IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ELOUISE PEPION COBELL, et al.,	)	
Plaintiffs,	)	
v.	)	**No. 1:96CV01285(TFH)**
KEN SALAZAR, Secretary of the Interior, et al.,	)	
Defendants.	)	

PLAINTIFFS' UNOPPOSED MOTION FOR APPEAL BOND PURSUANT TO FEDERAL RULE OF APPELLATE PROCEDURE 7

INTRODUCTION

On August 6, 2011, Kimberly Craven ("Craven"), a non-party objector,[1] filed notice of appeal [Dkt. No. 3854], challenging this Court's final judgment, which approves settlement of this action following ratification by Congress and approval of the President of the United States. [Dkt. No. 3853]. Pursuant to Fed. R. App. Proc. 7, plaintiffs respectfully request that this Court require Craven to post a bond or other security in the amount of $8,306,439.93 to ensure prompt payment of plaintiffs'-appellees' costs on affirmance of this Court's final judgment order.[2]

I. The Purpose of an Appeal Bond is to Protect Appellees

[1] Ms. Craven is an absent class member and she did not intervene in these proceedings. Accordingly, she does not have party status in this Court and plaintiffs have no obligation under local rules to meet and confer with her or her counsel on this or any other motion. Nonetheless, because plaintiffs are asking this Court to order Craven, a non-party objector-appellant, to post a bond or other security that is sufficient to ensure prompt payment of the costs incurred by plaintiffs in connection with her appeal and because her obligation to plaintiffs is executable in this Court, plaintiffs' counsel discussed the motion with Craven's counsel as a courtesy.

[2] The parties met and conferred in accordance with local rules and defense counsel stated that defendants take no position on this motion.

An appeal bond is designed to "protect the rights of appellees brought into appeals courts" by appellants like Craven who pose a substantial risk of non-payment of the costs of the appeal.[3] *Adsani v. Miller*, 139 F.3d 67, 75 (2nd Cir. 1998); *Curtis & Associates, P.C. v. Law Offices of David M. Bushman, Esq.*, Slip Copy, 2011 WL 917519, *1 (E.D.N.Y. 2011); *In re Initial Public Offering Securities Litigation*, 728 F.Supp.2d 289, 292 (S.D.N.Y. 2010); *In re AOL Time Warner, Inc.*, 2007 U.S. Dist. LEXIS 69510, at *4, (S.D.N.Y. Sept. 20, 2007); *Page v. A.H. Robins Co.*, 85 F.R.D. 139, 139-40 (E.D.Va.1980) ("[T]he purpose[ ] of an appeal bond is to provide an appellee security for the payment of such costs as may be awarded to him in the event that the appellant is unsuccessful in his appeal.").

Federal Rule of Appellate Procedure 7, derived from former Federal Rule of Civil Procedure 73(c), is the legal basis for a district court's authority to impose an appeal bond. Rule 7 provides in pertinent part:

> The district court may require an appellant to file a bond or provide other security in such form and amount as it finds necessary to ensure payment of costs on appeal in a civil case.

Fed. R. App. Proc. 7. Rule 7 confers on, and expressly delegates to, this Court the authority to decide whether an appellant should be required to post a bond as well as the amount of that bond or other security to "ensure payment" of costs incurred by appellees in their successful defense of the settlement. There is no local district court or circuit court rule that corresponds to Rule 7.[4]

[3] There is no constitutional right to an appeal. *Heike v. United States*, 217 U.S. 423 (1910); *Lindsey v. Normet*, 405 U.S. 56, 76-79 (1972); *Adsani v. Miller*, 139 F.3d 67, 76-77 (2nd Cir. 1998) ("The right to appellate review in federal court is conferred by statute alone."). Therefore, the requirement that Craven post a bond pursuant to Rule 7, which ensures that she compensate individual Indian trust beneficiaries promptly on affirmance for all costs they incur in connection with her appeal, is not an impermissible condition to appeal.

[4] Rule 7 has been in effect since August 1, 1979. Circuit Rule 7, entitled BOND FOR COSTS ON APPEAL IN A CIVIL MATTER, states that "[t]hat there is no corresponding Circuit Rule."

Further, there is no other local or federal rule that limits or modifies the authority of this Court to require a non-party appellant-objector to post a bond or other security to ensure prompt payment of plaintiffs'-appellees' cost of defending their settlement. The weight of case law in this Court, and from other courts, confirms that Fed. R. App. Proc. 7 is the sole governing rule on appeal bonds. Therefore, where, as here, there is no local rule limiting or guiding this Court's discretion, it is appropriate to consider persuasive authority from other jurisdictions where on point.

II. Appeal Bonds are Routine in Class Actions and Serve an Important Function

Although this Circuit has not addressed the breadth of discretion that a district judge has in determining the amount of an appeal bond that a non-party objector must post to challenge final approval of a class action settlement, this Court and many other federal courts have addressed the issue. They have determined that Fed. R. App. Proc. 7 confers on district judges broad authority to compel non-party objector-appellants to post substantial appeal bonds to ensure that appellees' costs are paid promptly in the event an objector's appeal fails. As discussed *supra*, Rule 7 contains no limitation on the district court's authority. Accordingly, full discretion is conferred in this Court, the court that is most familiar with the fairness and adequacy of the settlement, the dispositive issues, the parties, and the history of the case. *See, e.g., Hayhurst v. Calabrese*, 1992 WL 118296, *1 (D.D.C. 1992) ("The imposition of a bond is a matter of discretion for the district court."). To be sure, the practice of this Court is in accord with sister jurisdictions that impose substantial appeal bonds on non-party objectors who appeal final approval of class action settlements. *See, e.g., In re Dept. of Veterans Affairs (VA) Data Theft Litigation*, 653 F.Supp.2d 58, 61 (D.D.C. 2009) (noting the Court's "authority to require a substantial appeal bond to secure the costs of appeal"); *In Re: Dept. of Veteran's Affairs (VA)*

Data Theft Litigation, Misc. Action No. 06-0506 (JR) MDL Docket No. 1796 (November 20, 2009); *Hayhurst*, 1992 WL 118296, *1.

