roberto Perez, Henry Pimentel, Gerardo Rivera, Gregorio Sanchez, Marisol Sanchez, Laura Spindola, Wilber Torres, Kenneth Wright, Debra Wright, Raul Zelaya, Jose Zul, and Lucila Zul.

FN2. The "Palmer Objectors" are two Texas homeowners, Paul and Jeffrey Palmer.

On July 19, 2012, the Ortega Objectors filed a Notice of Appeal to the United States Court of Appeals for the Eighth Circuit [Docket No. 100] ("Ortega Objectors' Notice of Appeal"), and on August 2, the Palmer Objectors did the same. *See* Palmer Objectors' Notice of Appeal [Docket No. 106]. On August 13, 2012, the Settlement Class filed its Motion to Require an Appeal Bond.

III. DISCUSSION

The Settlement Class seeks three categories of bond costs from the Objectors: (1) the direct costs related to the appeal; (2) the cost caused by the delay; and (3) the cost of potentially republishing notice to the class. Although an appeal typically divests a district court of jurisdiction over a case, the court retains jurisdiction to impose a cost bond for appeal. *See Venen v. Sweet,* 758 F.2d 117, 121 n. 2 (3d Cir.1985). Rule 7 of the Federal Rules of Appellate Procedure permits a district court to require an appellant to file a bond in the "amount necessary to ensure payment of costs on appeal." Fed. R.App. P. 7.

***2** The purpose of an appellate cost bond is the protection of appellees' rights by "provid[ing] some level of security to Lead Plaintiffs who have no assurances that Appellants have the ability to pay costs and fees associated with opposing their appeals." *In re Ins. Brokerage Antitrust Litig.,* Civ. No. 04–5184, 2007 WL 1963063, at *2 (D.N.J. July 2, 2007) (quotation omitted). The district court has discretion to craft a bond indicative of the expected outcome on appeal. *Adsani v. Miller,* 139 F.3d 67, 79 (2d Cir.1998). Appeal bonds are often required on appeals of class action settlements or attorneys' fee awards because the appeal effectively stays the entry of final judgment, the claims process, and payment to all class members. *Id.; Allapattah Servs., Inc. v. Exxon Corp.,* No. 91–0986, 2006 WL 1132371, at *18 (S.D.Fla. Apr. 7, 2006). However, appeal bonds must not create "an impermissible barrier to appeal." *Adsani,* 139 F.3d at 79.

Courts consider several factors in determining whether a Rule 7 bond is necessary, including: (1) the appellant's financial ability to post a bond; (2) the risk of nonpayment of appellee's costs if the appeal is unsuccessful; (3) the merits of the appeal; and (4) bad faith or vexatious conduct on the part of the appellants. *See Berry v. Deutsche Bank Trust Co. Americas,* 632 F.Supp.2d 300, 307 (S.D.N.Y.2009). Within its discretion, the court may make objectors jointly and severally liable for the bond payment. *See, e.g., In re. Ins. Brokerage Antitrust Litig.,* 2007 WL 1963063, at *3.

The Court finds a cost bond appropriate in this case because all of the enumerated factors weigh in favor of its imposition. 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 of $1,000. Mem. of Ortega Objectors in Opp'n to Motion to Require an Appeal Bond [Docket No. 122] 5; Response of Palmer Objectors in Opp'n to Pls.' Request for Imposition of Appeal Bond [Docket No. 124] 4 ("Palmer Objectors' Response"). Therefore, the risk of nonpayment of appellees' costs if the appeal is unsuccessful is high. Additionally, the cost bond will be shared by the two groups of objectors, a total of thirty-eight individuals, which alleviates the financial burden and increases the ability of the individual objectors to post the bond.

