

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

IN RE COMPACT DISC MINIMUM]
ADVERTISED PRICE]
ANTITRUST LITIGATION]

MDL DOCKET No. 1361

(This Document Applies To All Actions Except
Trowbridge, et al. v. Sony Music Entertainment Inc.,
et al., Docket No. 2:01-CV-125-P-H)

**AMENDED MEMORANDUM AND ORDER ON
MOTION FOR ASSESSMENT OF APPEAL BOND**

On July 9, 2003, I entered final judgment approving a settlement in this lawsuit. Five notices of appeal were filed; three of them later were withdrawn; one of the remaining appeals is not at issue on this motion.¹ The plaintiff States and the private class plaintiffs (“the plaintiffs”) have requested that I order the appellants on the remaining appeal (Feldman and Marsh) to post an appeal bond pursuant to Fed. R. App. P. 7 in the amount of \$350,300. Pls.’ Mot. for Assessment of Appeal Bond (Docket No. 310) at 1 n.3.² The defendants do not object to the motion. The appellants on the pertinent notice of appeal have filed a response.

Federal Rule of Appellate Procedure 7 provides:

¹ The motion does not apply to the appeal of Michael L. Brewer, a *pro se* litigant. It applies, therefore, only to one appeal, that of Hannah Feldman and Lisa Marsh.

² The plaintiffs have also filed a motion in the United States Court of Appeals for the First Circuit to dismiss the appeal, as well as a motion that resulted in expedited briefing. I understand that initial briefs are due in that court on October 7, 2003.

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 8(b) applies to a surety on a bond given under this rule.

Such a bond is to be distinguished from a *supersedeas* bond, which is available only when a stay has been requested and granted in the district court. Fed. R. Civ. P. 62(d); see, e.g., J. Perez & Cia, Inc. v. United States, 747 F.2d 813, 815 (1st Cir. 1984). No one has requested a stay of my July 9, 2003 judgment.

The plaintiffs' proposed bond includes \$400 in reproduction costs (doubled under Fed. R. App. P. 38 based on an allegation that the appeal is frivolous); additional costs of \$240,300, covering storage and distribution of the *cypres* CDs, fees to the bank administering the settlement fund and tracking down claimants who move during the anticipated period from the July 9 judgment until resolution of the appeal; and \$110,000 in projected attorney fees in connection with the appeal.

In Sckolnick v. Harlow, 820 F.2d 13 (1st Cir. 1987), the First Circuit upheld a district court's imposition of a bond under Fed. R. App. P. 7, noting that

the district court's decision to set the amount at \$5,000 implied a view that the appeal might be frivolous and that an award of sanctions against plaintiff on appeal was a real possibility. . . . We note, also, that defendants introduced evidence below that plaintiff is a litigious *pro se* who has filed numerous lawsuits in state court.

Id. at 15. Objectors/Appellants Feldman and Marsh contend that a Rule 7 bond may not include attorney fees, but their argument is inconsistent with Sckolnick,

where the motion for a bond specifically included attorney fees and the First Circuit stated: “The determination and amount of the bond is a matter left to the sound discretion of the district court.” (The First Circuit may impose attorney fees should it determine that the appeal is frivolous, pursuant to Fed. R. App. P. 38. Maier v. Hyde, 272 F.3d 83, 87 (1st Cir. 2001)). Feldman and Marsh also contend that a Rule 7 bond may not include costs of delay. That issue is a matter of disagreement among some courts, compare In re Diet Drugs Prods. Liab. Litig., 2000 WL 1665134 (E.D. Pa. Nov. 6, 2000), at *4-*5, with In re NASDAQ Market-Makers Antitrust Litig., 187 F.R.D. 124, 128 (S.D.N.Y. 1999). Because Sckolnick makes clear that in the First Circuit a Rule 7 bond *can* cover damages assessed under Fed. R. App. P. 38, I agree with In re NASDAQ Market-Makers Antitrust Litig., 187 F.R.D. 124, 128 (S.D.N.Y. 1999), that damages resulting from delay or disruption of settlement administration caused by a frivolous appeal may be included in a Rule 7 bond.

Determining whether the appeal in this case “might be frivolous,” in the language of Sckolnick, is complicated somewhat by the fact that the notice of appeal does not specify any issues and no further specification of issues has yet been made in the First Circuit filings. But Feldman and Marsh state in their response to the plaintiff’s motion for an appeal bond that their appeal deals only with the award of attorney fees to the States. Mem. in Opp’n at 4. They cite a Seventh Circuit decision, In Re General Motors Corp. Engine Interchange Litig.,

594 F.2d 1106, 1130 (7th Cir. 1979) as supporting their position that States are not entitled to attorney fees. But in that case the State was not suing as *parens patriae* under the Clayton Act, the situation here. The Clayton Act explicitly grants a State the right to recover attorney fees in a *parens patriae* lawsuit. 15 U.S.C. § 15c(a)(2). I have little difficulty, therefore, in reaching the conclusion that the appeal “might be frivolous,” and that an award of sanctions on appeal is “a real possibility.”³

Accordingly an appeal bond recognizing some of the costs this appeal imposes on the plaintiffs is in order under Rule 7. But I am also mindful of the fact that objectors sometimes serve a useful role in helping police class action settlements in cases where the assumptions that customarily underlie the adversary system may be inaccurate (for example, defendants may co-opt plaintiffs’ counsel by agreeing to unreasonably high attorney fees). To pose too high a hurdle for objectors, therefore, could create a general deterrent that might well not comport with public policy.⁴

³ I have previously noted that Attorney Pentz representing Feldman filed a groundless objection following the fairness hearing, Decision and Order on Notice, Settlement Proposals, Class Certifications and Attorney Fees (Docket No. 270) (June 13, 2003) at 42 n.52, and he appears to be a repeat objector in class action cases. See, e.g., Spark v. MBNA Corp., 48 Fed. Appx. 385, 386 (3d Cir. 2002) (listing Mr. Pentz, from The Objectors Group, as counsel for objectors); Tenuto v. Transworld Sys., Inc., 2002 WL 188569 (E.D. Pa. Jan. 31, 2002), at *2 (same).

⁴ Counsel for Feldman and Marsh states that the bond sought by the plaintiffs in this case “would effectively terminate this appeal, as a practical matter,” but does not offer any evidence of the ability or inability of his clients to pay any amount that might be imposed under Rule 7.

Accordingly, taking all circumstances into account, I **GRANT** the motion for assessment of appeal bond, but in a lower amount, Thirty-Five Thousand Dollars (\$35,000).

So ORDERED.

DATED THIS 7TH DAY OF OCTOBER, 2003.

D. BROCK HORNBY
UNITED STATES DISTRICT JUDGE

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