Ordering a non-party objector to post an adequate appeal bond implements Rule 7 and exercises the discretion afforded district courts under the express language of Rule 7. Simply put, objector-appellants delay indefinitely class members' relief upon the filing of a Notice of Appeal. In multi-billion dollar class action cases that delay is costly. Where, as here, class members are Indian trust beneficiaries who are entitled to protection in accordance with "the most exacting fiduciary standards," delay, necessarily, is even more costly. *See, e.g., Cobell v. Norton* (*Cobell VI*), 240 F.3d 1081, 1099 (D.C. Cir. 2001) (quoting *Seminole Nation v. United States*, 316 U.S. 286, 297 (1942)). That delay can significantly harm class members even in non-trust cases, as described in detail by a number of courts that have addressed this situation. *See In re Cardizem CD Antitrust Litig.*, 391 F.3d 812, 815 (6th Cir. 2004) (including $123,429 in the appeal bond for "incremental administration costs" due to a projected six-month delay); *In re Compact Disc Minimum Advertised Price Antitrust Litig.*, No. MDL 1361, 2003 WL 22417252, at *1 (D.Me. Oct.7, 2003) (concluding that costs of delay or disruption of settlement may be included in a Rule 7 bond); *In re Pharmaceutical Industry Average Wholesale Price Litig.*, 520 F. Supp. 2d 274, (D.Mass. 2007) (imposing appeal bond of $61,000 for costs attributable to delay in distribution); *In re NASDAQ Market-Makers Antitrust Litig.*, 187 F.R.D. 124, 128-29 (S.D.N.Y. 1999) (imposing appeal bond of $101,500 for costs including damages resulting from the delay and/or disruption of settlement administration); *In re Wal-Mart Wage and Hour Employment Practices Litig.*, 2010 WL 786513, *2 (D.Nev. 2010) (imposing a $500,000 appeal bond including lost interest and administrative delay costs since the appeal effected a stay of the

judgment and costs to the class were difficult to estimate). The appeal bond ensures that the class members – who are trust beneficiaries – are not damaged after they prevail on appeal.

III. The Facts of this Case Warrant an Appeal Bond.

Since June 10, 1996, 500,000 individual Indian trust beneficiaries have waited for justice for wrongs suffered continuously over the last century. This Court determined that the settlement is fair and adequate, granted final approval, and carried out the will of Congress, which exercised its constitutionally derived plenary authority over Indian affairs when it ratified this historic settlement by enacting the Claims Resolution Act of 2010 ("Act"). No appellant, particularly a non-party objector, is entitled to a free pass at delaying justice for the trust beneficiary-classes, especially where, as here, uniquely, each branch of government has approved the settlement. This settlement is too important to individual Indians and the United States.

A. The Human Cost of Craven's Appeal is Unquantifiable

Thousands of individual Indian Trust beneficiaries have died since the action in equity was filed on June 10, 1996.[5] The delay caused by Craven's appeal means that more elderly and more infirm class members will pass on without obtaining justice that they deserve. The human cost of Craven's appeal can never be quantified, and as this Court has found, many of the class members depend on their trust funds for the most basic staples of life. *See, e.g., Cobell v. Norton*

[5] 156 Cong. Rec. S6179 2010 ("[The *Cobell* litigation] has gone on for 15 years, and a good many Indians have died while that lawsuit has gone on who should have benefitted from that lawsuit.") (Statement of Senator Dorgan, July 22, 2010); 156 Cong. Rec. S999 2010 (same, March 3, 2010); 156 Cong. Rec. S6799 2010, 2010 WL 3058469, *2-3 (same, Statement of Senator Dorgan, August 5, 2010); 156 Cong. Rec. S4959-S4960, 2010 WL 2400279, *5-6 (same, Statement of Senator Dorgan, June 16, 2010); 156 Cong. Rec. S2282, 2010 WL 1487123, *19 (same, Statement of Senator Dorgan, April 14, 2010); 156 Cong. Rec. H7688 (same, Statement of Rep. Hoyer, November 30, 2010); 156 Cong. Rec. H7688-H7689 (same, Statement of Rep. Cole, November 30, 2010)

(*Cobell XVI*), 394 F.Supp. 2d 164, 273 (D.D.C. 2005). That alone warrants the posting of a substantial appeal bond given the gravity of delay caused by Craven's appeal — life and death — to elders and the infirm.[6]

B. Craven's Appeal is a Political Crusade to Deter Trust Reform

For more than a year and one-half, Craven worked to convince class members to join her in opposing this settlement and she lobbied Congress to reject any settlement that did not meet her personal demands. Her efforts were unsuccessful. The Senate ratified the settlement unanimously and the House approved it by an overwhelming majority. Tellingly, notwithstanding her vigorous lobbying efforts in Congress and among tribes and tribal organizations and her pleas to class members to join her effort to block this settlement, only 12 objectors appeared at the fairness hearing.

Craven's efforts failed because 99.98% of all class members – nearly 500,000 individual Indians – understand that her personal and political interests conflict with their best interests; that her demands have been, and continue to be, premised on false assumptions, distortion, and fear; and that her opposition is driven by personal and political agenda unrelated to the merits of the settlement.[7] Since she opposes settlement for personal and political reasons, Craven would like

[6] *Id.*

[7] In addition to Craven's woefully misguided objections, *see* Plaintiff's Plaintiffs' Response to Objections to Settlement, Dkt. 3763, op-eds of Craven illustrate this point: *See, e.g.,* August 5, 2010 Op-Ed, the Hill's Congress Blog, entitled "Bailing out "the smartest guys in the room," declares, among other things, that the "Cobell plaintiffs are entitled to no monetary recovery whatsoever in the courts." http://thehill.com/blogs/congress-blog/judicial/112807-bailing-out-the-smartest-guys-in-the-room; August 2, 2010 Op-Ed, the Hill's Congress Blog, entitled "Cobell settlement worth doing right together," declares, among other things, that 1) the settlement is political and enables President Obama to "fulfill a campaign promise," 2) the district court may not award damages, 3) the settlement is "unfair," and 4) class representatives "will be very, very rich" because they are sharing up to $15 million." http://thehill.com/blogs/congress-blog/politics/112167-cobell-settlement-worth-doing-right-together; July 8, 2010 Op-Ed, Billings Gazette, entitled "Cobell lawsuit not good for all

to deny all class members the opportunity to enjoy its benefits. Because Craven failed to block this settlement politically, she now wants to kill, or at least seriously delay, the settlement through appeal.

