IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF SOUTH CAROLINA

IN RE: AQUEOUS FILM-FORMING FOAMS PRODUCTS LIABILITY LITIGATION	))	Master Docket No.: 2:18-mn-2873-RMG
CITY OF CAMDEN, et al., *Plaintiffs,* -vs- E.I. DUPONT DE NEMOURS AND COMPANY (n/k/a EIDP, Inc.), et al. *Defendants.*	))))))))))))	Civil Action No.: 2:23-cv-03230-RMG

CLASS COUNSEL'S MEMORANDUM IN SUPPORT OF MOTION TO IMPOSE BOND ON METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA

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I. INTRODUCTION

Pursuant to Fed.R.App.P. 7, Class Counsel move to impose an appeal bond on Metropolitan Water District of Southern California ("Met"). On March 11, 2024, Met filed a Notice of Appeal (ECF No. 4653) from this Court's Orders granting final approval of the landmark settlement with DuPont. This Court is presiding over the historic settlement with DuPont, which is currently the second largest water contamination settlement in the nation, second only to the 3M Public Water Provider Settlement, which is likewise before this Court. The DuPont Settlement will distribute $1.185 billion to every eligible Public Water System ("PWS") whose drinking water is contaminated by PFAS[1] to allow them to remediate their drinking water, which is consumed or otherwise used by hundreds of millions of Americans. The appeal of Met, an opted-out Class Member with no standing to either object to the settlement or appeal its approval, threatens to delay the implementation of the DuPont Settlement resulting in substantial and irreparable harm to Class Members. For example, the delay posed by Met's appeal will force PWS to find alternative sources of funds for PFAS remediation (from sources such as ratepayers, bank loans or bonds), or else be bereft of the necessary financial resources, while placing the public health at risk as a federally enforceable Maximum Contaminant Level ("MCL") looms.[2]

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[1] According to the Environmental Protection Agency ("EPA"), it has "determined that PFOA and PFOS are likely to cause cancer." See Federal Register, Vol. 88, No. 60, A Proposed Rule by Environmental Protection Agency (3/29/2023), *available at:* https://www.federalregister.gov/documents/2023/03/29/2023-05471/pfas-national-primary-drinking-water-regulation-rulemaking#addresses.

[2] EPA has proposed a MCL of 4 ppt for each PFOA and PFOS (contaminants the EPA has classified as likely human carcinogens), which would result in thousands of water providers likely finding themselves in violation of the newly enacted MCL and requiring them, in turn, to find funding for the high costs of PFAS remediation while the subject appeal is pending. *Id*.

To address Met's "Johnny Come Lately" and highly improper appeal, which effectively stays the Effective Date of the DuPont Settlement and payments to every Class Member, a meaningful bond should be imposed.

II. FACTUAL BACKGROUND

On March 11, 2024, Met filed an appeal to the Fourth Circuit from this Court's Order and Opinion (ECF No. 4471) and Final Order and Judgment (ECF No. 4543). Through those Orders, the Court granted final approval of the DuPont Settlement Agreement as being fair, reasonable, and adequate, after notice to the entire Class and a hearing that provided an opportunity for objections and comments. Only a few Class Members objected, including Met, most of them represented by the same counsel that represents Met, Marten Law. Met is not known to have PFOS or PFOA contamination, and on November 30, 2023, it elected to exercise its rights under the Settlement Agreement to exclude itself, or "opt-out" of the Settlement, which effectively rescinded its pending objection.[3] Nevertheless, Met has continually worked to discredit, disrupt, and dismantle the DuPont Settlement. Despite these efforts, the vast majority of the Class overwhelmingly supported approval of the Settlement, which creates a settlement fund totaling $1.185 billion for the benefit of Class Members. With this Court's August 22, 2023, Order granting Preliminary Approval of the Settlement,[4] DuPont was obliged to transfer the Settlement Amount to the Qualified Settlement Fund. However, notwithstanding ready access to these available funds, all payments from this fund to the Class Members must now await the outcome of Met's appeal of the Court's final approval orders, which quite foreseeably could take a year or more to adjudicate.