Regarding the strength of appellants' position, the Court finds the bases for their appeals to be very weak. "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." *Adsani,* 139 F.3d at 79 (citing *Skolnick v. Harlow,* 820 F.2d 13, 15 (1st Cir.1987)). The Palmer Objectors have not yet specified the issues which they will raise on appeal, and whether they have standing to object without having the fitting at issue in their home is doubtful. The Ortega Objectors are appealing issues which this Court has already entertained and found wanting: the timeliness of their intervention, class certification, and the adequacy of the class representatives. *See* Ortega Objectors' Notice of Appeal 3–6. None of these issues are likely to succeed on appeal, and this factor weighs strongly in favor of imposing a bond.

***3** As to the fourth factor in determining a cost bond, the Court finds that the Palmer Objectors have evidenced bad faith and vexatious conduct. Most critically, the Palmer Objectors are not class members. As the Court has noted in a previous order, the photograph of the allegedly faulty pipe fitting in the Palmer residences reveals that their pipe fittings are HLPEX systems, a pipe fitting not involved in this litigation. *See* Final Approval Order 6 n. 4; *see also* Palmers' Objections [Docket No. 73] Ex. A. 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. Raiter Supp. Aff. Relating to Palmer Objectors [Docket No. 125] ¶ 3. This attorney, Darrell Palmer, paid the appellate filing fee on behalf of the Palmer Objectors, and the documents filed on their behalf bear his California mailing address rather than the Texas addresses of the Palmer Objectors. *Id.* ¶¶ 3–6. Further, the Palmer Objectors' Response indicates the involvement of Darrell Palmer or some other attorney. Although the Palmer Objectors profess to be pro se, their memoranda stated that " **Counsel** for appellants has never ever seen a cost bill exceeding $1,000 for a record of this size, in any district." Palmer Objectors' Response 3 (emphasis added). The Palmer Objectors' objections and subsequent appeal appear little more than dilatory tactics of questionable motivation. While the Ortega Objectors have not evidenced any bad faith conduct, both objectors' arguments are without merit. Given the Palmers 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.

A. Direct Appeal Costs

The Settlement Class seeks a $25,000 bond in costs related to the Objectors' appeals. Costs that may be taxed in an appeal bond include the costs of preparing and transmitting the record, the costs of obtaining necessary transcripts, printing costs, and other copying costs. *In re Ins. Brokerage Antitrust Litig.,* 2007 WL 1963063, at *2. Courts routinely approve bonds for appeal-related costs of $25,000. *See id.* at 2–3; *In re Diet Drugs (Phentermine, Fenfluramine, Dexenfluramine) Prods. Liab. Litig.,* Civ.A. 99–20593, 2000 WL 1665134, at *4–5 (E.D.Pa. Nov. 6, 2000).

The Settlement Class estimates that the costs on appeal will be at least $25,000. The Ortega Objectors generally agree. The Palmer Objectors, on the other hand, contend that the Settlement Class has failed to provide evidence regarding allowable costs and, therefore, that this Court should not impose any appeal bond to cover costs. The Settlement Class bases its estimate of appeal-related costs on several factors, including the appearance of twenty-four law firms as counsel in this litigation, the filing of two separate appeals, and the size of the MDL and underlying dockets. *See* Raiter Aff. in Support of Mem. in Support of Settlement Class's Motion to Require Objectors to File Rule 7 Appeal Bond [Docket No. 115] (“Raiter Rule 7 Aff.”) ¶¶ 3–4. The Court finds that a $25,000 bond for costs related to the appeals is reasonable.

***4** Although the Palmer Objectors argue that costs incurred by the Settlement Class in defending this appeal are de minimus and less than $1,000, this figure is woefully understated and inadequate to protect the rights of the Settlement Class. For instance, the Palmer Objectors argue that the record will likely not exceed 100 pages, but they base this estimate on providing only “excerpts from the motion for preliminary settlement, motion for final settlement, Appellants' objection, transcript from final hearing, and Appellants' notice of appeal.” Palmer Objectors' Response 2. The Palmer Objectors also fail to account for the provision of copies to the twenty-three other law firms involved. For this reason, the Palmer Objectors' proposed amount is insufficient to protect Plaintiffs, and the $25,000 bond amount requested by the Settlement Class is an appropriate bond amount.

