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**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA**

ENZO FORCELLATI and LISA
ROEMMICH, on Behalf of Themselves
and all Others Similarly Situated,

Plaintiffs,

v.

HYLAND’S, INC., STANDARD
HOMEOPATHIC LABORATORIES,
INC., and STANDARD
HOMEOPATHIC COMPANY,

Defendants.

Case No. 2:12-CV-01983-ODW-MRW

CLASS ACTION

**REPLY IN SUPPORT OF
PLAINTIFFS’ MOTION FOR
APPEAL BOND**

Date: January 8, 2018
Time: 1:30 P.M.
Courtroom 5D, 5th Floor

Hon. Otis D. Wright II

1 **I. INTRODUCTION**

2 Objector Ashley Hammack (“Ms. Hammack”) does not contest that her appeal
3 lacks merit. Nor does she contest that the *Fleury* factors weigh heavily in favor of the
4 imposition of an appeal bond in this case. Instead, Ms. Hammack presents the Court
5 with a procedurally defective opposition in which she incorrectly contends that absent
6 an applicable cost-shifting statute or appellate rule, an objector can *only* be
7 responsible for costs under Fed. R. App. 39. Courts in this jurisdiction have routinely
8 included the costs associated with settlement administration in the computation of
9 appeal bonds, irrespective of an applicable cost-shifting statute. This Court should
10 follow suit and order Ms. Hammack to post an appellate bond in the amount of
11 \$79,142.

12 **II. THE COURT SHOULD GRANT THE MOTION FOR APPEAL BOND**
13 **IN THE AMOUNT OF \$79,142**

14 **A. Ms. Hammack Does Not Contest That an Appeal Bond Is**
15 **Appropriate under the *Fleury* Three-Factor Test**

16 Ms. Hammack’s opposition does not contest that the *Fleury* factors are met and
17 that an appeal bond should be imposed in this case. Ms. Hammack fails to argue that
18 *any* of the factors weigh in her favor. Instead, without citing any authority, Ms.
19 Hammack contends that because “the vast amount of the sum requested by Plaintiffs
20 are administrative expenses which are not allowable expenses under statute or rule”
21 the factors should not be considered at all. Opp. at 5. That is simply incorrect as the
22 *Fleury* factors are assessed to determine the propriety of an appeal bond and their
23 application is made irrespective of the amount proposed.

24 **B. Costs Associated with Settlement Administration Are Considered in**
25 **Setting an Appeal Bond**

26 “Rule 7 does not define ‘costs on appeal.’” *Azizian v. Federated Dep't Stores,*
27 *Inc.*, 499 F.3d 950, 958 (9th Cir. 2007). Courts in this jurisdiction, however have

1 broadly interpreted Rule 7 to include administrative costs, including costs associated
2 with continued settlement administration, as “costs of appeal” under Rule 7.
3 Plaintiffs have identified numerous cases on point despite Ms. Hammack’s inaccurate
4 contention that Plaintiffs only cite to “one non-precedential district court opinion.”¹
5 *See, e.g., Miletak v. Allstate Ins. Co.*, 2012 U.S. Dist. LEXIS 125426 (N.D. Cal. Aug.
6 27, 2012) and *Redwen v. Sino Clean Energy, Inc.*, 2013 U.S. Dist. LEXIS 197867
7 (C.D. Cal. Dec. 20, 2013). Courts have found this especially true when, as here, the
8 claims administrator has provided a detailed estimate of the costs associated with
9 delay. *See Redwen* at *6-7; *see also In re Netflix Privacy Litig.*, 2013 U.S. Dist.
10 LEXIS 168298, at *12 (N.D. Cal. Nov. 25, 2013) (requiring an appeal bond when
11 plaintiff laid out specific administrative costs associated with maintaining and
12 administering the settlement throughout estimate appeal period); *Retta, et al. v.*
13 *Millenium Prods., Inc., et al.*, No. 2:15-cv-01801-PSG-AJW, ECF No. 151-52 (C.D.
14 Cal. Dec. 20, 2017) (Exhs. A and B to the Declaration of L. Timothy Fisher) (Judge
15 Philip Gutierrez of the Central District of California ordering objector to post appeal
16 bond of \$41,000, which included proposed estimated settlement administration costs
17 supported by a declaration of the settlement administrator).