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[3] *See* Settlement Agreement at § 9.7.3 ("Any person that submits a timely and valid Request for Exclusion shall not *** (iv) be entitled to submit an Objection.").
[4] ECF No. 3603.

It is a travesty that this single opted-out Class Member can hold up significant payments to thousands of deserving Class Members, given that Met's decision to opt-out deprived it of standing to object to or appeal from the approval of the Settlement.[5]

Accordingly, Met has no standing to challenge the Settlement Agreement because it has no stake in any of its benefits. Met's appeal is nothing but a selfish attempt to frustrate the implementation of the Settlement for thousands of Class Members who desire to participate in its benefits and protect the health of millions of Americans, to garner some perceived strategic business advantage for itself through objections to the Class Settlement. As is more fully discussed below, Met's counsel, Mr. Kray of Marten Law, has demonstrated in this case that he is an opportunist looking to generate more business for himself rather than to advance the *bona fide* concerns of the Class.[6]

III. ARGUMENT

a. The Standards for Imposing a Cost Bond Have Been Satisfied

Rule 7 of the Federal Rules of Appellate Procedure provides that a 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." Fed.R.App.P. 7. Rule 7 authorizes district courts to exercise

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[5] *See Newberg and Rubenstein on Class Actions* § 13:22 (6th ed.) ("class members who opt out of the settlement are no longer class members and hence, by opting out of the class, lose the standing to object conferred by Rule 23 upon class members."); *Harper v. C.R. England, Inc*., 746 F. App'x 712, 718 (10th Cir. 2018) ("Opted-out class members lack standing to object to a settlement."); *Jenson v. Cont'l Fin. Corp*., 591 F.2d 477, 482 n.7 (8th Cir. 1979) ("Opt-outs … are not members of the class and hence are not entitled to the protection of Rule 23(e)); *Mayfield v. Barr,* 985 F.2d 1090, 1093 (D.C. Cir. 1993) ("[t]hose who are not class members, because they are outside the definition of the class or have opted out," lack standing to object to class settlement). *Accord Doe v. Pub. Citizen,* 749 F.3d 246, 257 (4th Cir. 2014) ("as a general rule, only named parties to the case in the district court and those permitted to intervene may appeal an adverse order or judgment.") (citing *Marino v. Ortiz,* 484 U.S. 301, 304 (1988)).

[6] *See* Class Counsel's Motion for Sanctions, ECF No. 4691.

their discretion whether to impose a bond. *See Schmidt v. FCI Enterprises LLC*, 3 F.4th 95, 99 (4th Cir. 2021) ("Federal Rule of Appellate Procedure 7 permits a district court to 'require an appellant to file a bond'"). The Fourth Circuit has acknowledged it has no precedent regarding what "costs" may be subject to a bond, so it looks to other sister courts for authority. *Id*. ("We have no precedent discussing the meaning of 'costs on appeal,' but our sister circuits have found that such costs must be related to the appeal and are the costs a 'successful appellate litigant can recover pursuant to a specific rule or statute.'") (quoting *Tennille v. W. Union Co.*, 774 F.3d 1249, 1254-55 (10th Cir. 2014) (collecting cases)). For example, most recently, in *Sky Cable, LLC v. DIRECTV, Inc.,* 23 F.4th 313, 321 n.8 (4th Cir. 2022), the Fourth Circuit affirmed the use of an appeal bond to secure the award of reasonable attorneys' fees and costs for post-judgment enforcement proceedings.

Given the paucity of authority from the Fourth Circuit of a specific test governing the exercise of discretion of Rule 7 cost bonds, courts within the Circuit employ the following three factor standard: "(1) whether there is a risk of non-payment in the event that the appellants lose their appeal, (2) any previous bad faith or vexatious conduct on part of the appellants, and (3) the likely merits of the appeal." *In re Meabon,* No. 15-398, 2017 WL 374921, at *2 (W.D.N.C. Jan. 25, 2017) (citing cases). *See also Durham v. Jones*, No. 10-2534, 2013 WL 12242047, at *2 (D. Md. Feb. 6, 2013) (same). Each of these factors suggests that an appeal bond should be issued.