Craven now attempts to thwart that exercise of Congressional plenary authority by challenging this Court's approval and final judgment pursuant to the Act. In furtherance of her political agenda, she retained a "professional objector"[8] as counsel to continue her attack on the very existence of the Settlement. Her challenge delays distribution of long-owed, desperately needed funds to class members. In addition, it obstructs essential trust reform by delaying indefinitely the acquisition of highly fractionated interests in IIM Trust land that the government says has impaired its ability to prudently manage the IIM Trust. As a result, delay will permit breaches of trust to continue and problems in trust management to fester. Class members will be helpless to mitigate that harm because Craven's appeal will deny them and the government access to a $1.9 billion Trust Land Consolidation Fund that was established by the parties and

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American Indians," declares, among other things, that tribes must "make[] the decision about how it [the $2 billion land consolidation fund] is to be administered." http://billingsgazette.com/news/opinion/guest/article_5330a9ee-8a2d-11df-93f7-001cc4c03286.html; July 4, 2010 Op-Ed, trib.com, entitled "Barrasso listened to Indian Country," declares, among other things, that the trust administration class should be stricken from the settlement. http://trib.com/news/opinion/forums/article_a972bb12-7b55-5c08-a07c-b450c64761ad.html; May 13, 2010, Op-Ed, the Denver Post, entitled "Settlement is wrong for Indians," declares, among other things, that the $2 billion land consolidation fund must be "put in a permanent trust for the tribes." http://www.denverpost.com/ci_15073079; And, May 12, 2010 Op-Ed, the Seattle Times, entitled "Cobell settlement on Indian claims needs Senate scrutiny of plaintiffs," declares, among other things, that 1) the trust administration class must be extinguished, 2) the district court lacks jurisdiction to award damages, 3) the $2 billion land consolidation fund is "illusory," and 4) the scholarship fund must be "immediately available." http://seattletimes.nwsource.com/html/opinion/2011849857_guest13craven.html.

[8] *See, e.g.*, Edward Brunet, Class Action Objectors: Extortionist Free Riders or Fairness Guarantors, 2003 U. CHI. LEGAL F. 403, 438-42 (providing a summary of several scholarly and judicial commentaries on objector "blackmail"); Brunet at 437 n.150 (describing "professional objectors" as "attorneys in private practice who have a specialty in filing objections in class action cases, usually after a proposed settlement has emerged").
See, http://centerforclassactionfairness.blogspot.com/

approved by Congress to cure an intractable fractionated interest problem. For the first time in the history of the 124 year-old IIM trust, the Trust Land Consolidation Fund will enable the trustee-delegates of the United States to discharge their trust duties prudently.

Further, Craven's appeal obstructs the efforts of Secretary Salazar to implement meaningful reform because it blocks access to settlement funds appropriated by Congress to establish and operate a Secretarial Commission on Trust Reform. Here, plaintiffs' concern is heightened because the Special Trustee for American Indians, a position that Congress created in the Trust Reform Act of 1994 to ensure reform of the government's broken trust management systems, is vacant and has been vacant for two and one-half years. In short, until the appeal is resolved, class members remain vulnerable and their trust assets remain at serious risk of loss, corruption, and misappropriation.

C. Craven's Appeal Causes Class Members Substantial Financial Loss

Finally, delay causes substantial financial loss by denying class members post-judgment interest on their settlement funds and by increasing materially their post-judgment administrative costs and legal fees and expenses in these proceedings. Fundamental fairness requires that appellants, particularly non-party objectors, be accountable fully and promptly when their appeals fail. This case is no exception. Accordingly, fundamental fairness justifies a bond or other security that meaningfully protects class members and ensures that they can recover in this Court all costs associated with the appeal, particularly where, as here, the non-party appellant resides outside the jurisdiction of this Court.

D. An Appeal Bond Furthers Public Policy

Imposition of a substantial bond, which is calculated on appellees' costs, furthers public policy and is not an impermissible condition on appellant's statutory right to appeal. *Cohen v.*

Beneficial Loan Corp., 337 U.S. 541, 551-52 (1949) (holding that statutory limitation of the right to appeal for the posting of security is proper); *O'Day v. George Arakelian Farms, Inc.*, 536 F.2d 856, 860 (9th Cir.1976) (holding that Congress may properly "condition the right to appeal upon posting security sufficient to protect appellee from loss of damages already awarded, interest, and costs on appeal, including a reasonable attorney's fee.").

Indeed, since the Supreme Court first established the right of a non-party objector to appeal in *Devlin v. Scardelletti*, the objector's obligation to post such an appeal bond is common in class action litigation. *Adsani v. Miller*, 139 F.3d 67, 76-77 (2nd. Cir. 1998); *In re Countrywide Financial Corp. Customer Data Sec. Breach Litig.*, Slip Copy, 2010 WL 5147222, *3 (W.D. Ky. 2010); *In re Initial Public Offering Sec. Litig.*, No. 21 MC 92(SAS), 2010 WL 2884794, at *2 (S.D.N.Y. July 20, 2010); *In re Currency Conversion Fee Antitrust Litig.*, No. M 21-95, MDL No. 1409, 2010 WL 1253741, at *2 (S.D.N.Y. Mar. 5, 2010); *Barnes v. FleetBoston*, No. 01 Civ. 10395, 2006 U.S. Dist. LEXIS 71072, at *3 (D.Mass. Aug. 22, 2006); *O'Keefe v. Mercedes–Benz United States*, LLC, 214 F.R.D. 266, 295 n. 26 (E.D.Pa. 2003). Finally, the status of class members as beneficiaries of a unique federal trust provides additional policy support for requiring an appeal bond so as to protect their trust assets from further waste.