B. Costs Caused by Delay

In addition to costs related to the appeal, the Settlement Class also seeks a bond for costs caused by delay of implementing the settlement. Specifically, the parties to the Settlement Agreement hired a claims administrator to handle incoming claims, and because an appeal will likely not be resolved for approximately twelve months, the parties expect the claims administrator to charge an extra $20,000 for additional administrative functions during the delay. *See* Raiter Rule 7 Aff. ¶ 6. The Objectors protest that the delay caused by the appeal will not increase class member inquiries or claims, that any delay was anticipated and therefore not causally related to the appeal, and that they have no obligation to ensure the availability of the judgment.

Costs 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 NASDAQ Market–Makers Antitrust Litig.,* 187 F.R.D. 124, 128 (S.D.N.Y.1999) (quoting *Morgan Guaranty Trust Co. of N.Y. v. Republic of Palau,* 702 F.Supp. 60, 65 (S.D.N.Y.1988)). Numerous courts have awarded costs incurred by delays caused by objectors' appeals in a class action settlement. *See In re NASDAQ Market–Makers Antitrust Litig.,* 187 F.R.D. at 128 (awarding a bond for “damages resulting from the delay and/or disruption of settlement administration caused by [an] appeal in the amount of $50,000”); *In re Checking Account Overdraft Litig.,* No. 1.09–MD–2036, 2012 WL 456691 (S.D.Fla. Feb. 14, 2012) (ordering a bond in excess of $616,000 because the appeal “prevent[ed] distribution of the Settlement proceeds as ordered by this Court's Final Judgment”); *In re Cardizem CD Antitrust Litig.,* 391 F.3d 812, 818 (6th Cir.2004) (affirming the trial court's imposition of an appeal bond including $123,429 in incremental administration costs because the appeal had “the practical effect of prejudicing the other injured parties by increasing transaction costs and delaying disbursement of settlement funds”); *In re Compact Disc Minimum Advertised Price Antitrust Litig.,* No. MDL 1361, 2003 WL 22417252 (D.Me. Oct. 7, 2003) (awarding a $35,000 bond, an amount which included fees for settlement administration and the cost of tracking down class members who moved during the appeals period).

***5** Courts 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 Checking Account Overdraft Litig.,* 2012 WL 456691, at *2.

The $20,000 bond requested by the Settlement Class for costs incurred by delay are reasonable and necessary. The costs of additional administration should be shouldered by the Objectors, particularly given the tenuous nature of their arguments. The Ortega Objectors cite several cases for their assertion that a bond is inappropriate for any delay, but those cases are inapposite. They cite language from a Pennsylvania case which states that a supersedeas bond is inappropriate because "an objector has no obligation to ensure the availability of the judgment; the defendants, and not the objector, are charged with implementing the settlement." *In re Am. Investors Life Ins. Co. Annuity Mktg. & Sales Practices Litig.,* 695 F.Supp.2d 157, 162 (E.D.Pa.2010). The court in that case, however, was analyzing the propriety of a supersedeas bond to effect a stay. No stay is involved here. Further unlike *In re Am. Investors,* the bond requested in this case is a Rule 7 bond rather than a Rule 62 supersedeas bond which makes the quoted language inapplicable. The purpose of a Rule 7 bond is not to ensure the availability of the judgment but rather to protect the Settlement Class from additional costs imposed by the appeals.

The Ortega Objectors other argument is similarly flawed. They contend that because an appeal was anticipated by the parties to the Settlement Agreement, no bond is required. The Ortega Objectors cite *Vaughn v. Am. Honda Motor Co., Inc.,* 507 F.3d 295 (5th Cir.2007), where a bond request was denied in part because the settlement agreement did not include a provision for payment of prejudgment interest and because the settlement was not effective until all appeals were concluded. *Id.* at 299. The bond to which the Ortega Objectors object, however, is a bond for administrative costs incurred by delay, not a bond for prejudgment interest. While the Settlement Agreement states that the settlement does not become effective until after all appeals, *see* Settlement Agreement ¶ 125, this does not resolve the question of which party should bear the additional cost caused by the delay of an unsuccessful appeal. The *Vaughn* case, therefore, is inapposite, and a bond for the costs of delay is appropriate in these circumstances.