First, there is a risk that Met will refuse payment of costs in the event it loses its appeal. Met has demonstrated its shiftiness throughout these proceedings. First it objected to the Settlement through its lawyers at Marten Law. Then, under the advice of Marten Law it submitted its opt-out Request for Exclusion, which effectively rescinded its objection. Then, it re-appeared under new counsel, while still represented by Marten Law, only to file a Notice of Appeal and a Motion to Intervene without regard for its obligation to meet and confer in good faith over its

proposed motion under Local Rule 7.02[7] or for the fact that its opting-out deprived it of standing to object to the Settlement or to appeal. Met may similarly decide to ignore compliance with established Rules or attempt to dodge any obligation to pay costs on appeal unless it is first pinned down with a sizable cost bond to ensure payment of the costs to the Class.

Second, there is a long history of bad faith and vexatious conduct on the part of Met and its counsel. As recounted at length in Class Counsel's Motion for Sanctions and Other Relief (ECF No. 4691), Met and its Counsel have a history of (1) libeling Class Counsel and the Court; (2) knowingly disseminating disinformation directly to Class Members regarding the Settlement; (3) burdening the Court with abusive and frivolous objections; and (4) broadcasting disinformation clearly intended to undermine the Settlement. Incredibly, *after* filing its Notice of Appeal, depriving the district court of jurisdiction to hear a motion to intervene,[8] Met still went ahead and filed its motion to intervene. The filing of such a patently and objectively meritless motion further demonstrates the bad faith and vexatious conduct of Met that has permeated these proceedings.

Finally, there is no merit to Met's appeal. It is incontrovertible that Met opted out of the DuPont Settlement. By law, "[o]pted-out class members lack standing to object to a settlement." *Harper,* 746 F. App'x at 718. Met's lack of standing similarly dooms its appeal. "[O]nly named parties to the case in the district court and those permitted to intervene may appeal an adverse order or judgment." *Doe*, 749 F.3d at 257. Met is not a party to these proceedings by virtue of its opt-

[7] The totality of Met's conduct throughout the course of the settlement process has been thoroughly set forth in Class Counsel's Motion for Sanctions [ECF No. 4691-1], which relevant parts are incorporated by reference as if fully stated herein.

[8] *Doe v. Public Citizen*, 749 F.3d 246, 258 (4th Cir. 2014) ("an effective notice of appeal divests a district court of jurisdiction to entertain an intervention motion.").

out status. This fact completely distinguishes Met's situation from that of the objector who was denied intervention and party status in *Devlin v. Scardelletti,* 536 U.S. 1 (2002).[9]

Because all three *Meabon* factors have been satisfied, a substantial cost bond should issue.

b. A Sizeable Cost Bond Commensurate with the Settlement is Justified

Looking outside of the Fourth Circuit to guide this Court's analysis of what costs may be awarded, the Court may take notice that a Rule 7 bond can include "damages resulting from the delay and/or disruption of settlement administration caused by [an] appeal." *In re NASDAQ Market-Makers Antitrust Litig.*, 187 F.R.D. 124, 128 (S.D.N.Y. 1999). *See also In re Cardizem CD Antitrust Litig.,* 391 F.3d 812, 815 (6th Cir. 2004) (affirming cost bond of $174,429.00, consisting of $1,000.00 in filing and brief preparation costs, $123,429.00 in incremental administration costs, and $50,000 in projected attorneys' fees.). *Accord, e.g.*, *In re Compact Disc Minimum Advertised Price Antitrust Litig.*, 2003 WL 22417252 at *1 (D. Me. Oct. 7, 2003) (holding that "damages resulting from delay or disruption of settlement administration caused by a frivolous appeal may be included in a Rule 7 bond").