E. The Totality of the Circumstances Warrants a Substantial Appeal Bond

This Circuit as well as other courts have construed Rule 7 costs to include attorneys' fees for the preparation[9] and compilation of the record for appeal, which is an enormous undertaking and very expensive. Here, there are more than 3850 docket entries; more than 250 days of trials, hearings, and status conferences before this Court as well as additional hearings before two

[9] "Preparation" is defined as "1a: the action or process of making something ready for use or service b; the action or process of putting something together …." Webster's Third New International Dictionary 1790 (2002).

special masters; thousands of trial exhibits; scores of depositions, tens of millions of pages of document production; and 10 interlocutory appeals over more than fifteen years of litigation. Because of Privacy Act considerations and protective orders that require strict confidentiality, many relevant exhibits, documents, and transcripts are sealed, which further increases, if not doubles, the cost of preparing the massive record of this case for appeal. *Cobell* is the most intensely litigated case in the history of this Circuit.

In addition, attorneys' fees and expenses for the preparation of procedural motions, dispositive motions, and opposition briefs as well as the increased cost of settlement administration and plaintiffs' loss of post-judgment interest on $1.5 billion may be included in the appeal bond. The practice of this Court is in accord and precedent confirms that bonds of more than $200,000 in cases far less complex and costly than this historic trust case are appropriate to secure an appellant's payment of appellees' costs. *See In Re: Dept. of Veteran's Affairs (VA) Data Theft Litig.*, Misc. Action No. 06-0506 (JR) MDL Docket No. 1796 (November 20, 2009). This is the largest settlement involving the government in American history and it resolves egregious breaches of trust that have continued for more than a century. It is not a garden-variety damages settlement where coupons are distributed to class members whose cars are defectively manufactured or repaired. *See, e.g., Dewey v. Volkswagen of America*, 728 F.Supp.2d 546 (D.N.J. 2010). Neither Craven nor her attorney seems to understand that, which is expected where, as here, the professional objector entered his appearance at the 11th hour.

It should be no surprise to anyone who is familiar with the record of these proceedings, that costs associated with her appeal necessarily are substantial. Therefore, the bond or other security that she posts should be sufficient to cover the cost of defending the appeal before a

three-judge panel, *en banc*, and the Supreme Court. It should also include the increased cost of the claims administrator (which averages about $300,000 per month), and post-judgment interest (which is substantial on $1.5 billion) on this, the largest settlement with the government in American history. Plaintiffs expressly reserve their right to request an increase in the posted security, among other things, if interest rates change or class communication and other costs otherwise exceed plaintiffs' initial estimates.[10] Should Craven lose her appeal, the importance of enforcing Craven's prompt payment in this Court cannot be overstated.

IV. This Court has Discretion to Determine the Amount of an Appeal Bond

The district court has discretion to order an appellant to post an adequate appeal bond to "ensure payment of costs on appeal." Fed. R. App. Proc. 7. This Court, like all other jurisdictions, has repeatedly done so in the class action context. *In re Dept. of Veterans Affairs (VA) Data Theft Litigation*, 653 F.Supp.2d 58, 61 (D.D.C. 2009) (noting the Court's "authority to require a substantial appeal bond to secure the costs of appeal'); *In Re: Dept. of Veteran's Affairs (VA) Data Theft Litigation*, Misc. Action No. 06-0506 (JR) MDL Docket No. 1796 (November 20, 2009); *Hayhurst v. Calabrese*, Not Reported in F. Supp., 1992 WL 118296, *1 (D.D.C. 1992) (holding that "[t]he imposition of a bond is a matter of discretion for the district court."); *see generally Marek v. Chesny*, 473 U.S. 1 (1985). Where, as here, the objector-appellant lives in another state and she has not come forward to guarantee payment of the costs that might be assessed against her, the imposition of an appeal bond is all the more necessary to ensure the

[10] Although courts in determining the amount of an appeal bond consider whether counsel for an appellant is a "professional objector" and whether a non-party objector/appellant, in fact, is acting in the best interest of class members, here, plaintiffs suggest that the costs incurred by plaintiffs in their defense of the settlement should be the principal factors that determine the amount of the appeal bond. *See, e.g.*, Edward Brunet, Class Action Objectors: Extortionist Free Riders or Fairness Guarantors, 2003 U. CHI. LEGAL F. 403, 437 n.150 (describing "professional objectors" to include "attorneys in private practice who have a specialty in filing objections in class action cases, usually after a proposed settlement has emerged").

repayment of costs on appeal to preclude collection actions by Class Counsel to recover appellate costs. *In re Countrywide Financial Corp. Customer Data Sec. Breach Litig., Slip Copy*, 2010 WL 5147222, *3 (W.D. Ky. 2010); *In re Initial Public Offering Sec. Litig.*, No. 21 MC 92(SAS), 2010 WL 2884794, at *2 (S.D.N.Y. July 20, 2010); *In re Currency Conversion Fee Antitrust Litig.*, No. M 21-95, MDL No. 1409, 2010 WL 1253741, at *2 (S.D.N.Y. Mar. 5, 2010). Federal courts across the country have construed the definition of "costs on appeal" broadly and have required non-party objectors to post substantial bonds or other security to prosecute appeals where, as here, a fee shifting statute underlies the litigation,[11] final judgment is stayed or enjoined, or where the appeal is without merit. In addition, courts are increasingly concerned about the obstruction caused by generic protests of professional objectors.[12] *Barnes v.*

[11] The Supreme Court has stated "the specific purpose of the EAJA is to eliminate for the average person the financial disincentive to challenge unreasonable governmental actions." *Commissioner v. Jean*, 496 U. S. 154, 163 (1990); *see also Scarborough v. Principi*, 541 U. S. 401, 406 (2004) (by "expressly authoriz[ing] attorney's fee awards against the Federal Government," Congress sought "'to eliminate the barriers that prohibit small businesses and individuals from securing vindication of their rights in civil actions and administrative proceedings brought by or against the Federal Government'" (quoting H. R. Rep. No. 96–1005, p. 9 (1979))); *Sullivan v. Hudson*, 490 U. S. 877, 883 (1989) (the EAJA was designed to address the problem that "'[f]or many citizens, the costs of securing vindication of their rights and the inability to recover attorney fees preclude resort to the adjudicatory process.'" (quoting S. Rep. No. 96–253, p. 5 (1979))).