18 Ms. Hammack relies heavily on *Azizian* in support of her position that “in the
19 absence of an applicable cost-shifting statute or appellate rule, Objectors are *only*
20 responsible for normal ‘costs’ under Rule 39.” Opp. at 1 (emphasis added). But Ms.
21 Hammack overstates the application of *Azizian*. *Azizian*’s holding was limited to
22 whether an appellant’s attorneys’ fees are considered “costs” under Rule 7. *See*
23 *Azizian* at 953 (“[W]e must decide whether, or under what circumstances, *appellate*
24 *attorney’s fees* are “costs on appeal.”) (emphasis added); *see also id.* (“We conclude
25 that a district court may require an appellant to secure appellate attorney’s fees in a

26

27 ¹ Further, Ms. Hammack does not identify which “one non-precedential district court
28 opinion” she is rebutting.

1 Rule 7 bond, but only if an applicable fee-shifting statute includes them in its
2 definition of recoverable costs, and only if the appellee is eligible to recover such
3 fees.”). Thus, *Azizian* does not govern the propriety of including administrative fees
4 in an appeal bond, nor does it preclude courts from doing so. *Azizian*’s analysis also
5 supports a narrow reading, as the court extensively discussed the deep-rooted
6 distinction between “costs” and “attorney’s fees,” as evidenced by the American rule
7 and other case law. *Azizian*, at 955-58. The parties here are not disputing whether
8 attorneys’ fees should be included in the appeal bond.

9 The *Azizian* court ultimately stated, “[w]e read [the Advisory Committee note
10 to Rule 39(e)] to mean that the costs identified in Rule 39(e) are among, **but not**
11 **necessarily the only**, costs available on appeal.” *Id.* at 958 (emphasis added). For
12 that reason, cases decided subsequent to *Azizian* have limited its application to the
13 issue of attorneys’ fees. *See, e.g., Netflix*, 2013 U.S. Dist. LEXIS 168298, at *11-12
14 (holding that because proposed appeal bond did not include attorneys’ fees, *Azizian*
15 was not invoked). The other cases referenced by Ms. Hammack, which relied on
16 *Azizian*, such as *In re Magsafe Apple Power Adapter Litig.*, *Low*, and *Lerma*, all read
17 and applied *Azizian* broadly beyond its direct holding on attorneys’ fees.
18 Accordingly, this Court should not follow *Azizian* and its narrow holding and should
19 instead impose an appeal bond that covers costs associated with continued settlement
20 administration.

21 **C. Plaintiffs’ Request Is Not Being Made For an Improper Purpose**

22 Ms. Hammack further argues that “the magnitude of the requested bond”
23 indicates that Plaintiffs are making this request for an improper purpose of
24 “intimidating Objector from exercising her appellate right.” But Ms. Hammack and
25 her attorney Michael F. Creamer, Jr. can only make this unfounded accusation
26 because they have never stood in Class Counsel’s shoes. Class Counsel has been
27 working on this case for more than five years and dedicated thousands of hours and

1 substantial resources to litigating this case. They have obtained an excellent
2 settlement for the class and want those 142,517 people to receive their money. Any
3 insinuation as to any other motivation of Class Counsel is inappropriate.

4 **D. Ms. Hammack’s Opposition Should Be Disregarded As It Is**
5 **Procedurally Defective and Does Not Comply with the Local Rules**

6 Ms. Hammack’s opposition is also procedurally defective, as Ms. Hammack
7 and her counsel have violated this Court’s Local Rules. For example, pursuant to
8 Civil L.R. 11-3.2, “[a]ll documents shall be formatted for 8 ½ x 11 inch paper, and
9 shall be numbered on the left margin with not more than 28 lines per page.” The
10 opposition is not numbered at all. Furthermore, the opposition fails to list identifying
11 information on the caption page, such as the attorney name, state bar number, and
12 address, in direct violation of Civil L.R. 11-3.8. This violation of the rules is
13 particularly egregious since Ms. Hammack’s attorney Michael Creamer is a member
14 of the California State Bar and admitted to practice before this Court. For this reason,
15 Ms. Hammack’s opposition should be disregarded in its entirety.

16 **III. CONCLUSION**

17 For the reasons outlined above and in Plaintiffs’ Memorandum in Support of
18 their Motion for Appeal Bond, Plaintiffs respectfully request that the Court order
19 Objector Ashley Hammack to post a bond in the amount of \$79,142 within 14 days of
20 entry of the Court’s order on this motion.

21
22 Dated: December 22, 2017 **BURSOR & FISHER, P.A.**

23 By: /s/ L. Timothy Fisher
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