The delay in effectuating the DuPont Settlement created by Met's appeal on behalf of an opted-out Class Member with no real stake in the outcome will create enormous damage. Requiring the posting of a reasonable appeal bond, as authorized by law, will ensure some modicum of responsibility for the reckless course that Met is now pursuing.

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[9] In *Devlin,* the majority's decision, which allows an objector to have the power to bring an appeal without first intervening, pivoted "particularly" on the fact that "petitioner had no ability to opt out of the settlement." 536 U.S. at 10. Here, unlike *Devlin*, not only does the DuPont Settlement Agreement provide for opt-outs, Met exercised its right to exclude itself from the Class proceedings. Therefore, by law and by virtue of the Settlement Agreement itself, Met is ***not*** "bound by any orders or judgments effecting the Settlement." Settlement Agreement § 9.7.3 (i).

Further, in *Heekin v. Anthem, Inc.*, the court ordered an appeal bond of $250,000, jointly and severally, against two objectors, whose appeal was determined to lack merit and was being pursued in bad faith. No. 1:05-CV-01908-TWP, 2013 WL 752637, at *4 (S.D. Ind. Feb. 27, 2013) ("[$250,000] is reasonable and is sufficient to protect Plaintiffs against the risk of nonpayment."). *See also Gemelas v. Dannon Co.*, No. 1:08 CV 236, 2010 WL 3703811, at *3 (N.D. Ohio Aug. 31, 2010) ("The Court is inclined to impose an appeal bond in the requested amount of $275,000.").

Among other possibilities, there is authority for calculating a bond based on interest on the settlement fund. *Barnes v. FleetBoston Fin. Corp.*, C.A. No. 01-10395, 2006 U.S. Dist. LEXIS 71072 (D. Mass. Aug. 22, 2006) (setting an appeal bond of $643,750 in the case of a frivolous appeal by an objector, based on one year of interest at an interest rate of 5.15% based on a $12.5 million settlement). Given the $1.185 billion settlement fund here, of course, the potential bond could theoretically be many times higher than in *Barnes*.[10] *See also In re GE Co. Secs. Litig*, 998 F. Supp. 2d 145 (S.D.N.Y. 2014) (citing *Barnes* and calculating bond based on settlement administration expenses); *In re Merck & Co., Inc.*, No. 05-1151, 2016 WL 4820620, at *2 (D.N.J. Sept. 14, 2016) (requiring a serial objector to class action settlements to post an appeal bond covering the administrative costs of delay to the class).

Applying the *Barnes* calculus here, *i.e.,* 5.15% of $1.185 billion, results in a bond of approximately $61.02 million, which represents approximately one year of interest on this

[10] Although the DuPont settlement funds have already been received from DuPont and are collecting interested in a Qualified Settlement Fund, Class Counsel propose that the *Barnes* metric is nonetheless a reasonable method to apply in determining an appropriate bond request under all the circumstances.

Settlement Amount. While Class Counsel are not necessarily asking for a bond of $61.02 million, it is reasonable to project that the appellate process would take at least one year.

IV. CONCLUSION

Met should be required to post a bond in an amount to be established by the Court to cover the costs of its appeal from the final approval of the DuPont Settlement, as well as for the damages resulting from the delay created by this ill-conceived appeal. An appeal from a historic settlement requires a bond which is historical in proportion. Considering all of the factors discussed above, including the vexatious conduct on the part of the Appellant, the frivolous nature of the appeal itself, the irreparable harm that would result from a delay occasioned by an appeal to the Class Members and the public health, and the unprecedented and historic nature of the settlement itself, Class Counsel respectfully submit that a bond in the range of $1 million to $61 million is appropriate. Even at a 1% interest rate, one year's worth of interest on $1.185 billion would result in an approximately $11 million bond.

This Court is justified to employ its discretion in imposing a sizable bond on Met under the circumstances. If ever the circumstances existed to justify such a bond, this is it.

Dated: March 19, 2024

Respectfully Submitted,

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