[12] Many courts have increased the amount of an appeal bond where the objection and appeal is brought by counsel who is a "professional objector." In the event that the Circuit concludes that Craven's appeal, in whole or part, is frivolous or without merit, plaintiffs will seek costs, including doubled attorneys' fees, as provided under Fed. R. App. Proc. 38. This Circuit in *South Star Communications, Inc. v. F.C.C.*, 949 F.2d 450, 452 n3 (D.C. Cir. 1991), held that "[i]f a court of appeals shall determine that an appeal is frivolous, it may award just damages and single or double costs to the appellee." Notably, this Circuit has found application of Rule 38 and the award of attorneys' fees and costs appropriate where an appellant's and her counsel's legal arguments are foreclosed by precedent. *See Saltany v. Reagan*, 886 F.2d 438, 440-41 (D.C. Cir. 1989) (granting attorneys' fees and costs under Rule 38 to appellees where applicable precedent "dooms" the appeal). Finally, this Circuit has held that it has the discretion under Rule 38 to award double costs, including attorneys fees, to the appellee and that the appellant and her counsel are jointly and severally liable for such costs. *Reliance Ins. Co. v. Sweeney Corp., Maryland*, 792 F.2d 1137, 1138 (D.C. Cir. 1986); *see also Romala Corp. v. United States*, 927

FleetBoston, No. 01 Civ. 10395, 2006 U.S. Dist. LEXIS 71072, at *3 (D.Mass. Aug. 22, 2006); *O'Keefe v. Mercedes–Benz United States, LLC*, 214 F.R.D. 266, 295 n. 26 (E.D.Pa. 2003). The presence of such professional objectors, to the extent there remains any doubt, tilts the balance in favor of an adequate appeal bond. *In re Initial Public Offering Securities Litig.*, 728 F.Supp.2d 289, 295 (S.D.N.Y. 2010).

A. Rudimentary Costs of an Appeal

Some courts have looked to FRAP 39 to inform the meaning of "costs"[13] under Rule 7. Although no express or implicit linkage between Rules 7 and 39 exists, courts have used Rule 39 to aid in their calculation of costs. This Circuit and others have determined that Rule 39 costs include, at a minimum, the rudimentary costs of the appeal: photocopying, binding briefs, preparing the appendix, and other similar expenses. Plaintiffs estimate the costs of photocopying and binding alone amount to $34,458.47. Declaration 1 of Shawn R. Chick ¶ 3. Since these costs are taxable under Rule 39, they are properly included in a Rule 7 bond. No court states otherwise and many courts do not limit Rule 7 bonds to these nuts-and-bolts costs.

Rule 39(e)(1) provides for the "the **preparation** and transmission of the record" as a cost on appeal taxable in this Court. Fed. R. App. Proc. 39(e)(1) (emphasis added). Preparation of the record necessarily includes the professional time of lawyers and paralegals. *See, e.g.*, *McCormick v. Astrue*, 2010 WL 1961211, *2 (E.D. Wis. 2010) ("It is expected that counsel carefully review all materials in the record in preparation for litigation."); *Gardner v. Social Sec. Admin.*, 2001 WL 1537722 (E.D. La. 2001) (holding that review of the record was appropriate basis for seeking attorneys' fees). Where, as here, the record of the litigation is extensive and

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F.2d 1219, 1225 (Fed. Cir. 1991) ("Though the language of Rule 38 does not explicitly provide for sanctions against attorneys, there is ample precedent in this and other circuits for imposing Rule 38 sanctions on an attorney as well as on the client."); *Pelletier v. Zweifel*, 921 F.2d 1465, 1520-23 (11th Cir. 1991) (finding joint and several liability under Rule 38 for bringing a frivolous appeal).

[13] "Cost" is defined as "1b…whatever must be given, sacrificed, suffered, or forgone to secure a benefit or accomplish a result." Webster Third New International Dictionary 515 (2002). Black's Law Dictionary defines "cost" as "1. [t]he amount paid or charged for something; price or expenditure. Cf. expense." Black's Law Dictionary 371 (8th ed. 2004).

complicated and much of it is under seal, the professional time that is required to prepare a relevant record to ensure compliance with protective orders will be substantial and necessarily includes attorney and paralegal time. *Id.* A prepared record does not simply spring into existence. Furthermore, the record for Craven's appeal necessarily includes sealed material, which requires both a redacted and un-redacted appendix. Therefore, these rudimentary costs may be doubled given the need to provide duplicate versions.

B. Attorneys' Time and Charges

In this Circuit and in a majority of courts, professional time is a "cost" that is included in the fair calculation of a bond that an appellant must post under Rule 7, where, as here, a statute underlying this litigation provides for the recovery of attorneys' fees such as with a fee shifting statute. *See, e.g., Montgomery & Associates, Inc. v. Commodity Futures Trading Com'n*, 816 F.2d 783 (D.C. Cir. 1987) (finding attorneys' fees available for appeal bond because they are available in underlying statute); *Adsani v. Miller*, 139 F.3d 67 (2nd Cir. 1998) (finding attorneys' fees available for appeal bond because available in underlying statute, Copyright Act); *In re Cardizem CD Antitrust Litig.*, 391 F.3d 812 (6th Cir. 2004) (finding attorneys' fees available for appeal bond because they are available in underlying statute under Tennessee Code); *International Floor Crafts, Inc. v. Dziemit*, --- F.3d ----, 2011 WL 1519113, *5 (1st Cir. 2011) (holding attorneys' fees includable in an appeal bond based on underlying fee-shifting statute).