C. Costs Caused by Additional Class Notice

The Settlement Class also requests a $500,000 bond to cover the costs of any additional class notice that may be required due to the delay caused by the appeal. The Ortega Objectors contend that no further notice is currently required, and it is highly unlikely that it will be required in the future. The Palmer Objectors do not specifically address this element of the requested bond, although they aver that "they cannot post a bond in the amount of $500,000" but "could post a bond in the amount of $1,000." Palmer Objectors' Response 4.

***6** A bond in the amount of $125,000 in this case is sufficient to ensure that appellees' rights are protected. This amount reflects that the appeal will result in a significant delay of the claims process and ultimate payment to class members. Courts have approved much higher Rule 7 bonds in the class settlement context. *See, e.g., Allapattah,* 2006 WL 1132371, at *18 (imposing a bond in the amount of $13.5 million because of the "highly detrimental impact of an appeal of the settlement agreement as to the entire class"); *In re Checking Account Overdraft Litig.,* 2012 WL 456691, at *3 (imposing a $616,000 bond because of the delay caused by an appeal). The Court finds that additional class notice may be required due to the delay occasioned by the appeal, and that a bond of $125,000 is sufficient to protect the appellees. Because the initial class notice program cost nearly $1 million, it is reasonable to discern that an additional notice would likely cost significantly more than $125,000. *See* Raiter Rule 7 Aff. ¶¶ 7–9. For these reasons, the Court finds that $125,000 is adequate and necessary to protect the appellees on these potential costs.

D. Bond Not a Barrier to Appeal

The total bond amount of $170,000 does not impose an insurmountable barrier to appeal for appellants. Rule 7 bonds are not intended to be used as a means of discouraging appeals, even appeals which lack merit. *See, e.g., Clark v. Universal Builders, Inc.,* 501 F.2d 324, 341 (7th Cir.1974) ("[A]ny attempt by a court at preventing an appeal is unwarranted and cannot be tolerated."); *In re Diet Drugs,* 2000 WL 1665134, at *6 (reducing bond amount because an excessive bond "would effectively squelch the right to appeal for many if not all of [the objectors]"); *cf. Lindsey v. Normet,* 405 U.S. 56, 77–79 (1972) (holding that bonds are not to be used as a barrier to appeal).

No evidence has been proffered by either the Ortega Objectors or the Palmer Objectors as to any financial hardship, and the Court finds that $170,000 shared between thirty-eight individuals—approximately $4,470 per individual—is not a barrier to appeal.

IV. CONCLUSION

Based upon the foregoing, and all the files, records, and proceedings herein, **IT IS HEREBY ORDERED:**

1. The Settlement Class's Motion to Require Objectors to File Rule 7 Appeal Bond [Docket No. 112] is **GRANTED;**

2. The Palmer Objectors and Ortega Objectors are required to post a bond in the total amount of $170,000, which is comprised of:

a. $25,000 for the direct costs of the appeal;

b. $20,000 for the administrative costs of the delay caused by the appeal;

c. $125,000 for the cost of additional class notice;

3. The Palmer Objectors and Ortega Objectors are jointly and severally liable for the full amount of the bond; and

4. The Palmer Objectors and the Ortega Objectors shall file, within ten (10) days of the date of this Order, proof that they have secured the bonds directed by this Order and shall further file the original bonds with the Clerk of Court.

D.Minn.,2012.
In re Uponor, Inc., F1807 Plumbing Fittings Products Liability Litigation
Not Reported in F.Supp.2d, 2012 WL 3984542 (D.Minn.)

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