The majority rule among jurisdictions is that attorneys' fees should be included in an appeal bond where the litigation involves an underlying statute with a fee-shifting provision. *See e.g., International Floor Crafts, Inc. v. Dziemit*, 2011 WL 1519113 at *5 (holding "we endorse the majority view that a Rule 7 bond may include appellate attorneys' fees if the applicable statute underlying the litigation contains a fee-shifting provision"). The Equal Access to Justice

Act is one among many statutes that underlie this litigation, therefore, warranting the inclusion of attorneys' fees in the appeal bond amount. 28 U.S.C. § 2412(b). Section 2412(b) provides "a court may award reasonable fees and expenses of attorneys, in addition to the costs which may be awarded pursuant to subsection (a), to the prevailing party." *Id.* Indeed, plaintiffs have recovered attorneys' fees in this litigation under that Act. *Cobell v. Norton*, 407 F.Supp.2d 140 (D.D.C. 2005).

Craven's appeal challenges the very existence of the Settlement and her objections have alleged all manner of factual and legal arguments. Such a blanket appeal requires extensive attorney time especially, where, as here the validity of the Settlement itself — and justice to 500,000 individual Indian trust beneficiaries — hangs in the balance. The ten interlocutory appeals in this case provide some guidance into the amount of time previously spent on appeals in this case. However, the present appeal is the remaining barrier to closing the book on this litigation and Class Counsel must do everything possible to address fully each of Craven's legal arguments and support their defense with record evidence. Such time includes combing through this case's voluminous record and marshaling the legal principles established by this Court and confirmed by the Circuit in this litigation. In addition, the recent Supreme Court ruling in *Wal-Mart Stores, Inc. v. Dukes et al*, 10-277 (June 20, 2011), presents legal issues that are fact driven and the record of these proceedings is essential for proper resolution of the Craven appeal.

A review of the five most recent appeals indicates that plaintiffs' counsel expended an average of 4,010.78 professional hours. Declaration 2 of David C. Smith, ¶ 3. Based on the average number of hours expended in prior appeals and current professional rates, professional time for the instant appeal will cost approximately $2,526,981.46. Smith Decl. at ¶ 4. An appeal

bond amount including these fees is justified in light of the EAJA fee-shifting provision and the breadth of Craven's objections challenging commonality, cohesion, and valuation.

C. Damages to the Class Members Caused by Delay of Settlement

It has been only a decade since non-party objectors have been permitted by the Supreme Court to appeal final judgments in class action settlements without intervening; however, because professional objectors have abused the appellate process, courts have protected class members from the delay caused by such appeals by requiring bonds to be posted that include post-judgment interest on the settlement amount as well as all other costs incurred by appellees in connection with the appeal "to cover the damages, costs and interest that the entire class will lose as a result of the appeal." *Allapattah Services, Inc. v. Exxon Corp.*, 2006 WL 1132371, *18 (S.D. Fla. Apr.7, 2006) (requiring objector to post an appeal bond in the amount of $13.5 million).

Often, district courts include the amount of post-judgment interest, which the class loses due to the delay of an appeal, in an appeal bond. Federal Appellate Rule of Procedure Rule 37, which has no corresponding local circuit rule, provides that upon an unsuccessful appeal of a money judgment in a civil case "whatever interest is allowed by law is payable from the date when the district court's judgment was entered." Fed. R. App. Proc. 37(a). Section 1961(a) provides that "interest shall be calculated from the date of the entry of the judgment, at a rate equal to the weekly average 1-year constant maturity Treasury yield, as published by the Board of Governors of the Federal Reserve System, for the calendar week preceding the date of the judgment." 28 U.S.C. § 1961(a).

Inclusion of post-judgment interest is proper since the primary purpose of such interest is to compensate a successful plaintiff for the time between her entitlement to damages and the

actual payment of those damages. *Bailey v. Chattem, Inc.*, 838 F.2d 149, 152 (6th Cir. 1988); *Weitz Co., Inc. v. Mo-Kan Carpet, Inc.*, 723 F.2d 1382, 1386-87 (3rd Cir. 1983). Including post-judgment interest in the amount of an appeal bond is even more appropriate in the class action context for two reasons. First, it creates an incentive for putative objector-appellants to file *only* meritorious and meaningful appeals. *Bailey v. Chattem, Inc.*, 838 F.2d at 152. Second, it minimizes the need for court-supervised execution of the judgment. *Id.* The delay in distribution of the $1.5 billion to class members directly results in lost interest to class members, thereby justifying its inclusion in any appeal bond calculation. Under the statutory framework set forth in § 1961, lost interest amounts to $3,150,000.00.[14] *See Compass Bank v. Villarreal*, Slip Copy, 2011 WL 3515913, *7 (S.D. Tex. 2011).

In addition to lost interest, class members suffer additional financial harm as a result of the increased cost of settlement administration, which averages more than $300,000 per month. Each month that settlement is delayed will reduce the settlement funds that are available for distribution to class members. In *In re Cardizem*, the Sixth Circuit included $123,429 in the appeal bond for "incremental administration costs" due to a projected six-month delay. 391 F.3d at 815. A variety of other jurisdictions have held that these costs to the class are properly considered in calculating the appeal bond amount. *See In re Compact Disc Minimum Advertised Price Antitrust Litig.*, No. MDL 1361, 2003 WL 22417252, at *1 (D.Me. Oct.7, 2003) (concluding that costs of delay or disruption of settlement may be included in a Rule 7 bond); *In re Pharmaceutical Industry Average Wholesale Price Litigation*, 520 F. Supp. 2d 274, (D.Mass.

[14] Pursuant to § 1961(a), the interest rate used in this calculation is 0.21, which is the weekly average 1-year constant maturity Treasury yield for the week ending on July 29, 2011—the week preceding the entry of the judgment. This interest rate is applicable to the $1.512 billion distribution fund and is computed daily, and compounded annually to arrive at the lost interest figure. A one year delay means $3,150,000.00 in lost interest. An 18 month delay means $4,728,307.50 in lost interest. A two year delay means $6,306,615.00 in lost interest.

2007) (imposing appeal bond of $61,000 for costs attributable to delay in distribution); *In re NASDAQ Market-Makers Antitrust Litigation*, 187 F.R.D. 124, 128-29 (S.D.N.Y. 1999) (imposing appeal bond of $101,500 for costs including damages resulting from the delay and/or disruption of settlement administration). In *In re Wal-Mart Wage and Hour Employment Practices Litigation*, 2010 WL 786513, *2 (D.Nev. 2010), the district court imposed a $500,000 appeal bond and explained that the inclusion of lost interest and administrative delay costs were especially warranted where the appeal effects a stay of the judgment and costs to the class cannot be determined with complete precision.

V. Amount of the Bond

The delay to class members caused by an objector whose wrong-headed challenges are sweeping – *e.g.*, challenges to commonality, cohesion, and valuation require record factual support relating back to the inception of this case – will be very costly. This is so not only because of the cost of preparing and compiling the voluminous factual record of this case (much of which is sealed, thereby requiring both a redacted and sealed version), the loss of post-judgment interest on $1.5 billion, and increased attorney's fees and expenses, but also because of the on-going cost of class communications for a very involved and informed class of hundreds of thousands of individual Indian trust beneficiaries. It is estimated that 8,300 hours per month of the claims administrator staff time is required to handle and respond to trust beneficiary inquiries regarding the terms of settlement. Declaration 3 of Jennifer M. Keough, ¶ 2. The average cost per month is $295,000 which results in an estimated cost between $2,595,000 and $2,795,000 for

a twelve month delay. Keough Decl. at ¶ 2.[15] Given the immediate negative reaction of class members to the Craven appeal, that number may be conservative.

In its bench opinion, this Court acknowledged that *Allapattah* is comparable to *Cobell* in terms of the settlement amount, the difficulty and complexity of the litigation, and the contribution of the Class Representatives. Here, too, the cost of Craven's appeal to class members is millions of dollars. Accordingly, *Allapattah* is a fair and appropriate standard for this Court to consider in its determination of the bond that Craven must post. For the reasons stated above, plaintiffs request that this Court order Craven to post an appeal bond or other security in the amount of $8,306,439.93 to be calculated as follows: photocopying and binding costs $34,458.47; attorneys' and other professional time of $2,526,981.46 for preparation of the record, compilation of appendix, procedural motions, dispositive motions, oral argument preparation, and merits briefs; lost interest on the settlement amount $3,150,000.00; and increased cost of settlement administration $2,595,000.[16]

CONCLUSION

Plaintiffs respectfully request that this Court order Craven to post a bond in the amount of $8,306,439.93 to ensure plaintiffs recover promptly the costs they incur in connection with Craven's appeal.

[15] In the event of an 18-month delay administrative costs are estimated to be between $3,765,000 – $$3,965,000 while the costs of a 24-month delay would be between $4,935,000 – $5,135,000. Keough Decl. at ¶ 3.

[16] *See* declarations of Shawn R. Chick, David C. Smith, and Jennifer M. Keough attached as Declarations 1, 2, and 3 respectively.

Respectfully submitted this 23rd day of August 2011.

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Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Plaintiffs' Unopposed Motion for Appeal Bond Pursuant to Federal Rule of Appellate Procedure 7 was served on the following via facsimile, pursuant to agreement, on this day, August 23, 2011.

Earl Old Person (Pro se)
Blackfeet Tribe
P.O. Box 850
Browning, MT 59417
406.338.7530 (fax)

/s/ Shawn Chick

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ELOUISE PEPION COBELL, et al.,	)	
Plaintiffs,	)	
v.	)	**No. 1:96CV01285(TFH)**
KEN SALAZAR, Secretary of the Interior, et al.,	)	
Defendants.	)	

DECLARATION OF SHAWN R. CHICK

I, Shawn R. Chick, declare as follows:

1. I am employed as a paralegal at Kilpatrick Townsend and Stockton. This declaration is filed in support of plaintiffs' motion to require appellant Kimberly Craven to post an appeal bond.

2. I have reviewed the costs and expenses for the most recent appeal in *Cobell v. Salazar*, 573 F.3d 808 (D.C. Cir. 2009) ("*Cobell XXII*") – *Cobell XXII* concerned appeals from decisions of this Court on January 30, 2008, *Cobell v. Kempthorne*, 532 F. Supp. 2d 37 (D.D.C. 2008)("*Cobell XX*") and August 7, 2008, *Cobell v. Kempthorne*, 569 F. Supp. 2d 223 (D.D.C. 2008) ("*Cobell XXI"*). A decision was rendered by the Court of Appeals on July 24, 2009.

3. Using the costs of *Cobell XXII* as a guideline for quantity and applying current vendor rates and taxes, the cost for photocopying is estimated at approximately $33,523.02 and the cost for the binding of documents is estimated at approximately $935.45.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed this 22nd day of August 2011, in Washington, District of Columbia.

/s/ Shawn R. Chick
Shawn R. Chick

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ELOUISE PEPION COBELL, et al.,	)	
Plaintiffs,	)	
v.	)	**No. 1:96CV01285(TFH)**
KEN SALAZAR, Secretary of the Interior, et al.,	)	
Defendants.	)	

DECLARATION OF DAVID C. SMITH

I, David C. Smith, declare as follows:

1. I am one of the class counsel representing the plaintiff class in the above referenced matter. This declaration is filed in support of plaintiffs' motion to require appellant Kimberly Craven to post an appeal bond.

2. I have reviewed the time records of Class Counsel Dennis M. Gingold, Thaddeus Holt, Keith Harper (while at the Native American Rights Fund), the attorneys, paralegals and staff at Kilpatrick Townsend Stockton, LLP (formerly Kilpatrick Stockton, LLP) and Geoffrey Rempel through December 7, 2009. The purpose of the review was to determine the approximate number of hours spent in representing the plaintiff class on appellate matters. In performing this review I have focused on the 5 most recent appeals:

a. *Cobell v. Norton*, 392 F. 3d 461 (D.C. Cir. 2004) ("*Cobell XIII*") – *Cobell XIII* was an appeal by the government from an order of this Court dated September 25, 2003, *Cobell v. Norton,* 283 F. Supp. 2d 66 (D.D.C. 2003) ("*Cobell X*"). A decision was rendered by the Court of Appeals on December 10, 2004.

b. *Cobell v. Norton*, 428 F. 3d 1070 (D.C. Cir. 2005) ("*Cobell XVII*") – *Cobell XVII* was an appeal by the government from this court's order dated February 23, 2005, *Cobell v. Norton*, 357 F. Supp. 2d 298 (D.D.C. 2005). A decision was rendered by the Court of Appeals on November 15, 2005.

c. *Cobell v. Kempthorne*, 455 F. 3d 301 (D.C. Cir. 2006)("*Cobell XVIII*") – *Cobell XVIII* was an appeal by the government from this Court's opinion dated October 20, 2005 in *Cobell v. Norton*, 394 F. Supp. 2d 164 (D.D.C. 2005)("*Cobell XVI*"). The Court of Appeals rendered a decision on July 11, 2006. Rehearing *en banc* was denied on September 26, 2006 and a petition for *writ of certiorari* to the Supreme Court was denied on March 27, 2007.

d. *Cobell v. Kempthorne*, 455 F.3d 317 (D.C. Cir. 2006)("*Cobell XIX*") – *Cobell XIX* was an appeal by the government from this Court's order of July 12, 2005 in *Cobell v. Norton*, 229 F.R.D. 5 (D.D.C. 2005) ("*Cobell XV*"). A decision was rendered by the Court of Appeals on July 11, 2006, rehearing *en banc* was denied on September 26, 2006 and a petition for *writ of certiorari* to the Supreme Court was denied on March 27, 2007.

e. *Cobell v. Salazar*, 573 F.3d 808 (D.C. Cir. 2009)("*Cobell XXII*") – *Cobell XXII* concerned appeals from decisions of this Court on January 30, 2008, *Cobell v. Kempthorne*, 532 F. Supp. 2d 37 (D.D.C. 2008)("*Cobell XX*") and August 7, 2008, *Cobell v. Kempthorne*, 569 F. Supp. 2d 223 (D.D.C. 2008) ("*Cobell XXI"*). A decision was rendered by the Court of Appeals on July 24, 2009. A petition for *writ of certiorari* to the Supreme Court was dismissed on July 6, 2010.

3. The approximate number of hours spent by Counsel for plaintiffs on these five appeals is 20,053.9. This amounts to an average of 4,010.78 hours of professional time per appeal.

4. After determining the approximate number of hours spent, I applied the current rate for each professional working on the appeal to the time spent on each appeal to arrive at an estimate of the total cost per appeal in present value. I then averaged the total cost for the five appeals and arrived at an estimated average cost of $2,526,981.46 per appeal.

5. These prior appeals dealt with relatively discrete issues, whereas the present appeal involves a variety of challenges to the Settlement.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed this 22nd day of August, 2011 in Easton, Maryland.

/s/ David C. Smith
David C. Smith

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ELOUISE PEPION COBELL, et al., as an individual, and on behalf of all others similarly situated, Plaintiffs, v. KEN SALAZAR, Secretary of the Interior, et al., Defendants.	Case No. 1:96 CV 01285 (TFH) **DECLARATION OF JENNIFER M. KEOUGH REGARDING ESTIMATE OF ADDITIONAL COSTS FOR SETTLEMENT ADMINISTRATION DUE TO PENDING APPEAL**

I, Jennifer M. Keough, declare as follows:

1. I am Executive Vice President, Operations, of The Garden City Group, Inc. ("GCG"). The following statements are based on my personal knowledge and information provided by other GCG employees working under my supervision and, if called on to do so, I could and would testify competently thereto.

2. Plaintiffs' Counsel has requested that GCG identify the additional costs resulting from the pending appeal and associated with the administration of the Settlement. These additional costs will result due to the necessity of maintaining the call center and website during the pending appeal process. The driving factors for additional costs are the operation of the call center and

other handling of communications with Class Members. Class Member call volume through the course of the Settlement has been averaging over 8,300 hours a month for a total average cost of $295,000 per month. The below estimates for Class Member communications, while the pending appeal is handled in due course, assume that pace and call volume will continue through November 2011, and then decrease. It will require minimal project management and systems time within these 12- 24 months other than what has already been estimated for the original Settlement and Claims administration. If Class Member communication levels increase or decrease, the below estimates would change accordingly. To this end, GCG has prepared below three different interval estimates in anticipation of the extended time and management involved during the pending appeal.

3. If the appeal period extends the Settlement administration and management time by 12 months, the additional cost for Settlement administration is estimated at approximately $2,595,000 - $2,795,000. Should the appeal period extend the Settlement administration time by 18 months or 24 months, the additional estimated costs for Settlement administration will be approximately $3,765,000 - $3,965,000 and $4,935,000 - $5,135,000, respectively.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed this 22nd day of August 2011, at Seattle, Washington.

Jennifer M. Keough

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ELOUISE PEPION COBELL, et al.,	)	
Plaintiffs,	)	
v.	)	**No. 1:96CV01285(TFH)**
KEN SALAZAR, Secretary of the Interior, et al.,	)	
Defendants.	)	

ORDER

On August 4, 2011, the Court entered an Order granting Final Approval to the Settlement. [Dkt. 3850]. On August 6, 2011, Objector, Kimberly Craven ("Craven"), filed a Notice of Appeal [Dkt. 3854] from this Court's Order (Dkt. 3850). On August 23, 2011, Plaintiffs filed their Unopposed Motion for Appeal Bond Pursuant to Federal Rule of Appellate Procedure 7 ("Plaintiffs' Motion") [Dkt. 3856], that asks this Court to order Craven to post a $8,306,439.93 appeal bond.

Based upon the record of these proceedings, Plaintiffs' Motion, defendants' decision not to oppose the motion, and Craven's response thereto, it is hereby **ORDERED, ADJUDGED, AND DECREED** that:

1. Plaintiff's Unopposed Motion for Appellate Bond Pursuant to Federal Rule of Appellate Procedure 7 [Dkt. 3856] in the amount of $8,306,439.93 is GRANTED. It is further ORDERED that

2. Pursuant to Rule 7 of the Federal Rules of Appellate Procedure, on or before September 12, 2011, Craven shall post a bond or other security in the amount of $8,306,439.93 to ensure payment of costs incurred by Plaintiffs in connection with Craven's appeal.

SO ORDERED.

_____

Thomas F. Hogan
United States District Judge